UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD P. BOLAND and MARY A. BOLAND, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. GERDAU S.A., et al., Defendants.	Civil Action No. 1:16-cv-03925-LLS CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITY

I. PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Policemen's Annuity and Benefit Fund of Chicago, on behalf of itself and the Class, respectfully submits this memorandum of law in support of its motion for final approval of the $15.0 million settlement (the "Settlement Amount") reached in the above-captioned securities class action (the "Litigation") resolving all claims asserted in the Litigation and for approval of the Plan of Allocation. The terms of the settlement are set forth in the Stipulation of Settlement ("Stipulation" or "Settlement"), which was previously filed with the Court on July 6, 2017. Dkt. No. 50.[1] This recovery is the product of Lead Counsel's vigorous efforts in prosecuting the Litigation, followed by arm's-length settlement negotiations among experienced and knowledgeable counsel, including a formal mediation session, conducted over several weeks and overseen by a nationally-recognized, neutral mediator.

The Settlement represents a very good result for the Class in light of the risks Lead Plaintiff faced, and would have faced, had the Litigation continued, including: (1) the risk that the Court would grant Defendants' motions to dismiss the Litigation; (2) the risk that the Court would deny Lead Plaintiff's motion to certify the Class; (3) the risk that Lead Plaintiff would be unable to obtain adequate discovery from witnesses in Brazil; (4) the risk that Defendants would prevail on their motions for summary judgment at the conclusion of discovery; and (5) the possibility that protracted, expensive and contested litigation, including trial and likely appeals, could ultimately lead to no recovery, or a far smaller recovery. As detailed below and in the Rosen Declaration, Defendants vigorously disputed any liability, including raising numerous arguments that the Court did not have

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulation and the Declaration of Henry Rosen in Support of Lead Plaintiff's Motion for Final Approval of Settlement and Approval of Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Rosen Decl."), submitted herewith.

personal jurisdiction over the Individual Defendants and that, in any event, they did not make materially misleading statements or act with scienter. Defendants also disputed loss causation and damages. Defendants would have contested the amount of damages that could be attributed to the revelation of allegedly false statements, as opposed to information about Gerdau that was unrelated to the alleged fraud and would have challenged Lead Plaintiff's ability to prove what part of the damages were caused by disclosure of the alleged fraud.

Further confirming the fairness of the Settlement is the fact that, to date, Members of the Class have reacted positively to the Settlement. Pursuant to the Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order") (Dkt. No. 51), the Court-appointed Claims Administrator, Gilardi & Co. LLC ("Gilardi"), mailed over 36,900 copies of the Notice and Proof of Claim and Release (together, "Notice Package") to potential Class Members and nominees beginning on July 31, 2017, and notice was published in *The Wall Street Journal* and transmitted over the *Business Wire* on August 4, 2017.[2] *See* Sylvester Decl., ¶¶4-11, 14. To date, not a single objection to the Settlement has been filed. Nor has Gilardi received a single request for exclusion from the Class. *Id.*, ¶15.

Finally, Lead Counsel, who has substantial experience prosecuting securities class actions, has concluded that the Settlement is fair, reasonable, and adequate and in the best interests of the Class. In light of these considerations, Lead Plaintiff respectfully requests that the Court grant final approval of the Settlement and approve the Plan of Allocation as fair and reasonable.

[2] *See* Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Sylvester Decl."), submitted herewith.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Rosen Declaration for a detailed discussion of the factual background and procedural history of the Litigation, the efforts undertaken by Lead Plaintiff and its counsel during the course of the Litigation, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement.

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Law Favors and Encourages Settlements

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014); *see also In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation."); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) ("the courts have long recognized that [complex class action] litigation 'is notably difficult and notoriously uncertain,' . . . and that compromise is particularly appropriate") (citation omitted). Therefore, when exercising discretion to approve a settlement, courts are "mindful of the 'strong judicial policy in favor of settlements.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)).

"A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery,'" *Wal-Mart*, 396 F.3d at 116 (citation omitted), and "overseen by an experienced, neutral

third-party mediator," *In re CitiGroup Inc.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013). "Due to the presumption in favor of settlement, '[a]bsent fraud or collusion, courts should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'" *Advanced Battery*, 298 F.R.D. at 174 (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007)). Thus, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

B. The Settlement Must Be Procedurally and Substantively Fair, Adequate, and Reasonable

Courts may approve a settlement that is binding on the class if it determines that the settlement is "'fair, adequate, and reasonable, and not a product of collusion.'" *Wal-Mart*, 396 F.3d at 116 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)). This evaluation requires courts to consider both the terms of the settlement and the negotiation process leading up to it. *Woburn Ret. Sys. v. Salix Pharms., Ltd.*, No. 14-CV-8925 (KMW), 2017 U.S. Dist. LEXIS 132515, at *4 (S.D.N.Y. Aug. 18, 2017); *Wal-Mart*, 396 F.3d at 116.

With respect to the negotiation process, a class action settlement enjoys a "presumption of fairness" where it is the product of arm's-length negotiations between experienced and capable counsel. *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *3 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *see also In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012); *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *1 (S.D.N.Y. Dec. 28, 2011).

With respect to the substantive terms of a settlement, courts in the Second Circuit consider the following factors (known as the "*Grinnell* factors") when determining whether to approve a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Wal-Mart, 396 F.3d at 117 (quoting *Grinnell*, 495 F.2d at 463).

In finding that a settlement is substantively fair, reasonable, and adequate, not every factor needs to be satisfied, but "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)). As such, the court should assess the settlement as presented, without modifying its terms, and without substituting its '"business judgment for that of counsel, absent evidence of fraud or overreaching.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (quoting *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 838 F. Supp. 729, 737 (S.D.N.Y. 1993)).

Lead Plaintiff respectfully submits that the proposed Settlement is fair, reasonable, and adequate when measured under the relevant criteria and the circumstances of this Litigation, and should be approved by the Court.

IV. THE PROPOSED SETTLEMENT IS PROCEDURALLY AND SUBSTANTIVELY FAIR, ADEQUATE, AND REASONABLE

A. The Settlement Is Entitled to a Strong Presumption of Fairness

As previously noted, a strong presumption of fairness attaches to a class action settlement reached through arm's-length negotiations among able and experienced counsel. *See Wal-Mart*, 396 F.3d at 116; *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Here, the presumption of fairness and adequacy is appropriate because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations, without collusion, and following mediation before a nationally-recognized mediator. *See Global Crossing*, 225 F.R.D. at 461; *see also* Rosen Decl., ¶¶29-31. Indeed, the participation of the Honorable Layn R. Phillips (Ret.), a former federal district judge and a highly-qualified mediator, strongly supports a finding that negotiations were conducted at arm's length and without collusion. *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 12991307, at *1 (N.D. Cal. Mar. 3, 2015) (finding Judge Phillips to be "an experienced mediator"); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (approving settlement where parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *2 (D. Nev. Oct. 19, 2012) (settlement was fair where it "was reached following arm's length negotiations between experienced counsel that involved the assistance of an experienced and reputable private mediator, retired Judge Phillips").

The negotiation process that Judge Phillips oversaw also supports the presumption of fairness. In that regard, the process included the preparation and exchange of detailed mediation statements, and candid and frank discussions about the strengths and weaknesses of the case. Rosen Decl., ¶29. Thus, Lead Counsel was fully informed of the strengths and weaknesses of the case by the time the Settlement was reached. *See id.*, ¶¶32-46; *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) ("great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation and internal quotations omitted).

These and other considerations discussed in the Rosen Declaration, therefore, confirm the reasonableness of the Settlement. Thus, the Settlement should be entitled to the presumption of procedural fairness under Second Circuit law.

B. The Settlement Satisfies the *Grinnell* Factors

1. Continued Litigation Would Be Complex, Expensive, and Protracted

Without the Settlement, the anticipated complexity, cost, and duration of the Litigation would be considerable. *See Advanced Battery*, 298 F.R.D. at 175 ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"); *see also In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS), 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). This Litigation involves many complex legal issues relating to the federal securities laws. Lead Plaintiff's allegations raised issues involving, among other things, Gerdau's attempted tax evasion and an alleged bribery scheme in collusion with Brazilian tax authorities in connection with Gerdau's goodwill deductions, and the actions of Gerdau and a number of its employees, officers, and directors in connection therewith. Rosen Decl., ¶10. Accordingly, if the Litigation proceeded past the motion to dismiss stage, the parties would be required to complete expensive and

time consuming document and deposition discovery in Brazil, where most of the documentary evidence (virtually all of it in Portuguese) and witnesses were located.

Moreover, had the Settlement not been reached, Lead Plaintiff would be required to retain experts, prepare expert reports, and conduct expert depositions and discovery. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (approving settlement in action where many witnesses were located beyond the court's subpoena power); *see also In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS) (SMG), 2007 WL 2743675, at *10 (E.D.N.Y. Sept. 18, 2007) (finding the costs of litigating against defendant to be "significant" due to increased costs and complexity of discovery). A motion for summary judgment, as well as motions *in limine* also would have to be briefed by the parties. All of the foregoing would add years of additional delay before Class Members could enjoy the benefit of a verdict, if any, obtained by Lead Plaintiff. *See In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

Even if the Class could recover a larger judgment after a trial, the additional delay posed by the trial itself, as well as post-trial motions, and the appellate process could deny the Class any recovery for years, further reducing any such recovery's value. *See Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

The Settlement avoids these risks. Instead of the lengthy, costly, and uncertain course of further litigation, the Settlement provides for an immediate $15.0 million cash recovery for the Class. As a result, the Settlement outweighs the risks associated with lengthy and costly continued litigation.

2. The Lack of Objections to Date Supports Final Approval of the Settlement

The reaction of the Class to the Settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007) (citation omitted); *see also Salix*, 2017 U.S. Dist. LEXIS 132515, at *7. In fact, the "'absence of objections may itself be taken as evidencing the fairness of a settlement.'" *City of Providence*, 2014 WL 1883494, at *5 (citing *PaineWebber*, 171 F.R.D. at 126).

To date, the reaction of the Class is unanimously positive and supports approval of the Settlement. *See Sadia*, 2011 WL 6825235, at *1. Pursuant to the Preliminary Approval Order, 36,985 copies of the Notice Package were mailed to potential Class Members and nominees; and the Summary Notice was published in *The Wall Street Journal* and transmitted over the *Business Wire* on August 4, 2017. Sylvester Decl., ¶¶11, 14. Although Class Members have until September 29, 2017, to object to the Settlement or request exclusion from the Class, to date, there have been no objections to the Settlement and no requests for exclusion have been received. *Id.*, ¶15. As provided in the Preliminary Approval Order, Lead Plaintiff will file papers on or before October 13, 2017, to address any objections and further update the Court on requests for exclusion that may be received following this submission.

3. Lead Plaintiff Has Sufficient Information to Make an Informed Decision as to the Settlement

In considering the third *Grinnell* factor, "'the question is 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.'" *Bear Stearns*, 909 F. Supp. 2d at 267 (quoting *IMAX*, 283 F.R.D. at 190). "To satisfy this factor, parties need not have even engaged in formal or extensive discovery." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 WL 7323417, at *7 (S.D.N.Y. Dec. 19, 2014) (noting that discovery cannot commence in cases brought under the PSLRA until the motion to dismiss is denied); *Maley*, 186 F. Supp. 2d at 363; *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) ("[T]he Court need not find that the parties have engaged in extensive discovery. . . . Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make . . . an appraisal' of the Settlement.") (quoting *Plummer v. Chem. Bank*, 668 F.2d 654, 660 (2d Cir. 1982)), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001); *see also Global Crossing*, 225 F.R.D. at 458 ("[T]he question is whether the parties had adequate information about their claims.").

In this case, there is no question that Lead Plaintiff had sufficient information to make an informed decision on the propriety of the Settlement. As detailed in the Rosen Declaration, Lead Plaintiff and its counsel were able to negotiate a settlement for the Class after conducting an extensive factual investigation and analysis relating to the events and transactions alleged in the Consolidated Complaint for Violations of the Federal Securities Laws (the "Consolidated Complaint") (Dkt. No. 32), and undertook substantial litigation efforts despite the PSLRA-mandated discovery stay. This included, *inter alia*: conducting a thorough pre-filing investigation into the

Class' claims; reviewing an investigative report prepared by Brazilian federal police concerning the alleged bribery of Brazilian tax officials to, among other things, resolve a tax dispute in Gerdau's favor; drafting a detailed consolidated complaint; briefing an opposition to Defendants' motions to dismiss the Consolidated Complaint; retaining an economic consultant to evaluate potential damages and Defendants' arguments concerning damages; consulting with Brazilian attorneys regarding unique issues posed by the Litigation; and participating in in-person mediation with Defendants' counsel overseen by Judge Phillips, with numerous follow-up communications. *See generally* Rosen Decl.

As noted above, Lead Counsel prepared a detailed mediation statement that was provided to Judge Phillips and Defendants' counsel prior to the April 25, 2017 mediation session, and held discussions with Defendants' counsel during the mediation where they not only pressed the arguments raised in their motions to dismiss but also identified arguments Defendants likely would make if the case were to progress. The mediation session was unsuccessful and litigation continued while Judge Phillips continued discussions with the parties until an agreement-in-principle was reached. Thus, Lead Counsel had a clear picture of the strengths and weaknesses of this case and of the legal and factual defenses that Defendants would likely raise had the Litigation continued.

Accordingly, Lead Plaintiff and its counsel "have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial." *City of Providence*, 2014 WL 1883494, at *7 (citing *Teachers' Ret. Sys.*, 2004 WL 1087261, at *3).

4. Establishing Liability and Damages Involves Significant Risks

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *Veeco*, 2007 WL 4115809, at *8; *Austrian & German Bank*, 80 F. Supp. 2d at 177. However, the Court need not "'decide the merits of the case or resolve unsettled legal questions'" (*Cinelli v. MCS Claim Servs.*, 236 F.R.D. 118, 121 (E.D.N.Y. 2006) (citation omitted)), or "foresee with absolute certainty the outcome of the case." *Austrian & German Bank*, 80 F. Supp. 2d at 177. Rather, the Court need only weigh the risks of litigation against the certainty of recovery offered by the Settlement. *See Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 337 (S.D.N.Y. 2005).

The risks presented by securities litigation generally weigh in favor of final settlement approval. Courts in this district '"'have long recognized that [securities] litigation is notably difficult and notoriously uncertain."'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)); *see also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation.").

While Lead Counsel believes, based on its investigation and litigation efforts to date, that the claims asserted against Defendants have merit, it also recognizes that Lead Plaintiff would (and did) face hurdles and uncertainties in prosecuting this very complex action and recovering a judgment from Defendants. Rosen Decl., ¶¶33-38.[3]

[3] As an initial matter, the Individual Defendants maintained in their motion to dismiss that this Court had no personal jurisdiction over them, as they do not have sufficient contacts with the United States.

a. Falsity and Materiality

Defendants would continue to challenge the materiality of their alleged misrepresentations and omissions, arguing that Gerdau's disclosures about its conduct were not misleading because Gerdau did not have a duty to disclose the alleged uncharged and unadjudicated conduct, and Gerdau adequately and timely disclosed to shareholders that it was being investigated in connection with Operation Zelotes, and when its facilities were searched by the Brazilian police. Defendants also argued that the Consolidated Complaint contained allegations constituting inactionable puffery and optimism. Finally, Defendants challenged Lead Plaintiff's allegations that Gerdau's internal controls, code of ethics, and SOX certification disclosures were materially false and misleading.[4]

Had any of these arguments been accepted by the Court in ruling on the motions to dismiss, or later on a motion for summary judgment, the Class would recover nothing.

b. Scienter

Even if Lead Plaintiff proved falsity and materiality, it also had to prove that Defendants acted with the requisite scienter. Specifically, Lead Plaintiff would have to establish (a) strong circumstantial evidence establishing that a defendant engaged in conscious misbehavior or was reckless, or (b) the defendant had a motive and an opportunity to commit the alleged fraud. *See ECA & Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009).

While Lead Plaintiff believes it adequately alleged that Defendants benefitted in a concrete, personal way from the alleged fraud, they engaged in deliberately illegal behavior, they knew or had access to information suggesting that their public statements were not accurate, and they had a duty

[4] Defendants argued that statements about the Company's ethical standards were not important to investors, and that any understatement of Gerdau's tax liabilities, whether intentional or not, did not materially affect the Company's financial disclosures. Rosen Decl., ¶35.

to monitor risks to Gerdau's financial health and reputation, *id.* at 199, Defendants steadfastly disagreed.

Defendants maintained that Lead Plaintiff's "group pleading" allegations do not support an allegation of scienter against any Defendant, that Lead Plaintiff failed to plead, and could not prove, that any Defendant had a motive and opportunity to commit fraud, and that Lead Plaintiff did not plead, and cannot prove, "strong circumstantial evidence" of conscious misbehavior or "reckless" conduct on the part of Gerdau or any Individual Defendant. Courts have often recognized the difficulty and substantial risk of pleading and proving scienter. *See In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 426 (S.D.N.Y. 2001); *Slomovics v. All for a Dollar*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995).[5]

Therefore, as detailed in the Rosen Declaration, while Lead Plaintiff believes that it could have satisfied its burden of establishing falsity, materiality, and scienter, it recognizes that overcoming these obstacles was not a foregone conclusion. Moreover, Lead Plaintiff faced the further risk that the Operation Zelote's investigation, which remains open, would not result in any findings of criminal conduct by Defendants. Rosen Decl., ¶35.

c. Loss Causation and Damages

Lead Plaintiff also would have faced challenges with respect to proving loss causation and the calculation of damages. *See AOL Time Warner*, 2006 WL 903236, at *9 (noting that "the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages"). To establish loss causation, Lead

[5] Lead Plaintiff faced practical challenges as well. Lead Plaintiff alleges wrongdoing that began over ten years ago. Not only would Lead Plaintiff struggle to secure deposition testimony from many relevant witnesses because they are located outside of the Court's jurisdiction, if they could even be located, and it would be almost impossible to secure their testimonies at trial.

Plaintiff has the burden to prove "a causal connection between the material misrepresentation and the loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Defendants have argued that the decline in the price of Gerdau's stock on March 26, 2015, when it was revealed that Gerdau was implicated in Operation Zelotes, is not all attributable to the alleged fraud. Rosen Decl., ¶36. In particular, Defendants argued, and may have been able to convince the trier of fact, that the Company's stock price declined because after the market closed that day, Gerdau also announced a c-suite reorganization that included positions contrary to the Brazilian SEC's qualifications for the highest listing category. *Id.* Defendants would have further argued that Lead Plaintiff bore the burden of proof in "disaggregating" the impact of this "confounding," non-fraud information. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 36 (2d Cir. 2009) ("to establish loss causation, *Dura* requires plaintiffs to disaggregate those losses caused by 'changed economic circumstances, changed investor expectations, industry-specific or firm-specific facts, conditions or other events,' from disclosures of the truth behind the alleged misstatements") (citation omitted). Defendants would have argued that this disaggregation could not be done by Lead Plaintiff's expert. Moreover, even if this disaggregation could be done, it would have substantially reduced damages.

Moreover, Defendants argued that any price declines after March 26, 2015, related to the Operations Zelotes investigation, are not recoverable damages because as of that date, the market was on notice of the investigation. Rosen Decl., ¶36. Defendants further maintained that all disclosures after March 26, 2015, were not actionable because Gerdau timely disclosed all materially relevant events after the investigation was announced, such as the search of Gerdau's premises, delay in issuing 4Q 2015 financial statements, and the recommendation by the federal police to issue indictments. *Id.* Had the finder of fact agreed with any of these assertions, recoverable damages would have been significantly reduced.

While Lead Plaintiff would have been able to present a cogent and persuasive expert's view establishing loss causation and damages, as well as the appropriate length of the Class Period, Defendants also would have been able to produce well-qualified experts who would opine against a finding of loss causation for the price declines and the length of the Class Period, giving rise to the risk of a "battle of the experts." *See Am. Bank Note*, 127 F. Supp. 2d at 427 ("'In [a] "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.'") (citation omitted); *see also* Rosen Decl., ¶36. Lead Plaintiff could not be certain which expert's view would prevail at trial. *See, e.g.*, *FLAG Telecom*, 2010 WL 4537550, at *18; *see also Sadia*, 2011 WL 6825235, at *2 ("Damages must be proved by expert testimony, which a jury may choose to reject."). Accordingly, courts have recognized that when parties will likely rely on significant expert testimony and analysis, settlement is favored. *See Park v. Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008).

Even if Lead Plaintiff successfully established loss causation, there would be no guarantee that a jury would have agreed with Lead Plaintiff's expert's calculation of damages. "Calculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." *Global Crossing*, 225 F.R.D. at 459 (citations omitted). As with loss causation, Lead Plaintiff could not be certain which expert's view would prevail at trial.

5. Maintaining Class Action Status Through Trial Presents a Substantial Risk

Lead Plaintiff had not yet moved for class certification at the time the Settlement was reached. While Lead Plaintiff believed it would prevail on any such motion, Defendants would

certainly disagree, giving rise to the risk that the Class would not be certified. Even if the Court ultimately granted the motion, Defendants may have moved to decertify the Class or to shorten the Class Period before trial or on appeal, as class certification may be reviewed at any stage of the litigation. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."); Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time). In fact, the length of the Class Period was, and would continue to be, vigorously litigated by the parties. Rosen Decl., ¶36. The presence of this risk and the uncertainty surrounding it, therefore, weighs in favor of final approval of the Settlement.

6. Defendants' Ability to Withstand a Greater Judgment

Courts generally do not find the ability of a defendant to withstand a greater judgment to be a barrier to settlement when the other factors favor the settlement. "[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *PaineWebber*, 171 F.R.D. at 129; *see also IMAX*, 283 F.R.D. at 191 ("'[A] defendant is not required to "empty its coffers" before a settlement can be found adequate.'") (citations omitted). Indeed, courts have repeatedly recognized that this factor, standing alone, does not weigh against approval of a settlement where, as here, the other factors weigh in favor of approving the settlement. *See FLAG Telecom*, 2010 WL 4537550, at *19 ("'the mere ability to withstand a greater judgment does not suggest the settlement is unfair'") (citation omitted); *McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y. 2006) ("the ability of defendants to pay more, on its own, does not render the settlement unfair, especially where the other *Grinnell* factors favor approval"). Nevertheless, a potential source of recovery from Defendants (their liability insurance policy) was diminishing through the course of the Litigation.

7. The Settlement Amount Is Reasonable in View of the Best Possible Recovery and the Risks of Litigation

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *see also Wal-Mart*, 396 F.3d at 119. A court need only determine whether the settlement falls within "'a range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted). The "range of reasonableness" has been described by the Second Circuit as a range that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, the $15.0 million Settlement is a substantial result for the Class, especially in light of the stage of litigation, the risks associated with continued litigation of this complex securities class action, and the total amount of damages. Lead Plaintiff estimates that approximately $100 million in damages could be recovered by the Class. Thus, the Settlement represents approximately 15% of maximum recoverable damages. *See In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approving settlement amounting to 5.2% of damages for common stock holders); *see also Union Carbide*, 718 F. Supp. at 1103 ("The Court of Appeals has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought. . . . The essence of settlement is compromise."); *Global Crossing*, 225 F.R.D. at 461 ("'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'") (quoting *Grinnell*, 495 F.2d at 455). Notably, however, had Defendants' loss causation arguments

been accepted in full or even in part at summary judgment or trial, damages could have been significantly lower than that amount, or eliminated entirely.

The Class' recovery of approximately 15% of estimated provable damages far exceeds the median recovery in similar securities class actions settled in 2016. *See* Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, at 36 (Figure 29) (NERA Jan. 2017). Indeed, the median settlement as a percentage of NERA-defined investor losses of $100 million to $199 million, where this case falls, was 3.2% from 1996 through 2016. *Id*. Thus, the Class' recovery as a percentage of damages is nearly ***5 times*** higher than the average settlement of cases with comparable investor losses.

Finally, the Settlement offers the opportunity to provide immediate relief to the Class, rather than a speculative payment years down the road. *See AOL Time Warner*, 2006 WL 903236, at *13 (where the settlement fund is in escrow and earning interest for the class, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"). In light of the complex legal and factual issues present here, the fairness of the Settlement is apparent. *See, e.g.*, *Maley*, 186 F. Supp. 2d at 366-67. Even if Lead Plaintiff was successful at trial, Defendants could have challenged the damages of each and every large class member in post-trial proceedings, substantially reducing any aggregate recovery by Lead Plaintiff.

Accordingly, Lead Plaintiff respectfully submits that the immediate cash benefit is well "within the range of reasonableness" in light of the best possible recovery and all the risks of litigation.

In sum, the *Grinnell* factors – including the expense and delay of further litigation, Lead Plaintiff's well-developed understanding of the strengths and weaknesses of the case, and the

significant risks of the Litigation – supports a finding that the Settlement is fair, reasonable, and adequate.

V. THE PLAN OF ALLOCATION OF THE NET SETTLEMENT FUND IS FAIR AND ADEQUATE

The standard for approval of the Plan of Allocation (the "Plan") is the same as the standard for approving the Settlement as a whole. Specifically, "'it must be fair and adequate.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (quoting *Maley*, 186 F. Supp. 2d at 367). "'As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP), 2015 WL 5918273, at *4 (E.D.N.Y. Oct. 9, 2015) (citation omitted). "'When formulated by competent and experienced class counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'" *Advanced Battery*, 298 F.R.D. at 180 (quoting *Global Crossing*, 225 F.R.D. at 462; *Am. Bank Note*, 127 F. Supp. 2d at 429-30).

The Plan, which is set forth in the Notice, was prepared by Lead Counsel's damages consultant to create a fair method to divide the Net Settlement Fund for distribution. *See* Rosen Decl., ¶¶50-53. The Plan attempted to eliminate the effects of market forces unrelated to the alleged misrepresentations and omissions, as well as to simplify claims administration with attendant reduced cost to the Class. The Net Settlement Fund will be distributed to Authorized Claimants, *i.e.*, Members of the Class who submit timely and valid Proof of Claim and Release forms that are approved for payment from the Net Settlement Fund pursuant to the Plan. The Plan treats all Class Members in a similar manner: everyone who submits a valid and timely Proof of Claim and Release form, and does not exclude himself, herself, or itself from the Class, will receive a *pro rata* share of the Net Settlement Fund in the proportion that the Authorized Claimant's claim bears to the total of

the claims of all Authorized Claimants so long as such Authorized Claimant's payment amount is $10.00 or more.

Indeed, it is appropriate for distributions to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of the purchases of the securities at issue. *See In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001). Otherwise, certain Class Members may receive an inequitable windfall, to the detriment of others. *PaineWebber*, 171 F.R.D. at 133.

Lead Counsel believes that the Plan is fair and reasonable and respectfully submits that it should be approved by the Court. Notably, there have been no objections to the Plan to date, which also supports the Court's approval. *See Veeco*, 2007 WL 4115809, at *7; *Maley*, 186 F. Supp. 2d at 367.

VI. NOTICE TO THE CLASS SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Rule 23 of the Federal Rules of Civil Procedure requires that notice of a settlement be "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); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Additionally, notice of a settlement must be directed to class members in a "reasonable manner." Fed. R. Civ. P. 23(e)(1). Notice of a settlement satisfies Rule 23(e) and due process where it fairly apprises "'members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114 (citations omitted); *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26-27 (2d Cir. 2014). "Notice need not be perfect" or received by every class member, but instead be reasonable under the circumstances. *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008). "There are no rigid standards to determine the reasonableness of notice."

Salix, 2017 U.S. Dist. LEXIS 132515, at *4. Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *Merrill Lynch*, 249 F.R.D. at 133 (citing *Wal-Mart*, 396 F.3d at 114).

The Notice and the method utilized to disseminate the Notice to potential Class Members satisfies these standards. The Court-approved Notice amply apprises Class Members of, *inter alia*: (1) the pendency of the Litigation; (2) the nature of the Litigation and the Class' claims; (3) the essential terms of the Settlement; (4) the proposed Plan; (5) Class Members' rights to request exclusion from the Class or object to the Settlement, the Plan, or the requested attorneys' fees or expenses; (6) the binding effect of a judgment on Class Members; and (7) information regarding Lead Counsel's motion for an award of attorneys' fees and expenses. *See* Sylvester Decl., Ex. A. The Notice also provides specific information regarding the date, time, and place of the Settlement Hearing, and sets forth the procedures and deadlines for: (1) submitting a Proof of Claim and Release; (2) requesting exclusion from the Class; and (3) objecting to any aspect of the Settlement, including the proposed Plan and the request for attorneys' fees and expenses.

The Notice also contains the information required by the PSLRA, 15 U.S.C. §78u-4(a)(7), including: (1) a statement of the amount to be distributed, determined in the aggregate and on an average per share basis; (2) a statement of the potential outcome of the case (*i.e.*, whether there was agreement or disagreement on the amount of damages); (3) a statement indicating the attorneys' fees and costs sought; (4) identification and contact information of counsel; and (5) a brief statement explaining the reasons why the parties are proposing the Settlement. *See* Sylvester Decl., Ex. A; *see also In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 184 (S.D.N.Y. 2003).

In accordance with the Preliminary Approval Order, Gilardi commenced the mailing of the Notice Package by first-class mail to potential Class Members, brokers, and nominees on July 31,

2017. Sylvester Decl., ¶¶5-8. As of September 20, 2017, over 36,900 copies of the Notice Package have been mailed. *Id.*, ¶11. Gilardi also published the Summary Notice in *The Wall Street Journal* and transmitted it over the *Business Wire* on August 4, 2017. *Id.*, ¶14. Additionally, Gilardi posted the Notice Package, as well as other important documents, on the website maintained for the Settlement. *Id.*, ¶13.[6]

This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by mailed notice to brokers and nominees and publication of the Summary Notice in a relevant, widely-circulated publication and internet newswire, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). This method of providing notice has been repeatedly approved for use in securities class actions and other comparable class actions. *See, e.g.*, *Sadia*, 2011 WL 6825235, at *1; *Salix*, 2017 U.S. Dist. LEXIS 132515, at *4; *Advanced Battery*, 298 F.R.D. at 182-83.

VII. CONCLUSION

The Settlement obtained here is a very good one under the circumstances. Therefore, for the foregoing reasons, Lead Plaintiff respectfully requests that this Court enter the proposed final Judgment approving the Settlement, and approving the notice program. Lead Plaintiff also requests that the Court enter an order approving the Plan, which will govern distribution of the Net Settlement Fund.

[6] The Notice and Summary Notice reference the Internet website for the Settlement. *See* Sylvester Decl., Exs. A and D.

DATED: September 22, 2017

Respectfully submitted,

s/ Ellen Gusikoff Stewart

Henry Rosen
Ellen Gusikoff Stewart
Susannah R. Conn
ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
henryr@rgrdlaw.com
elleng@rgrdlaw.com
sconn@rgrdlaw.com

Samuel H. Rudman
David A. Rosenfeld
ROBBINS GELLER RUDMAN
& DOWD LLP
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com
drosenfeld@rgrdlaw.com

Christopher C. Gold
ROBBINS GELLER RUDMAN
& DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)
cgold@rgrdlaw.com

Lead Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Ellen Gusikoff Stewart, hereby certify that on September 22, 2017, I caused a true and correct copy of the attached:

> Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Settlement and Approval of Plan of Allocation

to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filings to all counsel registered to receive such notice.

s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART