THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANTONIO BACHAALANI NACIF and WIES RAFI, individually and on behalf of all others similarly situated, Plaintiffs, v. ATHIRA PHARMA, INC., et al., Defendants.	CASE NO.: 2:21-cv-00861-TSZ **LEAD PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** **NOTE ON MOTION CALENDAR: SAME DAY MOTION**

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PRELIMINARY STATEMENT

Lead Plaintiffs Wies Rafi ("Rafi") and Antonio Bachaalani Nacif ("Nacif," and together with Rafi, "Lead Plaintiffs"), through their counsel Labaton Sucharow LLP ("Labaton Sucharow") and Glancy Prongay & Murray LLP ("Glancy Prongay & Murray," and together with Labaton Sucharow, "Co-Lead Counsel"), submit this memorandum of points and authorities in support of their unopposed motion, pursuant to Federal Rules of Civil Procedure 23(a), (b)(3), and 23(e), for preliminary approval of a proposed class action settlement in the amount of $10,000,000 in cash (the "Settlement Amount"), pursuant to the terms set forth in the Stipulation and Agreement of Settlement, dated April 27, 2023 (the "Stipulation"), which will resolve the above-captioned action (the "Action") in its entirety.[1] Lead Plaintiffs, on behalf of themselves and all others similarly situated, entered into the Stipulation with Athira Pharma, Inc. ("Athira" or the "Company"); Dr. Leen Kawas, Glenna Mileson, Dr. Tadataka Yamada, Joseph Edelman, James A. Johnson, and John M. Fluke, Jr. (the "Individual Defendants"); and Goldman Sachs & Co. LLC, Jefferies LLC, Stifel, Nicolaus & Company, Inc., and JMP Securities LLC (the "Underwriter Defendants," together with Athira and the Individual Defendants, "Defendants" and, Defendants together with Lead Plaintiffs, the "Parties").

Lead Plaintiffs respectfully submit that the Settlement is an excellent result for the Settlement Class and should be preliminarily approved by the Court. The decision to settle was informed by a comprehensive investigation, intensive motion practice, and extensive arm's-length negotiations overseen by a respected mediator. For the reasons stated herein, Lead Plaintiffs respectfully request that the Court grant this motion.

(a) Overview of the Litigation

Beginning in June 2021, three securities class action complaints were filed in the U.S. District Court for the Western District of Washington (the "Court") on behalf of investors in Athira, alleging violations of the Securities Exchange Act of 1934 (the "Exchange Act") and the

[1] The Stipulation is attached as Exhibit 1 to the Declaration of Thomas G. Hoffman, Jr., submitted herewith. All capitalized terms used in this memorandum that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation.

Securities Act of 1933 (the "Securities Act").[2]

On August 5, 2021, the parties in those three actions (*i.e.*, the *Fan Wang, Jawandha,* and *Slyne* actions) filed a joint motion to consolidate those actions, pursuant to the procedure set forth by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). ECF No. 14. Also on August 24, 2021, Nacif and Rafi filed motions for appointment as lead plaintiffs and for approval of their selection of lead counsel. ECF Nos. 40-43.

On August 9, 2021, the Court entered an Order consolidating the *Fan Wang, Jawandha,* and *Slyne* actions. ECF No. 15. On October 5, 2021, the Court entered an Order appointing Nacif and Rafi as Lead Plaintiffs; Labaton Sucharow and Glancy Prongay & Murray as Lead Counsel; and Breskin Johnson & Townsend, PLLC and Rossi Vucinovich, P.C. as Liaison Counsel. ECF No. 60.

Lead Plaintiffs filed the Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint") on January 7, 2022, alleging violations of Section 10(b) and Section 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder, and violations of Sections 11 and 15 of the Securities Act with respect to the Company's September 2020 Initial Public Offering ("IPO") and January 2021 Secondary Public Offering ("SPO"). ECF No. 74. The Complaint was based upon Co-Lead Counsels' extensive factual investigation, which included, among other things, the review and analysis of: (i) documents filed publicly by the Company with the U.S. Securities and Exchange Commission ("SEC"); (ii) publicly available information, including press releases, news articles, and other public statements issued by or concerning the Company and Defendants; (iii) research reports issued by financial analysts concerning the Company; (iv) other publicly available information and data concerning the Company, including *STAT News* articles and comments published on scientific research website, *PubPeer*, investigative reports regarding the patents for Dihexa and ATH-1017; (v) documents

[2] *Fan Wang and Hang Gao v. Athira Pharma, Inc. et. al.*, No. 2:21-cv-00861 (W.D. Wash. June 25, 2021); *Jawandha v. Athira Pharma, Inc., et al.*, No. 2:21-cv-00862-JCC (W.D. Wash. June 25, 2021); and *Slyne et al. v. Athira Pharma, Inc., et al.*, No. 2:21-cv-00864-JLR (W.D. Wash. June 25, 2021).

produced in response to Freedom of Information Act ("FOIA") requests issued to health regulators, including the National Institutes of Health; and (vi) the applicable laws governing the claims and potential defenses. Co-Lead Counsel's investigation also included identifying approximately twelve former Athira employees and other persons with relevant knowledge, and interviewing four of them. Co-Lead Counsel also consulted with an expert on loss causation and damages issues, as well as a patent expert.

On March 8, 2022, Defendants filed a motion to dismiss the Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). ECF No. 76. Lead Plaintiffs opposed the motion on May 6, 2022. ECF No. 81. On June 6, 2022, Defendants filed a reply brief in further support of their motion. ECF No. 87.

On July 29, 2022, the Court entered an order granting in part and denying in part Defendants' motion to dismiss for failure to state a claim. ECF No. 89 (the "MTD Order"). Specifically, the Court denied Defendants' motion with respect to Lead Plaintiffs' claims under Sections 11 and 15 of the Securities Act against Defendants Kawas and Athira solely as to "Statement 3," which was contained in Athira's IPO and SPO Prospectuses and discussed Athira's exclusive licensing agreement with WSU. *See Nacif v. Athira Pharma, Inc.*, 2022 WL 3028579, at *19 (W.D. Wash. July 29, 2022). The MTD Order granted Defendants' motion to dismiss with respect to Lead Plaintiffs' claims under Sections 11 and 15 of the Securities Act against Athira and Dr. Kawas with regard to all statements in the IPO and SPO Registration Statements other than "Statement 3." In addition, the MTD Order dismissed all claims under Section 12(a)(2) of the Securities Act, all claims under the Exchange Act, all claims against the other Individual Defendants, and all claims against the Underwriter Defendants. *See id*.

On August 12, 2022, Defendant Kawas filed a motion for partial reconsideration of the Court's MTD Order, arguing that the Court should reconsider its holding with respect to Statement 3. ECF No. 90. Lead Plaintiffs filed a response opposing the motion on September 12, 2022 (ECF Nos. 92-93), to which Defendant Kawas replied on September 16, 2022. ECF No.

94. On October 4, 2022, the Court denied Defendant Kawas' motion for reconsideration. ECF No. 95.

Subsequently, the remaining Parties began discovery, which included the filing of a joint discovery plan, a protective order and ESI Protocol governing the production of electronic discovery. Lead Plaintiffs and the remaining Defendants served interrogatories and requests for production ("RFPs") on each other. After serving their objections, Lead Plaintiffs and Athira met and conferred regarding their discovery requests and responses and provided opposing counsel with substantive discovery responses, including verified interrogatory responses and documents. In addition, Defendant Kawas provided verified interrogatory responses, and Athira served deposition notices on Lead Plaintiffs.

At the time the Settlement was reached, Lead Plaintiffs were preparing for class certification and fact depositions.[3]

(b) Settlement Discussions

Beginning in November 2023, Lead Plaintiffs and the remaining Defendants, through their counsel, conferred on the possibility of reaching a negotiated resolution of the Action and agreed to participate in a mediation under the auspices of Jed Melnick, Esq. of JAMS ("Mr. Melnick"), a well-respected mediator of complex cases. In advance of the mediation, those parties exchanged, and submitted to Mr. Melnick, detailed mediation statements and exhibits, which addressed issues of both liability and damages. On February 16, 2023, Lead Plaintiffs and the remaining Defendants met for a full-day, in-person mediation session with Mr. Melnick. Ultimately, they agreed in principle to a settlement of $10 million, subject to the negotiation of a mutually acceptable term sheet ("Term Sheet") and long form stipulation of settlement and completion of additional due diligence to confirm the reasonableness of the Settlement.

[3] The Underwriter Defendants also filed a Motion for Entry of Final Judgment under Rule 54(b) on December 19, 2022. ECF No. 105. Following briefing on the motion, the Court entered an order deferring and re-noticing the motion for March 17, 2023. ECF No. 114. Based on the proposed Settlement, the Underwriter Defendants entered a stipulation to withdraw that motion without prejudice to refiling it if the Settlement is not completed for any reason.

As a condition to the Settlement, Athira provided confirmatory discovery to Lead Plaintiffs. Importantly, that discovery included the documents that were reviewed by the special committee that was formed by Athira's Board of Directors to consider Defendant Kawas's alleged manipulation of Western blot images in her academic research.

The Term Sheet was executed on February 28, 2023, and the Stipulation was executed on April 27, 2023.

(c) The Proposed Settlement

Pursuant to the Stipulation, within thirty (30) calendar days after the later of (i) entry of the Preliminary Approval Order or (ii) Lead Counsel's provision of payment instructions to Wilson Sonsini Goodrich & Rosati and a W-9 form for the Settlement Fund, Athira shall pay, or cause to be paid, the Settlement Amount into the Escrow Account. *See* Stipulation at ¶8.

In exchange for this payment, upon the Effective Date of the Settlement, Lead Plaintiffs and each Settlement Class Member shall release and dismiss the "Released Plaintiffs' Claims" against the Released Defendant Parties. *See* Stipulation at ¶¶1(ll), 1(mm), 5. The definition of Released Plaintiffs' Claims has been tailored to release only claims that Lead Plaintiffs or any other member of the Settlement Class: (i) asserted in the Action; or (ii) could have asserted in any forum or proceeding that arise out of or are based upon or are related to the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Complaint and that arise out of the purchase, acquisition, sale or holding of Athira Pharma, Inc. publicly traded common stock during the Class Period (September 17, 2020 through June 17, 2021, inclusive) or pursuant and/or traceable to the registration statements and prospectuses issued in connection with the Company's IPO or SPO.[4] *See* Stipulation at ¶1(mm).

Pursuant to Rule 23(e)(3), the only agreements made by the Parties in connection with the

[4] Released Plaintiffs' Claims do not include: (a) any claims relating to enforcement of the Settlement; (b) any claims of any person or entity who or which submits a request for exclusion from the Settlement Class that is accepted by the Court; and (c) any derivative claims asserted by shareholders on behalf of Athira in the related consolidated shareholder derivative lawsuits, captioned *Bushansky v. Kawas et al.*, No. 2:22-cv-497-TSZ (W.D. Wash.) and *Houlihan v. Kawas et al.*, No. 2:22-cv-620-TSZ (W.D. Wash.). *See* Stipulation at ¶1(mm).

Settlement are the Term Sheet, the Stipulation, and the confidential Supplemental Agreement, dated April 27, 2023, concerning the circumstances under which Athira may terminate the Settlement based upon the number of exclusion requests. *See* Stipulation at ¶35. It is standard to keep supplemental agreements containing so-called "blow provisions" confidential so that a large investor, or a group of investors, cannot intentionally try to leverage a better recovery for themselves by threatening to opt out, at the expense of the class. *See Christine Asia Co. v. Yun Ma*, 2019 WL 5257534, at *15 (S.D.N.Y. Oct. 16, 2019) ("This type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the Settlement."), *appeal withdrawn sub nom. Tan Chao v. William*, 2020 WL 763277 (2d Cir. Jan. 2, 2020). The Supplemental Agreement can be provided to the Court *in camera* or under seal.

After approval of the Settlement and approval of the Plan of Allocation for the proceeds of the Settlement, the proposed Claims Administrator, Strategic Claims Services ("SCS"), will process all claims received and will apply the plan of allocation approved by the Court. At the completion of the administration, SCS will distribute the Net Settlement Fund to eligible claimants, and will continue to do so as long as it is economically feasible to make distributions. *See* Stipulation at ¶18. If there is any residual unclaimed balance that cannot be distributed economically, it will be donated to the Public Justice Foundation, *see* www.publicjustice.net, or such other non-sectarian, not-for-profit organization approved by the Court. This is not a "claims-made" settlement. If the Settlement becomes effective, neither Defendants nor any other person or entity who or which paid any portion of the Settlement Amount shall have any right to the return of the Settlement Fund, regardless of how many Claims are submitted or approved for payment. *Id*. at ¶13.

(d) Proposed Schedule of Events

Lead Plaintiffs respectfully propose the following schedule for Settlement-related events, each of which is in the proposed Preliminary Approval Order:

Deadline for mailing individual Notices and Claim Forms	***10 business days after entry of the Preliminary Approval Order ("Notice Date")***

Deadline for publication of Summary Notice in *Investor's Business Daily* and transmission over *PR Newswire*	***Within 10 business days of the Notice Date***
Deadline for filing motions in support of the Settlement, the Plan of Allocation, and Lead Counsel's request for an award of attorneys' fees and expenses	***No later than 35 calendar days before the Settlement Hearing***
Deadline for submission of requests for exclusion or objections	***No later than 21 calendar days before the Settlement Hearing***
Deadline for filing reply papers in support of Lead Plaintiffs' and Lead Counsel's motions	***No later than 7 calendar days before the Settlement Hearing***
Deadline for submission of Claim Forms	***Postmarked or received no later than 7 calendar days before the Settlement Hearing***
Settlement Hearing	***At the Court's convenience, but no fewer than 100 calendar days after entry of the Preliminary Approval Order***

This schedule is similar to those used and approved by numerous courts in securities class action settlements and complies with the Ninth Circuit's ruling in *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010) (fee motion must be made available to the class before the objection deadline).

ARGUMENT

I. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

As a matter of public policy, settlement is strongly favored for resolving disputes, especially in complex class actions. *See, e.g.*, *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.").[5]

Rule 23 requires court approval for any settlement of a class action. Approval of class action settlements proceeds in two stages: (i) preliminary approval, followed by notice to the class; and (ii) final approval. *See, e.g.*, *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 525 (C.D. Cal. 2004); Manual for Complex Litigation (Fourth) § 13.14 (4th ed. 2004). "At the preliminary approval stage, the reviewing court considers whether it is likely to approve

[5] All internal citations are omitted and emphasis added, unless otherwise noted.

of the proposed settlement." *In re BofI Holding, Inc. Sec. Litig.*, 2022 WL 2068424, at *4 (S.D. Cal. June 8, 2022) (citing Fed. R. Civ. P. 23(e)(1)(B)). Such an evaluation is made in the context of the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Syncor*, 516 F.3d at 1101.

Effective December 1, 2018, Rule 23(e) was amended to, among other things, specify that the crux of a court's preliminary approval evaluation is whether notice should be provided to the class given the *likelihood* that the court will be able to grant final approval to the settlement and certify the class. Rule 23(e)(1)(B). Rule 23(e)(2) provides that a court should consider whether:

> (A) class representatives and counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) 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, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) an agreement required to be identified under Rule 23(e)(3)[6]; and
> (D) the proposal treats class members equitably relative to each other.[7]

The standard is similar to prior case law that provided that courts should grant preliminary approval after considering whether the settlement: "(1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval." *Flynn v. Sientra, Inc.*, 2017 WL 11139918, at *4 (C.D. Cal. Jan. 23, 2017); *In re Banc of Calif. Sec. Litig.*, 2019 WL 6605884, at *2 (C.D. Cal. Dec. 4, 2019). Applying the standards set forth above, it is respectfully submitted that the Settlement should be preliminarily approved.

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[6] *See supra*, p. 5.

[7] The Court may also consider the Ninth Circuit's long-standing approval factors, many of which overlap with the Rule 23 considerations: "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement." *In re Zynga Inc., Sec. Litig.*, 2015 WL 6471171, at *8 (N.D. Cal. Oct. 27, 2015).

A. Lead Plaintiffs and Co-Lead Counsel Have 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." "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

Here, Lead Plaintiffs and Co-Lead Counsel adequately represented the Settlement Class both during the litigation of this Action and its settlement. Lead Plaintiffs' claims are typical of and coextensive with the claims of the Settlement Class, and they have no antagonistic interests; rather, Lead Plaintiffs' interest in obtaining the largest possible recovery in this Action is aligned with the other Settlement Class Members. *See Mild v. PPG Indus., Inc.*, 2019 WL 3345714, at *3 (C.D. Cal. July 25, 2019) ("Because Plaintiff's claims are typical of and coextensive with the claims of the Settlement Class, his interest in obtaining the largest possible recovery is aligned with the interests of the rest of the Settlement Class members."). Additionally, Lead Plaintiffs were involved throughout the litigation and worked closely with Co-Lead Counsel to achieve the best possible result for themselves and the Settlement Class.

Lead Plaintiffs also retained counsel who are highly experienced in securities litigation, and who have a long and successful track record of representing investors in such cases. Co-Lead Counsel have successfully prosecuted securities class actions and complex litigation in courts throughout the country. *See, e.g.*, Labaton Sucharow: *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04-cv-8141 (S.D.N.Y.) ($1 billion recovery); *In re HealthSouth Corp. Sec. Litig.*, No. 03-cv-1500 (N.D. Ala.) ($600 million recovery); and *In re Countrywide Sec. Litig.*, No. 07-cv-5295 (C.D. Cal.) ($600 million recovery); and Glancy Prongay & Murray: *In re Mercury Interactive Corp. Sec. Litig.*, No. 05-3395-JF (N.D. Cal.) ($117 million recovery); *In Re Yahoo! Inc. Sec. Litig.*, No. 5:17-cv-00373-LHK (N.D. Cal.) ($80 million recovery); and *The City of Farmington Hills Emps. Ret. Sys. v. Wells Fargo Bank, N.A.*, No. 10-cv-04372-DWF/JJG (D. Minn.) ($62.5 million recovery).

Moreover, Co-Lead Counsel developed a deep understanding of the facts of the case and merits of the claims through, *inter alia*: (i) review and analysis of publicly available information regarding the Company, documents produced in response to FOIA requests, and documents and information provided in response to requests for production and interrogatories; (ii) interviews of former employees; (iii) briefing Defendants' motion to dismiss; (iv) review and analysis of the remaining Defendants' mediation statement and exhibits; and (v) consultations with an expert on loss causation and damages and a patent expert regarding the reliance of Athira's IP on Defendant Kawas's allegedly manipulated research. Prior to executing the Stipulation, Co-Lead Counsel also conducted additional due diligence and reviewed additional documents produced by the remaining Defendants. The Settlement was, therefore, negotiated by well-informed counsel who had vigorously litigated the case on behalf of Lead Plaintiffs and the Settlement Class.

B. Settlement Resulted from Good Faith, Arm's-Length Negotiations

Rule 23(e)(2)(B) asks whether "the [settlement] proposal was negotiated at arm's length." Courts have long recognized that there is an initial presumption that a proposed settlement is fair and reasonable when it is the "product of arms-length negotiations." *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 1991529, at *6 (N.D. Cal. June 30, 2007); *see also In re Banc of Calif.*, 2019 WL 6605884, at *2 (noting, at preliminary approval, that "one important factor is that the parties reached the settlement after significant arms-length negotiations with a third-party mediator."); *In re OSI Sys., Inc. Derivative Litig.*, 2017 WL 5634607, at *3 (C.D. Cal. Jan. 24, 2017) (settlement is a fair result where it was "the result of sincere, arm's length negotiations before an experienced mediator."). Here, as noted above, the Settlement was achieved only after a full-day, in-person mediation overseen by Mr. Melnick, an experienced mediator who has facilitated dozens of securities class actions settlements. The remaining Defendants' counsel, two well-regarded U.S. law firms with strong records and deep expertise in defense of securities class actions, vigorously asserted arguments against liability and damages. The negotiations were at all times adversarial and at arm's-length. *See In re China Med. Corp. Sec. Litig.*, 2014 WL 12581781, at *4 (C.D. Cal. Jan. 7, 2014) (finding that the settlement, which was reached through

mediation with mediator, Mr. Melnick, weighed in favor of preliminary approval); *In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *8 (C.D. Cal. July 28, 2014) (approving settlement reached with the assistance of mediator, Mr. Melnick).

Further, courts give considerable weight to the opinion of experienced and informed counsel. *See, e.g.*, *In re NVIDIA Corp. Derivative Litig.*, 2008 WL 5382544, at *4 (N.D. Cal. Dec. 22, 2008) ("[S]ignificant weight should be attributed to counsel's belief that settlement is in the best interest of those affected by the settlement."). Thus, the fact that Lead Plaintiffs and Co-Lead Counsel believe that the Settlement is fair and reasonable weighs in favor of preliminary approval.

C. The Relief Provided by the Settlement Is Adequate

1. Many Risks to Obtaining a Recovery Remained

Although Lead Plaintiffs and Co-Lead Counsel believe that the claims asserted against Defendants have merit, they recognize the significant expense and length of continued litigation through trial and appeals, as well as the risks they would face in establishing the required elements—*i.e.*, falsity and materiality—to sustain their claims.

For example, the Court's decision on the motion to dismiss left only a Section 11 claim based on one alleged false and misleading statement that was repeated in Athira's IPO and SPO prospectuses. The remaining Defendants would no doubt have continued to argue that the statement, which relates to Athira's exclusive licensing agreement with WSU, was not materially false and misleading. While Lead Plaintiffs believed they had the better argument on this issue, success was not a forgone conclusion. *See Gross v. GFI Grp., Inc.*, 784 F. App'x. 27, 29 (2d Cir. Sept. 13, 2019) (affirming grant of summary judgment on the alternative ground that defendants' "statement did not, as a matter of law, amount to a material misrepresentation or omission actionable under section 10(b)," despite the trial court twice finding the statement actionable).

The Underwriter Defendants have also moved for entry of judgment dismissing the claims against them (ECF No. 105), and the Court invited submissions to broaden the relief to include all of the dismissed Defendants (ECF No. 114). Lead Plaintiffs opposed the motion (ECF No.

111), but without the proposed Settlement, Lead Plaintiffs faced the risk of either entry of final judgment as to all of the Defendants except Athira and Dr. Kawas, or being required to pursue an appeal as to the dismissed claims, even while continuing to prosecute the claims against the remaining Defendants in this Court.

Even if Lead Plaintiffs overcame the hurdles to establishing liability, the amount of damages that could be attributed to the allegedly false statement would be hotly contested. For instance, the remaining Defendants would likely argue that Athira's stock price dropped not as a result of the revelation of the allegedly concealed information—*i.e.*, Defendant Kawas' enhancement of Western blot images in her academic research—but rather as a result of unwarranted market panic regarding the validity of the science underlying Athira's lead development product, ATH-1017. Further, at the class certification stage, the remaining Defendants would likely argue that there were standing and traceability issues with Athira's SPO that would defeat class certification for that offering. Thus, the remaining Defendants would have likely argued that any statistically significant declines in Athira's stock price resulted from forces unrelated to the alleged fraud (*i.e.*, negative causation), and, even if they were not, damages were far lower because Lead Plaintiffs lacked standing to assert claims related to the SPO.

If liability were established with respect to the remaining claim, if the Court fully certified the class, and if Lead Plaintiffs prevailed on all damages arguments, the estimated ***maximum*** aggregate damages recoverable at trial, based on the full stock price declines on the disclosure date—*i.e.*, Lead Plaintiffs' best-case scenario—would be approximately $83 million. Accordingly, the Settlement recovers approximately 15% of ***maximum*** damages. Since the passage of the PSLRA, courts have regularly approved settlements that recover far smaller percentages of maximum damages. *See, e.g.*, *McPhail v. First Command Fin. Planning, Inc.*, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding a $12 million settlement recovering 7% of estimated damages was fair and adequate); *In re Omnivision Techs., Inc.,* 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages after

deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements.").

Of course, this maximum estimate assumes that Lead Plaintiffs would be able to prevail on ***all*** issues of liability and damages. Had the remaining Defendants won on the merits, standing or negative causation arguments at any stage of the litigation, the Settlement Class would have recovered significantly less, or nothing at all, many years in the future. In contrast, the Settlement represents a prompt and substantial tangible recovery without the considerable risk, expense, and delay of completing extensive fact and expert discovery and prevailing at class certification, summary judgment, trial, and post-trial litigation. *See, e.g.*, *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."); *In re GSE Bonds Antitrust Litig*., 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019) ("even if plaintiffs 'were to prevail at trial, post-trial motions and the potential for appeal could prevent the class members from obtaining any recovery for several years, if at all.'").

Accordingly, in light of the substantial risks and expense of continued litigation, and compared to the certain and prompt recovery of $10,000,000, the Settlement is a favorable result that is well within the range of reasonableness. *See, e.g.*, *Lo v. Oxnard Eur. Motors, LLC*, 2011 WL 6300050, at *5 (S.D. Cal. Dec. 15, 2011) (at preliminary approval, "'[c]onsidering the potential risks and expenses associated with continued prosecution of the Lawsuit, the probability of appeals, the certainty of delay, and the ultimate uncertainty of recovery through continued litigation,' the Court finds that, on balance, the proposed settlement is fair, reasonable, and adequate") (alteration in original).

2. The Proposed Process for Distributing Relief to the Class Is Effective

The method for processing Settlement Class Members' claims and distributing relief to eligible claimants includes well-established, effective procedures for processing claims and efficiently distributing the Net Settlement Fund. The Claims Administrator selected by Co-Lead

Counsel (subject to Court approval), SCS, is an experienced claims administrator that will process claims under the guidance of Co-Lead Counsel.[8]

The Claims Administrator will employ a well-established protocol for the processing of claims in a securities class action. Potential class members will submit, either by mail or online using the Settlement website, the Court-approved Claim Form. Based on the trade information provided by Claimants, the Claims Administrator will determine each Claimant's eligibility to participate in the Settlement, and calculate their respective "Recognized Claim" based on the Court-approved Plan of Allocation. *See* Stipulation at ¶ 20. Lead Plaintiffs' claims will be reviewed in the same manner. Claimants will be notified of any defects or conditions of ineligibility and given the chance to contest rejection. Any claim disputes that cannot be resolved will be presented to the Court for determination. *Id*. at ¶24(d)-(e). At the completion of the administration, SCS will distribute the Net Settlement Fund to eligible claimants, and will continue to do so as long as it is economically feasible to make distributions. *Id*. at ¶18.

3. Anticipated Legal Fees and Expenses

As set forth in the Notice, Co-Lead Counsel will request, on behalf of all Plaintiffs' Counsel, attorneys' fees of no more than 33⅓% of the Settlement Fund and Litigation Expenses not to exceed $125,000, which may include an application for reimbursement by the Lead Plaintiffs pursuant to the PSLRA. A fee request of no more than 33⅓%, while slightly above the 25% "benchmark" within the Ninth Circuit, would be consistent with other settlements approved in the Ninth Circuit. *See In re Banc of Calif. Sec. Litig.*, 2020 WL 1283486, at *1 (C.D. Cal. Mar. 16, 2020) (awarding 33% of $19.75 million settlement); *Kendall v. Odonate Therapeutics, Inc.*, 2022 WL 1997530, at *6 (S.D. Cal. June 6, 2022) (awarding 33⅓% of $12.75 million settlement fund). The basis of Co-Lead Counsel's fee and expense request will be detailed in the upcoming

[8] Co-Lead Counsel selected SCS to serve as the Claims Administrator, subject to Court approval, following a competitive bidding process involving three well-respected, experienced claims administration firms. Lead Plaintiffs request that the Court appoint SCS as the Claims Administrator to provide all notices approved by the Court, to process Claim Forms, and to administer the Settlement. SCS is a nationally recognized notice and claims administration firm that has successfully and efficiently administered hundreds of complex securities class action settlements. *See* Hoffman Decl. Ex. 2.

motion requesting fees and expenses.

D. Proposed Plan of Allocation for Distributing Relief Treats Settlement Class Members Equitably

Rule 23(e)(2)(D) requires courts to evaluate whether the settlement treats class members equitably relative to one another.[9] At the final Settlement Hearing, the Court will be asked to approve the proposed Plan of Allocation for distributing the proceeds of the Settlement to eligible claimants. The Plan of Allocation, which is set forth in full in the Notice (Exhibits A-1 to the Stipulation, at paragraphs 43-63), was drafted with the assistance of a consulting damages expert, and is designed to equitably distribute the Settlement proceeds among members of the Settlement Class who were allegedly injured by Defendants' alleged misrepresentation and who submit valid Claim Forms. The Plan provides for the calculation of a "Recognized Loss Amount" for each purchase or acquisition of Athira common stock during the Class Period that is listed in the Claim Form and for which adequate documentation is provided.

Recognized Loss Amounts are based primarily on the price declines quantified by Lead Plaintiffs' consulting damages expert over the period in which Lead Plaintiffs allege corrective information was entering the marketplace. In the Action, Lead Plaintiffs allege that Defendants made false statements and omitted material facts in the IPO materials and SPO materials, as well as during the Class Period (*i.e.*, September 17, 2020 through June 17, 2021, inclusive), which had the effect of allegedly artificially inflating the price of Athira common stock. The estimated alleged artificial inflation in the price of Athira common stock during the Class Period is reflected in Table 1 in the Notice. The computation of the estimated alleged artificial inflation in the price of Athira common stock during the Class Period is based on certain misrepresentations alleged by Lead Plaintiffs and the price changes in the stock, net of market and industry-wide factors, allegedly in reaction to the public announcements that allegedly corrected the misrepresentations alleged in the Action.

[9] The Settlement does not improperly grant preferential treatment to either Lead Plaintiffs or any segment of the Settlement Class. Rather, all members of the Settlement Class that submit valid Claims, including Lead Plaintiffs, will receive their *pro rata* share of the Net Settlement Fund pursuant to the Plan of Allocation approved by the Court.

The Claims Administrator will calculate claimants' Recognized Losses using the transactional information provided by claimants in their Claim Forms, which can be mailed to the Claims Administrator, submitted online using the website developed for the Settlement, www.AthiraSecuritiesSettlement.com ("Settlement Website"), or, for large investors, with hundreds of transactions, via e-mail to the Claims Administrator's electronic filing team. Because most securities are held in "street name" by the brokers that buy them on behalf of clients, the Claims Administrator, Lead Counsel, and Defendants do not have Settlement Class Members' transactional data and a claims process is required. Because the Settlement does not recover 100% of alleged damages, the Claims Administrator will determine each eligible claimant's *pro rata* share of the Net Settlement Fund based upon each claimant's total "Recognized Claim" compared to the aggregate Recognized Claims of all eligible claimants.

II. THE COURT SHOULD PRELIMINARILY CERTIFY THE SETTLEMENT CLASS

A. Standards Applicable to Class Certification

Lead Plaintiffs respectfully request that the Court preliminarily certify the Settlement Class for purposes of the Settlement only, pursuant to Rules 23(a) and (b)(3). The proposed Settlement Class, which has been stipulated to by the Parties, is defined as "all persons and entities who or which purchased or otherwise acquired Athira Pharma, Inc. publicly traded common stock: (a) during the period from September 17, 2020 through June 17, 2021, inclusive; (b) pursuant and/or traceable to the registration statement and prospectus issued in connection with the Company's September 2020 initial public offering; and/or (c) pursuant and/or traceable to the registration statement and prospectus issued in connection with the Company's January 2021 secondary public offering, and were damaged thereby," excluding those listed in ¶1(r) of the Stipulation.

Courts have acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In the Ninth Circuit, "Rule 23 is to be liberally construed in a securities fraud context because class actions are particularly effective in serving as private policing weapons against corporate wrongdoing."

In re Cooper Cos. Sec. Litig., 254 F.R.D. 628, 642 (C.D. Cal. 2009); *see also In re THQ Inc. Sec. Litig.*, 2002 WL 1832145, at *2 (C.D. Cal. Mar. 22, 2002) ("[T]he law in the Ninth Circuit is very well established that the requirements of Rule 23 should be liberally construed in favor of class action cases brought under the federal securities laws.").

A settlement class, like other certified classes, must satisfy the requirements of Rule 23(a) and (b). *See Hanlon,* 150 F.3d at 1022. However, the manageability concerns of Rule 23(b)(3) are not at issue for a settlement class. *See Amchem Prods.*, 521 U.S. at 593 ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested."). As discussed below, the Action satisfies all the factors for certification.

B. The Settlement Class Meets the Requirements of Rule 23(a)

1. Rule 23(a): Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. "'[I]mpracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). "Numerosity is presumed when the plaintiff class contains forty or more members." *In re Wash. Mut. Mortg.-Backed Sec. Litig.*, 276 F.R.D. 658, 665 (W.D. Wash. 2011). In securities litigation, courts regularly find the numerosity requirement is satisfied with respect to putative purchasers of nationally traded securities on the volume of outstanding shares. *See Howell v. JBI, Inc.*, 298 F.R.D. 649, 654-55 (D. Nev. 2014) ("in securities cases, when millions of shares are traded during the proposed class period, a court may infer that the numerosity requirement is satisfied.").

Here, there can be no dispute that the Settlement Class satisfies numerosity and consists of (at least) thousands of investors. Throughout the Class Period, Athira had more than 30 million common shares outstanding, which were actively traded on the NASDAQ, making joinder impracticable.

2. Rule 23(a)(2): Questions of Law or Fact Are Common

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." The Ninth Circuit construes this requirement "permissively," and has stated that "[a]ll questions of fact and law need not be common to satisfy the rule." *Hanlon*, 150 F.3d at 1019.

Securities cases have long been found to satisfy the commonality requirement:

> The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the "common question" requirement. Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit.

Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975); *see also In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009) ("Repeated misrepresentations by a company to its stockholders satisfy the commonality requirement of Rule 23(a)(2)."). Further, the common questions must be "of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wash. Mut.*, 276 F.R.D. at 665.

In this case, the commonality requirements are met. The central questions—whether Defendants' statements during the Class Period were materially false and misleading, and whether Plaintiffs and the Settlement Class suffered damages—are the same for all class members.

3. Rule 23(a)(3): Lead Plaintiffs' Claims Are Typical

Rule 23(a)(3) is satisfied where the claims of the proposed class representatives arise from the same course of conduct that gives rise to the claims of the other class members, and where the claims are based on the same legal theory. *In re Comput. Memories Sec. Litig.*, 111 F.R.D. 675, 680 (N.D. Cal. 1986). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct, which is not unique to the named plaintiffs, and whether other class members have been injured in the same courts of conduct." *Wash. Mut.*, 276 F.R.D at 665. Here, Lead Plaintiffs' claims are typical to those of the other Settlement Class Members. Like all other Settlement Class Members, Lead Plaintiffs purchased Athira common

stock at allegedly inflated prices and suffered damages when the alleged fraud was revealed through the alleged corrective disclosures.

4. Rule 23(a)(4): Lead Plaintiffs Are Adequate

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." "The proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000) (citing *Hanlon*, 150 F.3d at 1020).

Here, as mentioned above, Lead Plaintiffs have and will continue to represent the interests of the Settlement Class fairly and adequately. There is no antagonism or conflict of interest between Lead Plaintiffs and the proposed Settlement Class. Co-Lead Counsel also have extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States. *See* Exs. 3-4; *see also In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 2009 WL 50132, at *10 (S.D.N.Y. Jan. 5, 2009) (Labaton Sucharow has "substantial experience in the prosecution of shareholder and securities class actions"); *Wilson v. LSB Indus., Inc.*, 2018 WL 3913115, at *18 (S.D.N.Y. Aug. 13, 2018) ("[Glancy Prongay & Murray] has had extensive experience serving as lead or co-lead counsel in class action securities litigation."). Co-Lead Counsel are well qualified to conduct the Action and have ably represented Lead Plaintiffs and the proposed Settlement Class throughout the Action.[10]

C. The Settlement Class Meets the Requirements of Rule 23(b)(3)

1. Common Questions of Law or Fact Predominate

Rule 23(b)(3) sets forth two requirements, the first being that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 594. "'When common

[10] Thus, Lead Counsel should also be appointed under Rule 23(g)(1).

questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" *Hanlon*, 150 F.3d at 1022. Predominance is "readily met" in securities class actions. *Amchem Prods*., 521 U.S. at 625; *see also Cooper Cos*., 254 F.R.D. at 632 ("[S]ecurities fraud cases fit Rule 23 'like a glove.'").

Here, Defendants' alleged misstatements and omissions affected all Settlement Class Members in the same manner (*i.e.*, through public statements made to the market and documents publicly filed with the SEC). Predominance of common questions generally will be found when, as alleged here, "'many purchasers have been defrauded over time by similar misrepresentations, or by a common scheme to which alleged non-disclosures related.'" *Negrete v. Allianz Life Ins. Co. of N. Am*., 238 F.R.D. 482, 492 (C.D. Cal. 2006); *see also In re First Cap. Holdings Corp. Fin. Prods. Sec. Litig*., 1993 WL 144861, at *6 (C.D. Cal. Feb. 26, 1993) ("The Ninth Circuit has repeatedly found that common issues predominate in federal securities actions where the proposed class members have all been injured by the same alleged course of conduct.").

2. A Class Action Is a Superior Method of Adjudication

Finally, Rule 23(b)(3) requires that the action be superior to other available methods for the fair and efficient adjudication of the controversy. The rule lists several matters pertinent to this finding: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). Here, each of the applicable factors weighs in favor of superiority. *See, e.g., McPhail,* 247 F.R.D. at 615 ("class action is the superior method for fair and efficient adjudication" because individual suits would "clog [ ] the federal courts with innumerable individual suits litigating the same issues repeatedly," the plaintiffs assert complex claims that "would be very costly to litigate," and each claim is for a "relatively small amount").

Further, without the settlement class device, Defendants could not obtain a class-wide release, and therefore would have had little, if any, incentive to settle. Certification of the Settlement Class will allow the Settlement to be administered in an organized and efficient manner. Accordingly, the Court should preliminarily certify the Settlement Class.

III. THE PROPOSED NOTICE PROGRAM SATISFIES RULE 23, DUE PROCESS, AND THE PSLRA REQUIREMENTS

A. The Method of Notice Is Adequate

Rule 23(e) provides that a class action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise to all members of the class in such a manner as the court directs. Here, as outlined in the proposed Preliminary Approval Order, if the Court grants preliminary approval, the Claims Administrator will mail the Notice and Claim Form (Exhibits A-1 and A-2 to the Stipulation, together the "Notice Packet") to all Settlement Class Members who can be identified with reasonable effort, including through records maintained by Athira, as well as brokerage firms and other nominees who regularly act as nominees for beneficial purchasers of securities. Contemporaneously with the mailing of the Notice Packet, downloadable copies of the Notice and the Claim Form will be posted on the Settlement Website. The Settlement Website will also allow online claim submission. No more than ten (10) business days after mailing the Notice Packet, the Summary Notice will also be published once in *Investor's Business Daily* and transmitted once over the *PR Newswire*. *See* proposed Preliminary Approval Order at ¶7(d).

Courts routinely find that these methods of notice are sufficient. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (requiring notice be sent to all class members "whose names and addresses may be ascertained through reasonable effort"); *Vataj v. Johnson*, 2021 WL 5161927, at *5 (N.D. Cal. Nov. 5, 2021) (finding notice by mail and published in a newswire with national distribution "provided the best notice practicable to the class members"); *In re Northfield*

Labs. Inc. Sec. Litig., 2012 WL 366852 (N.D. Ill. Jan. 31, 2012) (approving similar method of notice). Thus, Lead Plaintiffs respectfully submit that the proposed notice program provides "the best notice practicable under the circumstances" and should be approved. *In re Enron Corp. Sec. & ERISA Litig.*, 2003 WL 22494413, at *3 (S.D. Tex. July 24, 2003).

B. The Content of the Notice Is Adequate

As required by Rule 23(c)(2), the notice program will inform Settlement Class Members of the claims alleged in the Action, the terms of the Settlement, and their rights as Settlement Class Members to opt out or object to the Settlement, or otherwise object to the Plan of Allocation and/or the request for attorneys' fees and Litigation Expenses. *See In re Mex. Money Transfer Litig. (W. Union & Valuta)*, 164 F. Supp. 2d 1002, 1032-33 (N.D. Ill. 2000), *aff'd sub nom. In re Mex. Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001) ("The purpose of class notice … is to advise [settlement class members] of the terms of the agreement which has been reached and provide those who disapprove of those terms an opportunity to object or to opt out.").

The proposed notice program satisfies the requirements of Rule 23(c)(2) by setting forth: (i) the nature of the Action; (ii) the Settlement Class definition; (iii) a description of the claims and defenses; (iv) the ability of Settlement Class Members to enter an appearance through counsel; (v) a Settlement Class Member's ability to be excluded from the Settlement Class; and (vi) the binding effect of a class judgment. Additionally, the notice program satisfies the requirements in the PSLRA, 15 U.S.C. §§ 77z-1(a)(7); 78u-4(a)(7), by setting forth: (i) a cover page summarizing the information in the Notice; (ii) a statement of the plaintiff's recovery, and the estimated recovery per damaged share; (iii) a statement of potential outcomes of the case; (iv) a statement of attorneys' fees or costs sought; (v) an identification of lawyers' representatives; and (vi) the reasons for settlement. Finally, the notice program will provide information about the date, time, and location of the Settlement Hearing and the process for submitting an objection

to the Settlement and other relief to be requested by Lead Plaintiffs and Co-Lead Counsel. *See In re HP Sec. Litig.*, 2015 WL 4477936, at *2 (N.D. Cal. July 20, 2015) (finding that similar procedures satisfy Rule 23 and the PSLRA, and constitute the best notice practicable); *Stratton v. Glacier Ins. Adm'rs, Inc.*, 2007 WL 274423, at *14 (E.D. Cal. Jan. 29, 2007) ("Notice is satisfactory in the context of settlement if it fairly apprises class members of the terms of the settlement in sufficient detail to afford them the opportunity to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement."); *Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 2570050, at *5 (N.D. Ind. May 21, 2020) (approving virtually identical notice program in securities class action).

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court issue an order substantially in the form of the proposed Preliminary Approval Order: (i) preliminarily approving the Settlement; (ii) approving the manner and forms of notice to the Settlement Class; (iii) setting a date for the Settlement Hearing; (iv) appointing SCS as Claims Administrator; (v) preliminarily certifying the Settlement Class; and (vi) granting such other and further relief as may be required.

Dated: April 28, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2023, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List served via ECF on all registered participants only.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 28, 2023

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