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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM LAMARTINA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. VMWARE, INC., et al., Defendants.	Case No. 5:20-cv-02182-EJD (VKD) CLASS ACTION LEAD PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: November 14, 2024 TIME: 9:00 a.m. JUDGE: Honorable Edward J. Davila CTRM: 4, 5th Floor

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SECONDARY AUTHORITIES

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on November 14, 2024, at 9:00 a.m., before the Honorable Edward J. Davila, at the United States District Court for the Northern District of California, Courtroom 4 – 5th Floor, 280 South 1st Street, San Jose, CA 95113, class representative Eastern Atlantic States Carpenters Pension Fund ("Lead Plaintiff" or "Class Representative"), on behalf of itself and all members of the certified Class, will and does hereby move the Court for an Order, pursuant to Rule 23 of the Federal Rules of Civil Procedure: (i) preliminarily approving the proposed settlement (the "Settlement") of this Action as set forth in the Stipulation;[1] (ii) authorizing the retention of Gilardi & Co. LLC ("Gilardi") as the administrator for the Settlement; (iii) approving the form and manner of giving notice of the proposed Settlement to the Class; (iv) scheduling a hearing before the Court to determine whether the proposed Settlement, the proposed Plan of Allocation, and Lead Counsel's motion for an award of attorneys' fees and litigation expenses, including an award to the Class Representative, should be approved; and (v) providing such other and further relief as this Court deems just and proper.

This motion is based on the Memorandum of Points and Authorities below and Appendix A thereto, the Saham Declaration and exhibits attached thereto, the Declaration of Peter Crudo Regarding Notice and Administration submitted herewith (the "Crudo Decl."), the Stipulation and attached exhibits, all prior pleadings in this Litigation, and such additional evidence or argument as may be requested by the Court.

A proposed Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order") with annexed exhibits is also submitted herewith.

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[1] All capitalized terms not defined herein shall have the same meanings as set forth in the Stipulation of Settlement dated October 4, 2024 (the "Stipulation"), a true and correct copy of which is attached as Exhibit 1 to the Declaration of Scott H. Saham in Support of Lead Plaintiff's Motion for Preliminary Approval of Proposed Class Action Settlement (the "Saham Decl."), submitted herewith. Emphasis is added and citations are omitted throughout unless otherwise noted.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the $102,500,000.00 cash recovery and the other terms of the Settlement of this Action are within the range of fairness, reasonableness, and adequacy to warrant the Court's preliminary approval and the dissemination of notice of its terms to Class Members.

2. Whether the Court should approve the form and substance of the proposed Notice of Pendency and Proposed Settlement of Class Action ("Notice"), Proof of Claim and Release Form ("Proof of Claim"), Summary Notice, and Postcard Notice, appended as Exhibits A-1 through A-4 to the Preliminary Approval Order, as well as the manner of notifying the Class of the Settlement.

3. Whether the Court should set a date for a hearing to determine whether the Settlement and the Plan of Allocation should be finally approved, and to consider Lead Counsel's application for an award of attorneys' fees and payment of expenses, including an award to the Class Representative pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class ("Settlement Hearing").

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Lead Plaintiff, on behalf of all persons and entities who purchased the publicly traded Class A common stock of VMware during the Class Period and were damaged thereby (the "Class"),[2] and defendants VMware LLC ("VMware" or the "Company") and Patrick P. Gelsinger and Zane Rowe ("Individual Defendants" and together with VMware, "Defendants") have reached a proposed Settlement of this securities class action for $102.5 million cash. The Class consists of thousands of investors who in aggregate purchased an estimated 54.9 million damaged shares. Lead Plaintiff is seeking an attorney fee award not to exceed 25% of the Settlement Amount, in addition to expenses not to exceed $950,000, plus interest on both amounts, to be paid from the Settlement Fund. Lead Plaintiff also estimates that other expenses associated with the dissemination of the Postcard Notice

[2] The Class Period is August 24, 2018, to February 27, 2020, inclusive.

and distribution of the Settlement Fund will total approximately $243,375.[3] Thus Lead Plaintiff estimates that 73.8% of the fund or approximately $75.6 million will be distributed to the Class pursuant to the Plan of Allocation (*see* Stipulation, Ex. A-1 at 8-14), which mirrors the damages suffered by the Class in this Action. Lead Plaintiff further estimates that the average recovery per share will be approximately $1.37. Pursuant to the Stipulation, the Settling Parties propose the Council of Institutional Investors ("CII") as the designated *cy pres* recipient for any *de minimis* balance remaining after all reallocations are completed. *See* Stipulation, ¶5.9. Finally, the proposed method of notice is detailed in the Crudo Declaration. This method has been repeatedly approved by Courts in this District. Based on the details set forth herein, Lead Plaintiff now moves the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, applicable Ninth Circuit precedent, and the guidelines set forth in the Northern District of California's Procedural Guidance for Class Action Settlements (the "Guidelines"),[4] to preliminarily approve the Settlement.

The Settlement is the product of a "mediator's proposal" and came after over four years of hard-fought litigation and thus at a time when the Settling Parties were fully aware of the strengths and potential weaknesses of their respective positions.[5] As set forth below, the Settlement was reached following: review of over 800,000 pages of documents, 10 depositions, lengthy discussions with leading experts, and lengthy and in-depth negotiations between experienced counsel, with the assistance of the Honorable Layn R. Phillips (Ret.) and Phillips ADR Enterprises, a highly respected mediation firm that has extensive experience in complex securities litigation. The Settlement, which

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[3] This estimate is highly dependent on the number of notices ultimately emailed and mailed and the number of claims ultimately received. *See* Crudo Decl., ¶28.

[4] The Guidelines are addressed in Appendix A attached hereto. While a court may "consider them," the Guidelines "do not carry the weight of law." *Norton v. LVNV Funding, LLC*, 2021 WL 3129568, at *12 (N.D. Cal. July 23, 2021).

[5] The term "Settling Parties" as used herein refers collectively to Lead Plaintiff and Defendants.

represents a range of 10.7% to 34% of the estimated aggregate damages in this case, and which is nearly 13 times what the SEC recovered from VMware, is an exceptional result for the Class and falls significantly above the typical range of percentage recoveries in securities class actions.

Prior to reaching the Settlement, Lead Plaintiff had significantly advanced this Action by, among other things: (i) filing detailed complaints, culminating in the Third Amended Consolidated Complaint for Violations of the Federal Securities Laws (ECF 85) ("Third Amended Complaint"); (ii) litigating two rounds of Defendants' motions to dismiss, including additional supplementary briefing; (iii) completing extensive fact discovery involving the exchange and review of approximately 650,000 pages of documents between the Settling Parties, 10 fact depositions, and over 30 subpoenas issued to third-parties which culminated in the receipt and review of over 25,000 documents (approximately 175,000 pages); and (iv) successfully obtaining class certification. Even considering the considerable progress that Lead Plaintiff achieved in advancing the Action, when evaluating the merits of the Settlement, Lead Plaintiff recognized that, even if it were to prevail on summary judgment and at trial, Defendants likely would appeal any favorable judgment, delaying and possibly jeopardizing any recovery.

Accordingly, Lead Plaintiff developed a keen understanding of the strengths and weaknesses of its claims and respectfully submits that the Settlement is in the best interests of the Class, represents a significant recovery, and merits preliminary approval.

II. OVERVIEW OF THE LITIGATION

A. Factual Background

The allegations and claims in this Action are familiar to the Court, and so Lead Plaintiff shall only briefly describe them at this preliminary approval stage. Lead Plaintiff alleged that during the Class Period (August 24, 2018, through February 27, 2020), Defendants made materially false or misleading statements in violation of §10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder, which caused the price of VMware stock to trade at artificially inflated prices. Specifically, Lead Plaintiff alleged that Defendants deceptively recorded VMware's sales as backlog so that the revenue from those sales could be recognized in subsequent

quarters as opposed to the quarter in which they were actually made. The Third Amended Complaint alleged that Defendants inflated backlog with sales that were not required to meet current period guidance throughout Fiscal Year ("FY") 2019, which misled investors as to the likelihood that FY 2020 guidance would be met. The Third Amended Complaint further alleged that Defendants treated the inflated backlog – nearly half a billion dollars at the end of FY 2019 – as a slush fund, drawing on it throughout FY 2020 rather than recognizing the revenue in FY 2019. The Third Amended Complaint alleged that by deferring revenue to FY 2020, VMware was able to continue to deliver double-digit earnings growth in FY 2020, despite operational challenges that year.

Lead Plaintiff alleged that the truth of Defendants' conduct came to light through a series of partial disclosures in FY 2020, culminating on February 27, 2020, when the Company revealed that: (1) VMware's total backlog had declined 96% from its peak just one year prior; (2) VMware poorly managed the industry-shift to subscription and SaaS products; and (3) VMware could not meet Q4 2020 or FY 2020 revenue guidance issued just three months prior. The same day, VMware also announced that in December 2019, the SEC launched an investigation into the Company's backlog and associated accounting and disclosures, on the heels of the sudden resignation of the Company's Chief Accounting Officer. Lead Plaintiff alleged that persons who purchased VMware stock during the Class Period suffered economic losses when the price of VMware stock declined as a result of the disclosures that revealed the backlog issues to investors. Defendants deny Lead Plaintiff's allegations.

B. Procedural History

The initial complaint was filed on March 31, 2020. ECF 1. On July 20, 2020, the Court appointed Eastern Atlantic States Carpenters Pension Fund as Lead Plaintiff, and Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as Lead Counsel. ECF 45. Lead Plaintiff filed a Consolidated Complaint for Violations of the Federal Securities Laws (the "Amended Complaint") on September 18, 2020. ECF 50. The Amended Complaint asserted violations of §§10(b), 20(a), and 20A of the Exchange Act. Defendants filed their motion to dismiss the Amended Complaint on

November 17, 2020. ECF 51. On September 10, 2021, the Court issued an Order Granting in Part and Denying in Part Motion to Dismiss with Leave to Amend. ECF 60.

On October 8, 2021, Lead Plaintiff filed the Second Amended Consolidated Complaint for Violations of the Federal Securities Laws (the "Second Amended Complaint"). ECF 63. On November 5, 2021, Defendants again moved for dismissal. ECF 64. On September 12, 2022, while Defendants' motion to dismiss the Second Amended Complaint was pending, the U.S. Securities and Exchange Commission issued an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (the "SEC Order") against VMware. *See* ECF 77. The Court thereafter permitted the parties to provide additional briefing on Defendants' motion to dismiss concerning the effect of the SEC Order on the allegations in the Second Amended Complaint. ECF 81.

After the supplemental briefing, the Court held that Lead Plaintiff had adequately pled its §§20(a) and 20A claims, as well as certain of its §10(b) and Rule 10b-5 claims, and ordered Lead Plaintiff to file the redlined Second Amended Complaint as a Third Amended Consolidated Complaint for Violations of the Federal Securities Laws. ECF 84. Lead Plaintiff filed the Third Amended Complaint on April 6, 2023. ECF 85.

Defendants answered the Third Amended Complaint on April 20, 2023 (ECF 86), and the parties began formal fact discovery. The parties exchanged and reviewed more than 100,000 documents (encompassing approximately 650,000 pages) from over a dozen custodians associated with VMware and the production of nearly 25,000 documents (approximately 175,000 pages) from 30 third parties subpoenaed to produce documents. Lead Plaintiff took 10 fact witness depositions, and propounded dozens of Requests for Production of Documents, Requests for Admission, and Interrogatories on Defendants. Lead Plaintiff also produced documents in response to Defendants' requests.

On July 2, 2024, the Court issued its Order Granting Motion for Class Certification ("Class Certification Order") and appointing Lead Plaintiff as Class Representative and appointing Robbins

Geller as Class Counsel. ECF 171. The Class Members are persons who purchased the publicly traded Class A common stock of VMware during the Class Period, and who were damaged thereby.[6] At the time the Settlement was achieved, the parties were in the process of preparing to exchange expert reports on various issues, including loss causation, damages, and insider trading, ahead of motions for summary judgment and motions to exclude expert testimony.

During the course of the Action, the parties engaged a neutral, third-party mediator, the Hon. Layn R. Phillips (Ret.) of Phillips ADR. The parties engaged in two mediation sessions, one that was in person in Judge Phillips' offices in Corona Del Mar, California, and one that was conducted by videoconference over Zoom. In the interim, the parties also participated in numerous teleconferences with Judge Phillips in an effort to resolve the Action. The parties also exchanged mediation briefs ahead of their in-person mediation session, setting forth their respective arguments concerning liability and damages, and their respective views of the merits of the Action. Though the parties' initial mediation session on March 1, 2024 was unsuccessful in resolving the Action, the parties continued to have telephonic and email exchanges with Judge Phillips regarding a potential resolution. On July 19, 2024, the parties attended the videoconference mediation session with Judge Phillips. Following a detailed evidentiary presentation including deposition testimony and key evidence obtained in discovery, the mediation session resulted in a "mediator's proposal" to settle the Action for $102.5 million in cash, which the parties accepted.

[6] Guideline §1(b) states that, "if a [litigation] class has been certified," "[t]he motion for preliminary approval should state . . . [a]ny differences between the settlement class and the . . . certified class . . . and an explanation as to why the differences are appropriate." Here, the certified class is identical to that contained in the Settlement, a factor that "weighs in favor of preliminary approval." *Norton*, 2021 WL 3129568, at *12.

III. THE PROPOSED SETTLEMENT

The Settlement requires Defendants to pay, or cause to be paid, $102.5 million (the "Settlement Amount"), which amount, plus all interest and accretions thereto, comprises the Settlement Fund. Stipulation, ¶2.1.

Notice to the Class and the cost of settlement administration will be funded by the Settlement Fund. Stipulation, ¶2.7. Lead Plaintiff proposes that Gilardi, a nationally-recognized class action settlement administrator, be retained as claims administrator, subject to the Court's approval. Gilardi was chosen following a competitive bidding process and Lead Counsel's careful review of proposals from several reputable settlement administrators. After reviewing the bids from each administrator, Lead Counsel concluded that Gilardi, because of the merits of its bid, its experience, and the quality of its work in prior engagements for Lead Counsel, is best suited to execute the claims administration in this Action. Lead Counsel respectfully requests that the Court approve its selection. Based on the estimate provided by Gilardi, and assuming that no unexpected or extraordinary issues arise, it expects notice and claims administration costs to be approximately $243,375 through the initial distribution. *See, e.g.*, Crudo Decl., ¶28. The proposed notice plan and plan for claims processing is discussed below in §§IV.C.5 and VI and in the Crudo Declaration.

The Notice and Postcard Notice provide that Lead Counsel will move for final approval of the Settlement and: (i) an award of attorneys' fees in the amount of no more than 25% of the Settlement Amount; (ii) payment of expenses or charges resulting from the prosecution of the Action not in excess of $950,000; (iii) any interest on such amounts at the same rate and for the same period as earned by the Settlement Fund; and (iv) may request an award to Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class.

Once Notice and Administration Costs, Taxes, Tax Expenses, and Court-approved attorneys' fees and expenses and any award to Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class have been paid from the Settlement Fund, the remaining amount (the "Net Settlement Fund"), shall be distributed pursuant to the Court-approved Plan of Allocation to Authorized Claimants. Stipulation, ¶5.5. These distributions shall be repeated until the balance

remaining in the Settlement Fund is *de minimis*. *Id.*, ¶5.9. Any *de minimis* balance that still remains in the Net Settlement Fund after such reallocation(s) and payment(s) and that is not feasible or economical to reallocate shall be donated to CII, a nonprofit, nonpartisan association of U.S. public, corporate and union benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments (subject to Court approval). *Id.* "CII promotes policies that enhance long-term value for U.S. institutional asset owners and their beneficiaries." cii.org/about.[7] The Plan of Allocation treats all Class Members equitably based on the timing of their VMware Class A common stock purchases and sales.

In exchange for the benefits provided under the Stipulation, all Class Members will release all claims (including, but not limited to, Unknown Claims), demands, losses, rights, and causes of action of any nature whatsoever, that have been or could have been asserted in the Action or could in the future be asserted in any forum, whether foreign or domestic, whether arising under federal, state, common or foreign law, by Lead Plaintiff, any member of the Class, or their successors, assigns, executors, administrators, representatives, attorneys and agents, whether brought directly or indirectly against any of the Released Defendants Parties, which arise out of, are based on, or relate in any way to, directly or indirectly: (i) any of the allegations, acts, transactions, facts, events, matters, occurrences, representations or omissions involved, set forth, alleged or referred to, in the Action, or which could have been alleged in the Action; and (ii) the purchase, acquisition, transfer,

[7] Accordingly, CII satisfies the "substantial nexus" test, since it "bears a substantial nexus to the interests of the class members," *In re Google Location History Litig.*, 2024 WL 1975462, at *12 (N.D. Cal. May 3, 2024), and complements the objectives of the federal securities laws. H.R. Conf. Rep. No. 104-369, at 31 (1995) (Congress noted that the broader purpose of the federal securities laws is "to protect investors and to maintain confidence in the securities markets, so that our national savings, capital formation and investment may grow for the benefit of all Americans").

holding, ownership, disposition or sale of VMware Class A common stock, by any members of the Class during the Class Period.[8] Stipulation, ¶¶1.21, 4.1.

Lastly, under the terms of the Stipulation, there is no clear sailing agreement, and Defendants have no right to the return of the Settlement Fund for any reason upon the occurrence of the Effective Date. Stipulation, ¶5.9. *See also* N.D. Cal. Guid. §1(g) (requiring the disclosure of any reversions).

IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

As a matter of public policy, settlement is a strongly favored method for resolving disputes, "'particularly where complex class action litigation is concerned.'" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019). Settlement of complex cases contributes to the efficient utilization of scarce judicial resources and achieves the speedy resolution of justice. *See, e.g.*, *McKnight v. Uber Techs., Inc.*, 2017 WL 3427985, at *2 (N.D. Cal. Aug. 7, 2017) ("The Ninth Circuit maintains a 'strong judicial policy' that favors the settlement of class actions."). With respect to "complex securities actions" like this one, "federal courts [have] long recognized the public policy in favor of . . . settlement." *Nelson v. Bennett*, 662 F. Supp. 1324, 1334 (E.D. Cal. 1987) ("'[T]here is an overriding public interest in settling and quieting litigation. This is particularly true . . .' in these days of burgeoning federal litigation, [where] the promotion of settlement is, as a practical matter, an absolute necessity."). Moreover, the Ninth Circuit "has long

[8] When a litigation class has been certified, Guideline §1(b) requires explanation regarding "[a]ny differences between the claims to be released and the claims . . . certified for class treatment." Here, the release is tailored to the allegations in the Third Amended Complaint and claims that could have been brought based on the factual underpinnings of those allegations. Courts look approvingly on releases that do not "'go[] beyond the scope of the present litigation,'" are "based on the facts of the complaint," and are made "with[] regard to the breadth of Plaintiffs' allegations in the complaint." *Terry v. Hoovestol, Inc.*, 2018 WL 4283420, at *5 (N.D. Cal. Sept. 7, 2018).

deferred to the private consensual decision of the parties" in such cases. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

Approval of class action settlements normally proceeds in two stages: (i) preliminary approval, followed by notice to the class; and (ii) final approval. *See, e.g.*, *West v. Circle K Stores, Inc.*, 2006 WL 1652598, at *2 (E.D. Cal. June 13, 2006). By this motion, Lead Plaintiff requests that the Court take the first step in the approval process by granting preliminary approval of the Settlement. At the preliminary approval stage, the court must "determine whether the settlement falls 'within the range of possible approval.'" *Terry*, 2018 WL 4283420, at *1 (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007)). Courts grant preliminary approval when the proposed settlement: "(1) appears to be the product of serious, informed, non-collusive negotiations; (2) does not grant improper preferential treatment to class representatives or other segments of the class; (3) falls within the range of possible approval; and (4) has no obvious deficiencies." *Ang v. Bimbo Bakeries USA, Inc.*, 2020 WL 2041934, at *4 (N.D. Cal. Apr. 28, 2020). If the court "finds the proposed settlement fair to its members," it will then "schedule[] a fairness hearing where it will make a final determination of the class settlement." *In re Haier Freezer Consumer Litig.*, 2013 WL 2237890, at *3 (N.D. Cal. May 21, 2013).

In addition, pursuant to Rule 23(e)(1), the issue at preliminary approval turns on whether the Court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). As to the latter requirement, the Court need not determine whether it could certify a class here because it has already certified the Class. *See* Class Certification Order. Rule 23(e)(2) provides the following factors:

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

Fed. R. Civ. P. 23(e)(2). While these Rule 23(e)(2) factors focus on core concerns of procedure and substance of a settlement, they are not intended to fully displace factors previously adopted by courts to evaluate settlements. *See, e.g.*, *Wong v. Arlo Techs., Inc.*, 2021 WL 1531171, at *5 (N.D. Cal. Apr. 19, 2021) ("[T]he Court applies the framework set forth in Rule 23 with guidance from the Ninth Circuit's precedent."). In this respect, the Ninth Circuit has long considered the following factors when evaluating a class settlement, some of which overlap with Rule 23(e)(2):

> [T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998); *see also e.g.*, *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (discussing the *Hanlon* factors).

As discussed below, the proposed Settlement readily satisfies each of the factors identified under Rule 23(e)(2), as well as the applicable Ninth Circuit *Hanlon* factors and Northern District Guidelines. Therefore, preliminary approval should be granted and notice of the proposed Settlement should be sent to the Class in advance of the final Settlement Hearing.

A. The Settlement Satisfies the Rule 23(e)(2) Factors

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

Lead Plaintiff and Lead Counsel have adequately represented the Class as required by Rule 23(e)(2)(A). The Settlement is the result of over four years of diligent prosecution of this Action on behalf of the Class. *See Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *6 (N.D. Cal. Dec. 18, 2018) (ruling that Rule 23(e)(2)(A) satisfied for purposes of finally approving settlement and finding "Class Counsel had vigorously prosecuted this action through dispositive motion practice, extensive . . . discovery, and formal mediation"); *In re Extreme Networks, Inc. Sec. Litig.*, 2019 WL 3290770, at *7 (N.D. Cal. July 22, 2019) (same).

Similarly, the Ninth Circuit tasks trial courts with resolving two questions to determine "legal adequacy: (1) do[es] the named plaintiff[] and [its] counsel have any conflicts of interest with other

class members and (2) will the named plaintiff[]and [its] counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. The Court previously found Lead Plaintiff and Lead Counsel adequate to represent the Class, *see* Class Certification Order at 6-7, and no evidence to the contrary has since emerged. Moreover, Lead Plaintiff and Lead Counsel have no interests antagonistic to other Class Members; Lead Plaintiff's claims are typical of the Class's claims; and their interest in obtaining the largest possible recovery for VMware investors is aligned with that of the Class. *Mild v. PPG Indus., Inc.*, 2019 WL 3345714, at *3 (C.D. Cal. July 25, 2019) ("Because Plaintiff's claims are typical of and coextensive with the claims of the Settlement Class, his interest in obtaining the largest possible recovery is aligned with the interests of the rest of the Settlement Class members."). Finally, the substantial monetary recovery obtained after the four years of litigation preceding the Settlement speaks for itself and is an exceptional result for Lead Plaintiff and the Class.

2. The Proposed Settlement Is the Result of Good Faith, Arm's-Length Negotiations by Informed, Experienced Counsel Who Were Aware of the Risks of the Litigation

Rule 23(e)(2)(B) asks whether a proposed settlement is procedurally adequate, *i.e.*, whether "the proposal was negotiated at arm's length." There is an initial presumption that a proposed settlement is fair and reasonable when it is "the product of arms-length negotiations." *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 1991529, at *6 (N.D. Cal. June 30, 2007). The Ninth Circuit and the district courts within it "put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution." *Rodriguez*, 563 F.3d at 965; *accord Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair.").

Here, the proposed Settlement was achieved only after two mediation sessions with Judge Phillips – an experienced mediator with considerable knowledge, experience, and expertise in the field of federal securities law – as well as various teleconferences and correspondences regarding a

potential resolution of the Action. Lead Counsel and Defendants' counsel prepared and presented submissions to Judge Phillips concerning their respective views on the merits of the Action, along with supporting evidence obtained through discovery, and the negotiations were at all times adversarial and performed at arm's length. The protracted negotiations under the supervision of a neutral, experienced mediator, together with a "mediator's proposal," are evidence that the $102.5 million Settlement was reached at arm's length. *See Hefler*, 2018 WL 6619983, at *6 ("[T]he Settlement was the product of arm's length negotiations through two full-day mediation sessions and multiple follow-up calls supervised by former U.S. District Judge Layn Phillips."); *In re MGM Mirage Sec. Litig.*, 708 F. App'x 894, 897 (9th Cir. 2017) (noting district court approved settlement reached "after extensive negotiations before a nationally recognized mediator, retired U.S. District Judge Layn R. Phillips").

Moreover, at the time it negotiated the Settlement on behalf of the Class, Lead Counsel had already engaged in exhaustive fact discovery. "A settlement is presumed to be fair if reached in arms-length negotiations after relevant discovery has taken place." *Pataky v. Brigantine, Inc.*, 2018 WL 3020159, at *3 (S.D. Cal. June 18, 2018). In sum, Lead Counsel, who are experienced securities litigators, were armed with extensive information generated through over four years of litigation at the time the Settling Parties (with Judge Phillips' assistance) negotiated the Settlement.

3. The Settlement Provides Adequate Relief for the Class

Pursuant to Rule 23(e)(2)(C), the Court also must consider whether "the relief provided for the class is adequate, taking into account" four relevant factors that are addressed below.[9] While each of these factors supports preliminary approval of the Settlement, as an initial matter, the $102.5

[9] In addition to the fourth *Hanlon* factor ("the amount offered in settlement"), which is subsumed within the Rule 23(e)(2)(C) analysis, courts also evaluate the requirements of Guideline §1(e) with regard to "'[t]he anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.'" *See, e.g.*, *Norton*, 2021 WL 3129568, at *13 (alteration in original).

million recovery achieved by the Settlement is undeniably a great result for the Class.[10] *See Wong*, 2021 WL 1531171, at *9 ("'The relief that the settlement is expected to provide to class members is a central concern,' though it is not enumerated among the factors of Rule 23(e)."") (quoting 2018 Advisory Committee Notes to Fed. R. Civ. P. 23).

Here, the recovery is estimated to be between 10.7% and 34% of recoverable damages depending on whether certain arguments expected to be asserted by Defendants were ultimately accepted by the Court or trier of fact. This is a tremendous result, and the recovery here is nearly 13 times larger than the recovery obtained by the SEC. *See, e.g.*, *Hefler*, 2018 WL 6619983, at *8 (finding 15% recovery weighed in favor of approving settlement as it was "higher than recoveries achieved in other securities fraud class actions of similar size (over $1 billion in estimated damages), which settled for median recoveries of 2.5 percent between 2008 and 2016, and 3 percent in 2017"); *In re Zynga Inc. Sec. Litig.*, 2015 WL 6471171, at *11 (N.D. Cal. Oct. 27, 2015) (14% recovery "exceeds the typical recovery" in securities fraud class action settlements); *Cheng Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *9 (C.D. Cal. Oct. 10, 2019) ("A 10% recovery of estimated damages is a favorable outcome in light of the challenging nature of securities class action cases."). As discussed more fully below, the benefits conferred on Class Members by the Settlement far outweigh the costs, risks, and delay of further litigation, and the attorneys' fees and expenses to be requested are reasonable. Accordingly, the relief provided by the Settlement is adequate and supports approval.

a. The Costs, Risks, and Delay of Trial and Appeal Support Approval of the Settlement

The factors presented by Rule 23(e)(2)(C)(i) are satisfied because the $102.5 million recovery provides a significant and immediate benefit to the Class, especially in light of the costs,

[10] Guideline §1(g) requires discussion of "whether . . . money originally designated for class recovery will revert to any defendant." No such reversion is present here.

risks, and delay posed by continued litigation.[11] "'[S]ecurities actions are highly complex and . . . securities class litigation is notably difficult and notoriously uncertain.'" *Hefler*, 2018 WL 6619983, at *13; *see also Mauss v. NuVasive, Inc.*, 2018 WL 6421623, at *6 (S.D. Cal. Dec. 6, 2018) (recognizing that "[s]ecurities class actions are complex actions to litigate" and often involve "complex and highly risky trial and likely post-trial appeals and motion practice").

While Lead Plaintiff at all times remained confident in its ability to ultimately prove its claims at trial, it would be required to prove all elements of its claims to prevail, while Defendants needed to succeed on only one defense to potentially defeat the entire Action. Here, Defendants advanced several arguments disputing both liability and damages; for example, Defendants raised numerous challenges disputing the actionability of their alleged misstatements and vigorously disputed scienter. ECF 64; *see In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) ("[T]he issue[] of scienter . . . [is] complex and difficult to establish at trial."). Defendants also challenged Lead Plaintiff's theory of loss causation, arguing that the alleged corrective stock price movements were caused by factors unrelated to Lead Plaintiff's allegations. ECF 64; *see Zynga*, 2015 WL 6471171, at *9 ("[I]n 'any securities litigation case, it [is] difficult for [plaintiff] to prove loss causation and damages at trial.'" (Second and third alterations in original)). Moreover, the sheer complexity of the underlying issues here and the fact that Defendants would engage competing expert witnesses to testify in support of Defendants' major defenses, were substantial obstacles to Lead Plaintiff's potential for success at trial. *See, e.g.*, *Weeks v. Kellogg Co.*, 2013 WL 6531177, at *13 (C.D. Cal. Nov. 23, 2013) ("The fact that this issue, which is at the heart of plaintiffs' case, would have been the subject of competing expert testimony suggests that

[11] Rule 23(e)(2)(C)(i) essentially incorporates the first three traditional *Hanlon* factors. *See, e.g.*, *Wong*, 2021 WL 1531171, at *8 (citing *Hanlon*, 150 F.3d at 1026); *Norton*, 2021 WL 3129568, at *5 ("The first three [*Hanlon*] factors are addressed together and require the court to assess the plaintiff's 'likelihood of success on the merits and the range of possible recovery' versus the risks of continued litigation and maintaining class action status through the duration of the trial.").

plaintiffs' ability to prove liability was somewhat unclear; this favors a finding that the settlement is fair.").

Barring the Settlement, this case would require the expenditure of substantial additional sums of time and money at trial and beyond, with no guarantee that any additional benefit would be provided to the Class. Even if Lead Plaintiff succeeded and met its burdens with respect to falsity, materiality, scienter, class-wide reliance under the "fraud on the market" presumption, loss causation, the measure of per-share damages (if any), and control person liability, the case would still be far from over. Defendants would have likely argued that they had the opportunity to challenge an individual Class Member's membership in the Class, and the amount of damages due to each Class Member. Such a process would have been lengthy, complex, and extremely costly. Moreover, Defendants would almost certainly file an appeal after either or both phases of the case – a process that would further extend the litigation for years and risk reversal of any verdict in favor of Lead Plaintiff. Conversely, the Settlement confers a substantial and immediate benefit on the Class, and avoids the risks associated with obtaining a wholly speculative (though potentially larger) sum in the future.

In sum, Defendants had "plausible defenses that could have ultimately left class members with a reduced or non-existent recovery," which weighs in favor of approving the Settlement. *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 999 (N.D. Cal. 2015). Defendants have denied any wrongdoing, and would have presented a multi-pronged defense to Lead Plaintiff's claims at summary judgment, trial, and in subsequent appeals. The Settlement thus balances the risks, costs, and delay inherent in complex cases. Given the risks of continued litigation and the time and expense that would be incurred to prosecute the Action through trial and beyond, the $102.5 million Settlement is a significant recovery that is in the Class's best interests.

b. The Proposed Method for Distributing Relief Is Effective

The method for distributing relief to eligible claimants and for processing Class Members' claims includes standard, well-established, and effective procedures for processing claims and efficiently distributing the Net Settlement Fund, and is therefore an effective method of distribution

to the Class under Rule 23(e)(2)(C)(ii). The notice plan includes email and/or direct mail notice to all those who can be identified with reasonable effort, supplemented by publication of the Summary Notice in *The Wall Street Journal* and once over a national newswire service. The Notice and Summary Notice also will be posted on the case website (www.VMwareSecuritiesLitigation.com).

The claims process also includes a standard claim form that requests the information necessary to calculate a claimant's claim amount pursuant to the Plan of Allocation. The Plan of Allocation will govern how Class Members' claims will be calculated and, ultimately, how money will be distributed to Authorized Claimants. The Plan of Allocation was prepared with the assistance of Lead Plaintiff's damages expert and is based primarily on the expert's event study and analysis estimating the amount of artificial inflation in the price of VMware Class A common stock during the Class Period.

c. Proposed Attorneys' Fees, Litigation Expenses, and Lead Plaintiff's Award

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment."[12] Lead Counsel intends to seek an award of attorneys' fees of no more than 25% of the Settlement Amount and expenses in an amount not to exceed $950,000, plus interest on both amounts. Lead Counsel will provide more detailed information in their forthcoming application for attorneys' fees and expenses that will be filed with the Court prior to the final settlement approval hearing.

A proposed attorneys' fee of up to 25% of the Settlement Amount is reasonable in light of the work required to reach the Settlement and the "benchmark" often referenced by courts in the Ninth Circuit. *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003) ("'This circuit has established 25% of the common fund as a benchmark award for attorney fees.'"). The proposed attorney fee award here is based on a lodestar of approximately $16.45 million in time expended

[12] Guideline §6 requires discussion of "information about the fees and costs" counsel intends to request, "their lodestar calculation," "the relationship between the amount of the common fund, the requested fee, and the lodestar."

over the past four years of litigation. A fee award of 25% of the Settlement Amount would result in a multiplier of approximately 1.5. This multiplier is reasonable and within the range of lodestar multipliers courts in this Circuit regularly approve.[13] If preliminary approval is granted, Lead Counsel will present their total lodestar with their fee application prior to the final settlement approval hearing.

Lead Counsel also intends to seek payment of their litigation expenses and charges in an amount not to exceed $950,000. Lead Counsel will provide appropriate detail in support of any request for an award of litigation expenses with their fee and expense application prior to final approval. Lead Counsel will request that any award of fees and expenses be paid at the time the Court makes its award. Stipulation, ¶6.2.

Finally, Lead Counsel also intends to seek an award of up to $7,500 for Lead Plaintiff, pursuant to 15 U.S.C. §78u-4(a)(4), in connection with its representation of the Class. *Fleming v. Impax Labs. Inc.*, 2022 WL 2789496, at *10 (N.D. Cal. July 15, 2022) (approving awards to lead plaintiff and class representative for time spent working with counsel "reviewing documents, providing input into the case's prosecution, and engaging in meetings, phone conferences, and correspondence with Lead Counsel"); *McPhail v. First Command Fin. Plan., Inc.*, 2009 WL 839841, at *8 (S.D. Cal. Mar. 30, 2009) (noting "requested reimbursement is consistent with payments in similar securities cases"). Lead Counsel believes this amount is fully supported by the work undertaken throughout the Action, which will be set forth in greater detail in connection with Lead Plaintiff's fee and expense motion.

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[13] *See, e.g.*, *Hefler*, 2018 WL 6619983, at *14 (awarding fee representing a 3.22 multiplier); *In re N.C.A.A. Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *7-*9 (N.D. Cal. Dec. 6, 2017) (awarding fee representing a 3.66 multiplier), *aff'd*, 768 Fed. App'x 651 (9th Cir. 2019); *see generally Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-52 & 1051 n.6 (9th Cir. 2002) (affirming 3.65 multiplier on appeal and finding that multipliers ranged as high as 19.6, with the most common range from 1.0 to 4.0).

Approval of the requested attorneys' fees is separate from approval of the Settlement, and the Settlement may not be terminated based on any ruling with respect to attorneys' fees. Stipulation, ¶6.3.

d. Other Agreements Made In Connection With the Global Resolution of the Case

The Settling Parties have entered into a standard supplemental agreement that provides that if Class Members opt out of the Settlement such that the requests for exclusion from the Class equals or exceeds an agreed-upon threshold, Defendants shall have the option to terminate the Settlement. Stipulation, ¶7.3. Such agreements are common and do not undermine the propriety of the Settlement. *See, e.g.*, *Hefler*, 2018 WL 6619983, at *7 ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair."). While the Supplemental Agreement is identified in the Stipulation, ¶7.3, and the nature of the agreement is explained in the Stipulation and here, the terms are properly kept confidential.[14]

4. The Proposed Plan of Allocation Treats Class Members Equitably and Does Not Confer Preferential Treatment

Rule 23(e)(2)(D) asks whether the proposal (here, the Plan of Allocation) treats class members equitably relative to each other.[15] Drafted with the assistance of Lead Plaintiff's damages expert, the Plan of Allocation is fair, reasonable, and adequate; it does not "'improperly grant'" Lead Plaintiff or any other Class Member "'preferential treatment.'" *Zynga*, 2015 WL 6471171, at *10; *see also Vinh Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014)

[14] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015) (finding settlement was not rendered unfair by the inclusion of an opt-out provision where "[o]nly the exact threshold, for practical reasons, was kept confidential"); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 329-30 (C.D. Cal. 2016) (considering confidential supplemental agreement).

[15] Guideline §1(e) states that the "motion for preliminary approval" should discuss the "proposed allocation plan for the settlement fund."

("A settlement in a securities class action case can be reasonable if it 'fairly treats class members by awarding a pro rata share to every Authorized Claimant, but also sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue.'"). Specifically, the Plan of Allocation provides formulas for calculating the recognized claim of each Class Member, based on each such Person's purchases of VMware Class A common stock on the open market during the Class Period and if or when they sold. "'A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable.'" *NuVasive*, 2018 WL 6421623, at *4.

Each Authorized Claimant, including Lead Plaintiff, will receive a *pro rata* distribution pursuant to the Plan of Allocation. No special formula for distribution will apply to Lead Plaintiff. *See Ciuffitelli v. Deloitte & Touche LLP*, 2019 WL 1441634, at *18 (D. Or. Mar. 19, 2019) ("The Proposed Settlement does not provide preferential treatment to Plaintiffs or segments of the class. . . . [T]he proposed Plan of Allocation compensates all Class Members and [Plaintiffs] equally in that they will receive a *pro rata* distribution based of [sic] the Settlement Fund based on their net losses.").

B. The Remaining Ninth Circuit Factors Support Preliminary Approval of the Settlement

Each of the relevant *Hanlon* factors that are not co-extensive with the Rule 23(e)(2) analysis above (*i.e.*, the third, fifth, and sixth *Hanlon* factors) also support preliminary approval.[16]

[16] "Because there is no governmental entity involved in this litigation," the seventh *Hanlon* factor ("presence of a governmental participant") is inapplicable. *Mendoza v. Hyundai Motor Co.*, 2017 WL 342059, at *7 (N.D. Cal. Jan. 23, 2017). Regarding the eighth *Hanlon* factor ("the reaction of the class members to the proposed settlement"), the Class's reaction is not yet available for consideration because notice of the Settlement has not yet been provided to the Class. *See, e.g.*, *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008) (noting "'a full fairness analysis is unnecessary at this stage'" because some factors bearing on the propriety of settlement cannot be assessed prior to a final approval hearing).

1. The Extent of Discovery Completed and the Stage of the Proceedings at Which the Settlement Was Achieved Strongly Support Preliminary Approval

The fifth *Hanlon* factor (the extent of discovery completed and the stage of the proceedings at which the settlement was achieved) strongly supports preliminary approval of the Settlement. The Settlement was reached after Lead Plaintiff had conducted significant fact discovery (exchanging with Defendants and reviewing approximately 650,000 pages of documents, obtaining and reviewing approximately 175,000 pages of documents produced by 30 third parties, and completing 10 fact depositions, including one deposition in London and the depositions of the two individual defendants (the CEO and CFO of the corporation)). The Settling Parties had a thorough understanding of many of the arguments, evidence, and witnesses that would be presented at trial. Accordingly, there can be no question that Lead Plaintiff was able to knowledgably evaluate the merits of the Settlement by the time it was reached. As discussed more fully above, Lead Plaintiff's decision to enter into the Settlement was based on a solid understanding of the strengths and potential weaknesses of its claims and Defendants' defenses.

2. Risks of Maintaining Class Action Status Through Trial

Lead Counsel believes the risk of maintaining class action status through to the end of trial (the third *Hanlon* factor) was minimal. Nevertheless, because Rule 23(c)(1) provides that a class certification order may be altered or amended at any time prior to a decision on the merits, Defendants still could have moved to decertify the Class or shorten the Class Period up until the time the jury reached a verdict. *See Rodriguez*, 563 F.3d at 966.

3. Experience and Views of Counsel

The opinion of experienced counsel (the sixth *Hanlon* factor) as to the merit of a class settlement after arm's length negotiation is entitled to considerable weight. *See Hefler*, 2018 WL 6619983, at *9 ("That counsel advocate in favor of this Settlement weighs in favor of its approval."). Lead Counsel has significant experience in securities and other complex class action litigation and have negotiated numerous other substantial class action settlements throughout the country. *See* rgrdlaw.com. Here, "[t]here is nothing to counter the presumption that Lead Counsel's

recommendation is reasonable." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).

Since being appointed by this Court, Lead Counsel largely defeated Defendants' motions to dismiss, obtained class certification, and aggressively pursued discovery critical to the claims asserted. As a result of these endeavors and with the assistance of sophisticated experts when appropriate, Lead Counsel had gained a firm understanding of the strengths and weaknesses of the claims by the time the Settlement was reached.

* * *

In sum, each factor identified under Rule 23(e)(2) and by the Ninth Circuit is satisfied. The Settlement is fair, adequate, and reasonable, and meets each of the applicable factors such that notice of the Settlement should be sent to the Class.

V. THE PROPOSED NOTICE PROGRAM SATISFIES RULE 23, THE PSLRA, AS WELL AS DUE PROCESS REQUIREMENTS

Rule 23(c)(2)(B) requires the Court to "direct to class members the best notice that is practicable under the circumstances." The notice must describe "'the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Lane*, 696 F.3d at 826 (quoting *Rodriguez*, 563 F.3d at 962). The PSLRA further requires that "every settlement notice must include a statement explaining a plaintiff's recovery." *In re Wireless Facilities, Inc. Sec. Litig.*, 253 F.R.D. 630, 636 (S.D. Cal. 2008); *see also In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 969 (9th Cir. 2007).

Here, Lead Plaintiff proposes to give interested parties notice in two ways. First, notice will be sent by email, where available, and by postcard where no email is available, or where the email has bounced back. The email will include a direct link, and the mailed Postcard (Stipulation, Ex. A-4) will include a QR Code, both of which will take the user directly to the case-specific website (www.VMwareSecuritiesLitigation.com) which contains the long form Notice (Stipulation, Ex. A-1). Second, Gilardi will publish the Summary Notice (Stipulation, Ex. A-3) in *The Wall Street Journal* and transmit over *Business Wire*, an online newswire service. *See* Crudo Decl., ¶14. The proposed methods for providing notice satisfy the requirements of Rule 23, the PSLRA, and due

process. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (requiring notice be sent to all class members "whose names and addresses may be ascertained through reasonable effort"); *MGM*, 708 F. App'x at 896; *Vataj v. Johnson*, 2021 WL 5161927, at *5 (N.D. Cal. Nov. 5, 2021) (finding notice by mail and published in a newswire with national distribution "provided the best practicable notice to the class members").

The form and substance of the notice program are sufficient. The proposed Notice describes the terms of the Stipulation and the Class's recovery in absolute dollars and, as required by the PSLRA, on an estimated per share basis; the considerations that caused Lead Plaintiff and Lead Counsel to conclude that the Settlement is fair, adequate, and reasonable; the maximum attorneys' fees and expenses and Class Representative award that may be sought; the procedure and deadline for requesting exclusion and objecting to the Settlement; the procedure and deadline for participating in the Settlement and instructions on how to complete and submit a Proof of Claim to the Claims Administrator (both on paper and electronically); the proposed Plan of Allocation for the Settlement proceeds; and the date, time, and place of the Settlement Hearing. *See Ching v. Siemens Indus., Inc.*, 2013 WL 6200190, at *6 (N.D. Cal. Nov. 27, 2013) ("The Court finds that the Class Notice adequately describes the nature of the action, summarizes the terms of the settlement, identifies the class and provides instruction on how to . . . object, and sets forth the proposed fees and expenses to be paid to Plaintiff's counsel and the settlement administrator in clear, understandable language."). The Notice also provides contact information for Lead Counsel and Gilardi, the proposed Claims Administrator, as well as information regarding the website created for the case.

VI. THE PROPOSED CLAIMS ADMINISTRATOR

Pursuant to Guideline §2, Lead Counsel proposes that the Court appoint Gilardi as the Claims Administrator for the Settlement in order to provide all notices approved by the Court to Class Members, to process Proofs of Claim, and to administer the Settlement. Gilardi is very experienced, having "implemented successful claims administration programs in more than a thousand securities class actions during our more than four decades as an administrator." *See* Crudo Decl., ¶4. Gilardi was selected as a result of Requests for Proposals sent to several claims

administrators. Based on the proposals received, Lead Counsel determined that Gilardi provided the best overall value to the Class. *See* Appendix A at 3.

While total Notice and Administration Costs are highly dependent on the actual number of notices ultimately emailed or mailed, and the number of claims ultimately received and processed, based on an assumption of 40,000 notices emailed/mailed and 10,000 claims received and processed, Gilardi estimates Notice and Administration Costs for the Action and Settlement up through the initial distribution of approximately $243,375. Crudo Decl., ¶28. These costs and expenses, which are necessary in order to fully and properly administer all notice and claims administration, represent approximately 0.2% of the Settlement Amount. All Notice and Administration Costs will be paid from the Settlement Fund.

VII. CONCLUSION

The proposed $102.5 million Settlement is an outstanding result for the Class. The Class should have its chance to evaluate it. For the reasons set forth above, Lead Plaintiff respectfully requests that the Court preliminarily approve the proposed Settlement, and enter the Preliminary Approval Order.

DATED: October 10, 2024

Respectfully submitted,

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APPENDIX A

(Compliance with *Procedural Guidance* of Northern District of California)

A. Guidance 1: Information about the Settlement

1. Guidance 1(a): *Any differences between the settlement class and the class proposed in the operative complaint (or, if a class has been certified, the certified class) and an explanation as to why the differences are appropriate*.

As explained in §II.B of the attached supporting memorandum ("Preliminary Approval Memorandum"), the Court certified a class of purchasers of publicly traded VMware Class A common stock during the period of August 24, 2018 through February 27, 2020, inclusive, and who were damaged thereby. ECF 171. The certified Class is identical to that contained in the Settlement. *See* Preliminary Approval Memorandum, at 7 n.5.

2. Guidance 1(b): *Any differences between the claims to be released and the claims in the operative complaint (or, if a class has been certified, the claims certified for class treatment) and an explanation as to why the differences are appropriate*.

The claims being released closely track the claims alleged. The Third Amended Complaint alleges federal securities law claims based on certain alleged misrepresentations and omissions by Defendants in connection with the purchase of VMware Class A common stock during the Class Period. The definition of "Released Claims" is properly limited to "all claims (including, but not limited to, Unknown Claims), demands, losses, rights, and causes of action of any nature whatsoever, that have been or could have been asserted in the Action or could in the future be asserted in any forum, whether foreign or domestic, whether arising under federal, state, common or foreign law, by [Lead] Plaintiff, any member of the Class, or their successors, assigns, executors, administrators, representatives, attorneys and agents, whether brought directly or indirectly against any of the Released Defendants Parties, which arise out of, are based on, or relate in any way to, directly or indirectly: (i) any of the allegations, acts, transactions, facts, events, matters, occurrences, representations or omissions involved, set forth, alleged or referred to, in the Action, or which could have been alleged in the Action; and (ii) the purchase, acquisition, transfer, holding, ownership,

disposition or sale of VMware, Inc. common stock, by any members of the Class during the Class Period." Stipulation, ¶1.21. Accordingly, the release is carefully tailored to the claims alleged.

3. Guidance 1(c): *The class recovery under the settlement (including details about and the value of injunctive relief), the potential class recovery if plaintiffs had fully prevailed on each of their claims, claim by claim, and a justification of the discount applied to the claims.*

The Class will receive $102.5 million in cash, less approved fees and expenses, through the Settlement. As set forth in the Preliminary Approval Memorandum (§§I. and IV.A.3), the Settlement represents approximately 10.7% to 34% of estimated aggregate damages. There are many factors that contributed to Lead Plaintiff's acceptance of a discount to that damages value, which are more fully explained in §IV.A.3.a. of the Preliminary Approval Memorandum.

4. Guidance 1(d): *Any other cases that will be affected by the settlement, an explanation of what claims will be released in those cases if the settlement is approved, the class definitions in those cases, their procedural posture, whether plaintiffs' counsel in those cases participated in the settlement negotiations, a brief history of plaintiffs' counsel's discussions with counsel for plaintiffs in those other cases before and during the settlement negotiations, an explanation of the level of coordination between the two groups of plaintiffs' counsel, and an explanation of the significance of those factors on settlement approval. If there are no such cases, counsel should so state.*

Counsel believes there are no other cases that will be affected by the Settlement.

5. Guidance 1(e): *The proposed allocation plan for the settlement fund.*

The proposed allocation plan is set forth in detail in the Notice of Pendency and Proposed Settlement of Class Action ("Notice") (Stipulation, Ex. A-1 at 8-14) and discussed in the Preliminary Approval Memorandum (§IV.A.4).

6. Guidance 1(f): *If there is a claim form, an estimate of the expected claim rate in light of the experience of the selected claims administrator and/or counsel based on comparable settlements, the identity of the examples used for the estimate, and the reason for the selection of those examples.*

This is a non-reversionary settlement in which the entire Settlement Fund will be paid out. Stipulation, ¶5.9. Once the Settlement becomes final, nothing is returned to Defendants. With respect to the number of class members, as well as their identities, these are unknown in securities cases. *See Vataj v. Johnson*, 2021 WL 1550478, at *11 (N.D. Cal. Apr. 20, 2021) ("The Court

understands that the majority of class members are likely beneficial purchasers whose securities were purchased by brokerage firms, banks, institutions, and other third-party nominees in the name of the nominee, on behalf of the beneficial purchaser."). Because the number and identity of class members is unknown, both the number and percentage of class members expected to file claims is unknown. Indeed, the number of claims varies widely from case to case as does the size of each claim. In a securities class action settlement, class member participation is determined by the number of damaged shares (shares affected by the inflation caused by the alleged misrepresentations and omissions) represented by the claims submitted. This more accurately reflects how much of the Class is seeking to participate in the Settlement. Consistent with its experience in securities class actions, and based on the effectiveness of the proposed Notice Plan, Lead Counsel anticipates that the vast majority of damaged shares will be represented by the claims submitted in this Action.

7. Guidance 1(g): ***In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the expected and potential amount of any such reversion, and an explanation as to why a reversion is appropriate.***

The Settlement is non-reversionary; there will be no reversions. Stipulation, ¶5.9.

B. Guidance 2: Settlement Administration

a. Guidance 2(a): ***Identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years.***

Lead Plaintiff's request to appoint Gilardi & Co. LLC ("Gilardi") to serve as the Claims Administrator, including the reasons for Lead Counsel's selection of Gilardi, is addressed in §§III and VI of the Preliminary Approval Memorandum. Lead Counsel sent Requests for Proposals to the following administrators: JND Legal Administration, Gilardi & Co. LLC, and A.B. Data. Based on the proposals received, Lead Counsel determined that Gilardi provided the best overall value (quality and price) to the Class. Lead Counsel states that Gilardi and affiliated entities have been appointed as the notice or claims administrator in approximately 50 matters where Robbins Geller was lead or

co-lead counsel in the past two years. Crudo Decl., ¶5. The proposed methods of notice are addressed in §V of the Preliminary Approval Memorandum.

b. Guidance 2(b): ***Address the settlement administrator's procedures for securely handling class member data (including technical, administrative, and physical controls; retention; destruction; audits; crisis response; etc.), the settlement administrator's acceptance of responsibility and maintenance of insurance in case of errors, the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs.***

Gilardi's Information Security Policy Framework is aligned to ISO/IEC 27002:2013 which is reviewed on an annual basis and communicated to all employees through a comprehensive training program. Crudo Decl., ¶30. Gilardi maintains a number of corporate governance policies that reflect the manner in which it does business, including an employee Code of Conduct that outlines the professional, responsible, and ethical guidelines that govern employee conduct. These policies are available on its website. *Id.*, ¶31.

C. Guidance 3: The Proposed Notices to the Class Are Adequate

As set forth in §V of the Preliminary Approval Memorandum, Lead Counsel believes that both the form of notice, which incorporates the suggested language from the *Procedural Guidance* (Stipulation, Ex. A-1 at 20), and the plan for disseminating the notice, satisfy Rule 23, the PSLRA, and due process.

D. Guidance 4 and 5: Opt-Outs and Objections

The proposed Notice complies with Rule 23(e)(5) in that it discusses the rights Class Members have concerning the Settlement. The proposed Notice includes information on a Class Member's right to: (i) opt out of the Settlement and what is required; (ii) object to the Settlement, or any aspect thereof, and the manner for filing an objection; and (iii) participate in the Settlement and instructions on how to complete and submit a Proof of Claim to the Claims Administrator. The Notice also provides contact information for Lead Counsel, as well as the postal address for the Court. Finally, the Notice incorporates the suggested language regarding objections from the *Procedural Guidance*. *See* Stipulation, Ex. A-1 at 18.

E. Guidance 6: Attorneys' Fees and Expenses

Lead Counsel's intended request for attorneys' fees and expenses is set forth in §IV.A.3.c. of the Preliminary Approval Memorandum.

F. Guidance 7: Service Awards

Lead Plaintiff Eastern Atlantic States Carpenters Pension Fund will not seek a "Incentive Award"; however, it may seek an award in an amount not to exceed $7,500 pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class. Support for this award will be presented in support of Lead Counsel's application for an award of attorneys' fees and expenses and in support of final approval of the Settlement.

G. Guidance 8: *Cy Pres* Awardees

The Settling Parties propose the Council of Institutional Investors ("CII") as the designated recipient for any *de minimis* balance remaining after all reallocations are completed. *See* Stipulation, ¶5.9. CII satisfies the "substantial nexus" test, since it "bears a substantial nexus to the interests of the class members," *In re Google Location History Litig.*, 2024 WL 1975462, at *12 (N.D. Cal. May 3, 2024), and complements the objectives of the federal securities laws. H.R. Conf. Rep. No. 104-369, at 31 (1995) (Congress noted that the broader purpose of the federal securities laws is "to protect investors and to maintain confidence in the securities markets, so that our national savings, capital formation and investment may grow for the benefit of all Americans"). "CII is a leading voice for effective corporate governance, strong shareowner rights and sensible financial regulations that foster fair, vibrant capital markets." *See* cii.org/about.

H. Guidance 9: Proposed Timeline

Lead Plaintiff proposes the following schedule for notice, Settlement Hearing, and related dates:

Event	Deadline for Compliance
Deadline to commence emailing and mailing the Postcard Notice to potential Class Members and posting of the Notice and Proof of Claim (the "Notice Date")	No later than 20 calendar days following entry of the Preliminary Approval Order (Preliminary Approval Order, ¶7)
Publication of the Summary Notice	No later than 7 calendar days following the

Event	Deadline for Compliance
	Notice Date (Preliminary Approval Order, ¶8)
Deadline for filing papers in support of the Settlement, the Plan of Allocation, and application for attorneys' fees and expenses	35 calendar days prior to the Settlement Hearing (Preliminary Approval Order, ¶17)
Deadline for submitting exclusion requests and objections	21 calendar days prior to the Settlement Hearing (Preliminary Approval Order, ¶¶14-15)
Deadline for submission of reply papers in support of the Settlement, the Plan of Allocation, and application for attorneys' fees and expenses	7 calendar days prior to the Settlement Hearing (Preliminary Approval Order, ¶17)
Proof of Claim submission deadline	90 calendar days after the Notice Date (Preliminary Approval Order, ¶11)
Date for the Settlement Hearing	At least 100 days after entry of the Preliminary Approval Order (Preliminary Approval Order, ¶2)

I. Guidance 10: Class Action Fairness Act

Although the CAFA statute is unclear whether notice is required in a securities class action settlement, Defendants are nevertheless coordinating compliance with 28 U.S.C. §1715 at their own cost.

J. Guidance 11: Comparable Outcomes

Impax Laboratories

Greg Fleming v. Impax Laboratories Inc., et al.
No. 4:16-cv-06557-HSG (N.D. California, Oakland Division)

Total Settlement Amount	$33,000,000.00
Notice and Claim Packets Mailed/Remailed	49,620
Number of Packets Returned Undeliverable/Unable to Forward	1,247 2.513%
Total Claims Submitted	13,863 27.938%
Total Valid Claims	5,398 38.938%
Opt-Outs Received	0
Objections Received	0
Mean Recovery per Eligible Claimant Median Recovery per Eligible Claimant	$4,236.68 $81.71
Largest Recovery per Eligible Claimant Smallest Recovery per Eligible Claimant	$1,087,785.25 $10.00
Method of Notice	Direct Mail; Published in The Wall Street Journal and PR Newswire; posted on the settlement website; DTCC LENS notice posting
Administrative Costs (including taxes, tax prep., etc.)	$311,213.89
Attorney Costs	$176,501.78
Attorney Fees % of Settlement Amount Multiplier	$9,900,000.00 30% 2.59
Initial Distribution Date	02/03/2023
Total Amount Distributed	$22,869,617.96
Number of Payments	5,398
Method of Payments	Checks/Wires
Cy Pres Distribution	$0.00
Reverter to Defendants	$0.00