UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE FORTERRA, INC. SECURITIES LITIGATION	Case No.: 3:18-cv-01957-X CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Fed. R. Civ. P. 23(e), the Court's January 8, 2020 Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order") (ECF No. 124), the Court's Order Resetting Date for Final Approval Hearing and Modifying Deadlines Set by the Court's Preliminary Approval Order (ECF No. 128), and the Court's April 3, 2020 Order granting Agreed Motion to Set Hearing Date (ECF No. 130), Lead Plaintiff Wladislaw Maciuga and additional named Plaintiff Supanin Disayawathana (collectively, "Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this Motion and Memorandum of Law in support of final approval of the proposed Settlement and Plan of Allocation. [1]

I. INTRODUCTION

After more than two years of contested litigation, Plaintiffs, through their counsel, obtained a $5,500,000 all cash, non-reversionary settlement for the benefit of the Settlement Class. As described below and in the Sams Declaration, the Settlement is an excellent result for the Settlement Class, providing a significant and certain recovery in a case that presented numerous hurdles and risks. In fact, in Plaintiffs' estimation, the Settlement represents between 3.2% and 67% of the maximum recoverable class-wide aggregate damages. *Compare* Ex. 9 (2019 median recovery in securities class action settlements was approximately 2.1% of estimated damages); *see also*, § IV.C.2, *infra* (discussing range of possible recovery). Moreover, the Parties reached the Settlement only after a full-day of arm's-length negotiations conducted by experienced counsel in conjunction with a highly respected mediator, Mr. Robert A. Meyer, Esq. of JAMS, which ended

[1] Unless otherwise noted, capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated November 4, 2019 (ECF No. 123-1) ("Stipulation") or the concurrently-filed Declaration of Ex Kano S. Sams II in Support of Plaintiffs' Motion for: (I) Final Approval of Class Action Settlement and Plan of Allocation; and (II) Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Sams Declaration" or "Sams Decl."). All citations herein to "¶__" and "Ex.__" refer, respectively, to paragraphs in, and Exhibits to the Sams Declaration.

without an agreement to settle. Following the mediation session's conclusion, Mr. Meyer presented a mediator's proposal that the Parties accepted the next day. *See* Ex. 3 (Declaration of Robert A. Meyer, Esq. ("Meyer Decl.")), ¶¶9-10. The Settlement is, therefore, both substantively and procedurally fair.

The substantial efforts of Plaintiffs and Plaintiffs' Counsel and their well-developed understanding of the strengths and weaknesses of the Action also support final approval. Plaintiffs' efforts, which are detailed in the Sams Declaration, included, among other things:

- reviewing and analyzing SEC filings, press releases, publicly available documents, reports, announcements, news articles, investor conference call transcripts, analyst reports, and other public information regarding the Forterra and the other Defendants;
- working with a damages and loss causation expert to analyze the Company's stock-price movement;
- retaining and working with a private investigator who conducted numerous interviews of former Company employees and other third parties;
- drafting and filing a complaint on behalf of named plaintiff Supanin Disayawathana;
- moving for the consolidation of four related cases and appointment of Lead Plaintiff;
- negotiating a stipulation with Defendants requesting a transfer to this Court, which was subsequently granted;
- using the information obtained from their thorough and substantive investigation to draft the Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint");
- researching, drafting, and filing an opposition to the motion to dismiss filed by Forterra, the Officer and Director Defendants, and the Underwriter Defendants, as well as an opposition to the motion to dismiss filed by the Lone Star Defendants;
- drafting a detailed mediation statement that set forth the facts of the case and analyzed the strengths and weaknesses of the Action and potential damages (Meyer Decl., ¶7);
- engaging in an all-day mediation session overseen by Mr. Meyer, an experienced and well-respected mediator (Meyer Decl., ¶¶5, 9);
- drafting and then negotiating the Stipulation and related exhibits; and
- drafting the preliminary approval and final approval briefs. ¶¶6-13; 17-40.

In view of the foregoing, Plaintiffs and their counsel had sufficient information to make an informed decision regarding the fairness of the Settlement before entering into it and presenting it

to the Court. ¶14.

Plaintiffs and Plaintiffs' Counsel believe that the Settlement is an excellent result for the Settlement Class. This belief is supported by, among other things: (1) the certainty of a $5,500,000 recovery today versus the significant risk of a smaller or even no recovery following years of additional litigation; (2) an analysis of the facts adduced to date; (3) past experience in litigating complex securities class actions; (4) the serious disputes between the parties concerning the merits; and (5) the favorable reaction of the Settlement Class. ¶¶11, 14, 42-52, 68, 91. Plaintiffs, therefore, respectfully submit that the Settlement is fair, reasonable, and adequate.

Plaintiffs also move for approval of the Plan of Allocation of the Net Settlement Fund. Plaintiffs' Counsel developed the Plan of Allocation in conjunction with Plaintiffs' damages expert, and it is designed to fairly and equitably distribute the proceeds of the Net Settlement Fund to Settlement Class Members. ¶¶69-76. As such, Plaintiffs respectfully submit that the Court should also approve the Plan of Allocation.

For these reasons, and those set forth below and in the Sams Declaration, Plaintiffs respectfully request that the Court grant final approval of the Settlement and Plan of Allocation and grant final certification of the Settlement Class for settlement purposes.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Sams Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*, the factual and procedural history of the Action (¶¶19-41); the nature of the claims asserted (¶¶17-18); the efforts involved in the drafting and defending of the Complaint (¶¶29-35); the risks of continued litigation (¶¶42-54); the negotiations leading to the Settlement (¶¶36-41); and the Plan of Allocation (¶¶69-76).

III. STANDARDS GOVERNING APPROVAL OF CLASS ACTION SETTLEMENTS

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of the compromise of claims brought on a class-wide basis. In determining the propriety of granting final approval of a class action settlement, courts determine whether the settlement is "fundamentally fair, adequate, and reasonable." Fed. R. Civ. P. 23(e)(2); *see also Newby v. Enron Corp*., 394 F.3d 296, 301 (5th Cir. 2004) (standard for approving a proposed class action settlement is whether the proposed settlement is "fair, adequate and reasonable and is not the product of collusion between the parties.").[2] When a settlement, such as this one, is reached as the result of arm's-length negotiations between competent counsel on both sides, it "is entitled to a presumption of validity, which ordinarily may be overcome only if its provisions are not within reasonable bounds or are illegal, unconstitutional or against public policy." *U.S. v. Tex. Educ. Agency*, 679 F.2d 1104, 1108 (5th Cir. 1982).

Evaluating the propriety of a complex class action settlement is a matter within the sound discretion of the district court, which should be exercised with appropriate consideration to the strong public policy interests favoring the settlement of class action lawsuits. *See Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982) ("[A]n approved settlement will not be upset unless the court clearly abused its discretion."), *cert denied*, 459 U.S. 828 (1982); *see also Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). Thus, "[w]here the court finds that counsel have adequately represented the interests of the class, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Klein v. O'Neal,*

[2] Unless otherwise noted, all internal citations and quotations are omitted, and emphasis is added.

Inc., 705 F. Supp. 2d 632, 649 (N.D. Tex. 2010), *as modified* (June 14, 2010); *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) ("[T]he court should not decide the merits of the action or attempt to substitute its own judgment for that of the parties."). "In other words, in determining the fairness, reasonableness, and adequacy of a proposed settlement, neither the district court nor the appellate court on review, should reach ultimate conclusions on the issues of fact and law underlying the dispute." *Maher*, 714 F.2d at 455 n.31.

Rule 23(e)(2), as amended on December 1, 2018, requires courts to consider the following factors in determining whether a proposed settlement is fair, reasonable, and adequate:

(A) whether the class representatives and class counsel have adequately represented the class;
(B) whether the proposal was negotiated at arm's length;
(C) whether the relief provided for the class is adequate, taking into account:
  i. the costs, risks, and delay of trial and appeal;
  ii. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  iii. the terms of any proposed award of attorneys' fees, including timing of payment;
  iv. any agreement required to be identified under Rule 23(e)(3); and
(D) whether the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Factors (A) and (B) "identify matters . . . described as procedural concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement," while factors (C) and (D) "focus on . . . a substantive review of the terms of the proposed settlement" (*i.e.*, "[t]he relief that the settlement is expected to provide to class members"). Advisory Committee Notes to 2018 Amendments (324 F.R.D. 904, at 919).

The four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the

proposal." *Id.* For this reason, the traditional Fifth Circuit factors in *Reed v. Gen. Motors Corp.*, 703 F.2d 170 (5th Cir. 1983), for evaluating whether a class action settlement is fair, reasonable and adequate under Rule 23—certain of which overlap with Rule 23(e)(2)—are still relevant to the analysis. *See Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*, No. 4:17-CV-3852, 2019 WL 387409, at *3 (S.D. Tex. Jan. 30, 2019) (considering "the criteria set forth in Fed. R. Civ. P. 23 (e)(2) as well as the Fifth Circuit's *Reed* factors"). The "*Reed* factors" are:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

Reed, 703 F.2d at 172.

As demonstrated below, application of each of the four factors set forth in Rule 23(e)(2), and the relevant, non-duplicative *Reed* factors, confirm that the Settlement merits final approval.

IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. Plaintiffs and Plaintiffs' Counsel Adequately Represented the Settlement Class

Rule 23(e)(2)(A) requires the Court to consider whether the "class representatives and class counsel have adequately represented the class." Here, Plaintiffs adequately represented the Settlement Class by actively pursuing their shared claims against Defendants, including regularly communicating with Lead Counsel on case developments, discussing significant filings and Orders filed in the Action, and conferring with Lead Counsel throughout the settlement negotiations. Ex. 4 and Ex. 5. Moreover, Plaintiffs—investors who purchased Forterra common stock during the Settlement Class Period and suffered damages as a result—suffered the same injury as other Settlement Class Members, thereby aligning Plaintiffs' interest in obtaining the largest possible recovery in the Action with the interests of other Settlement Class Members. *See In re Polaroid*

ERISA Litig., 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

Plaintiffs' Counsel have also adequately represented the Settlement Class throughout the litigation. *See* Ex. 7-C (Glancy Prongay & Murray LLP firm résumé) and Ex. 8-B (Kendall Law Group, PLLC firm résumé). As set forth above (*supra* § I), and detailed in the Sams Declaration, Plaintiffs' Counsel vigorously prosecuted the Action against skilled opposing counsel and achieved a favorable result. Indeed, the Parties achieved the Settlement only after: (1) Plaintiffs' Counsel thoroughly investigated the Settlement Class's claims; (2) consulted with an economic expert regarding loss causation and damages issues; (3) drafted an initial complaint on behalf of named plaintiff Disayawathana, as well as the operative Complaint; (4) researched and drafted separate responses to two motions to dismiss from two sets of defendants; (5) prepared a mediation statement addressing liability and damages; and (6) engaged in vigorous arm's-length settlement discussions before, during, and after the in-person mediation session. ¶¶7, 12-13, 19-40.

Based on the foregoing, it is clear that Plaintiffs and their counsel adequately represented the Settlement Class. *See Hays v. Eaton Grp. Attorneys, LLC*, No. CV 17-88-JWD-RLB, 2019 WL 427331, at *9 (M.D. La. Feb. 4, 2019) (representation was adequate where settlement was "negotiated by experienced, informed counsel . . .with substantial experience in litigating complex class actions" and where lead plaintiff was "familiar with the factual and legal issues").

B. The Settlement is the Product of Arm's-Length Negotiations Between Experienced Counsel Under the Auspices of a Well-Respected Mediator and There is No Fraud or Collusion

Rule 23(e)(2)(B) evaluates whether the proposed settlement "was negotiated at arm's length." Additionally, one *Reed* factor examines whether there was "fraud or collusion behind the settlement." *Reed*, 703 F.2d at 172. In conducting this procedural analysis, courts recognize that

the "presence of a neutral mediator" is a factor "weighing in favor of a finding of non-collusiveness." *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2018 WL 1942227, at *4 (N.D. Tex. Apr. 25, 2018). In the absence of fraud or collusion, the trial court "should be hesitant to substitute its own judgment for that of counsel." *Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir.1984); *see also DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 287 (W.D. Tex. 2007).

Here, the Settlement was reached only after extensive arm's-length negotiations between experienced counsel who thoroughly evaluated the merits of the claims and were well aware of the strengths and weaknesses of the case. ¶¶19-40 (detailing the investigation and work performed by Lead Counsel). And, the mediation process—which included a full-day mediation session that ultimately resulted in a mediator's recommendation—was led by Mr. Meyer, a well-respected mediator who has significant experience mediating securities class actions and other complex litigation. Mr. Meyer also strongly endorses the Settlement as fair, reasonable, and adequate, as detailed in his declaration. Meyer Decl., ¶12. Under such circumstances, this factor strongly supports final approval. *See Ramirez v. J.C. Penney Corp., Inc.*, No. 6:14-CV-601, 2017 WL 6462355, at *4 (E.D. Tex. Nov. 30, 2017), *report and recommendation adopted*, No. 6:14-CV-601, 2017 WL 6453012 (E.D. Tex. Dec. 18, 2017) (describing Robert Meyer as a "qualified mediator" and finding no evidence of fraud or collusion in granting final approval of a settlement); *Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738, 748 (E.D. Tex. 2007) ("There was no bias, collusion, or coercion in favor of any party or group of class members. This fact weighs heavily in favor of approval.").

C. The Relief Provided to the Settlement Class Is Adequate

Rule 23(e)(2)(C) instructs the Court to consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" along with other

relevant factors. Fed. R. Civ. P. 23(e)(2)(C). Rule 23(e)(2)(C)(i) essentially incorporates three *Reed* factors: the complexity, expense, and likely duration of the litigation (second factor); the probability of plaintiffs' success on the merits (fourth factor); and the range of possible recovery (fifth factor). *Reed*, 703 F.2d at 172. This last factor is satisfied where the relief afforded the Settlement Class falls within the range of reasonableness and where "[a] trial would be lengthy, burdensome, [] would consume tremendous time and resources of the Parties and the Court [and] [a]ny judgment would likely be appealed." *Hays*, 2019 WL 427331, at *10; *see also Marcus v. J.C. Penney Co., Inc.*, No. 6:13-CV-736, 2017 WL 6590976, at *4 (E.D. Tex. Dec. 18, 2017), *report and recommendation adopted*, No. 6:13-CV-736, 2018 WL 307024 (E.D. Tex. Jan. 4, 2018) (approving settlement that fell "within the range of reasonableness in light of the risks and costs associated with this litigation").

1. The Cost, Risks, and Delay of Trial and Appeal

"It is common knowledge that class action suits have a well-deserved reputation as being most complex." *Cotton*, 559 F.2d at 1331. Courts have repeatedly recognized that securities litigation "is a highly technical and specialized area of the law" and that claims brought pursuant to the federal securities laws are "extremely complex." *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. CIV. 6:12-1609, 2015 WL 965693, at *7 (W.D. La. Mar. 3, 2015); *see also Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641, 654 (N.D. Tex. 1978) ("[A] securities case, by its very nature, is a complex animal."), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980). Indeed, "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009). Given the "notorious complexity" of securities class actions, settlement is often appropriate because it "circumvents the

difficulty and uncertainty inherent in long, costly trials." *In re AOL Time Warner, Inc.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006).

Continued litigation of the Action would unquestionably involve complex, lengthy, and costly trial and post-trial proceedings that would delay the resolution of the claims alleged with no guarantee of recovery. ¶¶42-52. Although Plaintiffs were confident that they would prevail against Defendants' two motions to dismiss, the outcome was far from certain. ¶42. Further litigation of the Action would have necessitated extensive fact and expert discovery, a motion for class certification, dispositive motion practice, pre-trial preparation, trial, and post-trial appeals. ¶¶43-52. Considering the costs, risks, complexity and delay at stake, Plaintiffs and their counsel recognized the very real risk that continuing to prosecute their claims could have resulted in a smaller—or even non-existent—recovery for the Settlement Class years into the future. ¶¶52, 55.

In contrast, the Settlement provides a substantial and immediate recovery of $5.5 million for the Settlement Class, without subjecting the Settlement Class to the significant risks, expenses and delay of continued litigation. ¶11. Accordingly, this factor supports final approval of the Settlement. *See Hays*, 2019 WL 427331, at *10 ("By reaching a favorable settlement prior to dispositive motions or trial, Plaintiff is avoiding expense and delay and ensuring recovery for the Class."); *Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 343 (N.D. Tex. 2011) ("[s]ecurities claims are difficult to prove, and without agreeing to a settlement, Plaintiffs no doubt face unpredictable and significant delays and expense in prosecuting this case").

2. The Probability of Plaintiffs' Success on the Merits and The Range of Possible Recovery

The Court is also required to determine whether the terms of the Settlement "fall within *a reasonable range of recovery*, given the likelihood of the plaintiffs' success on the merits." *Klein*, 705 F. Supp. 2d at 656 (emphasis in original). In making this assessment, "courts will compare

the settlement amount to the relief the class could expect to recover at trial, *i.e.*, the strength of the plaintiff's case." *Halliburton*, 2018 WL 1942227, at *5. The Court should not, however, "try the case via the fairness hearing because the very purpose of the compromise is to avoid the delay and expense of such a trial." *Id.* at *5 (quoting *Reed*, 703 F.2d at 172); *see also Cotton*, 559 F.2d at 1330 ("[T]he trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes."). Accordingly, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Parker*, 667 F.2d at 1210 n.6. Indeed, "final approval is frequently given to settlements even when the settlement amount is a very small fraction of the damages amount projected by the Plaintiffs." *Halliburton*, 2018 WL 1942227, at *5; *see also In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7-12 Litigation*, 447 F. Supp. 2d 612, 622 (E.D. La. 2006) ("In considering the range of possible recovery, the Court need not consider recoveries that are beyond the range of the most minimal probability.").

Under the terms of the Settlement, the Settlement Class will receive $5.5 million—a substantial amount—in exchange for the release of all claims against Defendants. Plaintiffs' damages consultant estimates that, if Plaintiffs had ***fully prevailed*** on their claims pursuant to the Securities Act of 1933 ("Securities Act") at both summary judgment and after a jury trial, if the Court certified the same class period as the Settlement Class Period, and if the Court and jury accepted Plaintiffs' damages theory—*i.e.*, Plaintiffs' ***best case scenario***—the total ***maximum*** damages would be approximately $170 million. Thus, the $5,500,000 Settlement Amount represents approximately 3.2% of the total ***maximum*** damages ***potentially*** available in this Action.

Conversely, Plaintiffs' damages consultant estimates that if Defendants' colorable negative causation arguments were accepted, the maximum recoverable damages would be drastically reduced to $8,200,000. Under such a scenario, the $5,500,000 recovery equates to approximately 67% of damages. A recovery of 3.2% - 67% of maximum recoverable damages is well within the range of reasonableness. *See* Ex. 9 (Excerpts from Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* (NERA Feb. 12, 2020) at p. 20, Fig. 13 (median recovery in securities class actions in 2019 was approximately 2.1% of estimated damages); *Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-CV-00419-MMD, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving securities class action settlement where recovery was 3.5% of maximum damages and noting "this amount is within the median recovery in securities class actions settled in the last few years"). This is especially true when the recovery is balanced against the risks of continued litigation. *See* § IV.C.3, *infra*.

3. The Probability of Plaintiffs' Success on the Merits

(a) Risks to Proving Liability

As in every complex case of this kind, Plaintiffs and the Settlement Class faced formidable obstacles to recovery at trial, both with respect to liability and damages. Although Plaintiffs believe that they would be successful and that the allegations of the Complaint would ultimately be borne out by the evidence, they also recognize that they faced significant hurdles in proving liability and damages at trial. Defendants argued that this Action was essentially an omissions case with no financial restatement, no government investigation, no whistleblower allegations, and no false financial reporting and, accordingly, vigorously disputed that Plaintiffs would be able to satisfy the elements of the claims under the Securities Act. ¶46. They argued, among other things,

that: (i) Plaintiffs would not be able to demonstrate that Defendants made false or misleading statements or had omitted any material information while making such statements; and (ii) the misrepresentations and omissions alleged were immaterial to reasonable investors. ¶45. Defendants also contended that the risk disclosures in Forterra's Registration Statement purportedly cautioned investors regarding the information allegedly omitted. *Id.* Such disclosures purportedly warned investors that Forterra's recent acquisitions had not been fully integrated, that the integration process presented significant risks, and extensive work had remained to fully implement and complete the Company's remediation plan regarding existing material weaknesses. *Id.*

While Plaintiffs believe that they have meritorious counterarguments, success was not a foregone conclusion. "If litigation were to proceed, the issues would be hotly disputed by the parties. Litigation relating to such fact-intensive and difficult-to-prove claims would thus be extraordinarily complicated and time consuming, and require expert testimony." *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *18 (N.D. Tex. Nov. 8, 2005). Consequently, "[t]here was a very real risk that Plaintiffs would not have convinced a jury that the alleged misrepresentations and omissions were materially false or misleading when made or that damages related to them." *Buettgen v. Harless*, No. 3:09-CV-00791-K, 2013 WL 12303143, at *8 (N.D. Tex. Nov. 13, 2013).

(b) Risks of Class Certification

While Plaintiffs were confident that they would successfully obtain class certification, such success was not guaranteed. ¶43. Class certification requires substantial briefing, extensive and costly expert discovery, including depositions, on the issue of market efficiency. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 131 S. Ct. 2398, 2405-08 (2014) (holding that defendants may

rebut the presumption of reliance at the class certification stage by showing that the alleged misrepresentations did not impact the stock price). Thus, the class certification process would have involved substantial risk to the Settlement Class and considerable expense to both parties. *See In re Seitel, Inc. Secs. Litig.*, 245 F.R.D. 263, 278 (S.D. Tex. 2007) (denying class certification based on a failure to demonstrate loss causation).

Moreover, "the law of class actions is developing at a rapid clip, and it is always possible that some new Supreme Court decision would counsel in favor of decertification." *City of Providence v. Aeropostale, Inc.,* No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014); *see also Buettgen*, 2013 WL 12303143, at *8. In short, Plaintiffs faced very real risks in obtaining and maintaining class action status, both of which would be necessary in order to achieve a class-wide recovery.

(c) Risks in Proving Damages

Additionally, even if Plaintiffs were successful in establishing liability at trial, they would still face substantial risks in establishing damages on a class-wide basis. For example, Defendants would certainly have disputed damages by claiming that there was no causal connection between Forterra's allegedly misleading disclosures and drops in the Company's stock price, and even if there were such a connection, the damages suffered by the class were a mere fraction of the amount sought by Plaintiffs. ¶48. This dispute would have required a jury to decide the "battle of the experts"—an intrinsically expensive and unpredictable process. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("[E]stablishing damages at trial would lead to a battle of experts with each side presenting its figures to the jury and with no guarantee whom the jury would believe."); *In re OCA, Inc. Sec. & Derivative Litig.*, No. CIV. A. 05-2165, 2009 WL 512081, at *14 (E.D. La. Mar. 2, 2009) ("Because the jury would have been faced with competing expert

opinions, the resulting damage award would have been highly unpredictable.").

(d) Risks of Preserving a Favorable Jury Verdict After Trial

Finally, even "if Plaintiffs were to succeed at trial, they still could expect a vigorous appeal by Defendants and an accompanying delay in the receipt of any relief." *Schwartz*, 2005 WL 3148350, at *19; *see also OCA*, 2009 WL 512081, at *11 ("After trial, the parties could still expect years of appeals."). And, of course, there was no guarantee they would prevail. *See Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing securities action with prejudice); *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion in securities action after 13 years of litigation on loss causation grounds and error in jury instructions).[3]

Accordingly, "[t]aking into account the risks inherent in this litigation, as well as the costs of litigation, the settlement amount is fair and reasonable." *Quintanilla v. A & R Demolition Inc.*, 2008 WL 9410399, at *5 (S.D. Tex. May 7, 2007); *see also Bussie v. Allmerica Fin. Corp*., 50 F. Supp. 2d 59, 76 (D. Mass. 1999) ("the reality that the Class would encounter significant, and potentially insurmountable, obstacles to a litigated recovery underscores the reasonableness of the compromise set forth in the Settlement Agreement").

4. Other Factors Established by Rule 23(e)(2)(C) Support Final Approval of the Proposed Settlement

Under Rule 23(e)(2)(C), courts also must consider whether the relief provided for the class

[3] *See also Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (overturning securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for judgment N.O.V. was denied; on appeal, the judgment was reversed and the case was dismissed—after 11 years of litigation); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298, at *1 (N.D. Cal. Sept. 6, 1991) (rendering verdict against two individual defendants, but vacating judgment on motion for judgment notwithstanding the verdict).

is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," "the terms of any proposed award of attorneys' fees, including timing of payment," and "any agreement required to be identified under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors supports the Settlement's approval or is neutral and does not suggest any basis for concluding the Settlement is inadequate.

First, the Net Settlement Fund will be allocated to Settlement Class Members who submit valid Claim Forms in accordance with the Plan of Allocation. *See* § VII, *infra*. Epiq Class Action & Claims Solutions, Inc. ("Epiq")—the Claims Administrator selected by Lead Counsel and approved by the Court—will process claims under the guidance of Lead Counsel, allow claimants an opportunity to cure any deficiencies in their claims or request the Court to review a denial of their claims, and, lastly, mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund (per the Plan of Allocation), after Court-approval.[4] The manner of processing Claims proposed here is standard in securities class action settlements and courts have found this process to be effective, as well as necessary, since neither Plaintiffs nor Defendants possess the individual investor trading data required for a claims-free process to distribute the Net Settlement Fund.[5] *See New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 233-34, 245 (E.D. Mich. 2016) (approving settlement with a nearly identical distribution process), *aff'd*, No. 1601821, 2017 WL 6398014 (6th Cir. Nov. 27, 2017).

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[4] Epiq has substantial experience serving as the claims administrator in securities class action cases and was selected by Lead Counsel following an RFP process in which it was the low bidder.

[5] This is not a claims-made settlement. If the Settlement is approved, Defendants will not have any right to the return of a portion of the Settlement based on the number or value of the claims submitted. *See* Stipulation ¶13. Instead, after the initial distribution of the Net Settlement Fund and at such time as it is determined that a re-distribution of the remaining balance is not cost-effective, the remaining balance of the Settlement will be contributed to a non-sectarian, not-for-profit organization. Ex. 6-A at ¶56. Subject to the Court's approval, Lead Counsel intend to contribute that balance to Legal Aid of NW Texas.

Second, the relief provided for the Settlement Class is also adequate when the terms of the proposed award of attorneys' fees are taken into account. As discussed in detail in the accompanying Fee Memorandum, the proposed attorneys' fees of 33⅓%, to be paid upon approval by the Court, are reasonable in light of the substantial work and efforts of Plaintiffs' Counsel, the risks that they faced in the litigation, the results achieved, and awards in similar complex cases. *See Al's Pals*, 2019 WL 387409, at *4 ("The fee represents one-third of the $15 million settlement fund, which is an oft-awarded percentage in common fund class action settlements in this Circuit."). Most importantly, the Court's consideration of the proposed award of attorneys' fees is entirely separate from approval of the Settlement, and neither Plaintiffs nor their counsel may terminate the Settlement based on the ultimate award of attorneys' fees or expenses.

Third, with respect to Rule 23(e)(2)(C)(iv), the Parties entered into a confidential agreement establishing conditions under which Defendants may terminate the Settlement if a certain threshold of Settlement Class Members submit valid and timely requests for exclusion. This type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the Settlement. *See Halliburton*, 2018 WL 1942227, at *5 (approving settlement with similar confidential agreement).

D. All Settlement Class Members Are Treated Equitably

Rule 23(e)(2)(D) requires that the Court assess whether the settlement "treats class members equitably relative to each other." The Settlement does that. Under the proposed Plan of Allocation,[6] each Authorized Claimant will receive his, her, or its *pro rata* share of the Net Settlement Fund. Because the proposed Plan of Allocation does not provide preferential treatment to any Settlement Class Member, segment of the Settlement Class, or to Plaintiffs, this factor

[6] The proposed Plan of Allocation is set forth in the Notice. Ex. 6-A (Notice at pp. 8-12).

supports final approval of the proposed Settlement. *See City of Omaha*, 2015 WL 965693, at *15 (approving plan of allocation where each class member would receive their *pro rata* share of the funds based on calculation of recognized losses).[7]

E. The Remaining *Reed* Factors Warrant Final Approval of the Settlement

1. The Stage of the Proceedings and the Amount of Discovery Completed

Another factor that courts consider in evaluating a settlement is "the stage of the proceedings and the amount of discovery completed." *Reed*, 703 F.2d at 172. Under this factor, the inquiry is whether the plaintiff has obtained sufficient understanding of the case to gauge the strengths and weaknesses of the claims and the adequacy of the settlement. *Cotton*, 559 F.2d at 1332.

Even in cases where "very little formal discovery was conducted," the Fifth Circuit has declared that "the lack of such does not compel the conclusion that insufficient discovery was conducted." *Id.*; *see also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) ("notwithstanding the status of discovery, plaintiffs' negotiators had access to a plethora of information regarding the facts of their case"). "The question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it." *OCA*, 2009 WL 512081, at *12. Indeed, "[a] settlement may be approved even where plaintiffs have not conducted formal discovery where plaintiffs did have access to the desired quantum of information necessary to achieve a settlement." *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D.

[7] Pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Plaintiffs may separately seek reimbursement of costs (including lost wages) incurred as a result of their representation of the Settlement Class. *See* 15 U.S.C. § 77z-1(a)(4).

403, 432 (S.D. Tex. 1999). Thus, "formal discovery is not a prerequisite to settlement" and "[u]nless Lead Counsel settled while 'groping in darkness' the lack of formal discovery will not hinder the settlement." *Schwartz*, 2005 WL 3148350, at *19; *see also Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012) (affirming approval of securities class action settlement where there had been no "formal discovery" but "class counsel had conducted informal discovery by hiring private investigators and experts," the settlement compared favorably to similar settlements, and the parties were "well informed about the merits of their respective positions").

Here, "[b]ecause the PSLRA prohibits formal discovery during the pendency of any motion to dismiss, the parties were prohibited from engaging in formal discovery until the Court ruled on defendants' motion[s] to dismiss." *OCA*, 2009 WL 512081, at *12. Nevertheless, Plaintiffs and their counsel had a comprehensive understanding of the strengths and weaknesses of the case and had sufficient information to make an informed decision regarding the fairness of the Settlement before entering into it.

As detailed in the Sams Declaration, Plaintiffs' efforts included, among other things: (i) analysis of Forterra's public filings and Defendants' public statements; (ii) review of news articles and analyst reports about the Company; (iii) working with a private investigator to identify and conduct interviews with numerous former Forterra employees; (iv) consultations with an expert on loss causation and damages; (v) drafting the Complaint; (vi) researching and drafting oppositions to Defendants' two motions to dismiss; (vii) preparation of a detailed mediation statement; (viii) engaging in a full-day mediation overseen by Mr. Meyer, which included detailed arm's-length discussions of the strengths and weaknesses of the case; (ix) participating in further settlement discussions after the conclusion of the mediation; and (x) conducting protracted and

time-intensive negotiations regarding the terms of the proposed Settlement. ¶¶7, 19-40. Thus, by the time the Settlement was reached, Plaintiffs and their counsel had a "full understanding of the legal and factual issues surrounding this case." *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996).

2. The Opinions of Lead Counsel, Plaintiffs, and Absent Settlement Class Members

Courts also consider "the opinions of the class counsel, class representatives, and absent class members" in determining the propriety of a settlement. *Reed*, 703 F.2d at 172. "Counsel are the Court's main source of information about the settlement . . . and therefore the Court will give weight to class counsel's opinion regarding the fairness of settlement." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 852 (E.D. La. 2007); *see also Vaughn*, 627 F. Supp. 2d at 748 ("The counsel for the parties in this case are experienced in class action litigations, and their opinion that the settlement should be approved and is fair to the class is entitled to weight.").

Here, Plaintiffs' Counsel possess substantial experience litigating securities class actions, have a thorough understanding of the strengths and weaknesses of this case, and believe the Settlement merits approval. *See* Ex. 7-C (Glancy Prongay & Murray LLP firm résumé); Ex. 8-B (The Kendall Law Group, PLLC firm résumé), and ¶¶12-14. It is, therefore, respectfully submitted that the Court should give substantial weight to Lead Counsel's assessment in determining whether to approve the Settlement. *Schwartz*, 2005 WL 3148350, at *21-22; *see also Cotton*, 559 F.2d at 1330 ("the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel"); *Marcus*, 2017 WL 6590976, at *3 ("Significant weight is given to the opinion of class counsel concerning whether the settlement is in the best interest of the class and the court is not to substitute its own judgment for that of counsel."). In addition, Plaintiffs, both of whom have been actively involved in the litigation, support the Settlement. *See* Ex. 4

(Maciuga Decl.), ¶8 & Ex. 5 (Disayawathana Decl.), ¶7.

Finally, the Court should consider the reaction of the Settlement Class, including the number of requests for exclusion and any objection to the Settlement. While the deadline to file objections and requests for exclusion is June 30, 2020, to date, no objections and only one request for exclusion have been received. ¶68; Mulvihill Decl. ¶¶18-19. This reaction weighs in favor of final approval of the proposed Settlement. *See Halliburton*, 2018 WL 1942227, at *5 ("Receipt of few or no objections can be viewed as indicative of the adequacy of the settlement"); *In re MicroStrategy, Inc. Sec. Litig.*, 150 F. Supp. 2d 896, 906 (E.D. Va. 2001) ("perhaps the most significant factor" in determining whether a settlement is adequate is the class's reaction to it).[8]

* * *

Accordingly, each of these factors favors approval of the Settlement.

V. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Court's January 8, 2020 Preliminary Approval Order certified the Settlement Class for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3). *See* ECF No. 124, ¶¶1-2. There have been no changes to alter the propriety of class certification for settlement purposes. Thus, for the reasons stated in Plaintiffs' Preliminary Approval Brief (*see* ECF No. 122, at pp. 23-25), Plaintiffs respectfully request that the Court affirm its determinations in the Preliminary Approval Order certifying the Settlement Class under Rules 23(a) and (b)(3).

VI. THE NOTICE PROGRAM SATISFIES RULE 23 AND DUE PROCESS

The Court approved the proposed notice program in the Preliminary Approval Order, and Lead Plaintiff has executed the notice program in accordance with the provisions therein. ¶¶56-

[8] If any objections or requests for exclusions are received after the date of this submission, Lead Counsel will address them in the reply brief, which will be filed with the Court no later than July 14, 2020.

57. Notice was given to Settlement Class Members via Postcard Notice, the settlement website, and publication. ¶57. Copies of the Court-approved Postcard Notice were timely mailed by the Court-appointed Claims Administrator, Epiq, to an aggregate of 19,407 potential Settlement Class Members and the largest brokerage firms, banks, institutions, and other nominees. ¶64; Mulvihill Decl. ¶11.[9]

On February 10, 2020, the Court-approved Summary Notice was published in *Investors' Business Daily* and over the *PR Newswire*. ¶65; Mulvihill Decl. ¶12. The published Summary Notice clearly and concisely provided information concerning the Settlement and the means to obtain a copy of the Notice. *See* Mulvihill Decl. at Ex. 6-D. Finally, the Claims Administrator posted the Notice, Claim Form, and other relevant documents online at the Settlement Website, www.ForterraSecuritiesLitigation.com, and provided a toll-free telephone number for Settlement Class Members to call with any questions concerning the Settlement. ¶66; Mulvihill Decl. ¶¶13, 15. Courts routinely find that comparable notice programs meet the requirements of due process and Rule 23. *See In re Mut. Funds Inv. Litig.*, MDL No. 1586, 2010 WL 2342413, at *6-7 (D. Md. May 19, 2010) (approving combination of postcard notice, summary notice, and detailed notice available online as "the best notice practical"); *In re Advanced Battery Techs., Inc. Secs. Litig.*, 298 F.R.D. 171, 182-83 n.3 (S.D.N.Y. 2014) (collecting cases and stating that "[t]he use of

[9] As a result of a cyber incident experienced by Epiq, the Court extended several settlement related deadlines, including the exclusion and objection deadline to June 30, 2020, the claim filing deadline to July 10, 2020, and the Settlement Hearing to July 21, 2020. ECF Nos. 128 & 130. In order to make potential Settlement Class Members aware of the updated deadlines, Epiq, at its own expense, sent a reminder postcard to all potential Settlement Class Members to whom a Postcard Notice had previously been sent (the "Reminder Postcard"). The Reminder Postcard provided the new claims filing deadline and directed potential Settlement Class Members to the Settlement Website for any updated Settlement related dates. Mulvihill Decl. ¶9 & Ex. 6-C. Additionally, Epiq updated the downloadable Notice and Claim Form on the Settlement Website to reflect the extended deadlines set by the Court. *Id*. ¶9.

a combination of a mailed post card directing class members to a more detailed online notice has been approved by courts").

VII. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

In the Preliminary Approval Order, the Court preliminarily approved the Plan of Allocation. Plaintiffs now request final approval of the Plan of Allocation. Assessment of a plan of allocation of settlement proceeds in a class action under Rule 23 is governed by the same standards of review applicable to approval of the settlement as a whole—the plan must be "fair, adequate and reasonable." *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1982). "When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012); *see also In re Marsh & McLennan Companies, Inc. Sec. Litig.*, No. 04 CIV. 8144 (CM), 2009 WL 5178546, at *13 (S.D.N.Y. Dec. 23, 2009) ("In determining whether a plan of allocation is fair, courts look largely to the opinion of counsel."). District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord Chicken Antitrust*, 669 F.2d at 238.

Here, the proposed Plan of Allocation is set forth in the Notice posted on the Settlement website. Mulvihill Dec. at Ex. 6-A (Notice at pp. 8-12). Lead Counsel developed the Plan of Allocation in consultation with Plaintiffs' damages consultant with the objective of equitably distributing the Net Settlement Fund. ¶¶69-76. The Plan of Allocation was developed based on an event study, which calculated the estimated amount of artificial inflation in the per share closing prices of Forterra common stock as a result of Defendants' alleged materially false and misleading statements and omissions. ¶71. In calculating this estimated alleged artificial inflation, the

damages consultant considered price changes in Forterra common stock in reaction to the alleged corrective disclosures, adjusting for factors attributable to market or industry forces. *Id.*

Under the Plan of Allocation, a "Recognized Claim" will be calculated for each purchase of a Forterra common stock for which adequate documentation is provided. ¶73. The calculation of Recognized Losses is explained in detail in the Notice and incorporates several factors, including when and for what price the Forterra common stock was purchased and sold, and the estimated artificial inflation in the respective stock prices at the time of purchase and sale, as determined by Plaintiffs' damages consultant. *Id. see also In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007) ("plans that allocate money depending on the timing of purchases and sales of the securities at issue are common"). If a Claimant has an overall market gain with respect to his, her, or its overall transactions in Forterra common stock during the Settlement Class Period, or if the Claimant purchased shares during the Settlement Class Period, but did not hold any of those shares through at least one of the alleged corrective disclosures, the Claimant's recovery under the Plan of Allocation will be zero, as any loss suffered would not have been caused by the revelation of the alleged fraud. ¶74. The Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claim, which is the sum of a Claimant's Recognized Loss amounts. ¶72.

Lead Counsel believes that the proposed Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as a result of the conduct alleged in the Action, and their opinion as to allocation is entitled to "considerable weight" by the Court in deciding whether to approve the plan. ¶76; *see also In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001) ("As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to

considerable weight."). To date, no objections to the Plan of Allocation have been filed on this Court's docket or received by Lead Counsel, suggesting that the Settlement Class also finds the Plan of Allocation to be fair and reasonable. ¶77. Moreover, similar plans have repeatedly been approved by federal courts in securities class actions. *See, e.g.*, *City of Omaha*, 2015 WL 965693, at *15 (approving plan of allocation where "[u]nder the Plan, each Class Member will receive his or her *pro rata* share of the funds based on the calculation of recognized losses."); *Marcus*, 2017 WL 6590976, at *5 ("The proposed plan has a reasonable and rational basis and should be approved."); *Schwartz*, 2005 WL 3148350, at *24 ("The Court . . . finds that allocation of the Net Settlement Fund that will be accomplished by the Plan of Allocation is fair, reasonable and adequate."). Accordingly, Plaintiffs respectfully submit that the proposed Plan of Allocation is fair and reasonable, and merits final approval from the Court.

VIII. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate, and certify the Settlement Class for the purposes of settlement.

DATED: June 16, 2020

KENDALL LAW GROUP, PLLC

By: */s/ Joe Kendall*

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CERTIFICATE OF CONFERENCE

Having reached agreement on all outstanding issues, on November 4, 2019, the parties executed the Stipulation of Settlement. On January 8, 2020, the Court granted Plaintiffs' Unopposed Motion for: (I) Preliminary Approval of Class Action Settlement; (II) Certification of the Settlement Class; and (III) Approval of Notice of the Settlement. On June 12, 2020, Lead Counsel emailed Defense Counsel to meet and confer concerning the finalization of the Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation. Defendants' Counsel do not oppose the motion.

/s/ Ex Kano S. Sams II
Ex Kano S. Sams II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served on all counsel of record on June 16, 2020 via CM/ECF, in accordance with the Federal Rules of Civil Procedure.

/s/ Joe Kendall
Joe Kendall

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE FORTERRA INC. SECURITIES LITIGATION	Case No. 3:18-cv-01957-X Honorable Brantley Starr

[PROPOSED] ORDER APPROVING
PLAN OF ALLOCATION OF NET SETTLEMENT FUND

This matter came on for hearing on July 21, 2020 (the "Settlement Hearing") on Plaintiffs' motion to determine whether the proposed plan of allocation of the Net Settlement Fund ("Plan of Allocation") created by the Settlement achieved in the above-captioned class action (the "Action") should be approved. The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that notice of the Settlement Hearing substantially in the form approved by the Court was mailed to all Settlement Class Members who or which could be identified with reasonable effort, and that a summary notice of the hearing substantially in the form approved by the Court was published in *Investor's Business Daily* and was transmitted over the *PR Newswire* pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the proposed Plan of Allocation,

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order approving the proposed Plan of Allocation incorporates by reference the definitions in the Stipulation and Agreement of Settlement dated November 4, 2019 (ECF No. 123-1) (the "Stipulation") and all capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Stipulation.

2. The Court has jurisdiction to enter this Order approving the proposed Plan of Allocation, and over the subject matter of the Action and all parties to the Action, including all Settlement Class Members.

3. Notice of Plaintiffs' motion for approval of the proposed Plan of Allocation was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the motion for approval of the proposed Plan of Allocation satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Private Securities Litigation Reform Act of 1995 (15 U.S.C. § 77z-1(a)(7)), due process, and all other applicable law and rules, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

4. The Notice, which included the Plan of Allocation, was available to potential Settlement Class Members and nominees on the settlement website, www.forterrasecuritieslitigation.com, and no objections to the proposed plan were submitted.

5. The Court hereby finds and concludes that the formula for the calculation of the claims of Claimants as set forth in the Plan of Allocation provides a fair and reasonable basis upon which to allocate the proceeds of the Net Settlement Fund among Settlement Class Members with due consideration having been given to administrative convenience and necessity.

6. The Court hereby finds and concludes that the Plan of Allocation is, in all respects, fair and reasonable to the Settlement Class.

7. There is no just reason for delay in the entry of this Order, and immediate entry by the Clerk of the Court is expressly directed.

Dated: _____, 2020

The Honorable Brantley Starr
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE FORTERRA INC. SECURITIES LITIGATION	Case No. 3:18-cv-01957-X Honorable Brantley Starr

JUDGMENT APPROVING CLASS ACTION SETTLEMENT

WHEREAS, a consolidated class action is pending in this Court entitled *In re Forterra Inc. Securities Litigation*, Case No. 3:18-cv-01957 (the "Action");

WHEREAS, (a) Lead Plaintiff Wladislaw Maciuga and additional named Plaintiff Supanin Disayawathana (the "Plaintiffs"), on behalf of themselves and the Settlement Class (defined below), and (b) defendant Forterra Inc. ("Forterra"); Jeffrey Bradley, Lori M. Browne, William Matthew Brown, Kyle S. Volluz, Kevin Barner, Robert Corcoran, Samuel D. Loughlin, Clint McDonnough, John McPherson, Chris Meyer, Chadwick Suss, Grant Wilbeck; Goldman Sachs & Co. LLC, Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC; Forterra US Holdings, LLC, Mid Holdings, Concrete Holdings Ltd., LSF9 Concrete Ltd., LSF9 Concrete II Ltd., Stardust Holdings, LSF9 Stardust GP, LLC, Lone Star Fund IX (U.S.), L.P., Lone Star Partners IX, L.P., Lone Star Management Co. IX, Ltd., and John P. Grayken (collectively, "Defendants"[1]; and together with Plaintiffs, the "Parties") have entered into a Stipulation and Agreement of Settlement dated November 4, 2019 (the "Stipulation"), that provides for a

[1] Defendants shall include Jacques Sarrazin, an unserved defendant named in the prior complaints filed in this Action.

complete dismissal with prejudice of the claims asserted against Defendants in the Action on the terms and conditions set forth in the Stipulation, subject to the approval of this Court (the "Settlement");

WHEREAS, unless otherwise defined in this Judgment, the capitalized terms herein shall have the same meaning as they have in the Stipulation;

WHEREAS, by Order dated January 8, 2020 (the "Preliminary Approval Order"), this Court: (a) preliminarily approved the Settlement; (b) certified the Settlement Class solely for purposes of effectuating the Settlement; (c) ordered that notice of the proposed Settlement be provided to potential Settlement Class Members; (d) provided Settlement Class Members with the opportunity either to exclude themselves from the Settlement Class or to object to the proposed Settlement; and (e) scheduled a hearing regarding final approval of the Settlement;

WHEREAS, due and adequate notice has been given to the Settlement Class;

WHEREAS, the Court conducted a hearing on July 21, 2020 (the "Settlement Hearing") to consider, among other things, (a) whether the terms and conditions of the Settlement are fair, reasonable and adequate to the Settlement Class, and should therefore be approved; and (b) whether a judgment should be entered dismissing the Action in its entirety with prejudice as against the Defendants; and

WHEREAS, the Court having reviewed and considered the Stipulation, all papers filed and proceedings held herein in connection with the Settlement, all oral and written comments received regarding the Settlement, and the record in the Action, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. **Jurisdiction** – The Court has jurisdiction over the subject matter of the Action,

and all matters relating to the Settlement, as well as personal jurisdiction over all of the Parties and each of the Settlement Class Members.

2. **Incorporation of Settlement Documents** – This Judgment incorporates and makes a part hereof: (a) the Stipulation filed with the Court on November 22, 2019; and (b) the Notice, the Summary Notice, and the Postcard Notice, all of which were filed with the Court on November 22, 2019.

3. **Class Certification for Settlement Purposes** – The Court hereby affirms its determinations in the Preliminary Approval Order certifying, for the purposes of the Settlement only, the Action as a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the Settlement Class consisting of all persons and entities who purchased or otherwise acquired Forterra common stock between Forterra's Initial Public Offering on October 19, 2016 and August 14, 2017, inclusive, and/or who purchased or acquired stock pursuant to and/or traceable to the Registration Statement issued in connection with Forterra's Initial Public Offering and were damaged thereby. Excluded from the Settlement Class are: (i) Defendants and their Immediate Family members; (ii) Non-defendant Underwriters; (iii) each of the foregoing's respective subsidiaries; (iv) their past and current executive officers and directors; (v) their legal representatives, heirs, successors or assigns; and (vi) any entity in which any of the foregoing excluded persons have or had a controlling interest. Notwithstanding the foregoing exclusions, no Investment Vehicle is excluded from the Settlement Class. [Also excluded from the Settlement Class are the persons and entities listed on Exhibit 1 hereto who or which are excluded from the Settlement Class pursuant to request.]

4. **Adequacy of Representation** – Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of the Settlement only, the Court hereby affirms its

determinations in the Preliminary Approval Order certifying Plaintiffs as Class Representatives for the Settlement Class and appointing Lead Counsel as Class Counsel for the Settlement Class. Plaintiffs and Lead Counsel have fairly and adequately represented the Settlement Class both in terms of litigating the Action and for purposes of entering into and implementing the Settlement and have satisfied the requirements of Federal Rules of Civil Procedure 23(a)(4) and 23(g), respectively.

5. **Notice** – The Court finds that the dissemination of the Postcard Notice, the online posting of the Notice, and the publication of the Summary Notice: (a) were implemented in accordance with the Preliminary Approval Order; (b) constituted the best notice practicable under the circumstances; (c) constituted notice that was reasonably calculated, under the circumstances, to apprise Settlement Class Members of (i) the pendency of the Action; (ii) the effect of the proposed Settlement (including the Releases to be provided thereunder); (iii) Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses; (iv) their right to object to any aspect of the Settlement, the Plan of Allocation and/or Lead Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses; (v) their right to exclude themselves from the Settlement Class; and (vi) their right to appear at the Settlement Hearing; (d) constituted due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (e) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995, 15 USC 77z-1 & 15 U.S.C. § 78u-4, as amended, and all other applicable law and rules.

6. **CAFA** – The Court finds that the notice requirements set forth in the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, to the extent applicable to the Action, have been

satisfied.

7. [**Objections** – The Court has considered each of the objections to the Settlement submitted pursuant to Rule 23(e)(5) of the Federal Rules of Civil Procedure. The Court finds and concludes that each of the objections is without merit, and they are hereby overruled.]

8. **Final Settlement Approval and Dismissal of Claims** – Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, this Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation: the amount of the Settlement; the Releases provided for therein; and the dismissal with prejudice of the claims asserted against Defendants in the Action), and finds that the Settlement is, in all respects, fair, reasonable and adequate to the Settlement Class. The Parties are directed to implement, perform and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation.

9. The Action and all of the claims asserted against Defendants in the Action by Plaintiffs and the other Settlement Class Members are hereby dismissed with prejudice. The Parties shall bear their own costs and expenses, except as otherwise expressly provided in the Stipulation.

10. **Binding Effect** – The terms of the Stipulation and of this Judgment shall be forever binding on Defendants, Plaintiffs and all other Settlement Class Members (regardless of whether or not any individual Settlement Class Member submits a Claim Form or seeks or obtains a distribution from the Net Settlement Fund), as well as their respective successors and assigns. [The persons and entities listed on Exhibit 1 hereto are excluded from the Settlement Class pursuant to request and are not bound by the terms of the Stipulation or this Judgment.]

11. **Releases** – The Releases set forth in paragraphs 5 and 6 of the Stipulation,

together with the definitions contained in paragraph 1 of the Stipulation relating thereto, are expressly incorporated herein in all respects. The Releases are effective as of the Effective Date. Accordingly, this Court orders that:

(a) Without further action by anyone, and subject to paragraph 12 below, upon the Effective Date of the Settlement, Plaintiffs and each of the other Settlement Class Members, on behalf of themselves, and their respective Immediate Family members, heirs, trusts, trustees, members, partners, shareholders, estates, beneficiaries, agents, affiliates, insurers and reinsurers, corporate parents and subsidiaries, executors, administrators, predecessors, successors, assigns, and assignees, in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever released, relinquished, compromised, settled, resolved, waived and discharged each and every Released Plaintiffs' Claim against the Defendants and the other Defendants' Releasees, and shall forever be barred and enjoined from prosecuting any or all of the Released Plaintiffs' Claims against any of the Defendants' Releasees. This Release shall not apply to any of the Excluded Claims (as that term is defined in paragraph 1(r) of the Stipulation).

(b) Without further action by anyone, and subject to paragraph 12 below, upon the Effective Date of the Settlement, Defendants, on behalf of themselves, and their respective Immediate Family members, heirs, trusts, trustees, members, partners, shareholders, estates, beneficiaries, agents, affiliates, insurers and reinsurers, corporate parents and subsidiaries, executors, administrators, predecessors, successors, assigns, and assignees, in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Defendants' Claim against Plaintiffs and the other

Plaintiffs' Releasees, and shall forever be barred and enjoined from prosecuting any or all of the Released Defendants' Claims against any of the Plaintiffs' Releasees. [This Release shall not apply to any person or entity listed on Exhibit 1 hereto.]

12. Notwithstanding paragraphs 11(a) – (b) above, nothing in this Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the Stipulation or this Judgment.

13. **Rule 11 Findings** – The Court finds and concludes that the Parties and their respective counsel have complied in all respects with the requirements of Rule 11 of the Federal Rules of Civil Procedure in connection with the institution, prosecution, defense, and settlement of the Action.

14. **No Admissions** – Neither this Judgment, the Term Sheet, the Stipulation (whether or not consummated), including the exhibits thereto and the Plan of Allocation contained therein (or any other plan of allocation that may be approved by the Court), the negotiations leading to the execution of the Term Sheet and the Stipulation, nor any proceedings taken pursuant to or in connection with the Term Sheet, the Stipulation and/or approval of the Settlement (including any arguments proffered in connection therewith):

(a) shall be offered against any of the Defendants' Releasees as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by any of the Defendants' Releasees with respect to the truth of any fact alleged by Plaintiffs or the validity of any claim that was or could have been asserted or the deficiency of any defense that has been or could have been asserted in this Action or in any other litigation, or of any liability, negligence, fault, or other wrongdoing of any kind of any of the Defendants' Releasees or in any way referred to for any other reason as against any of the Defendants' Releasees, in any civil,

criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation;

(b) shall be offered against any of the Plaintiffs' Releasees, as evidence of, or construed as, or deemed to be evidence of any presumption, concession or admission by any of the Plaintiffs' Releasees that any of their claims are without merit, that any of the Defendants' Releasees had meritorious defenses, or that damages recoverable under the Complaint would not have exceeded the Settlement Amount or with respect to any liability, negligence, fault or wrongdoing of any kind, or in any way referred to for any other reason as against any of the Plaintiffs' Releasees, in any civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; or

(c) shall be construed against any of the Releasees as an admission, concession, or presumption that the consideration to be given under the Settlement represents the amount which could be or would have been recovered after trial; provided, however, that the Parties and the Releasees and their respective counsel may refer to this Judgment and the Stipulation to effectuate the protections from liability granted hereunder and thereunder or otherwise to enforce the terms of the Settlement.

15. **Retention of Jurisdiction** – Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (a) the Parties for purposes of the administration, interpretation, implementation and enforcement of the Settlement; (b) the disposition of the Settlement Fund; (c) any motion for an award of attorneys' fees and/or Litigation Expenses by Lead Counsel in the Action that will be paid from the Settlement Fund; (d) any motion to approve the Plan of Allocation; (e) any motion to approve the Class Distribution Order; and (f) the Settlement Class Members for all matters relating to the Action.

16. Separate orders shall be entered regarding approval of a plan of allocation and the motion of Lead Counsel for an award of attorneys' fees and reimbursement of Litigation Expenses. Such orders shall in no way affect or delay the finality of this Judgment and shall not affect or delay the Effective Date of the Settlement.

17. **Modification of the Agreement of Settlement** – Without further approval from the Court, Plaintiffs and Defendants are hereby authorized to agree to and adopt such amendments or modifications of the Stipulation or any exhibits attached thereto to effectuate the Settlement that: (a) are not materially inconsistent with this Judgment; and (b) do not materially limit the rights of Settlement Class Members in connection with the Settlement. Without further order of the Court, Plaintiffs and Defendants may agree to reasonable extensions of time to carry out any provisions of the Settlement.

18. **Termination of Settlement** – If the Settlement is terminated as provided in the Stipulation or the Effective Date of the Settlement otherwise fails to occur, this Judgment shall be vacated, rendered null and void and be of no further force and effect, except as otherwise provided by the Stipulation, and this Judgment shall be without prejudice to the rights of Plaintiffs, the other Settlement Class Members and Defendants, and the Parties shall revert to their respective positions in the Action as of September 20, 2019, as provided in the Stipulation. Except as otherwise provided in the Stipulation, in the event the Settlement is terminated in its entirety or if the Effective Date fails to occur for any reason, the balance of the Settlement Fund including interest accrued therein, less any Notice and Administration Costs actually incurred, paid, or payable and less any Taxes paid, due or owing, shall be returned as instructed by Forterra's counsel, in accordance with the Stipulation.

19. **Entry of Final Judgment** – There is no just reason to delay the entry of this

Judgment as a final judgment in this Action. Accordingly, the Clerk of the Court is expressly directed to immediately enter this final judgment in this Action.

SO ORDERED this _____ day of _____, 2020.

_____

The Honorable Brantley Starr
United States District Judge

Exhibit 1

[List of Persons and Entities Excluded from the Settlement Class Pursuant to Request]