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2 UNITED STATES DISTRICT COURT  
3 WESTERN DISTRICT OF WASHINGTON  
4 AT SEATTLE

4 ANTONIO BACHAALANI NACIF; WIES  
5 RAFI; and HANG GAO, individually and  
6 on behalf of all others similarly situated,

6 Plaintiffs,

7 v.

8 ATHIRA PHARMA, INC.; and LEEN  
9 KAWAS, Ph.D.,

9 Defendants.

C21-0861 TSZ

ORDER

10 THIS MATTER comes before the Court on plaintiffs’ unopposed renewed motion  
11 for preliminary approval of a proposed class settlement, docket no. 125. By Order  
12 entered September 27, 2023, docket no. 123, the Court denied plaintiffs’ previous  
13 motion, docket no. 118, for preliminary approval of a proposed class settlement because  
14 (i) an intraclass conflict of interest existed, and (ii) the proposed settlement could not be  
15 certified as “treat[ing] class members equitably relative to each other.” Order at 5–9  
16 (docket no. 123) (quoting Fed. R. Civ. P. 23(e)(2)(D)). The parties have since engaged in  
17 further settlement negotiations and have entered into an Amended Stipulation and  
18 Agreement of Settlement (“Settlement Agreement”), docket no. 125-2. Having reviewed  
19 the Settlement Agreement, the pending motion, and the other materials submitted by the  
20 parties, the Court enters the following Order granting the motion in part, preliminarily  
21 approving the proposed settlement, certifying a class and two subclasses, deferring in part  
22 as to the proposed notices and claim form, requiring submission of an opt-out (exclusion  
23 request) form, and renaming the motion to March 15, 2024.

1 **Discussion**

2 As indicated in the Court’s earlier Order, this case involves publicly traded  
3 common stock of defendant Athira Pharma, Inc. (“Athira”), some of which was acquired  
4 in connection with Athira’s initial public offering (“IPO”) in September 2020, some of  
5 which was purchased when Athira conducted a secondary public offering (“SPO”)  
6 in January 2021, and some of which cannot be traced to either the IPO or the SPO.  
7 In response to the Court’s inquiries, *see* Order at 11–12 (docket no. 123); Minute Order  
8 at ¶ 1(a)(i) (docket no. 119), the parties have clarified that all Athira shares issued before  
9 the IPO (and SPO) were subject to lock-up or market-stand-off restrictions that prevented  
10 their trading until the market opened on March 17, 2021. *See* Duncan Decl. at ¶¶ 3–8  
11 (docket no. 125-7). Based on this information, the parties have substantially simplified  
12 their traceability analysis for purposes of the claims in this litigation, which are now as  
13 follows:

14 **Securities Act Claims:** Claims relating to Athira’s publicly traded  
15 common stock acquired during the period from September 17, 2020,  
16 through March 16, 2021; such claims are brought pursuant to Sections 11,  
12(a)(2), and 15 of the Securities Act of 1933 (“Securities Act”), 15 U.S.C.  
§§ 77k, 77l, and 77o; and

17 **Exchange Act Claims:** Claims relating to Athira’s publicly traded  
18 common stock acquired during the period from March 17, 2021, through  
19 June 17, 2021; such claims were asserted under Sections 10(b) and 20(a) of  
the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C.  
§§ 78j(b) & 78t(a), and United States Securities and Exchange Commission  
20 (“SEC”) Rule 10b-5, 17 C.F.R. § 240.10b-5.

21 *See* Pl.’s Renewed Mot. at 5–6 (docket no. 125); *see also* Am. Compl. (docket no. 74).

22 In other words, the Securities Act Claims relate to Athira shares traceable to the IPO and  
23 SPO, and the Exchange Act Claims concern Athira shares purchased after the lock-up

1 period expired and before “corrective information” was disclosed. See Nye Decl. at ¶ 8  
2 (docket no. 125-5); see also Am. Compl. at ¶ 91 (docket no. 74) (quoting a press release  
3 issued by Athira after the market closed on June 17, 2021).

4 **A. Joinder**

5 In addition to involving separate timeframes, the two types of claims in this matter  
6 differ with regard to their litigation status. Although some portions of the Securities Act  
7 Claims remain viable, the Exchange Act Claims have been dismissed, see Order (docket  
8 no. 89), and they have not been repleaded by the lead plaintiffs, Antonio Bachaalani  
9 Nacif and Wies Rafi. See Order at 2–4 (docket no. 123) (reciting the procedural history  
10 of these claims and observing that the “decision not to timely amend [the] operative  
11 pleading renders ‘final’ the earlier dismissal without prejudice” (quoting Order at 5  
12 (docket no. 114))). As a result, Nacif’s and Rafi’s positions are not “typical” of those of  
13 the absent class members. See Order at 5–7 (docket no. 123) (citing Epstein v. MCA,  
14 Inc., 179 F.3d 641, 652–53 (9th Cir. 1999) (Thomas, C.J., dissenting)); see also Fed. R.  
15 Civ. P. 23(a)(3) & (e)(2)(A). To cure this inherent conflict of interest, the parties propose  
16 to add Hang Gao as a named plaintiff. See Stlm’t Agr. at ¶ 1(hh) (docket no. 125-2 at  
17 13). Gao’s attorneys participated in a mediation session conducted on November 16,  
18 2023, and signed the Settlement Agreement on Gao’s behalf. See Melnick Decl. at 1 n.1  
19 & ¶ 11 (docket no. 125-4); Stlm’t Agr. at 40 (docket no. 125-2 at 42).

20 Gao was one of two individuals who commenced this action, see Compl. (docket  
21 no. 1), but Gao did not thereafter seek appointment as a lead plaintiff, see Order (docket  
22 no. 60). According to a certification filed with the original complaint, Gao purchased  
23 100 shares of Athira stock on February 24, 2021, at the SPO price of \$22.50 per share,

1 and another 100 shares of Athira stock on March 25, 2021, at the price of \$17.00 per  
2 share. See Pl.’s Certif. (docket no. 1-1 at 3); see also Am. Compl. at ¶ 90 (docket no. 74).  
3 Thus, Gao has both Securities Act Claims and Exchange Act Claims, but unlike Nacif  
4 and Rafi, Gao is not bound by the decision not to replead the Exchange Act Claims and  
5 does not have interests that are antagonistic toward or in conflict with those of absent  
6 putative class members. The Court treats the pending motion as seeking leave to amend  
7 to join Gao as a named plaintiff and hereby GRANTS the request.

8 **B. Allocation**

9 The parties propose to settle both the Securities Act Claims and the Exchange Act  
10 Claims on the following terms. Defendants would deposit the gross settlement amount of  
11 \$10 million into an interest-bearing escrow account. Attorney’s fees (predicted to be  
12 33 $\frac{1}{3}$ % of the gross amount), litigation costs (capped at \$205,000), awards to the named  
13 plaintiffs (no more than \$30,000), settlement administration fees (estimated to be  
14 \$200,000), taxes (approximately \$200,000), and escrow account fees<sup>1</sup> would be deducted  
15 before the remaining net settlement proceeds (roughly \$6-to-6.5 million, depending on  
16 interest rates and the Court’s rulings on requests for attorney’s fees, etc.) would be  
17 distributed to class members. The method for calculating the amount due to each class  
18 member, denominated by the parties as the “Plan of Allocation,” is not a provision of the  
19 Settlement Agreement, and defendants have expressly disavowed any involvement in the

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20  
21 <sup>1</sup> In their Joint Status Report dated June 30, 2023, the parties indicated that escrow account fees  
22 would be about \$5,200 per year. See JSR at 21 (docket no. 122). The current motion and related  
23 documents, including the proposed notice, do not mention escrow account fees. The parties  
have, however, deducted the escrow account fees in calculating the probable value of the net  
settlement fund, and thus, they must revise the notice accordingly.

1 disbursement process. *See* Stlm’t Agr. at ¶ 21 (docket no. 125-2 at 26) (indicating that  
2 defendants may not object to, and will have no “liability, obligation, or responsibility  
3 whatsoever” in connection with, the Plan of Allocation).

4 In response to certain concerns set forth in the Order entered September 27, 2023,  
5 docket no. 123 (denying the earlier motion for preliminary approval of a settlement), the  
6 parties sought an opinion from Jed D. Melnick, a mediator associated with JAMS, Inc.,  
7 concerning a “fair and reasonable” allocation of settlement proceeds between Securities  
8 Act Claims and Exchange Act Claim. *See* Melnick Decl. at ¶¶ 1–3 (docket no. 125-4).  
9 Melnick recommends allocating at least 91.5% of the net settlement fund to the Securities  
10 Act Claims and leaving a maximum of 8.5% of the net sum for the Exchange Act Claims.  
11 *See id.* at ¶¶ 3 & 17. In his declaration, Melnick states that, in forming this view, he  
12 relied on the opinion of plaintiffs’ expert Zachary Nye, Ph.D., who estimated that almost  
13 “60% of Athira’s stock is traceable to either the IPO or SPO.” *Id.* at ¶ 17; *see also* Nye  
14 Decl. at ¶ 14–15 (docket no. 125-5). Melnick further advises that, in his experience,<sup>2</sup>  
15 “sustained (Securities Act) claims earn a ‘premium’ of settlement value relative to  
16 dismissed (Exchange Act) claims, with the latter typically subject to a ‘discounted’  
17 allocation of five to fifteen percent.” *Id.* at ¶ 14.

18 The Court is persuaded that the proposed apportionment between Securities Act  
19 Claims and Exchange Act Claims “treats class members equitably relative to each other.”  
20

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21 <sup>2</sup> Melnick received his Juris Doctorate from Benjamin N. Cardozo School of Law in 1999, and  
22 has served as a full-time mediator since 2005. *See* <https://www.jamsadr.com/melnick>. Melnick  
23 has conducted mediations in over a thousand disputes, including complex securities class actions  
and shareholder derivative suits, and he has been recognized by *The National Law Journal* as an  
“ADR Champion.” Melnick Decl. at ¶ 1 (docket no. 125-4).

1 See Fed. R. Civ. P. 23(e)(2)(D). The 91.5-to-8.5% split reflects that the Securities Act  
2 Claims are associated with more than a majority of affected shares (59.6%) and estimated  
3 damages (57.8%). See Nye Decl. at ¶ 15 (docket no. 125-5). The suggested allocation is  
4 also consistent with the range of usual values for dismissed claims (5–15%) and the  
5 minimal chance of resurrecting the Exchange Act Claims following any appeal in this  
6 matter. Finally, the percentages are the product of an experienced mediator’s careful  
7 consideration of the positions articulated by separate counsel for each named plaintiff,<sup>3</sup>  
8 as well as defendants’ attorneys. See Melnick Decl. at ¶¶ 2 nn.1–2 & 11–12 (docket  
9 no. 125-4). The Court therefore ADOPTS the mediator’s recommended apportionment  
10 as being fair and reasonable in light of the circumstances.

### 11 C. Anticipated Recoveries

12 Pursuant to plaintiffs’ proposed Plan of Allocation, as to which defendants take no  
13 position, putative class members that timely submit claim forms will receive distributions  
14 from the net settlement funds, but only if their distribution amounts exceed \$10. See 2d  
15 Revised Notice at ¶¶ 35 & 66 (docket no. 125-8). Each participating class member’s pro  
16 rata distribution amount (“Distrib. Amt.”) will be the sum of such class member’s pro

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17  
18 <sup>3</sup> During the mediation session that transpired on November 16, 2023, Nacif and Gao advocated  
19 on behalf of putative class members with Exchange Act Claims, while Rafi participated on  
20 behalf of putative class members with Securities Act Claims. See Melnick Decl. at ¶¶ 2 n.1 & 11  
21 (docket no. 125-4). At the time of the mediation, based on the parties’ original traceability  
22 analysis and the Court’s related rulings, Nacif was believed to have only Exchange Act Claims.  
23 See Order at 2 & 5–6 (docket no. 123); Order at 5–7 (docket no. 60); see also Order at 12 (docket  
no. 123) (inquiring why the parties had chosen February 10, 2021, rather than when the lock-up  
period expired (*i.e.*, March 16, 2021), as the end date for Securities Act Claims). Because the  
parties have since altered the timeframe for Securities Act Claims, Nacif appears to now have  
both Securities Act Claims and Exchange Act Claims. See Order at 2 n.1 (docket no. 123)  
(reflecting that Nacif engaged in active trading of Athira stock from February 19, 2021, until  
June 16, 2021 (citing Exs. A & B to Townsend Decl. (docket nos. 41-1 & 41-2))).

1 rata distribution amount for any Securities Act Claims (“Securities Act Distribution  
 2 Amount” or “Sec. Amt.”) and such class member’s pro rata distribution amount for any  
 3 Exchange Act Claims (“Exchange Act Distribution Amount” or “Ex. Amt.”). *See id.* at  
 4 ¶ 66. The proposed calculation is expressed mathematically as follows:

$$\text{Distrib. Amt.} = \text{Sec. Amt.} + \text{Ex. Amt.}$$

5  
 6  
 7 The Securities Act Distribution Amount is the product of multiplying 91.5% of the  
 8 net settlement funds (“Net Amt.”) by the quotient of the class member’s Recognized Loss  
 9 Amount for Securities Act Claims (“Sec. RLA”) divided by the sum of all participating  
 10 class members’ Recognized Loss Amounts for Securities Act Claims (“ $\sum$  Sec. RLA”).  
 11 *See id.* The Exchange Act Distribution Amount is computed as 8.5% of the net proceeds  
 12 (“Net Amt.”) times the ratio of the class member’s Recognized Loss Amount for  
 13 Exchange Act Claims (“Ex. RLA”) to the total of all participating class members’  
 14 Recognized Loss Amounts for Exchange Act Claims (“ $\sum$  Ex. RLA”). *See id.* The  
 15 following equation summarizes the proposed computation:

$$\text{Distrib. Amt.} = 0.915 \times \text{Net Amt.} \times \left( \frac{\text{Sec. RLA}}{\sum \text{Sec. RLA}} \right) + 0.085 \times \text{Net Amt.} \times \left( \frac{\text{Ex. RLA}}{\sum \text{Ex. RLA}} \right).$$

16  
 17  
 18 The Recognized Loss Amount is defined as indicated below:

Purchase and Sale Timeframes for Athira Stock	Recognized Loss Amount
Share was purchased and sold prior to the close of U.S. financial markets on June 17, 2021	\$0

Purchase and Sale Timeframes for Athira Stock		Recognized Loss Amount
Securities Act Claims	Share was purchased between September 17, 2020, and March 16, 2021, and sold between June 18, 2021, and June 25, 2021	LESSER of: <ul style="list-style-type: none"> <li>• \$7.14 per share</li> <li>• purchase price<sup>4</sup> minus sale price</li> </ul>
	Share was purchased between September 17, 2020, and March 16, 2021, and still held as of the close of trading on June 25, 2021	LESSER of: <ul style="list-style-type: none"> <li>• \$7.14 per share</li> <li>• purchase price<sup>4</sup> minus \$10.84 per share</li> </ul>
Exchange Act Claims	Share was purchased between March 17, 2021, and June 17, 2021, and sold between June 18, 2021, and September 15, 2021	LESSER of: <ul style="list-style-type: none"> <li>• \$7.14 per share</li> <li>• purchase price minus sale price</li> <li>• purchase price minus “90-Day Lookback Value”<sup>5</sup></li> </ul>
	Share was purchased between March 17, 2021, and June 17, 2021, and still held as of the close of trading on September 15, 2021	LESSER of: <ul style="list-style-type: none"> <li>• \$7.14 per share</li> <li>• purchase price minus \$10.33 per share</li> </ul>
Share was purchased on or after June 18, 2021		\$0

*See id.* at ¶¶ 56–57.

<sup>4</sup> For shares acquired prior to January 21, 2021, the purchase price is the IPO price of \$17.00 per share. For shares acquired during the SPO directly from one of the Underwriters, the purchase price is \$22.50. For all other shares of Athira stock acquired from January 21, 2021, through March 16, 2021, the purchase price is calculated as \$18.41, which is the weighted average of the IPO and SPO offering prices. *See* 2d Revised Notice at ¶ 49 (docket no. 125-8); *see also* Nye Decl. at ¶ 10 & n.9 (docket no. 125-5).

<sup>5</sup> The “90-Day Lookback Value” is set forth in Table 2 of the proposed Plan of Allocation, which provides a figure for each possible sale date between June 18, 2021, and September 15, 2021, ranging from a high of \$11.15 per share on June 18, 2021, to a low of \$10.22 per share in late August 2021. *See* 2d Revised Notice (docket no. 125-8 at 30–31).



Applying the “80/20 Multi-Trader Model,”<sup>6</sup> and assuming that all putative class members participate in the settlement, the anticipated recoveries from the proposed settlement are as follows:

	Gross	Net
Minimum Distribution Amount	N/A	\$10 <sup>7</sup>
Average Securities Act Distribution Amount	\$0.72 per share <sup>8</sup>	\$0.47 per share <sup>9</sup>
Average Exchange Act Distribution Amount	\$0.10 per share <sup>8</sup>	\$0.06 per share <sup>9</sup>
Maximum <sup>10</sup> Securities Act Distribution Amount	\$600,000	Maximum <sup>10</sup> Distribution Amount \$408,000
Maximum <sup>10</sup> Exchange Act Distribution Amount	\$25,000	

<sup>6</sup> The “80/20 Multi-Trader Model” hypothesizes the existence of a large set of “slow” traders (holding 80% of the available shares, but trading only 20% of the volume) and a small group of “fast” traders (holding 20% of the available shares, and trading 80% of the volume). Nye Decl. at ¶ 14 (docket no. 125-5).

<sup>7</sup> The parties have agreed on a threshold amount of \$10 to ensure that the cost of printing and mailing each payment check (typically \$3.25) does not exceed its value and that the payment checks will likely be negotiated. *See* JSR at 23 (docket no. 122).

<sup>8</sup> *See* Nye Decl. at ¶ 17 (docket no. 125-5). According to Nye, Securities Act Claims are associated with approximately 12.72 million shares, and Exchange Act Claims are linked to roughly 8.64 million shares. *Id.* at ¶ 15. The average gross recoveries reflect the proportion of the gross settlement fund allocated to each type of claim divided by the number of shares related to each such claim. In other words, the Average Securities Act Distribution Amount equals 91.5% of \$10 million (*i.e.*, \$9,150,000) divided by 12.72 million shares, or \$0.719 per share, and the Average Exchange Act Distribution Amount is 8.5% of \$10 million (*i.e.*, \$850,000) divided by 8.64 million shares, or \$0.098 per share. Nye has rounded up each figure.

<sup>9</sup> *See* 2d Revised Notice at ¶ 4 (docket no. 125-8). These estimates appear to presume a net settlement fund of \$6,526,467. *See* Nye Decl. at ¶ 18 (docket no. 125-5).

<sup>10</sup> *See* Nye Decl. at ¶ 18 & n.20 (docket no. 125-5). The maximum recovery amounts were computed for Athira’s largest, publicly-known, institutional investor during the relevant period, namely BlackRock Institutional Trust Company, N.A. *Id.*

1 The proposed Plan of Allocation envisions that, nine months after the initial  
2 distribution of payment checks, a portion of the net settlement funds might remain in the  
3 escrow account because some checks could not be delivered or were not negotiated (and  
4 interest continued to accrue). *See* 2d Revised Notice at ¶ 68 (docket no. 125-8). In such  
5 event, the proposed Plan of Allocation contemplates that the firms designated as “Class  
6 Counsel” and the entity appointed as the “Settlement (or Claims) Administrator” will  
7 determine whether another round of distribution would be cost effective and, if not, the  
8 balance of the escrow account would be remitted to the proposed *cy pres* recipient, the  
9 Public Justice Foundation. *Id.*

10 **D. “Class Counsel” and Attorney’s Fees**

11 According to the Settlement Agreement, Block & Leviton LLP (Gao’s attorneys),  
12 as well as Rossi Vucinovich, P.C. and the Schall Law Firm (which has never appeared in  
13 this action), have served as “plaintiffs’ counsel.” *See* Stlm’t Agr. at ¶ 1(ii) (docket  
14 no. 125-2). The pending motion does not, however, seek appointment of any of these  
15 three firms as “Class Counsel.” The two firms proposing to serve as “Class Counsel,”  
16 namely Labaton Sucharow LLP, which recently became Labaton Keller Sucharow LLP,  
17 *see* Notice (docket no. 127), and Glancy Prongay & Murray LLP, have proposed to share  
18 fees with Longman Law, PC, which appeared in one of the matters consolidated into this  
19 case, *see* 2d Revised Notice at ¶ 70 n.12 (docket no. 125-8), and perhaps with the other  
20 three firms listed in the Settlement Agreement as “plaintiffs’ counsel.” Any motion for  
21 attorneys’ fees and litigation costs shall indicate which firms will be paid and in what  
22 amounts, and it shall be accompanied by a copy of any agreement among or between  
23 firms concerning how the fees and/or costs will be apportioned.

1 **E. Definition of the “Class”**

2 The Settlement Agreement purports to define three separate classes, with a “Class  
3 Period” of September 17, 2020, through June 17, 2021; the “Settlement Class” is  
4 described as including all members of a “Securities Act Class” and all members of an  
5 “Exchange Act Class.” *See* Stlm’t Agr. at ¶¶ 1(i), (r), (tt), & (xx) (docket no. 125-2).  
6 The Court interprets the Settlement Agreement as defining, and the pending motion as  
7 seeking certification of, a “Class,” as well as a “Securities Act Subclass” and an  
8 “Exchange Act Subclass.” The “Class” is estimated to include 30,000 or more members,  
9 each of which acquired, during the “Class Period,” a portion of Athira’s roughly 37  
10 million shares.<sup>11</sup> *See* Mulholland Decl. at ¶¶ 12 & 29–31 (docket no. 122-4) (indicating  
11 that most putative class members purchased, held, and/or sold their stock through a  
12 nominee, that transfer records show only 43 record holders during the “Class Period,”  
13 and that the number of putative class members is “approximately 30,000” and “likely  
14 more than 45,000”).

15 **F. Exclusion Requests**

16 The proposed form of notice instructs putative class members wishing to be  
17 excluded from the class to mail or deliver to the Settlement Administrator a written  
18 request for exclusion containing identifying information (name, address, telephone  
19 number, contact person), as well as the number of shares of Athira stock that were  
20 acquired and/or sold and the dates and prices associated with each transaction. *See* 2d

21 \_\_\_\_\_  
22 <sup>11</sup> Athira sold 13,397,712 shares during the IPO, and 4,600,000 shares during the SPO. *See* Nye  
23 Decl. at 2 n.1 (docket no 125-5). At the conclusion of the IPO, 19,087,472 shares of Athira stock  
were subject to lock-up or market-stand-off restrictions. Duncan Decl. at ¶ 4 (docket no. 125-7).

1 Revised Notice at ¶¶ 71–72 (docket no. 125-8). The proposed notice further indicates  
2 that, unless an exclusion request includes all of these details and is “received” by the  
3 Settlement Administrator before the deadline, it will not be “valid and effective.” *Id.* at  
4 ¶ 72. The parties are ADVISED that, although they may ask for the numbers of shares,  
5 dates, and prices involved, the Court will not reject a request for exclusion if such  
6 particulars are not provided.<sup>12</sup> The parties are DIRECTED to craft a suitable opt-out  
7 (or exclusion request) form, which shall be included with the notice to putative class  
8 members and available for download from the Settlement Administrator’s website. The  
9 notice shall indicate that putative class members may exclude themselves by sending to  
10 the Settlement Administrator (via mail or electronic means) either a completed and  
11 signed opt-out form or a letter along the lines described above. The opt-out form shall  
12 indicate that disclosure of share quantities, dates of acquisition and/or sale, and prices is  
13 optional. Finally, because putative class members will have little or no control over when  
14 a mailing might be delivered to the Settlement Administrator, the notice should describe  
15 the deadline for submitting exclusion requests in terms of a postmark or other proof of  
16 when the document was sent or submitted (as opposed to received).

17 **G. Method of Serving Notice**

18 The Settlement Agreement itself contains minimal information concerning how  
19 notice will be distributed to putative class members. *See* Stlm’t Agr. at ¶ 19 (docket  
20 no. 125-2). Instead, the Settlement Agreement mentions a “Preliminary Approval Order  
21 \_\_\_\_\_

22 <sup>12</sup> With reference to the parties’ confidential Supplement Agreement, docket no. 120-1, after the  
23 deadline for requesting exclusion has expired, counsel may, if necessary, seek leave of the Court  
to obtain further information from persons or entities that have opted out of the settlement.

1 to be entered by the Court.” *Id.* This language is construed as incorporating by reference  
2 into the Settlement Agreement the relevant terms of the proposed order attached thereto  
3 as Exhibit A. *See* Stlm’t Agr. at Ex. A (docket no. 125-2 at 47–59). As so interpreted,  
4 the Settlement Agreement requires that Athira provide in electronic form to the selected  
5 Settlement (or Claims) Administrator a list of purchasers of record of Athira publicly  
6 traded common stock during the “Class Period,” and that the Settlement Administrator  
7 send to putative class members via first-class mail (i) the long-form notice, and (ii) a  
8 claim form. *Id.* at ¶¶ 7(a) & (b). The Settlement Agreement further directs that the  
9 Settlement Administrator post the long-form notice and the claim form on its website,<sup>13</sup>  
10 and that the Settlement Administrator arrange for a short-form (3-page) notice to be  
11 published once in *Investor’s Business Daily* and transmitted once via *PR Newswire*. *Id.*  
12 at ¶¶ 7(c) & (d). The Settlement Agreement then obligates brokers and other nominees  
13 that purchased Athira stock during the “Class Period” for the benefit of another person or  
14 entity and that receive notice of the proposed settlement to either (a) obtain from the  
15 Settlement Administrator sufficient copies of the long-form notice and claim form and  
16 forward such documents to the various beneficial owners, or (b) send a list of beneficial  
17 owners and their addresses to the Settlement Administrator, which would “promptly  
18 mail” the requisite items to such persons and/or entities.<sup>14</sup> *Id.* at ¶ 9.

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19  
20 <sup>13</sup> As indicated in Section F, the Settlement Administrator shall also include an opt-out form with  
the notice and on its website.

21 <sup>14</sup> The parties propose to require nominees, regardless of whether they choose option (a) or (b),  
22 to also provide to the Settlement Administrator available email addresses for beneficial owners.  
23 *See* Stlm’t Agr. at Ex. A, ¶ 9 (docket no. 125-2). The parties have not, however, made any  
provision for notice to be delivered to putative class members via email, and they offer no

1 **H. Forms of Notice**

2 **1. Long-Form Notice**

3 With regard to the proposed (currently 24-page) long-form notice to be distributed  
 4 to putative class members, the Court has serious concerns about its length and structure,  
 5 which might inhibit recipients from devoting the necessary time to understand, and/or  
 6 impair their comprehension of, the information provided. The long-form notice also  
 7 contains erroneous information, as well as vestiges of previously disapproved language,  
 8 *see* Minute Order at 5 n.3 (docket no. 119). The Court therefore DIRECTS that the  
 9 following amendments be made:

10 (a) **Nominees**. The instructions for nominees should be moved to the  
 11 beginning of the notice (as opposed to in Paragraphs 85 and 86, which appear on  
 12 the next to last page), and they should be preceded by an attention-grabbing  
 13 header. For example:

14 **ATTENTION NOMINEES: If you purchased or otherwise acquired Athira common stock between September 17, 2020, and June 17, 2021, for the beneficial interest of persons or entities other than yourself, you must take the following actions with the next seven (7) days.**

15 (b) **Summary**. A two-to-three page summary should be added to the  
 16 start of the notice, after the nominee instructions. The summary should provide  
 17 enough information that putative class members need not study the rest of the  
 18 notice to understand (i) the basic nature of the case, (ii) the amount and structure  
 19 of the proposed settlement, (iii) the average and range of recoveries, and  
 20 (iv) generally how the *pro rata* shares of the net settlement fund would be  
 21 calculated.<sup>15</sup> As currently organized, the proposed notice requires an individual to  
 22 wade through several (over 18) pages of single-spaced text before reaching the key

20 rationale for requiring nominees that elect procedure (a), perhaps based on privacy concerns  
 21 and/or contractual requirements, to disclose any email addresses. The Court DECLINES to  
 22 require brokers or other nominees to provide any list of email addresses for beneficial owners.

22 <sup>15</sup> The summary may cross-reference the later provisions of the notice that offer specific details,  
 23 for example, the formulas for calculating the applicable Recognized Loss Amount and/or the  
 table of 90-Day Lookback Values.

1 paragraph that explains how the distribution amount will be determined. *See* 2d  
 2 Revised Notice at ¶ 66 (docket no. 125-8). And, this paragraph contains no cross-  
 3 reference to the much earlier provision (*i.e.*, *id.* at ¶ 4) in which the average and  
 4 range of recoveries are recited. As a result, putative class members might not be  
 5 able to link together the details necessary to evaluate the proposed settlement and  
 6 decide whether to participate, object, or request exclusion. *See Rodriguez v.*  
*W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009) (“Settlement notices are  
 supposed to present information about a proposed settlement neutrally, simply,  
 and understandably . . . .”); *see also* Fed. R. Civ. P. 23(c)(2)(B) (requiring that a  
 notice to putative class members contain “clearly and concisely state[d] . . . plain,  
 easily understood language”).

7 (c) **Errors.**<sup>16</sup> The proposed notice contains different estimates than  
 8 those provided by Nye regarding the “number of damaged shares.” *Compare* 2d  
 9 Revised Notice at 3 n.3 (docket no. 125-8) (indicating that 12.79 million shares  
 are associated with Securities Act Claims and 8.57 million shares are related to  
 10 Exchange Act Claims) *with* Nye Decl. at ¶ 15 (docket no. 125-5) (opining that  
 11 12.72 million and 8.64 million shares, respectively, were affected). The Court has  
 12 relied on Nye’s figures to double-check the calculations of average recoveries.  
*See supra* note 8. The proposed notice further estimates that the anticipated  
 13 attorney’s fees, litigation costs, and awards to named plaintiffs will be “\$0.16 per  
 14 eligible share.” 2d Revised Notice at ¶ 7 (docket no. 125-8). This statement is  
 misleading. The amount that will be sought is \$3,333,333.33 in attorney’s fees  
 plus \$235,000 in litigation costs and service awards, resulting in a pre-distribution  
 deduction of \$3,568,333.33, which must be apportioned 91.5% (\$3,265,025) to the  
 Securities Act Claims and 8.5% (\$303,308.33) to the Exchange Act Claims. Thus,  
 the per-share computation is more accurately reflected as follows:

Type of Claim	Estimated Shares	Fees, Costs, & Awards
Securities Act Claims	12.72 million	\$0.26 per share
Exchange Act Claims	8.64 million	\$0.04 per share

15  
 16  
 17  
 18 The notice must be revised to address these discrepancies.

19 (d) **Objections.** The proposed notice tells putative class members that  
 20 they “may write to the Court” to express an objection to the proposed settlement,  
*id.* at ¶ 9, which improperly suggests that objections should be sent to the Court.  
 21 The proposed notice later directs putative class members to mail any objection to

22 <sup>16</sup> As indicated earlier, *see supra* note 1, the notice fails to disclose that escrow account fees of  
 23 roughly \$5,200 per year would be deducted from the gross settlement proceeds before the net  
 recoveries are calculated and distributed.



1 five different law firms, including three that represent defendants, *id.* at ¶ 78,  
2 which would require objectors to incur five times the necessary postage. The  
3 notice must be amended to indicate that putative class members may object by  
4 sending a letter to the Settlement Administrator **or** by appearing in person or  
5 virtually at the final approval hearing. *See* Minute Order at 5–6 n.3 (docket  
6 no. 119) (indicating that the submission of written materials shall not be a  
7 prerequisite to addressing the Court at any hearing concerning the proposed  
8 settlement). The Settlement Administrator shall circulate to the attorneys copies  
9 of any written objections and, in connection with any motion for final approval of  
10 the proposed settlement, the Settlement Administrator shall submit a declaration,  
11 attached to which shall be copies of all written objections and opt-out forms;  
12 because such materials will contain identifying information, they shall be filed  
13 under seal. As with requests for exclusion from the class, the deadline for written  
14 objections shall be expressed with respect to a postmark or other proof of when the  
15 document was sent or submitted,<sup>17</sup> and the Court will consider written objections  
16 even if data and/or “documents sufficient to prove membership in the . . . Class,”  
17 2d Revised Notice at ¶ 79 (docket no. 125-8), are not provided.

18 (e) **Attorney’s Fees and Litigation Costs.** The Court will require that  
19 any motion for attorney’s fees and litigation costs be filed and uploaded to the  
20 website relating to the settlement on or before the date that notices are distributed  
21 to putative class members. *See In re Mercury Interactive Corp. Sec. Litig.*, 618  
22 F.3d 988 (9th Cir. 2010). The notice should reflect that the motion for attorney’s  
23 fees and litigation costs is posted on the website, and that any written objection to  
the requested attorney’s fees and litigation costs will be due on the same date as  
any written objection to the proposed settlement.

(f) **Final Approval Hearing.** Contrary to the suggestion in the  
proposed notice, *see* 2d Revised Notice at ¶ 83 (docket no. 125-8), in the absence  
of an emergency, the Court does not anticipate altering the final approval hearing  
schedule without ample notice to putative class members. The notice should  
advise recipients to consult the Settlement Administrator’s website to confirm the  
date and time of the final approval hearing, and the Settlement Administrator shall  
prominently display such information on its website, along with the means (*e.g.*,  
Zoom link or conference call number and access code) of accessing the hearing  
remotely, which will be provided to counsel via email. To avoid any confusion,  
the provisions concerning the final approval hearing should appear separately in

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<sup>17</sup> This alteration will make the deadline for objections, as well as for opt-out forms, the same as the deadline currently articulated for claim forms. *See* 2d Revised Notice at ¶¶ 9, 35, & 41 (docket no. 125-8); *see also* Prop. Claim Form at ¶ 3 (docket no. 125-8) (indicating that putative class members “must mail by first [**sic**] first-class mail or submit online [a] completed and signed claim form . . . no later than” a date to be determined).



1 the notice, and in such section, the address of the Settlement Administrator’s  
2 website should be repeated in a clear and conspicuous manner.

3 (g) **Dispute Resolution**. The proposed notice states that the Court  
4 “has reserved jurisdiction to allow, disallow, or adjust on equitable grounds any  
5 Claim.” *Id.* at ¶ 43. This provision is not consistent with the Settlement  
6 Agreement or the procedural history of this matter. Stlm’t Agr. at ¶¶ 24(c)–(e)  
7 (docket no. 125-2) (indicating that the firms serving as Class Counsel will “make a  
8 final determination” as to any claim dispute); JSR at 24 (docket no. 122); Minute  
9 Order at ¶ 1(g) (docket no. 119). Moreover, the proposed notice does not outline  
10 the dispute resolution procedures set forth in the Settlement Agreement. This  
11 omission should be corrected.

12 (h) **Imprimatur**. The three lines at the end of the proposed notice,  
13 which could be construed as a signature block, (“By Order of the Court” | “United  
14 States District Court” | “Western District of Washington”), shall be deleted. The  
15 phrase “Court-appointed” shall also be avoided.

## 16 2. **Short-Form Notice**

17 The proposed short-form notice should be revised to be consistent with the long-  
18 form notice, particularly with regard to how deadlines are described, to whom objections  
19 should be submitted, and deletion of the phrase “By Order of the Court.” *See* Prop.  
20 Summary Notice (docket no. 125-8 at 52–54).

### 21 I. **Claim Form**

22 With respect to the proposed (currently 11-page) claim form, the Court has similar  
23 concerns about its length, content, and structure. In particular, instructions for  
institutional filers (*see* Prop. Claim Form at ¶ 14 (docket no. 125-8)) belong at the  
beginning of the form. The claim form requires “affirmative documentation” of direct  
purchases from the Underwriters, *see id.* at ¶ 10, but the Underwriters, which are parties  
to the Settlement Agreement, presumably have such records, and the date of purchase  
alone would seem sufficient to establish a Securities Act Claim, as now defined. The  
claim form asks for the last four digits of the putative class member’s Taxpayer

1 Identification or Social Security Number, but it offers more fill-in boxes than such  
2 numbers conceivably contain. *Id.* at 6 (docket no. 125-8 at 45). To prevent confusion  
3 (and/or the provision of all digits, which might raise privacy and security issues), the  
4 claim form should include only four (4) fill-in boxes. The claim form also seeks account  
5 numbers, but the parties have not made clear why such information is required. Finally,  
6 the claim form includes release language that is unnecessary, given the legal effect of an  
7 approved and enforceable settlement agreement, and that would treat putative class  
8 members seeking renumeration differently from (and potentially less favorably than)  
9 those who do not submit claim forms. The overall tenor of the claim form, which also  
10 requires agreement to submit to the Court’s jurisdiction and various warranties and  
11 certifications, seems designed to discourage putative class members from participating in  
12 the settlement. A more user-friendly, streamlined claim form might do more to alleviate  
13 the Court’s previously-expressed concerns about the “opt-in” approach. *See* Minute  
14 Order at ¶ 1(c) (docket no. 119); *see also* Order at 10–11 (docket no. 123) (deferring  
15 ruling “on the appropriateness of a claim-form (opt-in) requirement”).

## 16 **Conclusion**

17 For the foregoing reasons, the Court hereby ORDERS:

18 (1) Plaintiffs’ unopposed renewed motion for preliminary approval of a  
19 proposed class settlement, docket no. 125, is GRANTED in part and DEFERRED in part,  
20 as indicated in this Order. The deferred portion of plaintiffs’ motion is RENOTED to  
21 March 15, 2024.

1 (2) Plaintiffs' request for leave to amend to join Hang Gao as a named plaintiff  
2 is GRANTED. The Clerk shall update the docket accordingly and all future pleadings  
3 shall be captioned in the same manner as this Order.

4 (3) The trial date of September 9, 2024, the pretrial conference scheduled for  
5 August 30, 2024, and all related deadlines are STRICKEN.

6 (4) The following class and subclasses are hereby CERTIFIED for settlement  
7 purposes:

- 8 • a class of all persons and entities who or which purchased or  
9 otherwise acquired Athira Pharma, Inc. publicly traded common  
10 stock during the period from September 17, 2020, through June 17,  
2021, inclusive (the "Class Period"), and were damaged thereby (the  
"Class");
- 11 • a subclass of all persons and entities who or which purchased or  
12 otherwise acquired Athira Pharma, Inc. publicly traded common  
13 stock during the period from September 17, 2020, through March 16,  
2021, inclusive, and were damaged thereby (the "Securities Act  
Subclass"); and
- 14 • a subclass of all persons and entities who or which purchased or  
15 otherwise acquired Athira Pharma, Inc. publicly traded common  
16 stock during the period from March 17, 2021, through June 17,  
2021, inclusive, and were damaged thereby (the "Exchange Act  
Subclass").

17 (5) Antonio Bachaalani Nacif, Wies Rafi, and Hang Gao are APPOINTED as  
18 Class Representatives. The law firms of Glancy Prongay & Murray, LLP, and Labaton  
19 Keller Sucharow LLP (f/k/a Labton Sucharow LLP) are APPOINTED as Class Counsel.

20 (6) The Amended Stipulation and Agreement of Settlement executed by the  
21 parties as of December 15, 2023, Ex. 1 to Hoffman Decl. (docket no. 125-2), is  
22 preliminarily APPROVED. To the extent that the Settlement Agreement uses the terms  
23 "Securities Act Class" and "Exchange Act Class," it shall be interpreted as meaning

1 “Securities Act Subclass” and “Exchange Act Subclass,” respectively, as certified in this  
2 Order. The notice to Class members and related materials, including the claim form,  
3 shall be revised accordingly.

4 (7) The proposed settlement is not obviously deficient and no evidence exists  
5 at this stage of the proceedings of any fraud, collusion, overreaching, or disregard of the  
6 rights of absent Class members on the part of any party. Sufficient discovery and motion  
7 practice was conducted in this case, and Class Counsel has enough experience in similar  
8 proceedings to propose this settlement. The Court makes a preliminary finding that the  
9 proposed settlement, including the proposed Plan of Allocation, is fair, reasonable, and  
10 adequate. See Fed. R. Civ. P. 23(e)(2). The Court’s preliminary approval is subject to  
11 change pending the outcome of a hearing on final approval of the proposed settlement.

12 (8) The Class satisfies the following prerequisites: (i) the Class is so numerous  
13 that joinder of all members is impracticable; (ii) questions of law and fact common to all  
14 members of the Class exist; (iii) the claims of the Class Representatives are typical of the  
15 claims of the Class members; (iv) the Class Representatives and Class Counsel meet the  
16 criteria for fair and adequate representation; (v) the questions of law and fact that are  
17 common to Class members predominate over questions affecting only individual  
18 members; (vi) resolution by a class action settlement is superior to other available  
19 methods of adjudicating the dispute; and (vii) the interests of absent Class members who  
20 wish to litigate their claims for damages individually are adequately protected by the  
21 notice and opt-out provisions described in the Settlement Agreement. See Fed. R. Civ.  
22 P. 23(a) & (b)(3).

1 (9) Strategic Claims Services (“SCS”) is APPOINTED as Settlement (or  
2 Claims) Administrator. SCS shall not incur, charge, or receive from the settlement  
3 proceeds more than \$200,000 in settlement administration fees absent prior approval of  
4 the Court. Before notice is distributed to Class members, SCS shall establish a website  
5 for this matter, and the website’s address, along with text indicating that the Settlement  
6 Agreement and other case materials are available for review, shall be prominently  
7 displayed in the notice, rather than buried in a footnote. *Compare* 2d Revised Notice at  
8 1 n.1 (docket no. 125-8). SCS shall maintain this website until further order of the Court.  
9 Such website shall allow anyone visiting it to view and download copies of (i) the  
10 operative pleadings and relevant motions, including any motion for attorney’s fees and  
11 costs and any motion for final approval of the proposed settlement, (ii) the Settlement  
12 Agreement, (iii) the Orders and substantive Minute Orders of the Court, including this  
13 Order, the Orders entered July 29, 2022, February 17, 2023, and September 27, 2023, and  
14 the Minute Orders entered October 4, 2022, and May 31, 2023 (docket nos. 89, 95, 114,  
15 119, 123), and (iv) the long-form and short-form notices, the claim form, and the opt-out  
16 form. SCS shall capture screen shots of the website on the date that notices are  
17 distributed and on a monthly basis thereafter until the date of the final settlement  
18 approval hearing, and shall submit such screen shots along with any declaration filed in  
19 support of any motion for final approval of the proposed class settlement.

20 (10) The Public Justice Foundation is APPROVED as the *cy pres* recipient,  
21 subject to change after considering any objections raised prior to or during a hearing on  
22 final approval of the proposed settlement. *See Nachsin v. AOL, LLC*, 663 F.3d 1034,  
23 1036 (9th Cir. 2011) (“*Cy pres* distributions must account for the nature of the . . .

1 lawsuit, the objectives of the underlying statutes, and the interests of the silent class  
2 members, including their geographic diversity.”); *see also* Dennis v. Kellogg Co., 697  
3 F.3d 858 (9th Cir. 2012). The proposed notice to Class members shall be amended to  
4 (i) use the term “cy pres recipient” (both as a header for, and within the text of, the  
5 relevant paragraph, *see* 2d Revised Notice at ¶ 68 (docket no. 125-8)), and (ii) advise  
6 Class members that they may object to the proposed cy pres recipient and how they may  
7 do so.

8 (11) For purposes of this Order, (a) former defendants Goldman Sachs & Co.  
9 LLC, Jefferies LLC, JMP Securities LLC, and Stifel, Nicolaus & Company, Incorporated  
10 are referred to, collectively, as the “Underwriters,” (b) former defendants Joseph  
11 Edelman, John M. Fluke, Jr., James A. Johnson, and Tadataka Yamada, M.D. (deceased)  
12 are referred to, collectively, as the “Directors,” and (c) the Directors, former defendant  
13 Glenna Mileson (Athira’s Chief Financial Officer), defendant Leen Kawas, Ph.D., and  
14 their immediate family members are referred to, collectively, as “Excluded Persons.”

15 The following persons and entities are EXCLUDED from the Class: (a) Athira and  
16 Kawas; (b) the Underwriters; (c) all persons who served, during the Class Period,  
17 as partners, control persons, executive officers, or directors of Athira or the Underwriters  
18 and members of their immediate families; (d) all present and former parents, subsidiaries,  
19 assigns, successors, affiliates, and predecessors of Athira or the Underwriters; (e) any  
20 entity in which Athira, the Underwriters, or one or more Excluded Persons have or had a  
21 controlling interest; (f) any trust of which one or more Excluded Persons is the settlor or  
22 beneficiary; (g) all liability insurance carriers for Athira or Excluded Persons; and (h) the  
23 legal representatives, heirs, successors, or assigns of any person or entity excluded

1 pursuant to (a) through (g). Notwithstanding any provision to the contrary, (i) any  
2 Investment Vehicle, as defined in the Settlement Agreement, *see* Stlm't Agr. at ¶ 1(x)  
3 (docket no. 125-2), shall not be excluded from the Class, and (ii) "affiliates" are persons  
4 or entities that directly, or indirectly through one or more intermediaries, control, are  
5 controlled by, or are under common control with Athira or the Underwriters, including  
6 Athira's employee retirement and/or benefit plan(s).

7 (12) The following persons and entities are also EXCLUDED from the Class:  
8 persons or entities that timely submit a written request for exclusion from the Class.

9 (13) The Court CONCLUDES that the proposed plan for serving notice via  
10 U.S. first-class mail, either directly or via brokers or other nominees, to the extent that  
11 contact information is available, as well as through publication and the Settlement  
12 Administrator's website, provides the best notice practicable under the circumstances.  
13 Fed. R. Civ. P. 23(c)(2)(B).

14 (14) The proposed notices and claim form shall be revised as indicated earlier,  
15 and amended versions, along with a proposed opt-out form, shall be submitted for the  
16 Court's review by March 15, 2024. In addition to filing these materials via the Case  
17 Management and Electronic Case Filing (CM/ECF) system, the parties shall provide  
18 Microsoft-Word-compatible versions as attachments to an email addressed to  
19 ZillyOrders@wawd.uscourts.gov.

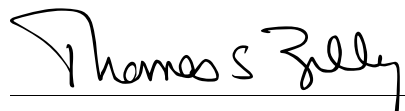
20 (15) Counsel shall meet and confer and also file, by March 15, 2024, a Joint  
21 Status Report proposing a date after which the Court may schedule the final approval  
22 hearing, indicating any known scheduling conflicts, and outlining the applicable  
23

1 deadlines (*i.e.*, to disclose purchasers of record, to distribute long-form notices, to publish  
2 short-form notices, to opt in, object, or opt out, and to file the requisite motions).

3 (16) The Clerk is DIRECTED to send a copy of this Order to all counsel of  
4 record.

5 IT IS SO ORDERED.

6 Dated this 15th day of February, 2024.

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9 Thomas S. Zilly  
10 United States District Judge  
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