UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RUBEN A. LUNA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. CARBONITE, INC., et al., Defendants.	No. 1:19-cv-11662-LTS **(Consolidated)** CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Court-appointed Lead Plaintiff, Construction Industry and Laborers' Joint Pension Trust ("Lead Plaintiff"), by and through its counsel, respectfully submits this memorandum of law in support of its motion pursuant to Federal Rule of Civil Procedure 23(e), requesting that the Court: (i) approve the proposed Settlement, which the Court preliminarily approved on February 1, 2024 (the "Notice Order") (ECF 178); (ii) approve the proposed Plan of Allocation; (iii) find that notice to the Class satisfied due process; and (iv) enter the proposed Order Approving Plan of Allocation and proposed Final Judgment.[1]

I. INTRODUCTION

As set forth herein and in the Gerson Decl., the $27,500,000 all-cash Settlement represents an excellent result for the Class. Indeed, the Settlement was reached by experienced and knowledgeable counsel only after, *inter alia*, an extensive investigation by Lead Counsel, the filing of a detailed amended complaint (the "CAC"), full briefing regarding Defendants' motion to dismiss the CAC and successfully reversing this Court's dismissal of the CAC in the First Circuit, reviewing of hundreds of thousands of pages of documents, class certification briefing and discovery, and briefing on a motion to decertify the Class, fact and expert depositions, summary judgment briefing, and six months of arm's-length settlement negotiations conducted by a highly experienced, nationally-recognized mediator David M. Murphy, Esq. of Phillips ADR.

It is also Lead Counsel's informed opinion that in light of the significant risks and the delay, expense, and uncertainty of pursuing the Litigation through trial and any post-trial appeals, the

[1] Unless otherwise defined herein, all capitalized terms are defined in the Stipulation of Settlement dated January 31, 2024 (ECF 175) (the "Stipulation") and the Declaration of Robert D. Gerson in Support of: (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses, Charges and Costs and Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Gerson Decl."), submitted herewith.

Settlement is a certain and reasonable result for the Class. The benefit that the proposed Settlement will provide to the Class weighs in favor of final approval when considered against the risks that, absent the Settlement, the Class might recover less (or nothing at all) if the Litigation continued to be litigated through the motion to decertify the Class, summary judgment, trial, and any post-trial appeals that would likely follow – a process that could last many additional years. While Lead Plaintiff believes that it has meritorious responses to each of Defendants' arguments against liability and damages, the proposed Settlement, if approved, will enable the Class to be compensated now for damages without incurring the risk of further litigation. Lead Counsel, with extensive experience in prosecuting shareholder class actions and other complex litigation, believes that the proposed Settlement satisfies each of the applicable Rule 23(e)(2) factors, is fair, reasonable, and adequate under the First Circuit's standards for approval, and is in the best interests of the Class. Likewise, the Plan of Allocation, based on the out-of-pocket measure of damages (*i.e.*, the difference between what Class Members paid for their Carbonite, Inc. ("Carbonite" or the "Company") common stock during the Class Period and what they would have paid had the misstatements not been made or omissions withheld), which Lead Counsel developed with the assistance of a damages expert, and which is a fair, reasonable, and adequate method for distributing the Net Settlement Fund to Class Members, should be approved.

The fairness of the Settlement is further evidenced by the fact that, to date, no members of the Class have objected to it, and none have sought exclusion from the Class. Pursuant to the Court's Notice Order, 13,871 Postcard Notices have been sent to potential Class Members and nominees since February 22, 2024, and the Summary Notice was published in *The Wall Street*

Journal and transmitted over *Business Wire*, a national newswire service, on February 29, 2024.[2] Additionally, Settlement-related documents were posted on the Settlement-specific website at www.CarboniteSecuritiesLitigation.com. *Id.*, ¶14.[3] The deadline for Class Members to object to the Settlement and Plan of Allocation expires on April 24, 2024. Lead Counsel will address any timely objections in a reply memorandum due no later than May 8, 2024.

II. HISTORY AND BACKGROUND OF THE LITIGATION

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Gerson Decl. for a detailed discussion of the factual background and procedural history of the Litigation, the efforts undertaken by Lead Plaintiff and Lead Plaintiff's Counsel during the course of the Litigation, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement.

III. ARGUMENT

A. Applicable Standards Favor Approval of Class Action Settlements

In determining whether to approve the Settlement, the Court should be guided by the "'strong public policy in favor of settlements'" over continued litigation, particularly complex actions. *See, e.g.*, *United States v. Davis*, 261 F.3d 1, 27 (1st Cir. 2001);[4] *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000) (same). To grant final approval of a class action settlement, the court must find that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010) (same).

Rule 23(e)(2) provides that:

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[2] *See* accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), on behalf of the Court-appointed Claims Administrator for the Settlement, Gilardi & Co. LLC ("Gilardi"), ¶¶4-12.

[3] The briefs and declarations in support of the motions to approve the Settlement, Plan of Allocation, and attorneys' fees and expenses will be posted to the website once they are filed.

[4] Citations are omitted and emphasis is added throughout, unless otherwise noted.

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
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> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account:
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> (i) the costs, risks, and delay of trial and appeal;
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> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
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> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
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> (iv) any agreement required to be identified under Rule 23(e)(3); and
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> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). *See also Robinson v. Nat'l Student Clearinghouse*, 14 F.4th 56, 59 (1st Cir. 2021) ("Where 'the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable.'") (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009)).

While the First Circuit has not espoused any single test for determining whether a proposed settlement is fair, reasonable, and adequate,[5] courts within this Circuit commonly reference factors identified by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974), *abrogated sub nom.*, *Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43 (2d Cir. 2000). *See*

[5] *See, e.g.*, *In re Lupron Mktg. & Sales Prac. Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005) ("the First Circuit has not established a formal protocol for assessing the fairness of a settlement"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003) ("There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement.").

Lupron, 228 F.R.D. at 93. Courts in this Circuit have further distilled the *Grinnell* factors into a more concise list, examining the

> (1) risk, complexity, expense and duration of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations.

In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 259-60 (D.N.H. 2007).

Moreover, in evaluating whether a settlement is fair, reasonable, and adequate, courts are to balance the benefits of settlement against the risks of continued litigation. *Voss*, 592 F.3d at 251. "'[T]he court cannot, and should not, use as a benchmark the highest award that could be made to the plaintiff[s] after full and successful litigation of the claim[s].'" *Rolland v. Cellucci*, 191 F.R.D. 3, 14-15 (D. Mass. 2000). As the First Circuit has observed: "[A]ny settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion." *Greenspun v. Bogan*, 492 F.2d 375, 381 (1st Cir. 1974); *see also Compact Disc*, 216 F.R.D. at 211 ("I am not to prejudge the merits of the case . . . and I am not to second-guess the settlement; I am only to determine if the parties' conclusion is reasonable."); *Lupron*, 228 F.R.D. at 97 (the court should not "hypothesize about larger amounts that might have been recovered"). The factors set forth in Rule 23(e)(2) are applied in tandem with the applicable First Circuit approval factors and "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) Advisory Committee's Notes to 2018 Amendments. In this case, an examination of the foregoing factors firmly demonstrates that the Settlement satisfies both Rule 23(e)(2) and the applicable First Circuit factors, is fair, reasonable, and adequate to the Class, and should be approved by the Court.

B. The Proposed Settlement Merits Final Approval

1. The Settlement Satisfies the Requirements of Rule 23(e)(2)

As explained in Lead Plaintiff's Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement and Approval of Notice to the Class (ECF 174) (the "Preliminary Approval Memorandum") at 7-14, and as acknowledged by the Notice Order, Lead Plaintiff has met all of the requirements imposed by Rule 23(e)(2). Courts analyzing the Rule 23(e)(2) factors have noted that a plaintiff's satisfaction of these factors at final approval is virtually assured where, as here, little has changed between preliminary and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg. Sales Pracs., & Prods. Liab. Litig.*, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"); *Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019) (noting in analyzing Rule 23(e)(2) that "[s]ignificant portions of the Court's analysis remain materially unchanged from the previous order [granting preliminary approval]").

a. Lead Plaintiff and Lead Counsel Adequately Represented the Class

Lead Plaintiff and Lead Counsel have adequately represented the Class as required by Federal Rule of Civil Procedure 23(e)(2)(A). They have diligently prosecuted this Litigation on the Class' behalf. Among other things, Lead Counsel conducted a thorough pre-filing investigation, drafted a detailed amended complaint, opposed Defendants' motion to dismiss, then obtained reversal by the First Circuit of dismissal of the CAC, obtained, reviewed, and analyzed hundreds of thousands of pages of non-public documents, conducted and defended fact and expert depositions, successfully obtained class certification over Defendants' opposition, opposed Defendants' motions for summary judgment and to decertify the Class, engaged in six months of mediation and settlement

negotiations, and achieved a Settlement of $27.5 million, which will provide a significant recovery to the Class. Lead Plaintiff actively and faithfully oversaw the prosecution of the case over the course of the Litigation in accordance with its duties as a Lead Plaintiff. *See* Declaration of Thomas Clement ("Clement Decl."), submitted herewith. Lead Plaintiff and Lead Counsel stood ready to, and at all times did, advocate for the best interests of the Class.

2. The Settlement Was Reached After Significant Investigation and Discovery and Is the Product of Arm's-Length Negotiations Among Experienced Counsel

Rule 23(e)(2)(B) is clearly satisfied. Where, as here, the settling parties have bargained at arm's length, "'there is a presumption in favor of the settlement.'" *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009) (quoting *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)); *see also Roberts v. TJX Cos.*, 2016 WL 8677312, at *5 (D. Mass. Sept. 30, 2016) (where "the parties' Settlement is the product of arms-length negotiation by competent counsel, . . . it is entitled to a presumption of reasonableness"). Moreover, where, as here, the settlement was reached with the assistance of an experienced mediator, there is "a presumption that the settlement achieved meets the requirements of due process." *In re Penthouse Exec. Club Comp. Litig.*, 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013) ("The assistance of [an] experienced mediator[] . . . reinforces that the Settlement Agreement is non-collusive.").

At the time of the Settlement, all parties were in an excellent position to evaluate the strengths and weaknesses of their respective claims and defenses. As described more fully in the Gerson Decl., Lead Counsel vigorously prosecuted this Litigation. In response to their requests and following negotiations over the scope of discovery, Defendants and non-parties produced to Lead Counsel hundreds of thousands of non-public documents. The parties' settlement negotiations

included the exchange of comprehensive mediation statements which detailed their respective positions and included extensive citations to the evidentiary record, a formal mediation session with Mr. Murphy, followed by more than six months of negotiations overseen by the mediator. At the mediation, the parties' positions were fully explored. This accumulation of information permitted Lead Plaintiff and Lead Counsel to be well-informed about the strengths and weaknesses of the case, resulting in a significant recovery of $27,500,000 for the Class. Thus, the proposed Settlement is procedurally fair and entitled to a presumption of reasonableness. *See Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("[S]ettlement negotiations . . . conducted at arms' length . . . support 'a strong initial presumption' of the Settlement's substantive fairness.").

Moreover, the judgment of experienced and well-informed class counsel should be afforded great weight by the Court. *Rolland*, 191 F.R.D. at 10 ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Bussie*, 50 F. Supp. 2d at 77 ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that they believe the settlement provides to the Class relief that is fair, reasonable and adequate."). Lead Counsel is a national shareholder's rights law firm with significant experience in PSLRA securities litigation, as well as other shareholder and complex litigation. *See* www.rgrdlaw.com.

3. The Risk, Complexity, and Expense of Continued Litigation Favors Final Approval

The Settlement is also substantively fair. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). While Lead Plaintiff believes that the claims asserted against Defendants have merit, it recognizes that there were significant risks as to whether Lead Plaintiff would ultimately be able to prove liability and establish

damages on its claims (it was even given the opportunity, given the pending motions for summary judgment and to decertify the Class). Continued litigation would be complex, risky, and costly. *See In re Stockeryale, Inc. Sec. Litig.*, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007) (this factor "'captures the probable costs, in both time and money, of continued litigation'"). Securities class actions are "notorious[ly] complex[]" and "[t]he difficulty of establishing liability is a common risk of securities litigation.'" *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *8, *11 (S.D.N.Y. Apr. 6, 2006). The Settlement provides an immediate benefit to the Class that when balanced against the potential costs and risks associated with continued litigation, supports a finding that the Settlement is fair, reasonable, and adequate. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 74 (D. Mass. 2005) ("'Although fully litigating the claims through trial could possibly result in a higher recovery, the settlement represents a necessary compromise between inherent risks of doing so and a guaranteed cash recovery.'").

Defendants also vigorously contested their liability on the merits in their pending summary judgment motion and have denied and continue to deny each and every claim and allegation of wrongdoing alleged by Lead Plaintiff. Specifically, Defendants have argued that the alleged misstatements were not actionable because they were loose statements of corporate optimism that were not untruthful because, *inter alia*, VME exhibited certain aspects of functionality before its release. Gerson Decl., ¶88.

Defendants likewise argued that Lead Plaintiff could not establish scienter. *Id.*, ¶89. They argued that Ali and Folger lacked the requisite scienter at the time of the alleged misstatements because they received mixed and/or positive reviews about VME before its release. *Id*. Defendants further maintained that there was no evidence in the record that anyone ever told Messrs. Ali or Folger of VME's problems prior to their November 2018 statements. *Id*. Finally, Defendants

contended that the record evidence established that Lead Plaintiff's allegations regarding Mr. Ali's departure from the Company was completely unrelated to VME's failure. *Id.* "Proving scienter is hard to do." *Christine Asia Co. v. Jack Yun Ma*, 2019 WL 5257534, at *12 (S.D.N.Y. Oct. 16, 2019). *See also Kalnit v. Eichler*, 99 F. Supp. 2d 327, 345 (S.D.N.Y. 2000), *aff'd*, 264 F. 3d 131 (2d Cir. 2001) ("The element of scienter is often the most difficult and controversial aspect of a securities fraud claim.").

Lead Plaintiff also faced significant risks in proving loss causation and damages. Gerson Decl., ¶¶92-93. As to loss causation, Defendants maintained that Lead Plaintiff cannot offer any evidence that the alleged misrepresentations ever had an impact on Carbonite's stock price. *Id*., ¶93. Likewise, the level of damages, if any, would have been the subject of expert testimony by each side. Which expert's position would be accepted by the Court or the jury was unknown. *Id.*

Lead Plaintiff also faced uncertainty with respect to the pending motion to decertify the Class in light of the Second Circuit's application of the Supreme Court's *Goldman Sachs* opinion. Gerson Decl., ¶79. Because Rule 23(c) authorizes a court to decertify a class at any time prior to entry of judgment, the risk of maintaining class action status weighs in favor of final approval.

Although Lead Plaintiff believed that it would have succeeded on Defendants' summary judgment and decertification motions, there remained significant hurdles to recovery, at trial and any post-trial appeals. *See, e.g.*, *Stockeryale*, 2007 WL 4589772, at *3 (this factor supported settlement where the defendants had defenses to liability and loss causation that "could result in no liability and zero recovery for the class"). This Settlement obviates any of those risks.

4. Comparing the Proposed Settlement to the Likely Result of Continued Litigation Weighs in Favor of Final Approval

This factor requires the Court to consider the reasonableness of the settlement fund in light of the possible recovery in the litigation and risks of further litigation. The issue is not whether the

settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. Thus, the court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "'is not susceptible of a mathematical equation yielding a particularized sum.'" *In re PaineWebber P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. Mar. 20, 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *accord Relafen*, 231 F.R.D. at 73 ("'A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes.'"). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, the $27,500,000 cash Settlement is well within the range of reasonableness under the circumstances so as to warrant final approval of the Settlement. It represents nearly twice the median settlement value for securities fraud cases settled in 2023. *See* Edward Flores and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review* at 20, Fig. 19 (NERA Jan. 23, 2024), attached as Exhibit A to the Gerson Decl.

Thus, under the circumstances here, the Settlement achieved represents an excellent result for the Class and is reasonable in light of the best possible recovery, especially when compared to the funds available to satisfy a judgment and the overall range of recovery involving securities class action settlements.

5. Lead Plaintiff Had Sufficient Information to Make Informed Decisions About Settling This Case

This factor questions "'whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of

settlement.'" *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012). "The threshold necessary to render the decisions of counsel sufficiently well informed, . . . is not an overly burdensome one to achieve – indeed, formal discovery need not have necessarily been undertaken yet by the parties." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012); *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474 (D.P.R. 2011) (even where formal discovery had not occurred, counsel's investigation and informal discovery provided "sufficient information to make a well informed decision").

As detailed in the Gerson Declaration, prior to filing the CAC, Lead Counsel conducted a thorough review of Carbonite's press releases, public statements, SEC filings, and securities analysts' reports and advisories about the Company and reviewed other publicly available information relating to Carbonite. Lead Counsel, *inter alia*, researched the applicable law with respect to the claims asserted and the potential defenses thereto and prepared the CAC, the opposition to Defendants' motion to dismiss, and the appeal of the Court's order on the motion to dismiss. Lead Counsel moved for and obtained class certification, conducted extensive document and other written discovery, reviewed hundreds of thousands of pages of non-public documents, and took or defended 16 depositions, and fully briefed Defendants' motion for summary judgment, supported by a 100 page document containing Lead Plaintiff's Responses to Defendants' Local Rule 56.1 Statement of Material Facts as to Which There is No Genuine Issue to Be Tried, and Lead Plaintiff's Statement of Additional Material Facts (both of which contained extensive citations to record evidence). Finally, the parties exchanged detailed evidentiary-based mediation statements and engaged in negotiations under the guidance of an experienced mediator. Thus, Lead Plaintiff and Lead Counsel engaged in sufficient investigation and discovery to thoroughly understand the claims, merits, and weaknesses of the Litigation before agreeing to the Settlement.

6. The Favorable Reaction of the Class to Date Supports Final Approval

To date, no objections have been filed, and no exclusion requests were submitted. *See* Murray Decl., ¶16. Such a favorable reaction of the Class to the Settlement also supports its approval. While not dispositive, "[t]he number of requests for exclusion from the settlement, as well as the number and substance of objections filed . . . constitutes strong evidence of fairness of proposed settlement and supports judicial approval." *Bussie*, 50 F. Supp. 2d at 77. Moreover, Lead Plaintiff fully supports the Settlement. Clement Decl., ¶5. *See Stockeryale*, 2007 WL 4589772, at *3 ("The Court finds it significant that the Lead Plaintiffs are fully in support of the settlement.").

Pursuant to the Notice Order, beginning on February 22, 2024, the Claims Administrator caused a total of over 13,800 Postcard Notices to be mailed or emailed to potential Class Members, including brokers and other nominees. *See* Murray Decl., ¶¶5-11. The Claims Administrator also caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over *Business Wire* on February 29, 2024. *Id.*, ¶12. As noted, no objections have been received and no requests for exclusion from the Settlement have been submitted. The Class Members' positive reaction to the Settlement fully supports final approval.

C. The Plan of Allocation of Settlement Proceeds Should Be Approved

A plan of allocation of settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See Tyco*, 535 F. Supp. 2d at 262 ("Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate."). A plan of allocation is fair and reasonable as long as it has a "'reasonable, rational basis.'" *City of Providence v. Aéropostale, Inc.*, 2014 WL 1883494, at *10 (S.D.N.Y. May 9, 2014) ("A plan of allocation 'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'"), *aff'd sub nom.*, *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). A plan of

allocation that reimburses class members based on the extent of their injuries is generally reasonable, and the plan "'need not necessarily treat all class members equally.'" *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *23 (N.D. Tex. Nov. 8, 2005). A reasonable plan of allocation "'may consider the relative strength and values of different categories of claims.'" *IMAX*, 283 F.R.D. at 192; *see In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 35 (D.N.H. 2006) (approving a plan of allocation that took into consideration "the strengths and weaknesses of the claims of the various types of class members").

Here, the Plan of Allocation was developed by Lead Counsel in consultation with its damages expert and it calculates a recognized loss based on the amount of the alleged inflation in Carbonite common stock at various times during the Class Period allocable to the alleged fraud, and also takes into account the PSLRA-mandated 90-day lookback. Gerson Decl., ¶¶96-97. Lead Counsel believes the proposed Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members and that the Plan of Allocation treats Class Members equitably relative to each, and by providing that each Authorized Claimant shall receive a *pro rata* share of the Net Settlement Fund based on recognized losses. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Further, Lead Counsel's opinion is entitled to "considerable weight" by the Court in deciding whether to approve the plan. *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) ("When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel."); *see also In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *13 (S.D.N.Y. July 21, 2020) ("In determining whether a plan of allocation is reasonable, courts give great weight to the opinion of experienced counsel.").

Further, to date, no objections to the Plan of Allocation have been filed, suggesting that the Class also finds the Plan of Allocation to be fair, reasonable, and adequate. Similar plans have

repeatedly been approved by courts within this District. *See*, *e.g.*, *Machado v. Endurance Int'l Grp. Holdings, Inc.*, 2019 WL 4409217, at *1 (D. Mass. Sept. 13, 2019); *McGee v. Constant Contact, Inc., et al.*, No. 15-13114-MLW, ECF 119, Order Approving Plan of Allocation (D. Mass. May 27, 2020); *KBC Asset Mgmt. NV v. Aegerion Pharms., Inc.*, No. 1:14-cv-10105-MLW, ECF 168, Order Approving Plan of Allocation (D. Mass. Nov. 30, 2017); *see also Cabletron*, 239 F.R.D. at 35 (approving a plan where claimants would "receive a pro rata share of the Net Settlement Fund").

D. Notice to the Class Satisfied the Requirements of Rule 23, Complies With Due Process, and Is Reasonable

The notice provided to the Class satisfied the requirements of Federal Rule of Civil Procedure 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The notice also satisfied Federal Rule of Civil Procedure 23(e)(1), which requires that notice of a settlement be directed "in a reasonable manner to all class members who would be bound" by the settlement (Fed. R. Civ. P. 23(e)(1)(B)), and that the notice "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them.'" *Bogan*, 492 F.2d at 382.

Both the substance of the Court-approved Postcard Notice and the method of dissemination to potential Members of the Class satisfy these standards. The notice program was carried out by a nationally-recognized claims administrator, Gilardi. The Postcard Notice directed Class Members to the Notice, which contains the information required by Federal Rule of Civil Procedure 23(c)(2)(B), including: (i) an explanation of the nature of the Litigation and claims asserted; (ii) the definition of the Class; (iii) a description of the claims, issues, and defenses in the Litigation and the key terms of the Settlement, including the consideration amount and the releases to be given; (iv) the Plan of

Allocation; (v) the parties' reasons for proposing the Settlement; (vi) a description of the attorneys' fees and expenses that will be sought; (vii) an explanation of Class Members' right to enter an appearance through an attorney and to request exclusion from the Class and to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses, as well as the time and manner for requesting exclusion and filing objections; and (viii) notice of the binding effect of a judgment on Class Members. The Notice also provides instructions for submitting a Proof of Claim in order to be eligible to receive a distribution from the Net Settlement Fund, relevant deadlines, and contact information, including a dedicated toll-free telephone hotline and link to the Settlement website.

In accordance with the Court's Notice Order, Gilardi has emailed or mailed by first-class mail a total of 13,871 Postcard Notices to potential Members of the Class and their nominees. *See* Murray Decl., ¶11. In addition, Gilardi caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over *Business Wire* on February 29, 2024. *Id.*, ¶12. Copies of the Notice, Proof of Claim, Notice Order, and Stipulation were made available on the Settlement website maintained by Gilardi, www.CarboniteSecuritiesLitigation.com. *Id.*, ¶12. Copies of the Notice, Proof of Claim, Notice Order, and Stipulation were made available on the Settlement website maintained by Gilardi, www.CarboniteSecuritiesLitigation.com. *Id.*, ¶14. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in a widely circulated business publication, transmitted over a newswire, and set forth on a dedicated website, constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Stockeryale*, 2007 WL 4589772, at *3 (finding that due process was satisfied where notice mailed by first class mail to all class members who could be identified with reasonable effort and summary notice was published once in *Investor's*

Business Daily and over *PR Newswire*); *Cabletron*, 239 F.R.D. at 35-6 (combination of individually mailed notice packets, published notice in *The Wall Street Journal*, a dedicated website, and a dedicated phone hotline met the notice standard). *See also Medoff v. CVS Caremark Corp.*, 2016 WL 632238, at *7 (D.R.I. Feb. 17, 2016).

IV. CONCLUSION

Based on the foregoing, Lead Plaintiff respectfully requests that the Court: (i) grant final approval of the proposed Settlement; (ii) approve the proposed Plan of Allocation; (iii) find that notice to the Class satisfied due process; and (iv) enter the proposed Order Approving Plan of Allocation and proposed Final Judgment.[6]

DATED: April 10, 2024

Respectfully submitted,

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[6] Proposed orders will be submitted with Lead Counsel's reply submission on May 8, 2024, after the April 24, 2024 deadline for Class Members to object has passed.

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Local Counsel

CERTIFICATE OF SERVICE

I, David A. Rosenfeld, hereby certify that on April 10, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all counsel of record.

/s/ David A. Rosenfeld
DAVID A. ROSENFELD