UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PENSION TRUST FUND FOR OPERATING ENGINEERS, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. DEVRY EDUCATION GROUP, INC., DANIEL HAMBURGER, RICHARD M. GUNST, PATRICK J. UNZICKER, AND TIMOTHY J. WIGGINS, Defendants.	Case No. 1:16-CV-05198 Hon. Mary M. Rowland

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

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Lead Plaintiff Utah Retirement Systems ("URS" or "Lead Plaintiff") respectfully submits this memorandum of law in support of its motion, pursuant to Federal Rule of Civil Procedure 23(e), requesting (i) final approval of the proposed settlement of the above-captioned class action (the "Settlement") and (ii) approval of the proposed Plan of Allocation.[1]

PRELIMINARY STATEMENT

As detailed in the Settlement Agreement, the Parties have agreed to settle the Action, and related claims, for a payment of $27,500,000 in cash. The terms of the Settlement are set forth in the Settlement Agreement. ECF No. 146-1. This recovery is a very favorable result for the Settlement Class and avoids the substantial risks and expenses of continued litigation, including the risk of recovering less than the Settlement Amount, or nothing at all.

The Settlement was reached only after Lead Plaintiff and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the claims. As more fully described in the Villegas Declaration,[2] the decision to settle was well informed by three years of hard-fought litigation involving a thorough and wide-ranging factual investigation, which included a careful review of publicly available information concerning Defendants, interviews with 68

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[1] All capitalized terms not otherwise defined herein have the same meaning as those in the Stipulation of Settlement, dated as of August 29, 2019 (the "Settlement Agreement") (ECF No. 146-1).

[2] The Declaration of Carol C. Villegas in Support of (I) Lead Plaintiff's Motion for Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Villegas Declaration" or "Villegas Decl."), filed herewith, is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation. Citations to "¶" in this motion refer to paragraphs in the Villegas Declaration. All exhibits herein are annexed to the Villegas Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Villegas Declaration and the second reference is to the exhibit designation within the exhibit itself.

confidential witnesses, and a review of approximately 2,330 pages of documents obtained from government agencies through the Freedom of Information Act ("FOIA"); two rounds of motion to dismiss briefing; a review of approximately 74,000 pages of documents produced by Defendants in connection with the mediation; and an extensive mediation process overseen by a well-respected mediator, the Hon. Layn R. Phillips (Ret.) ("Judge Phillips"), including preparing detailed mediation briefs and attending two full-day mediation sessions. *See generally* Villegas Decl. at §II - IV.

While Lead Plaintiff and Lead Counsel believe that the claims asserted against Defendants have merit, they recognize that continuing to litigate the Action presented a number of substantial risks. Despite Lead Plaintiff's success opposing the motion to dismiss the Complaint and its belief that it could prove all of the requisite elements of the claims asserted under Section 10(b) and 20(a) of the Securities Exchange Act of 1934, Defendants would have continued to vigorously challenge the claims were the Action to continue into summary judgment, trial, and through appeals.

In light of these risks, as discussed below and in the Villegas Declaration, Lead Plaintiff respectfully submits that the Settlement is fair, reasonable, and adequate, and warrants final approval by the Court. It also has the full support of Lead Plaintiff. *See* Declaration on Behalf of Utah Retirement Systems, dated October 31, 2019. *See* Ex. 1 at ¶6. Lead Plaintiff also requests that the Court approve the proposed Plan of Allocation for the distribution of the Settlement, which was set forth in the Notice sent to Settlement Class Members. The Plan of Allocation, which was developed by Lead Counsel in consultation with Lead Plaintiff's consulting damages expert, provides a reasonable and equitable method for allocating the Net Settlement Fund among Settlement Class Members who submit valid claims.

PRELIMINARY APPROVAL AND THE NOTICE PROGRAM

On September 5, 2019, the Court entered an order preliminarily approving the Settlement and approving the proposed forms and methods of providing notice to the Settlement Class (the "Preliminary Approval Order," ECF No. 149). Pursuant to and in compliance with the Preliminary Approval Order, through records maintained by the Company's transfer agent and information provided by brokerage firms and other nominees, beginning on September 13, 2019, the Court-appointed Claims Administrator, KCC LLC ("KCC"), caused the Notice and Claim Form (together, the "Notice Packet") to be mailed by first-class mail to potential Settlement Class Members. *See* Declaration of Lance Cavallo, dated October 31, 2019 (the "Mailing Declaration"), Ex. 3 at ¶¶2-7. To date, 65,217 Notice Packets have been mailed. *Id*. at ¶7. On September 27, 2019, the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire. Id*. at ¶8 and Exhibit B attached thereto. The Notice and Claim Form were also posted, for review and easy downloading, on the website established for purposes of this Settlement, as well as Labaton Sucharow's website. *Id*. at ¶10; Villegas Decl. at ¶61.

The Notice described, *inter alia*, the claims asserted in the Action, the contentions of the Parties, the course of the litigation, the terms of the Settlement, the maximum amounts that would be sought in attorneys' fees and expenses, the Plan of Allocation, the right to object to the Settlement, and the right to seek to be excluded from the Settlement Class. *See generally* Ex. 3-A. The Notice also gave the deadlines for objecting, seeking exclusion, submitting claims, and advised potential Settlement Class Members of the scheduled Final Approval Hearing before this Court. *Id*. To date, the Settlement Class's reaction to the proposed Settlement has been positive. While the deadline (November 15, 2019) for requesting exclusion or objecting to the Settlement has not yet passed, to date there have been no requests for exclusion, no objections to the

proposed Settlement, and no objections to the Plan of Allocation.[3]

For all the following reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Settlement and Plan of Allocation, and finally certify the Settlement Class.

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE UNDER THE APPLICABLE STANDARDS AND SHOULD BE APPROVED

A. The Standards for Final Approval of Class Action Settlements

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); s*ee also Equal Emp't Opportunity Comm'n v. Hiram Walker & Sons, Inc*., 768 F.2d 884, 888-89 (7th Cir. 1985); *In re: Sears, Roebuck & Co. Front-loading Washer Prods. Liab. Litig*., No. 06 C 7023, 2016 WL 772785, at *6 (N.D. Ill. Feb. 29, 2016). "Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Id*. at *6.[4]

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of the compromise of claims brought on a class basis. The standard for determining whether to grant final approval to a class action settlement is whether the proposed settlement is "fundamentally fair, adequate, and reasonable." Fed. R. Civ. P. 23(e)(2). In making this determination, courts in the Seventh Circuit consider the following factors:

> (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed.

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[3] Should any objections or requests for exclusion be received, Lead Plaintiff will address them in its reply papers, which are due to be filed with the Court on November 27, 2019.

[4] All internal quotations and citations are omitted unless otherwise noted.

Wong v. Accretive Health, Inc., 773 F.3d 859, 863 (7th Cir. 2014); *see also Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

Additionally, pursuant to the recent amendments to Rule 23(e)(2), a court may approve a settlement as "fair, reasonable, and adequate" after considering the following four factors, most of which overlap with the factors considered by the Seventh Circuit:[5]

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

For the reasons discussed herein, the proposed Settlement meets the criteria set forth by the Seventh Circuit and the federal rules.

B. Application of the Seventh Circuit's Factors Supports Final Approval of the Settlement

1. The Strength of the Case on the Merits, Balanced Against the Extent of the Settlement Offer

The Seventh Circuit has "deemed the first factor to be the most important." *Wong*, 773 F.3d at 864; *see also Synfuel*, 463 F.3d at 653. "The most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's cases on the merits balanced against the amount offered in the settlement." *Wong*, 773 F.3d at 864. In considering whether to enter into the Settlement, Lead Plaintiff, represented by experienced counsel, weighed the $27.5 million

[5] *See Hale v. State Farm Mut. Automobile Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *2 (S.D. Ill. Dec. 16, 2018) ("These considerations overlap with the factors previously articulated by the Seventh Circuit . . .").

Settlement Amount against the strength of Lead Plaintiff's claims, taking into consideration the risks inherent in proving materiality, scienter, loss causation, and recoverable damages, as well as the expense and likely duration of the Action. *See Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *2 (N.D. Ill. Dec. 10, 2001) (finding the first factor weighed in favor of approval in securities class action, noting that it is not certain that plaintiff would have been able to prevail at trial); *see also Great Neck Capital Appreciation Inc. P'ship v. PricewaterhouseCoopers L.L.P.*, 212 F.R.D. 400, 409 (E.D. Wis. 2002) (approving a settlement and noting that the "factual and legal issues in the case are not simple, and a jury would have to evaluate conflicting evidence on such issues as scienter, materiality, causation and damages, as well as conflicting expert testimony").

To establish a claim under the Exchange Act, a plaintiff must prove: (i) the defendant made a material misrepresentation or omission; (ii) with scienter; (iii) in connection with the purchase or sale of a security; (iv) that the plaintiff relied on the material misstatement; (v) economic loss; and (vi) loss causation. Here, Defendants would have vigorously challenged Lead Plaintiff's ability to establish scienter, the falsity and materiality of the alleged misleading statements, reliance, and loss causation, among other challenges. The principal risks are discussed in detail in the Villegas Declaration at Section VI. Briefly, regarding scienter, Defendants would likely argue that Lead Plaintiff could not point to any evidence proving that the Defendants knew that the representations regarding DeVry's employment statistics were false or misleading, or that they intentionally acted in a manner that they knew would violate applicable law. Specifically, Defendants would argue that the CEO, Daniel Hamburger, was never directly informed about concerns raised within the Company about employment metrics. Defendants would also argue that any problems with DeVry's employment statistics were

isolated to specific campuses and did not permeate the organization, such that Defendants should have been aware they were false or misleading. ¶¶64-68.

Even if Lead Plaintiff was successful in proving liability, Lead Plaintiff's ability to establish loss causation and damages also presented a significant risk to recovery in the Action. *See Goldsmith v. Tech. Sols. Co*., No. 92 C 4374, 1995 WL 17009594, at *4 (N.D. Ill. Oct. 10, 1995) (approving settlement and noting that "even if plaintiffs were to prevail in establishing liability, providing causation and the existence and amount of damages would be problematic"). As set forth in the Villegas Declaration, Defendants would argue that the January 27, 2016 disclosures by the FTC and DoE did not reveal any truth or correct any misstatements and therefore the price declines in the Company's stock are not actionable, and that even if they are actionable, the disclosures did not cause loses on January 27 and 28. ¶¶73-75. Lead Plaintiff's proposed damages calculation would have come under sustained attack by Defendants, and the correct measure of damages would likely have come down to an inherently unpredictable and hotly disputed "battle of the experts" where it would be impossible to predict with any certainty which arguments would find favor with a jury.

In contrast, the proposed Settlement provides a substantial and certain recovery of $27.5 million for the benefit of the Settlement Class, without the risk, delay and expense of continued litigation. As explained in the Villegas Declaration, Lead Plaintiff's consulting damages expert has estimated that if liability were established, maximum aggregate damages recoverable at trial, based on non-disaggregated stock price declines, would be approximately $230 million, meaning that the Settlement represents a recovery of approximately 12% of Lead Plaintiff's expert's estimate. However, if the price decline on January 28, 2016 was not found to be recoverable, damages would decrease to approximately $186 million, representing a recovery of

approximately 17% of Lead Plaintiff's possible damages. ¶75.

Since the passage of the Private Securities Litigation Reform Act of 1995, courts have approved settlements that recovered a smaller percentage of maximum damages. *See, e.g.*, *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"); *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 12 Civ. 1609, 2015 WL 965693, at *9 (W.D. La. Mar. 3, 2015) (finding reasonable a $7,850,000 settlement in securities fraud action providing 7.4% to 10.3% of class's potential recovery). To put the recovery further into perspective, the $27.5 million settlement is above the median settlement amount of $8.6 million for securities class actions between 1996 and 2017, is higher than the median recovery in 2018 of $11.3 million, and is higher than the $5.5 million median recovery in 2014-18 in cases that settled after a motion to dismiss was decided, but before the filing of a class certification motion. *See* Laarni T. Bulan, Ellen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlements – 2018 Review and Analysis*, at 1, 13 (Cornerstone Research 2019), Ex. 2.

2. Complexity, Length, and Expense of Further Litigation

Courts also consider the likely "complexity, length, and expense of the litigation." *Wong*, 773 F.3d at 863; *Isby*, 75 F.3d at 1199. There can be no doubt that this securities fraud class action concerning alleged false statements about post-graduate employment statistics involves complex factual and legal issues. *Retsky,* 2001 WL 1568856, at *2 ("Securities fraud litigation is long, complex and uncertain."). The claims asserted in the Action raise many complex issues, as evidenced by the 230 page Complaint, the extensive briefing on Defendants' consecutive motions to dismiss; and the two opinions issued by the Court.

In the absence of a settlement now, the Parties would have continued through the

completion of extensive fact discovery, expert discovery on complicated issues pertaining to loss causation and damages, briefing on summary judgment, class certification briefing, pre-trial evidentiary motions, a trial, and appeals. Even if Lead Plaintiff could recover a judgment greater than the Settlement Amount at trial, the additional delay of post-trial motions and the appellate process could last for years. Therefore, the expense, complexity, and likely duration of further litigation support approval of the Settlement.

3. Amount of Opposition to the Settlement and the Reaction of Members of the Class to the Settlement

Pursuant to this Court's Preliminary Approval Order, the Court-approved Notice and Claim Form were mailed to potential Settlement Class Members who could be identified with reasonable effort. *See* Ex. 3 at ¶¶2-7. To date, 65,217 Notice Packets have been mailed to potential Settlement Class Members and nominees. *Id*. at ¶7. While the objection/exclusion deadline—November 15, 2019— has not yet passed, to date, no objection or exclusion requests have been received.[6] *Id*. at ¶11.

Moreover, Lead Plaintiff—a sophisticated institutional investor—actively participated in both the prosecution of the Action and the settlement negotiations. Lead Plaintiff's direct participation and approval of the Settlement is further evidence that the Settlement is fair, reasonable and adequate. *See In re Veeco Instruments Inc. Sec. Litig*., No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) ("[U]nder the PSLRA, a settlement reached . . . under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness . . . .'").

4. The Opinion of Competent Counsel

Experienced counsel, negotiating at arm's-length, have weighed the factors discussed

[6] If any objections or requests for exclusion are received, Lead Plaintiff will address them in its reply submission to be filed with the Court on November 27, 2019.

above and endorse the Settlement. "The Court can consider the opinion of competent counsel in determining whether a settlement is fair, reasonable, and adequate." *Retsky*, 2001 WL 1568856, at *3. Lead Counsel firmly believes that the Settlement is fair, adequate, and reasonable, and particularly so in view of the risks, burdens, and expense of continued litigation. Further, it is respectfully submitted that Labaton Sucharow is among the most experienced and skilled firms in the securities litigation field, and has a long and successful track record in such cases. *See* Ex. 4-C. Accordingly, this factor strongly favors approval of the Settlement.

5. Stage of the Proceedings and the Amount of Discovery Completed

At the time the Parties agreed to settle, Lead Plaintiff and Lead Counsel had vigorously litigated the Action and had a well-founded and realistic understanding of the strengths and weaknesses of the claims and defenses asserted. The Action has been hotly contested from its inception in May 2016. As a result, the stage of the proceedings is more than adequate to support the Settlement. This knowledge is based on, among other things, counsel's thorough and wide-ranging investigation before filing three comprehensive amended complaints, including the review and analysis of 68 witness accounts; a review of approximately 2,330 pages of documents obtained from government agencies through FOIA; the briefing and orders on Defendants' two motions to dismiss; consultations with experts on damages; review and analysis of approximately 74,000 pages of core documents produced by Defendants in connection with the mediation; and extensive settlement negotiations, including two all-day mediation sessions where the Parties' claims and defenses were fully vetted, preceded by the preparation of detailed mediation statements. *See* Villegas Decl. at §§II - IV.

In sum, Lead Plaintiff had a firm understanding of the likelihood of success and the potential recovery at trial at the time the Settlement was entered into. *See Wong*, 773 F.3d at 864 (affirming approval of settlement and noting that although formal discovery had not commenced,

plaintiff had access to extensive public documents and a number of potential witness interviews). This factor supports final approval of the Settlement.

C. Application of the Factors Identified in the Amendments to Rule 23 Support Approval of the Settlement as Fair, Reasonable, and Adequate

The proposed Settlement also meets the criteria set forth in the amendments to Rule 23(e)(2), some of which are covered by the traditional Seventh Circuit factors discussed above.

1. Lead Plaintiff and Lead Counsel Have Adequately Represented the Settlement Class

Lead Plaintiff and Lead Counsel have adequately represented the Settlement Class. As set forth in the previously filed motion for preliminary approval, Lead Plaintiff, like all other members of the Settlement Class, purchased DeVry common stock during the Class Period and claims to have suffered damages. *See* ECF No. 145. Thus, the claims of Lead Plaintiff and the Settlement Class would prevail or fail in unison. Moreover, the common objective of maximizing recovery from Defendants aligns the interests of Lead Plaintiff and all other members of the Settlement Class. Lead Plaintiff participated in the litigation, conferred with counsel, attended both mediations, and agreed to settle the case with an informed understanding of the strengths and weaknesses of the claims. *See* Ex. 1 at ¶¶4-6.

Additionally, throughout the Action, Lead Plaintiff had the benefit of the advice of knowledgeable counsel well-versed in shareholder class action litigation and securities fraud cases. *See supra* at §I.B.4.

2. The Settlement Is the Result of Arm's-Length Negotiations

The Settlement here was achieved after thorough arm's-length negotiations between well-informed and experienced counsel, under the supervision of an experienced mediator, and rigorous investigation into the claims. A formal mediation session was held on September 20,

2019 and was overseen by a well-respected and experienced mediator, Judge Phillips.[7] The mediation was preceded by the exchange of mediation statements. However, the mediation session did not result in a settlement. A second mediation session was held on May 22, 2019, also before Judge Phillips, and following extensive negotiations, the Parties reached a settlement in principle that day. ¶¶53-55. Given the arm's-length nature of the negotiations and the active involvement of an experienced mediator, there can be no question that the Settlement was fairly and honestly negotiated. *See Mangone v. First USA Bank,* 206 F.R.D. 222, 226 (S.D. Ill. 2001) ("a settlement proposal arrived at after arms-length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate").

3. The Relief Provided to the Settlement Class Is Adequate and the Settlement Treats Class Members Equitably Relative to Each Other

Rule 23(e)(2)(C)(i) which requires that "the relief provided for the class is adequate, taking into account the costs, risks, and delay of trial and appeal," has been discussed above.

Rule 23(e)(2)(C)(ii) considers whether the relief is adequate, taking into account the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." As set forth below in Section II, discussing the proposed Plan of Allocation, the proceeds of the Settlement will be distributed to Settlement Class Members who submit valid and timely claims. Using the formulas of the Plan of Allocation, the Claims Administrator will calculate claimants' "Recognized Claims" using the transactional information provided by claimants in their Claim Forms, which can be mailed to the Claims Administrator, submitted online using the settlement website, or, for large investors with hundreds of transactions, submitted via e-mail to the Claims Administrator's electronic filing team. Lead

[7] *See, e.g., In re Delphi Corp. Sec. Derivative & ERISA Litig.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008) (speaking of Judge Phillips, "the Court and the parties have had the added benefit of the insight and considerable talents of a former federal judge who is one of the most prominent and highly skilled mediators of complex actions. . .").

Plaintiff's claim will be calculated the same way. 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.

Once the Claims Administrator has processed all submitted claims, notified claimants of deficiencies or ineligibility, processed responses, and made claim determinations, distributions will be made to eligible claimants. Any disputes about claim determinations that cannot be resolved will be presented to the Court. After an initial distribution of the Net Settlement Fund, if there is any balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise), after at least six (6) months from the date of initial distribution, the Claims Administrator will, if feasible and economical after payment of Notice and Administration Expenses, Taxes, and attorneys' fees and expenses, if any, re-distribute the balance among eligible claimants who have cashed their checks. These re-distributions will be repeated until the balance in the Net Settlement Fund is no longer feasible to distribute. *See* Settlement Agreement at §III.D.9. Any balance that still remains in the Net Settlement Fund after re-distribution(s), which is not feasible or economical to reallocate, after payment of any outstanding Notice and Administration Expenses or Taxes, if any, shall be contributed to the Council of Institutional Investors, or any not-for-profit successor of it, or as otherwise ordered by the Court. *Id.*

The terms of the proposed award of attorneys' fees (Rule 23(e)(2)(C)(iii)), are discussed

in Lead Counsel's accompanying Fee and Expense Application. Lead Counsel seeks an award of attorneys' fees and expenses pursuant to the common fund doctrine and the request is fully within the discretion of the Court, was not negotiated with Defendants, and is separate from the Settlement. Any fees and expenses that are awarded by the Court are payable upon award.

Finally, Rule 23(e)(2)(C)(iv) asks the Court to consider the fairness of the proposed Settlement in light of any agreement required to be identified under Rule 23(e)(3). Here, the only agreements made by the Parties in connection with the Settlement are the term sheet, the Settlement Agreement and the Supplemental Agreement concerning the circumstances under which Defendants may terminate the Settlement based upon the number of exclusion requests. *See* Settlement Agreement at §X.B.2.a. It is standard to keep such agreements 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.[8] The Supplemental Agreement may be submitted to the Court *in camera*, if requested.

In sum, each of the relevant factors for considering approval of a class action settlement fully supports a finding that the Settlement here is fair, reasonable, and adequate.

II. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED

The objective of a plan of allocation is to provide an equitable method for distributing a settlement fund among eligible class members. "The same standards of fairness, reasonableness and adequacy that apply to the settlement apply to the Plan of Allocation." *Retsky*, 2001 WL 1568856, at *3.

Here, Lead Plaintiff's consulting damages expert prepared the Plan of Allocation after careful consideration of Lead Plaintiff's theory of liability and damages under the Exchange Act.

[8] Rule 23(e)(2)(D), whether the proposal treats class members equitably with respect to each other, has been discussed and is addressed in Section II below.

The Plan provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on "Recognized Loss" formulas tied to liability and alleged damages. These formulas consider the amount of alleged artificial inflation in the prices of DeVry stock, as quantified by the consulting damages expert. ¶¶79-81. The Plan of Allocation was fully described in the Notice and, to date, there has been no objection to the proposed plan. *See* Ex. 3-A at 10-16; ¶82. Accordingly, for all of the reasons set forth herein and in the Villegas Declaration, it is respectfully submitted that the Plan of Allocation is fair, reasonable, and adequate and should be approved, and that the Settlement satisfies the approval criteria set forth in Rule 23(e)(2)(C)(ii).

III. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE SETTLEMENT CLASS

The Court previously granted preliminary certification to the Settlement Class under Rules 23(a) and (b)(3). *See* ECF No. 149. Because nothing has occurred since then to cast doubt on the propriety of class certification for settlement purposes, and no objections have been received to date, the Court should grant final class certification.

CONCLUSION

For all the foregoing reasons, Lead Plaintiff respectfully requests that the Court: (i) grant final approval of the Settlement; (ii) finally certify the Settlement Class, for settlement purposes only; and (iii) approve the Plan of Allocation as fair, reasonable, and adequate.

Dated: November 1, 2019

By: */s/ Carol C. Villegas*

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I caused the foregoing document to be electronically filed, using the Court's CM/ECF system, which will cause the document to be sent electronically to the registered participants as identified on the attached Electronic Mail Notice List.

/s/ Carol C. Villegas
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Mailing Information for a Case 1:16-cv-05198

Pension Trust Fund for Operating Engineers v. DeVry Education Group, Inc. et al.

Electronic Mail Notice List

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Manual Notice List

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