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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SEB INVESTMENT MANAGEMENT AB, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

ALIGN TECHNOLOGY, INC., JOSEPH M. HOGAN, and JOHN F. MORICI,

Defendants.

Case No. 3:18-cv-06720-VC

CLASS ACTION

DECLARATION OF JENNIFER L. JOOST IN SUPPORT OF (I) LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PLAN OF ALLOCATION; AND (II) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

Hearing Date:	April 28, 2022
Time:	1:30 p.m.
Courtroom:	4, 17th Floor
Judge:	Hon. Vince Chhabria

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I, JENNIFER L. JOOST, declare:

1. I am an attorney admitted to this Court. I am a partner in the law firm Kessler Topaz Meltzer & Check, LLP ("KTMC" or "Lead Counsel"), counsel for Court-appointed Lead Plaintiff SEB Investment Management AB ("SEB" or "Lead Plaintiff") and Lead Counsel for the Settlement Class.[1] The following statements are based on my personal knowledge and information provided by other KTMC attorneys working under my supervision, and if called on to do so, I could and would testify competently thereto.

2. I respectfully submit this Declaration in support of Lead Plaintiff's motion pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("Rules") for final approval of the proposed settlement ("Settlement") with defendants Align Technology, Inc. ("Align" or the "Company"), Joseph M. Hogan, and John F. Morici (collectively, "Defendants" and, together with Lead Plaintiff, the "Parties"). If approved, the Settlement will resolve all claims asserted in the Action against Defendants, on behalf of the Settlement Class, which consists of all persons and entities who purchased or otherwise acquired the common stock of Align between May 23, 2018 and October 24, 2018, both dates inclusive ("Settlement Class Period"), and who were damaged thereby.[2] The Court preliminarily approved the Settlement by order dated November 2, 2021 ("Preliminary Approval Order"). ECF No. 198.

3. I also respectfully submit this Declaration in support of: (i) the proposed plan for allocating the net proceeds of the Settlement to eligible Settlement Class Members ("Plan of Allocation" or "Plan"); and (ii) Lead Counsel's motion for an award of attorneys' fees in the amount of 20% of the Settlement Fund and reimbursement of Litigation Expenses in the amount of $190,419.50 ("Fee and Expense Application").

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[1] Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed in the Stipulation and Agreement of Settlement dated June 30, 2021 ("Stipulation"). ECF No. 189-2. Citations to "¶ __" refer to paragraphs in the Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws filed November 29, 2019 ("Amended Complaint" or "AC").

[2] Certain persons and entities are excluded from the Settlement Class as provided in Paragraph 1(oo) of the Stipulation.

4. For the reasons discussed below and in the accompanying memoranda,[3] I, on behalf of Lead Counsel, respectfully submit that: (i) the terms of the Settlement are fair, reasonable, and adequate in all respects and should be approved by the Court; (ii) the proposed Plan of Allocation is fair, reasonable, and adequate and should be approved by the Court; and (iii) the Fee and Expense Application is reasonable, supported by the facts and the law, and should be granted in all respects.

I. PRELIMINARY STATEMENT

5. Following nearly three years of hard-fought litigation and extensive arm's-length negotiations facilitated by an experienced neutral, Lead Plaintiff and Lead Counsel have succeeded in obtaining a recovery of $16,000,000 in cash ("Settlement Amount") for the benefit of the Settlement Class.[4] As provided for in the Stipulation, in exchange for this consideration, the Settlement resolves all claims asserted in the Action by Lead Plaintiff and the Settlement Class against Defendants and the other Released Defendants' Parties.

6. Until a resolution was reached in June 2021, the Parties actively and vigorously litigated this Action. At the time of settlement, Lead Counsel had, among other things, researched and prepared two detailed complaints, fully briefed two motions to dismiss, engaged in substantial, hard-fought fact discovery—including reviewing 19,690 pages of documents from Defendants and briefing and arguing four discovery-related motions, and consulted with experts in the areas of market efficiency, loss causation, and damages. The Settlement is the product of these efforts, and others, as well as protracted arm's-length negotiations, including two formal mediation sessions before Gregory P. Lindstrom of Phillips ADR ("Mr. Lindstrom").

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[3] In addition to this Declaration, Lead Plaintiff and Lead Counsel are submitting: (i) the Memorandum of Points and Authorities in Support of Lead Plaintiff's Motion for Final Approval of Proposed Settlement and Plan of Allocation ("Settlement Memorandum"); and (ii) the Memorandum of Points and Authorities in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses ("Fee Memorandum").

[4] Pursuant to the terms of the Stipulation and the Preliminary Approval Order, the Settlement Amount has been fully funded, and is currently being held in the interest-bearing Escrow Account.

7. In deciding to settle the Action, Lead Plaintiff and Lead Counsel carefully considered the significant risks associated with advancing their case through further fact discovery, expert discovery, class certification, summary judgment, trial, and the inevitable post-trial appeals.

8. Had the Settlement not been reached, Defendants would have continued to assert aggressive defenses to Lead Plaintiff's claims. Indeed, the fate of this Action largely hinged on the interpretation of *one* allegedly misleading statement—specifically, whether Lead Plaintiff could establish that the statement materially misled investors, whether the information omitted from the statement was material, and what information Defendants knew when they made the statement. Defendants would have vehemently argued that the statement at issue did not mean what Lead Plaintiff alleged it did, that the allegedly omitted information was not material given Align's disclosures, and that Defendants did not have the requisite knowledge when they made the statement. Moreover, although claims related to this one allegedly misleading statement were sustained at the motion to dismiss stage, the Court found it to be "a close call with respect to both the falsity and the materiality of the statement in light of Defendants' repeated disclosures about the existence of promotional discounts." ECF No. 138 at 23. Additionally, Defendants would have vigorously challenged Lead Plaintiff's ability to prove loss causation and damages. For example, if the Action continued, Defendants would have argued that a large portion of Align's Average Selling Price ("ASP") decline—and resulting stock price decline—on October 25, 2018, was caused by non-fraud related factors like a change in the exchange rate and a shift in Align's product mix rather than the promotional activity at issue in the Action. When viewed in the context of such risks and the delays of continued litigation, the Settlement is an excellent result.

9. Lead Counsel has worked with the Court-authorized Claims Administrator, JND Legal Administration ("JND"), to disseminate notice of the Settlement to Settlement Class Members as directed in the Preliminary Approval Order. In this regard, JND has mailed over 135,000 copies of the Notice and Claim Form (together, the "Notice Packet") to potential Settlement Class Members and nominees.[5]

[5] *See* Declaration of Luiggy Segura Regarding (A) Dissemination of Notice Packet; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion and Claims Received to Date ("Segura Decl."), submitted herewith, ¶ 10.

Additionally, JND has posted the Notice and Claim Form, along with other relevant documents, on the website www.AlignSecuritiesLitigationSettlement.com ("Settlement Website"), and has caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over *PR Newswire*. Segura Decl., ¶¶ 11, 14. As ordered by the Court and stated in the notices, objections and requests for exclusion from the Settlement Class are due no later than March 31, 2022. To date, there have been no objections to any aspect of the Settlement and only one request for exclusion from the Settlement Class.[6]

II. SUMMARY OF THE SETTLEMENT CLASS'S CLAIMS

10. In this Action, the Settlement Class asserted the following claims as fully set forth in the Amended Complaint: (i) claims under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder against Defendants Align, Hogan, and Morici; and (ii) claims under Section 20(a) of the Exchange Act against Defendants Hogan and Morici. ECF No. 120.

11. The AC alleged, among other things, that during the period between May 23, 2018 and October 24, 2018, Defendants violated the federal securities laws when they told the market that the Company was not making changes in response to competition, while failing to disclose that Align had already implemented a discounting promotion on comprehensive clear aligners ("3Q Discounting Promotion") in response to growing competition, which negatively impacted Align's ASPs. *See* ¶ 108.

12. More specifically, the AC alleged that leading up to the relevant time period, "Align's arsenal of patents—one of its key competitive advantages over other clear aligner manufacturers—began to expire." ¶ 50. The expiration of these early patents in 2017 allowed "competitors to design and manufacture cases using generic technology and ultimately offer clear aligners at a lower price than Align." *Id*. As a result, Align was focused on curtailing the effects of this competitive threat. ¶ 51; *see also* ¶¶ 52-56, 60-62. The AC alleged analysts were closely watching the prices of comprehensive products, and so maintaining a high ASP became a "metric of great concern to Align and its top executives" and a consistent topic of analysis for Defendants in late 2017. ¶ 56; *see also* ¶¶ 51-54, 57-58, 93.

[6] Lead Plaintiff and Lead Counsel will address any objections and/or additional requests for exclusion received after this submission in their reply to be filed on or before April 21, 2022.

13. The AC additionally alleged that during the May 4-8, 2018 Annual Meeting of the American Association of Orthodontists ("AAO"), several competitors announced comprehensive offerings at lower price points than Align's comprehensive clear aligners. ¶ 66. The AC further alleged that Defendants knew that this new competition to the comprehensive product line was a threat to Align's business and that Align would need to lower its prices in order to compete. ¶¶ 75, 86-87, 93.

14. Unknown to investors, in response to competitive threats Defendants developed discounting promotions on Align's comprehensive products. ¶¶ 75-79. In particular, at the beginning of 3Q18, Defendants put in place the 3Q18 Discounting Promotion, which provided a $200-per-unit discount on Align's comprehensive clear aligners. ¶¶ 76-78. The AC alleged that these discounts had begun to negatively impact Align's ASPs before the start of the third quarter. ¶¶ 80, 86-87.

15. The AC alleged that Defendants held the July 25, 2018 Earnings Call three weeks after the undisclosed 3Q18 Discounting Promotion was put into effect. ¶ 114. During the call, Richard S. Newitter, an analyst from Leerink Partners asked Defendant Hogan:

> First one on just competition, Joe, is there anything—since some of the competitors launched back in May [at the AAO], that you're hearing in terms of how they're approaching their and potentially your customer bases with respect to trialing or getting some initial kind of traction in the field? Or has it been relatively kind of quiet? And then with respect to the guidance question and competition, is there anything at all factored into your 2018 growth outlook, including the revised one? Any kind of impact from competition?

¶ 116. Defendant Hogan answered:

> [T]he feedback that we get is [that our customers are] being contacted and – but there's nothing really that's different from what was the output from the AAO in that piece . . . there's not a momentum piece or anything that we're adjusting the business around right now.

¶ 117. The AC alleged that Defendant Hogan's statement that there was not "a momentum piece or anything that we're adjusting the business around right now" was a direct response to the analyst's question about whether Align was seeing "[a]ny kind of impact from competition[,]" and that the statement was misleading because Defendant Hogan "did not disclose Align's ongoing 3Q18 Discounting Promotion,

which had specifically been put in place to win back lost market share from competitors in the comprehensive aligner space." ¶¶ 116-17.

16. Through independent investigation, including interviews with former employees ("FEs") of Align, Lead Counsel verified the allegations set forth in the AC. In support of its narrative, the AC included the following detailed allegations based on FE interviews:

- FE 1, a Regional Sales manager at Align, confirmed that Align's top executives were more focused on the impact of competition in early 2017 when Align's patents began to expire. ¶¶ 33, 60.
- FE 3, a mid-level manager at Align, recounted that he attended Align's quarterly All-Hands meetings where Defendant Hogan discussed the expiration of patents and the resulting competition. ¶ 34. In fact, he stated that it was "all they talked about." ¶ 62. After the All-Hands meetings with Align's leadership team, FE 3 reported that he attended mandatory meetings with Align's SVP of Global Operations, Emory Wright, who confirmed the Company's plans to address the concerns about the expiration of its patents and the increasing competitive pressure by implementing discounting promotions and lowering prices. ¶ 62.
- FE 4, a Senior Support Assistant at Align during the Settlement Class Period, reported directly to Defendant Hogan and stated that he had access to internal discussions among top executives and the agendas for the monthly Executive Management Committee ("EMC") meetings. ¶ 35. FE 4 confirmed that ASPs and revenues were included on the circulated agendas for Align's monthly EMC meetings, and that competition was always a discussion topic during these meetings. ¶ 61. FE 4 additionally stated that Align's SVP and Managing Director Christopher C. Puco, who reported directly to Defendant Hogan, approved all promotions before implementation and would have had to approve the 3Q18 Discounting Promotion. ¶ 78.
- FE 5, a member of Align's corporate Financial Planning and Analysis group, worked directly with Defendant Morici. ¶ 36. FE 5 corroborated the other FE accounts regarding Defendants' concerns about competition and pricing, reporting that Align's ASPs were tracked and updated

every few hours and were included with other financial figures in daily, weekly, and monthly reports circulated to top management, which included important financial figures like the ASP. ¶ 56. FE 5 stressed that Morici was "very, very aware of Align's competition" and recounted that in discussion with Align's Finance Department, Defendant Morici explicitly linked the 3Q18 Discounting Promotion to addressing competition-related concerns. ¶ 78. FE 5 recalled seeing a "whiteboard on which 3M and other competitors were identified and an analysis presented of what percentage of the comprehensive clear aligner market Align could get back with the $200-per-unit discount provided by the 3Q18 Discounting Promotion." ¶ 79. FE 5 conducted additional analyses on the ASP decline in 3Q18 and circulated the results to Align's entire executive team, including Defendant Hogan. ¶ 93. FE 5 attended regular meetings with Defendant Morici to "figure out how to stop the bleeding." *Id*.

- FE 7, an Invisalign Territory Manager for a Midwest area during the Settlement Class Period, sold Invisalign products to dentists and orthodontists. ¶ 37. FE 7 confirmed that the undisclosed 3Q18 Discounting Promotion only applied to comprehensive cases but could be applied in addition to discounts provided through the Advantage Program. ¶ 77. The discounts dropped prices so dramatically that some dentists rearranged their patients' treatment plans to take advantage of the promotion during the third quarter while the promotion was in effect. *Id.* According to FE 7, these discounts caused a significant decrease in ASPs. ¶ 87.

17. The AC alleged that Defendants' material misstatements and omissions artificially inflated the price of Align common stock during the Settlement Class Period, causing damages to Settlement Class Members when the relevant truth concealed by those statements and omissions was disclosed to the public, thereby causing Align's stock price to plummet. ¶¶ 126-44. As alleged in the AC, on October 24, 2018, during the 3Q18 earnings call, investors learned about the competitive pressures impacting Align and the 3Q18 Discounting Promotion designed to combat that competition. ¶¶ 94-100.

18. More specifically, the AC alleged that when Align held its 3Q18 earnings call on October 24, 2018, it revealed a significant $85 year-over-year ASP decline, from $1,315 in 2Q18 to $1,230

in 3Q18. ¶¶ 16, 94, 96, 130. During the October 24, 2018 call, Defendant Morici connected the ASP decline to the concealed 3Q18 Discounting Promotion. ¶¶ 132-33. For example, Defendant Morici stated:

> Q3 Invisalign ASPs were down sequentially and year-over-year due to a combination of promotional programs, unfavorable foreign exchange and product mix, partially offset by price increases across all regions. In Q3, we offered new product promotions designed to increase adoption of Invisalign treatment, and we saw much higher-than-expected uptake on some of these promotions.

¶ 132.

19. During the call, Defendant Hogan also disclosed that the 3Q18 Discounting Promotion applied to comprehensive cases. An analyst at Stifel, Nicolaus & Company, Incorporated, asked:

> So can you be a little bit more clear that the promotions that you ran in the quarter, you hear the word promotions at the same time that 2 or 3 comprehensive clear aligners were introduced in the market for the first time ever. And that's going to freak a lot of people out, right? So the promotions that you mentioned, were those specific to express type cases? Were they more specific to comprehensive?

¶ 135. Defendant Hogan responded: "Yes. Jon, to answer your question backwards is, these were comprehensive cases." *Id.*

20. The AC alleged that, following the disclosure, market analysts connected Align's ASP decline to increased competition. Credit Suisse, for example, published a report on October 24, 2018, stating that the ASP decline "will inevitably raise concerns over competitive dynamics with new players in the wings" and that "a greater than anticipated decline in ASP will be a focus area for investors tomorrow, particular [sic] amidst intensified competitive dynamics." ¶ 142.

21. Piper Jaffray likewise reported on October 24, 2018 that "[s]urely the results will stoke fears about competitive pressures on ALGN's business." ¶ 142.

22. On October 25, 2018, Morgan Stanley also expressed that competition was impacting Align's prices:

> Our own work has suggested that there is a path to competitors having an impact on ALGN's growth . . . . Disclosure that ALGN saw accelerated pricing pressure in 3Q, which is expected to persist into 4Q, raises questions of whether these dynamics are already putting pressure on the franchise.

¶ 143.

23. Berenberg Capital Markets similarly reported on October 25, 2018 that the "weaker" ASPs were attributed to "more competitive pressure":

> ALGN shares are likely to be under meaningful pressure, in our view, following a Q318 print that may raise investor concerns around the company's ability to maintain average selling price (ASP) in the face of increased competition.

¶ 144.

24. In response to these disclosures, the price of Align common stock declined by over 20%, or $58.76, in a single trading day, closing at a price of $232.07 per share on October 25, 2018. ¶ 138.

III. BACKGROUND OF THE ACTION

A. Commencement of the Action

25. On November 5, 2018, the first securities class action complaint captioned *Lu v. Align Technology, Inc., et al.*, No. 5:18-cv-06720-LHK, was filed in the United States District Court for the Northern District of California on behalf of a putative class of investors who acquired Align securities between July 25, 2018 and October 24, 2018, inclusive. ECF No. 1. The *Lu* complaint asserted claims under Sections 10(b) and 20(a) of the Exchange Act. *Id.*

26. That same day, consistent with the PSLRA, notice was published in *Business Wire*, advising members of the putative class of the pendency of the litigation and their right to move the Court to serve as a lead plaintiff by January 4, 2019. ECF No. 45-5.

27. On December 12, 2018, a second securities class action complaint, captioned *Infuso v. Align Technology Inc., et al.*, No. 3:18-cv-07469-WHA, was filed in the United States District Court for the Northern District of California on behalf of a putative class of investors who acquired Align securities between April 25, 2018 and October 24, 2018, inclusive. *See* ECF No. 10; and *Infuso* ECF No. 5. The *Infuso* complaint also asserted claims under Sections 10(b) and 20(a) of the Exchange Act. *Id.*

28. On December 20, 2018, Align, Joseph Hogan, John Morici, and Raphael Pascaud moved to relate the *Infuso* action to the *Lu* action pursuant to Local Rules 3-12 and 7-11. ECF No. 10.

29. On January 2, 2019, the Court granted the motion to relate the cases and directed that the *Infuso* action be reassigned to the Honorable Lucy H. Koh. ECF No. 11.

30. On January 4, 2019, SEB filed a motion requesting consolidation of the securities class action cases, its appointment as lead plaintiff, and appointment of KTMC as lead counsel. ECF No. 45. In its motion, SEB argued that, *inter alia*: (i) it made a timely motion for appointment as lead plaintiff under the PSLRA's sixty-day deadline; (ii) pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), it had "the largest financial interest" in the litigation; and (iii) it met the applicable requirements under Federal Rule 23, i.e., its claims were typical of the claims of proposed class members and it would fairly and adequately represent the interests of the class. *Id.*

31. Seven other plaintiff groups brought similar motions for consolidation and appointment. ECF Nos. 12, 19, 24, 27, 28, 37, 52. Between January 8, 2019 and January 18, 2019, three movants withdrew their motions for consolidation and appointment (ECF Nos. 61, 63, 71), and four movants filed notices of non-opposition to SEB's motion (ECF Nos. 58, 62, 64, 65, 66), all conceding they did not possess the largest financial interest in the relief sought as defined by the PSLRA. On January 25, 2019, SEB filed a notice of unopposed motion for consolidation and appointment. ECF No. 68.

32. On March 22, 2019, this Court granted SEB's consolidation and appointment motion. ECF No. 72. The order consolidated the *Lu* and *Infuso* actions, appointed SEB as Lead Plaintiff and appointed KTMC as Lead Counsel. *Id.* The Court further ordered the parties to submit a stipulation by April 1, 2019, regarding a deadline to file a consolidated complaint and proposing a briefing schedule for any motion to dismiss. *Id.*

33. On March 29, 2019, the parties filed a joint stipulation to set deadlines for filing a consolidated complaint and motion to dismiss. ECF No. 74.

34. On April 9, 2019, the Court issued an order granting the parties' stipulation and requiring, among other things: (i) Lead Plaintiff to file a consolidated complaint by May 10, 2019; and (ii) Defendants to move to dismiss the case by June 24, 2019. ECF No. 80.

B. The Consolidated Complaint

35. Prior to filing the Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("Consolidated Complaint" or "CC"), Lead Counsel conducted a thorough investigation

into the facts underlying the Action. As part of this investigation, Lead Counsel reviewed an extensive number of publicly available documents, including: (i) conference calls concerning Align, (ii) Align's SEC filings, (iii) wire and press releases published by Align, (iv) analyst reports and advisories about Align, (v) media reports concerning Align, and (vi) other information that was publicly available concerning Align and the individual defendants.

36. In addition to reviewing documents, Lead Counsel, through and in conjunction with its investigators, contacted or attempted to contact 150 potential witnesses, and interviewed 69. Lead Counsel incorporated information provided by seven former Align employees into the CC, identified therein as FEs 1 through 7. ECF No. 87, ¶¶ 28-34.

37. Furthermore, Lead Counsel conducted extensive legal research before filing the CC to determine which theories of liability to allege and how to allege those theories given the current state of the law. For example, Lead Counsel comprehensively researched the law in the Ninth Circuit related to the pertinent issues in this case.

38. On May 10, 2019, based on Lead Counsel's thorough investigation and research, Lead Plaintiff filed the 75-page CC. ECF No. 87. On May 16, 2019, Lead Plaintiff filed a Notice of Errata and subsequently filed the 75-page corrected CC. ECF No. 90-1. The CC alleged violations of: (i) Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder against Align, Joseph Hogan, John Morici, Raphael Pascaud, and Emory Wright (collectively, the "CC Defendants"); (ii) Section 20(a) of the Exchange Act against individual defendants Hogan, Morici, Pascuad, and Wright; and (iii) Section 20A of the Exchange Act and Rule 10b-5 promulgated thereunder against individual defendants Hogan and Morici. *Id.*

39. In the CC, Lead Plaintiff alleged that, following the expiration of Align's patents, the CC Defendants denied that Align was facing increased competition in the clear aligner market. ECF No. 90-1, ¶¶ 76-77, 193. Meanwhile, the CC alleged Align was scrambling internally to address competition by implementing significant changes to the Advantage Program and implementing an undisclosed 3Q Discounting Promotion, both of which would discount Align's clear aligners. *Id.*, ¶¶ 67-

75, 101-06. Lead Plaintiff further alleged that the CC Defendants concealed that these changes were designed to address competitive threats and obscured the magnitude of the impact the discounts would have on the Company's revenues and ASPs. *Id.*, ¶¶ 107-12.

C. The CC Defendants' June 2019 Motion to Dismiss the Consolidated Complaint

40. On June 24, 2019, the CC Defendants filed a motion to dismiss the CC ("First Motion to Dismiss") pursuant to Rule 12(b)(6), along with a 25-page supporting memorandum. ECF No. 92. The CC Defendants also filed a request for judicial notice in connection with their First Motion to Dismiss. ECF No. 93.

41. In the First Motion to Dismiss, the CC Defendants argued that Lead Plaintiff's Exchange Act claims should be dismissed on the grounds that the CC failed to adequately allege facts establishing falsity and a strong inference of scienter. ECF No. 92. Specifically, the First Motion to Dismiss argued, *inter alia*, that:

- The CC failed to adequately allege falsity with respect to the statements about the impact of competition following the expiration of Align's patents because Align acknowledged in its SEC filings and at investor conferences that it was facing competition. ECF No. 92, at 9-14.
- The CC failed to allege falsity with respect to the statements about the impact of competition because it did not plead with particularity that competition had any material impact on Align's sales. *Id.* at 14-16. In particular, the CC did not provide data from internal reports about any impact from competition, the allegations based on the FE accounts did not provide enough specificity, and Align's actual performance contradicted any allegations that it was facing an impact from competition. *Id.*
- The CC failed to plead actionable false and misleading statements because several of the alleged statements were forward-looking statements accompanied by meaningful cautionary language and protected by the PSLRA safe harbor. *Id.* at 16-17.
- The CC failed to raise a strong inference of scienter because the FEs lacked sufficient personal knowledge to indicate reliability (*id.* at 18-21) and because the CC did not cite

contemporaneous data from internal reports that would support the CC Defendants' knowledge of the impact of competition (*id.* at 21-22).

- The CC failed to adequately allege that insider stock sales contributed to a strong inference of scienter because the sales were not inconsistent with prior trading practices of the CC Defendants. *Id.* at 22-24.
- The CC failed to plead 20A and 20(a) claims because it did not adequately allege an underlying violation of securities laws. *Id.* at 24-25.

42. Lead Counsel reviewed and analyzed the CC Defendants' briefing, exhibits, and the extensive legal authority cited in their brief. Lead Counsel also conducted additional legal research into the CC Defendants' arguments and all of Lead Plaintiff's potential responses to those arguments. On August 13, 2019, Lead Plaintiff filed a 25-page brief opposing the First Motion to Dismiss. ECF No. 97.

43. In its opposition to the First Motion to Dismiss, Lead Plaintiff vigorously defended its allegations, arguing that the CC adequately alleged all elements of the claims under the Exchange Act, including falsity and scienter. ECF No. 97. More specifically Lead Plaintiff argued, *inter alia*, that:

- The CC adequately alleged the falsity of the statements about the competition facing Align because the CC Defendants misled the market to believe that Align was insulated from competition resulting from its patents expiring when in reality Align was actually closely monitoring its competition, had already been negatively impacted by competition, and was taking affirmative steps to reduce the impact of competition including by lowering prices through the use of promotional discounts. *Id.* at 7-12.
- The CC Defendants' argument that Align disclosed the relevant truth to the market was a premature fact question that was not properly adjudicated at the motion to dismiss stage, and the statements Defendants claimed disclosed the truth were too vague and boilerplate to negate falsity. *Id.* at 12-15.
- The CC Defendants' arguments failed to recognize that the CC Defendants' statements, when read in context, materially misled the market; and, that when the CC Defendants chose to speak

about Align's competition, they were required to disclose that competition was already having an impact on their sales. *Id.* at 15-17.

- The CC adequately alleged the CC Defendants' scienter as it established the CC Defendants' knowledge of negative material nonpublic information about the impact of competition and Align's responses to that competition which contradicted their public statements, or, at the very least, established that the CC Defendants acted with deliberate recklessness. *Id.* at 17-19.
- The CC's FEs were alleged to have personal knowledge and their accounts were specific enough to support a strong inference of scienter. *Id.* at 19-21.
- The CC contained additional allegations that bolstered the inference of scienter, including: the CC Defendants' insider trading, the suspicious resignation of an Align executive, the temporal proximity of the misstatements to the revelation of the relevant truth, the CC Defendants' repeated unequivocal statements about competition, and the fact that the clear aligner segment was Align's core operation. *Id.* at 21-24.
- The CC adequately alleged Section 20A and 20(a) claims. *Id.* at 24-25.
- The documents at issue in the CC Defendants' request for judicial notice (ECF No. 93) could not be judicially noticed for their truth. *Id.* at 12 n.6.

44. The CC Defendants filed a 15-page reply in further support of their First Motion to Dismiss on September 12, 2019. ECF No. 98. Specifically, the CC Defendants argued, *inter alia*, that:

- Lead Plaintiff's opposition incorrectly characterized the CC Defendants' arguments as a truth on the market defense, which is inapplicable where the CC Defendants themselves disclosed the truth instead of other sources. *Id.* at 2.
- The CC Defendants adequately disclosed the truth about the expiring patents, the possibility of increasing competition, and Align's promotional activity and, as a result, their statements were not misleading. *Id.* at 2-6.
- The CC did not adequately allege that Align's business was impacted by competition and therefore did not adequately allege falsity or scienter. *Id.* at 7-9.

- The CC allegations based on FE accounts and the allegations about insider sales, the executive resignation, and clear aligners being the core operation of Align, were not sufficient to adequately allege scienter and were not as compelling as an opposing inference of non-fraudulent intent. *Id.* at 9-15.

45. After the First Motion to Dismiss was fully briefed, Lead Counsel reviewed all of the briefing on the CC Defendants' motion, as well as the key authorities cited therein in preparation for oral argument schedule for October 17, 2019. On September 25, 2019, the parties entered a stipulation to vacate the hearing date due to a conflict identified by Lead Counsel and providing that the hearing date shall be rescheduled for a later date if the Court deemed such a hearing necessary. ECF No. 102. On October 10, 2019, the Court vacated the hearing and stated that the First Motion to Dismiss would be decided on the papers without oral argument. ECF No. 105.

46. On October 29, 2019, the Court issued an order granting Defendants' First Motion to Dismiss with leave to amend. ECF No. 107.

47. *First*, the Court found dismissal warranted under Rule 8(a)(2) because "as pleaded, the Court cannot discern which specific statements Plaintiff contends to be false or misleading." ECF No. 107 at 7; *see also id.* at 6-8.

48. *Second*, the Court held that the CC failed to adequately allege falsity because: (i) "Plaintiff ignores the disclosures that *were* made" that acknowledged the competition against Align and disclosed that it could affect Align's business (ECF No. 107 at 8-10), (ii) the CC "consistently fails to provide factual allegations that show how Defendants' statements were false or misleading when made" (*id.* at 10; *see also id.* at 11-12), and (iii) the CC "failed to plead with particularity that competition increased following the expiration of Align's patents and that any such changes impacted Align" (*id.* at 14; *see also id.* at 12-13).

49. *Third*, the Court held that the CC did not adequately allege scienter because: (i) the FE allegations concerning scienter did not "directly relate" to the allegations that the CC Defendants' statements about Align's competition were materially false or misleading (ECF No. 107 at 15-16), (ii) the CC did not plead with particularity "what specific data Defendants had that would raise an inference of

scienter" (*id.* at 16), and (iii) the CC "has not sufficiently alleged why the timing of the sales weighs in favor of scienter" and did not allege "prior trading history" (*id.* at 16-18).

50. *Fourth*, the Court dismissed the Section 20(a) claim because Lead Plaintiff failed to plead a primary violation under Section 10(b). *Id.* at 18.

51. *Fifth*, the Court dismissed the Section 20A claim because the CC did not adequately plead a predicate violation of Section 10(b) and "failed to allege contemporaneity, at least with respect to Defendant Hogan's June 1, 2018 trades" because Lead Plaintiff's purchases predated Defendant Hogan's sales. *Id.* at 18-20.

52. The Court ordered that any amended complaint must be filed within 30 days of its order and must comply with the Court's Securities Class Action Standing Order, effective September 23, 2019. *Id.* at 20.

D. The Amended Consolidated Complaint

53. Following the Court's Order granting Lead Plaintiff leave to amend the CC, Lead Counsel conducted further extensive investigation into the facts underlying the Action and Align's alleged misconduct before filing the AC.

54. Within thirty days, Lead Counsel, through and in conjunction with its investigators, re-interviewed several confidential witnesses and also contacted or attempted to contact more than 20 additional potential witnesses. Lead Counsel also conducted another extensive review of the analyst reports concerning Align.

55. In addition to a renewed factual investigation, Lead Counsel also exhaustively reviewed the Court's opinion granting Defendants' First Motion to Dismiss. Lead Counsel then conducted comprehensive legal research to address the deficiencies raised by the Court's opinion; developed a significantly narrower, more focused theory of liability; shortened the class period by approximately one month; removed claims against two individual defendants; eliminated several alleged misstatements and connected the remaining alleged misstatements or omissions with the facts rendering them misleading; and added new facts to support Lead Plaintiff's falsity and scienter allegations.

56. Based on Lead Counsel's diligent investigation and research, Lead Plaintiff filed the 58-page AC on November 29, 2019, alleging violations of: (i) Sections 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder against Defendant Align and Defendants Hogan and Morici; (ii) Section 20(a) of the Exchange Act against Defendants Hogan and Morici; and (iii) Sections 10(b) and 20A of the Exchange Act and Rule 10b-5 promulgated thereunder against Defendant Hogan. ECF No. 120.

57. In accordance with the Court's Securities Class Action Standing Order of September 23, 2019, Lead Plaintiff submitted a chart with the AC to connect the alleged misstatements and omissions to the reasons why each were false and misleading when made and the facts supporting scienter for each. ECF No. 130, Ex. A.

E. Defendants' January 2020 Motion to Dismiss the Amended Complaint

58. On January 17, 2020, Defendants filed the Motion to Dismiss the Amended Complaint ("Second Motion to Dismiss") pursuant to Rule 12(b)(6) accompanied by a 25-page supporting memorandum of points and authorities. ECF No. 122. Defendants simultaneously filed a request for judicial notice in connection with their Second Motion to Dismiss. ECF No. 123.

59. In the Second Motion to Dismiss, Defendants argued that Lead Plaintiff's claims should be dismissed on the grounds that the AC failed to adequately plead falsity and a strong inference of scienter.

60. Specifically, in the Second Motion to Dismiss, Defendants argued, *inter alia*, that:

- The AC failed to allege falsity and scienter because it did not plead with particularity facts that showed Align's competition had any material impact on its business. ECF No. 122, at 3-4.
- The FEs relied upon in the AC did not provide sufficient detail to identify or quantify the impact of competition on Align's business and Align's ASPs. *Id.* at 4-7.
- The market was not misled because Defendants disclosed to the market during earnings calls and SEC filings: (i) the expiration of its patents, the resulting competition, its anticipated competitors, and the risks associated with increased competition (*id.* at 7, 9-11); and (ii) the promotional discounts, including the Advantage Program, and their negative impacts on ASPs (*id.* at 7-8).

- The AC did not adequately plead the alleged May 23, 2018 and June 12, 2018 statements were materially false or misleading because Defendants disclosed the risk of increased competitors. *Id.* at 12-15.
- The AC did not adequately allege the falsity of the July 25, 2018 statements because Defendants already identified Align's competition, Defendants adequately disclosed the changes to the Advantage Program discounts and its negative impact on ASPs, and the AC failed to allege with particularity any impact from competition on Align's business. *Id.* at 15-17.
- The AC did not allege the falsity of the September 5, 2018 statements because it failed to allege specific facts about the impact of competition on Align. *Id.* at 17-18.
- The July 25, 2018 statement about third quarter ASP results was a forward-looking projection accompanied by meaningful cautionary language, and thus protected by the PSLRA's safe harbor. *Id.* at 18-20.
- The AC did not raise a strong inference of scienter because the alleged 3Q Discounting Promotion drove higher sales for Align and Defendants disclosed that they ran promotions and that they negatively impacted ASPs; the FEs did not demonstrate that the individual Defendants' statements were intentionally false or deliberately reckless; Defendant Hogan's stock sales were not suspicious; the individual Defendants' performance-based compensation could not demonstrate fraudulent intent; and the competing non-culpable inference that the 3Q Discounting Promotion merely failed negated scienter. *Id.* at 20-24.
- The AC failed to sufficiently plead a Section 20A claim because it failed to plead that Lead Plaintiff purchased contemporaneously with Defendant Hogan's sales. *Id.* at 24-25.

61. In its 25-page opposition to the Second Motion to Dismiss filed on March 2, 2020, Lead Plaintiff zealously defended the AC's allegations, arguing that it had adequately alleged all elements of its claims under the Exchange Act, including falsity and scienter. ECF No. 130. More specifically, Lead Plaintiff argued, *inter alia*, that:

- Lead Plaintiff adequately pled falsity because it alleged Defendants' statements created the misleading impression that the new competition entering the market was limited to the low-end non-comprehensive product segment and that Align did not need to and was not going to take action in response to these new products when, in fact, competition was already negatively impacting Align and it was putting in place discounting promotions in response. *Id.* at 7-10.
- In response to Defendants' argument that the AC did not specifically identify the impact of competition, Lead Plaintiff argued that it did not need to specifically quantify the impact with specific figures and data, but it nevertheless did specify that the impact that the discount promotions were having on comprehensive aligner ASPs. *Id.* at 10.
- Contemporaneous analyst reports demonstrated that the public was misled by Defendants' alleged misstatements and omissions, confirming Lead Plaintiff's allegations. *Id.* at 10-11.
- Defendants had a duty to disclose the 3Q Discounting Promotion when it discussed competition and Align's response thereto. *Id.* at 11-12.
- Defendants' arguments that they disclosed the truth to the market must be rejected because (i) even though Align made disclosures before the Settlement Class Period about the identity of competitors and the Advantage Program, they never disclosed the 3Q18 Discounting Promotion; (ii) when Align discussed potential impact from competition, competition was already negatively impacting Align; and (iii) Defendants' statements denying that Align was taking any action responding to new competition and denying that competition was putting any downward pressure on ASPs counteracted any disclosure concerning these topics. *Id.* at 13-14.
- Defendants' July 25, 2018 statement concerning 3Q18 ASPs was misleading and was not protected by the PSLRA's safe harbor because Defendants materially omitted present or historical facts, the statement was not accompanied by meaningful cautionary language, and Defendants made the statement with actual knowledge that it was false. *Id.* at 16-18.
- Lead Plaintiff adequately alleged a strong inference of scienter because (i) Defendants had access to undisclosed information about competition and pricing strategies like the 3Q18

Discounting Promotion that rendered their public statements misleading; (ii) the comprehensive aligner was the core of Defendants' business and ASP was one of its most significant financial metrics; (iii) Defendant Hogan's insider trading was suspicious in amount and timing and was inconsistent with his past trading history; and (iv) there was no competing inference that was more compelling than Lead Plaintiff's allegations regarding the omission of the 3Q Discounting Promotion. *Id.* at 19-25.

- Lead Plaintiff sufficiently alleged a Section 20A insider trading violation against Defendant Hogan, who traded while knowing that ASPs had already declined and would decline further. *Id.* at 25. Lead Plaintiff sufficiently alleged contemporaneity because Lead Plaintiff purchased Align shares just six days after Defendant Hogan's sales. *Id.*

62. On April 1, 2020, Defendants filed a 15-page reply brief in further support of their Second Motion to Dismiss. ECF No. 131. Defendants argued, *inter alia*, that:

- The Court should reject the allegations in the AC regarding Align's response to new competition in the high-end comprehensive market because they contradicted the allegations in the CC that Align's new competitors were at the lower end of the market. *Id.* at 1-2.
- The AC did not plead with particularity the specific impact that the high-end comprehensive competition had on Align's 3Q18 results. *Id.* at 2-4.
- The disclosures made in Defendants' SEC filings counteracted any allegations that Defendants attempted to mislead investors about the risk of competition or conceal the 3Q18 Discounting Promotion. *Id.* at 4-5.
- The AC did not plead a material omission of the 3Q18 Discounting Promotion because there was no duty to disclose it and the challenged statements did not mention discounting promotions at all. *Id.* at 6-7.
- Defendants' statements regarding its insulation from competitive effects were inactionable corporate optimism. *Id.* at 8-10.

- The July 25, 2018 prediction about Align's Q318 ASPs was protected by the PSLRA's safe harbor as a forward-looking statement accompanied by sufficient cautionary language. *Id.* at 10-12.
- The AC did not adequately allege a strong inference of scienter because (i) Lead Plaintiff did not plead that Defendants knew the 3Q Discounting Promotion would be unsuccessful; (ii) the FE allegations were not sufficient to allege scienter; (iii) Defendants' statements denying any response to competition did not support scienter; (iv) the core operations doctrine was inapplicable; (v) the stock sales of Defendant Hogan were not suspicious and did not support scienter; and (vi) Defendants' competing inference that Align implemented the 3Q Discounting Promotion to incentivize sales but failed was more plausible and negated scienter. *Id.* at 12-15.

63. On September 9, 2020, the Court issued an order denying in part Defendants' Second Motion to Dismiss ("MTD Order"). ECF No. 138. In its MTD Order, the Court made several key holdings.

64. *First*, the Court dismissed Statement 3, a projection of the 3Q18 gross margins during an earnings call, finding that it was protected by the PSLRA's Safe Harbor as a forward-looking statement that was accompanied by meaningful cautionary language. ECF No. 138 at 6-9. The Court dismissed Statement 3 with prejudice, finding that any attempt to amend would be futile. *Id.* at 9.

65. *Second*, the Court dismissed Statements 1, 2, 4, and 6, finding that the AC failed to adequately allege the falsity of the statements. ECF No. 138 at 9-18. The Court dismissed each of these statements with prejudice, finding any amendment would be futile. *Id.* at 13-18. The Court held Statement 1, a statement regarding Align's competition being limited to the low-end segment, was not false considering the statement was in response to a question focused on a specific type of competitor. *Id.* at 10-11. The Court further held that the AC did not provide "any particularized factual allegations as to the degree of competition" that Align was facing. *Id.* at 12. The Court held that Statement 2, a representation about Align's expected competition, was not false because the full statement acknowledged that Defendants were concerned about competition, but that the competition was in line with Defendants' expectations. *Id.* at 13-15. The Court found that there was a lack of facts "substantiating the true state of

competition to contrast to Defendants' expectations." *Id.* at 14. The Court dismissed Statement 4 regarding Defendants' representation that it did not change its assessment of competition for a lack of falsity. *Id.* at 15-16. The Court found that the AC failed to explain: "what Defendants' assessment of competition *was*, nor how the assessment had *changed*;" and why the implementation of the 3Q18 Discounting Promotion rendered the statement false. *Id.* at 15-16. The Court dismissed Statement 6, a statement in which Defendants represented that Align had not seen any competitor's product or pricing that was disruptive or different than what Align had seen or done in the past. *Id.* at 17-18. The Court held that the AC did not provide allegations "about what Align had seen or done in the past" or about "any products or pricing of the competitors that [Lead] Plaintiff contends to actually be 'disruptive or different,' such that Hogan's statement was false or misleading." *Id.* at 17.

66. *Third*, the Court held that the AC adequately stated a claim under Section 10(b) of the Exchange Act and Rule 10b-5 for Statement 5. ECF No. 138 at 18-23. The AC alleged that Statement 5 was made by Defendant Hogan on Align's July 25, 2018 Earnings Call. *Id.* at 18-19. During the call, an analyst asked Defendant Hogan:

> First one on just competition, Joe, is there anything—since some of the competitors launched back in May [at the AAO], that you're hearing in terms of how they're approaching their and potentially your customer bases with respect to trialing or getting some initial kind of traction in the field? Or has it been relatively kind of quiet? And then with respect to the guidance question and competition, is there anything at all factored into your 2018 growth outlook, including the revised one? Any kind of impact from competition?

Id. at 19 (quoting ¶ 116). Defendant Hogan responded: "[T]he feedback that we get is [that our customers are] being contacted and—but there's nothing really that's different from what was the output from the AAO in that piece," and added that "there's not a momentum piece or anything that we're adjusting the business around right now." *Id.* (quoting ¶ 117).

67. The Court held that the AC adequately alleged the falsity of Statement 5. ECF No. 138 at 19. In so holding, the Court found "the implementation of an 'aggressive, $200-per-unit discount' to combat competition in the comprehensive case market could sufficiently demonstrate how Hogan misrepresented that Align was not adjusting its business around competition." *Id.* at 19-20.

68. The Court rejected Defendants' attempt to challenge the materiality of Defendants' failure to disclose the 3Q18 Discounting Promotion because "the Court may not decide in this posture" whether the omission was material. ECF No. 138 at 20.

69. The Court held that scienter was also satisfied because Lead Plaintiff "has pled adequate facts here to allege that Hogan either intentionally or with deliberate recklessness misrepresented that Align had not adjusted the business despite having recently implemented the $200-per-unit 3Q18 Discounting Promotion." ECF No. 138 at 21. In addition to the core operations doctrine, the Court found that Defendant Hogan's scienter was also supported by particularized facts and FE accounts showing that the 3Q18 Discounting Promotion was approved by Align executives. *Id.* at 22.

70. *Fourth*, the Court denied Defendants' motion to dismiss Lead Plaintiff's second claim asserting a violation of Section 20(a) of the Exchange Act against Defendants Hogan and Morici. *Id.* at 23-24. The Court found that Defendants did not argue that the control person claims should be dismissed in its motion and could not do so for the first time in its reply brief. *Id.* at 24.

71. *Fifth*, the Court dismissed Lead Plaintiff's insider trading claim against Defendant Hogan under Sections 10(b) and 20A of the Exchange Act. ECF No. 138 at 24-26. The Court held that Lead Plaintiff could not satisfy the contemporaneity requirement. *Id.* Because the Court found that an amendment would be futile, this claim was dismissed with prejudice. *Id.* at 26-27.

72. On September 18, 2020, the Parties filed a stipulation and proposed order requesting an extension of the deadline for Defendants to file an answer to the AC. ECF No. 139. The Court denied the extension in an order dated September 18, 2020, indicating that the Civil Justice Reform Act requires the case to be resolved by November 4, 2021. ECF No. 140. The Court further ordered the Parties to "propose . . . an expedited case schedule that allows post-trial motions to be resolved by November 4, 2021. Otherwise, the Court requests that the parties agree to engage in alternative dispute resolution now, during which time the Court will stay the case and administrative close the case file." *Id.*

73. In accordance with the Court's September 18, 2020 Order, the Parties met and conferred about pursuing alternative dispute resolution. The Parties agreed to engage in private mediation and thus requested a stay of the Action. ECF No. 141.

74. Defendants then filed their Answer to the AC on September 23, 2020. ECF No. 142.

75. On September 24, 2020, the Court issued an order staying the case and continuing the Case Management Conference to January 20, 2021, among other deadlines. ECF No. 143.

F. November 2020 Mediation Efforts

76. Following the Court's MTD Order, the Parties scheduled a formal arms-length mediation session with Mr. Lindstrom of Phillips ADR on November 23, 2020. In advance of the mediation, Lead Counsel prepared a detailed mediation statement, including exhibits, setting forth the salient factual and legal issues, which assisted the Parties and the mediator in evaluating the strengths and weaknesses of the case.

77. During the mediation, the Parties discussed the merits of the Action in detail, presenting the strengths and weaknesses of their respective positions to the mediator. At the conclusion of the mediation session, the Parties recognized that they were too far apart in their respective positions to reach a resolution of the Action at that time.

G. The Parties' Extensive Discovery Efforts

78. Lead Counsel aggressively pursued discovery from Defendants and the discovery process was extremely contentious. Numerous disputes arose between the Parties regarding the scope of discovery, the terms of discovery-related agreements, and responses to written discovery. Lead Counsel engaged in extensive discovery-related negotiations with Defendants' Counsel and brought and defended multiple disputes before Magistrate Judge Virginia K. DeMarchi ("Judge DeMarchi"). A summary of these discovery efforts follows.

1. Federal Rule 26(f) Report, Initial Disclosures, Protective Order, and ESI Order

79. In December 2020, the Parties conferred following the unsuccessful mediation. As a result of these discussions, on December 21, 2020, the Parties submitted a Joint Status Report in accordance with

the Court's September 24, 2020 order. ECF No. 144. The Parties advised the Court that they had not resolved the Action through mediation and intended to proceed with the litigation. *Id.* at 1. Lead Counsel developed and proposed a schedule to allow post-trial motions to be resolved before February 21, 2022, in accordance with the Civil Justice Reform Act ("CJRA"). *Id.* at 1-2. Defendants did not agree with Lead Plaintiff's proposed schedule and requested the Court do one of the following: stay this Action entirely pending the Supreme Court's decision in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021); stay class certification briefing and expert discovery until after June 2021 but allow all merits discovery to proceed; or enter an elongated proposed schedule. ECF No. 144 at 9-11. In the Joint Status Report, Lead Counsel opposed Defendants' request to stay the Action and opposed the proposed discovery schedule on the basis that the drawn-out schedule would violate the CJRA. *Id.* at 7.

80. On January 13, 2021, the Court ordered the Parties to file a joint proposed case schedule, noting that "the parties may propose a more elongated case schedule than what they proposed after their unsuccessful mediation." ECF No. 146.

81. The Parties conferred and on January 15, 2021, submitted a Joint Case Management Statement with their amended proposed case schedule. ECF No. 147. The Joint Case Management Statement also outlined two disputes that had arisen between the Parties. First, Lead Plaintiff sought to establish a deadline for the substantial completion of discovery. *Id.* Second, Defendants renewed their request to stay entirely discovery in the Action pending the Supreme Court's decision in *Goldman Sachs*, 141 S. Ct. 1951. *Id.* at 4-5. After completing extensive research on these two issues, Lead Counsel opposed the stay and supported its positions with relevant case law. *Id.* at 5-6.

82. On January 15, 2021, the Court denied Defendants' request to stay the Action, lifted the stay, and partially adopted the case schedule proposed by the Parties. ECF No. 148. The Court modified several of the proposed dates, adopted Lead Plaintiff's proposed deadline to substantially complete the production of documents, and set a five-day jury trial for October 3, 2022. *Id.*

83. On February 5, 2021, the Parties exchanged initial disclosures pursuant to Rule 26(a)(1). On March 8, 2020 and March 19, 2020, Lead Counsel served amended initial disclosures to provide the

address and telephone number of individuals likely to have discoverable information and the subjects of that information.

84. Throughout February 2021, the Parties held a series of conferences to negotiate a Protective Order to govern confidentiality and an order governing the production of electronically stored information ("ESI") that was agreeable to both sides. The Parties engaged in extensive negotiations regarding these two orders, exchanged multiple drafts and rounds of edits, and held numerous telephonic meet and confer sessions. Ultimately, however, the Parties were unable to reach complete agreement on either protocol.

85. As discussed in further detail below, the Parties briefed joint discovery letters to Judge DeMarchi regarding disputes related to the Protective Order and the ESI Order. *See supra* Section III.G.4. Following resolution of the dispute, Judge DeMarchi entered the ESI Order on March 24, 2021 (ECF No. 166), and the Protective Order on April 7, 2021 (ECF No. 169).

2. Lead Plaintiff's Written Discovery Propounded on Defendants

86. Lead Plaintiff's first set of requests for production of documents to Defendants, which included 30 unique requests, was served on January 22, 2021. These document requests sought, *inter alia*, documents concerning: (i) Align's efforts to monitor competitors; (ii) the expiration of Align's patents; (iii) the pricing of clear aligners; (iv) the ASP of clear aligners; (v) the Advantage Program; (vi) the 3Q18 Comprehensive Promotions; (vii) Align's other promotional discounts; and (viii) Defendants' alleged misstatement.

87. Defendants provided responses and objections to the document requests on March 8, 2021. Thereafter, the Parties exchanged correspondence and met and conferred multiple times about Defendants' responses and objections to the document requests. As explained more fully below, on May 14, 2021, the Parties advised Judge DeMarchi that a discovery dispute had arisen regarding the applicable scope of discovery. *See supra* Section III.G.4. Ultimately, Judge DeMarchi granted in part Lead Plaintiff's request to compel additional discovery and ordered Defendants to produce documents in accordance with her order. ECF No. 184.

88. By the time this Action resolved, Defendants had produced 19,690 pages of documents in response to the document requests and the Parties were in the process of negotiating additional productions. For example, the Parties were engaged in extensive negotiations regarding custodian and search term parameters for additional productions, as well as the sources of custodial and non-custodial data intended to be searched. Lead Counsel meticulously drafted a list of proposed custodians and search terms, exchanged lists with Defendants, thoroughly evaluated Defendants' proposal, and exchanged correspondence with Defendants supporting its own proposal and identifying defects in Defendants' proposal.

89. As part of the process to efficiently review, analyze, and organize documentary evidence in the Action, Lead Counsel developed a thorough document review protocol and assigned a team of two staff attorneys to conduct an initial review of the produced documents.

90. Lead Counsel retained KLDiscovery, a third party vendor, to host Defendants' production on its sophisticated electronic database and litigation support platform. Lead Counsel used this electronic database to organize and search the documents produced by Defendants. Reviewing attorneys were able to categorize the documents by issues and level of relevance, and to identify key documents supporting Lead Plaintiff's claims. Lead Counsel's discovery efforts provided Lead Plaintiff with a thorough understanding of the strengths and weaknesses of Lead Plaintiff's claims and assisted Lead Counsel in considering and evaluating the fairness of the Settlement.

91. Lead Counsel also prepared and, on March 26, 2021, served five particularized interrogatories on the three Defendants. Lead Plaintiff's interrogatories were designed to (i) uncover information related to Align's promotional activity, forecasting, and competition; and (ii) better understand the defenses Defendants intended to present at trial, including whether Defendants intended to rely on any legal advice in defending the Action.

92. Defendant Align provided its responses and objections to Lead Plaintiff's interrogatories on April 26, 2021. Defendants Morici and Hogan provided responses and objections to Lead Plaintiff's interrogatories on May 3, 2021. Lead Counsel carefully reviewed the responses and objections to Lead

Plaintiff's interrogatories and informed Defendants of a number of deficiencies identified by Lead Counsel. The Parties met and conferred at length regarding Defendants' responses and objections to Lead Plaintiff's interrogatories.

93. On April 14, 2021, Lead Counsel also served 50 particularized requests for admission ("RFAs"). The RFAs were designed to narrow the disputed issues related to class certification.

3. Defendants' Written Discovery Propounded on Lead Plaintiff

94. Defendants also sought extensive discovery from Lead Plaintiff.

95. *First*, on January 22, 2021, Defendants served their first set of requests for production on Lead Plaintiff. Defendants served 24 unique requests for documents covering a wide array of topics including, among others: (i) Lead Plaintiff's communications with Defendants; (ii) the identities of persons referenced in the AC; (iii) Lead Counsel's investigation; (iv) communications related to the Action and Lead Counsel's investigation; (v) Lead Plaintiff's retention of Lead Counsel; (vi) the identities of members of the alleged class; (vii) Lead Plaintiff's participation in other litigation; (viii) Lead Plaintiff's corporate structure; (ix) Lead Plaintiff's document retention policy; (x) Lead Plaintiff's investment strategies and transactions in Align securities; (xi) communications with financial advisors or portfolio managers; and (xii) the computation of losses suffered.

96. After reviewing and analyzing the document requests, on March 8, 2021, Lead Plaintiff served its responses and objections to Defendants' document requests. The Parties thereafter met and conferred and exchanged correspondence regarding the scope of discovery from Lead Plaintiff.

97. In conjunction with these document requests, Lead Plaintiff, with the help of Lead Counsel, began a search for responsive documents in its possession, custody, or control. At the time the Action resolved, Lead Plaintiff was in the process of searching its files for potentially responsive documents. As a result of those efforts, Lead Plaintiff had already produced nearly 2,000 pages of responsive documents to Defendants. Prior to production, Lead Counsel also undertook a thorough review of the documents that Lead Plaintiff had collected to date, to ensure that they were relevant and responsive and that they were not privileged.

98. *Second*, on January 22, 2021, Defendants served a set of 16 unique interrogatories, including contention interrogatories, on Lead Plaintiff. Defendants' interrogatories sought information regarding, *inter alia*: (i) the facts Lead Plaintiff contends supports falsity, reliance, materiality, scienter, and loss causation; (ii) Lead Plaintiff's transactions in Align securities; (iii) the identities of all persons who were involved in the decision to transact in Align securities; (iv) Lead Plaintiff's investment strategies and policies related to the transactions in Align securities; (v) Lead Plaintiff's participation in other litigation; (vi) the computation of losses suffered; and (vii) the identity of the former employees used in the AC.

99. Lead Counsel initially provided Lead Plaintiff's responses and objections to Defendants' interrogatories on March 8, 2021. Lead Plaintiff provided substantive responses to a number of Defendants' interrogatories, but objected to providing substantive responses to the remaining interrogatories on the bases that they were, *inter alia*: (i) premature contention interrogatories served prior to the close of fact and expert discovery; and (ii) premature, overbroad, unduly burdensome, and disproportionate to the needs of the case because the requested information would be produced as part of Lead Plaintiff's forthcoming document productions. The Parties met and conferred concerning Lead Plaintiff's responses and objections. On May 17, 2021, Lead Counsel served a set of amended responses and objections to Defendants' interrogatories. Defendants maintained that the amended responses and objections to two of their interrogatories were not sufficient. As set forth in further detail below, this dispute was ultimately submitted to Judge DeMarchi for resolution on May 18, 2021. ECF No. 174.

4. Discovery Disputes and Related Briefing

100. This litigation was extremely hard fought, especially regarding the appropriate scope of discovery. The Parties attempted in good faith to resolve all discovery disputes without Court intervention, including through the exchange of extensive correspondence and hours of telephonic meet and confer sessions. Through the course of discovery, many disputes were resolved without Court intervention.

101. Ultimately, however, the Parties were unable to resolve certain key issues regarding (i) the Protective Order, (ii) the ESI Order, (iii) Lead Plaintiff's requests for production, and (iv) Lead Plaintiff's responses to Defendants' interrogatories.

102. **Dispute Regarding Protective Order**: The Parties disagreed about whether the Protective Order should prohibit the disclosure of protected material: (i) to experts with connections to Align competitors, and (ii) during depositions of individuals who were not current employees, agents, experts or consultants of Align. The Parties attempted in good faith to resolve this discovery dispute through the exchange of multiple drafts and rounds of edits, extensive correspondence, and five telephonic meet and confers, but were unsuccessful. The Parties negotiated a briefing schedule to submit a joint letter brief to Judge DeMarchi on the issue.

103. After Lead Counsel conducted comprehensive legal research and exchanged its portion of the joint letter brief with Defendants, on March 1, 2021, the Parties filed an eight-page joint letter brief. ECF No. 155. Judge DeMarchi conducted a discovery hearing on March 9, 2021 (ECF No. 159), during which Lead Counsel vigorously defended Lead Plaintiff's position. Following the discovery hearing, Judge DeMarchi ordered the Parties to confer again and submit additional briefing. ECF No. 161. After further negotiations, the Parties came to an agreement on language regarding disclosure to experts, but were not able to resolve the issue regarding disclosure during depositions. ECF No. 164. On March 25, 2021, Judge DeMarchi ordered that the Parties submit a Protective Order using the language proposed by Lead Plaintiff. ECF No. 167.

104. **Dispute Regarding ESI Order**: The Parties also disagreed as to whether the Protective Order should include a Federal Rule of Evidence 502(d) order even though no producing party had committed to a "quick peek" process. As with the Protective Order, the Parties attempted in good faith to resolve this discovery dispute, including through five telephonic meet and confers, but were not successful. Pursuant to Judge DeMarchi's Standing Order for Civil Cases, the Parties filed a seven-page joint letter brief regarding this dispute on March 1, 2021, to be heard at the same March 9, 2021 discovery hearing. ECF No. 156. Following the discovery hearing, Judge DeMarchi ordered the Parties to confer again. ECF

No. 161. After further negotiations, the Parties advised Judge DeMarchi that they came to an agreement. ECF No. 164. Judge DeMarchi then entered the ESI Order on March 24, 2021. ECF Nos. 165-66.

105. **Dispute Regarding Lead Plaintiff's Requests for Production**: Although the Parties engaged in extensive negotiation efforts regarding Lead Plaintiff's requests for production, they were unable to reach agreement on: (i) the relevant time period applicable to three document requests, (ii) whether Lead Plaintiff was entitled to certain documents regarding the Advantage Program and 3Q18 Comprehensive Promotions as requested in five document requests, and (iii) whether Lead Plaintiff was entitled to certain documents regarding Align's clear aligner ASP and the reasons for the 3Q18 ASP decline as requested in four document requests. *See* ECF No. 172. On May 14, 2021, the Parties filed an eight-page joint discovery letter with Judge DeMarchi describing the dispute. ECF No. 172. On June 1, 2021, Judge DeMarchi held a discovery hearing regarding the dispute. ECF No. 178. On June 25, 2021, Judge DeMarchi granted Lead Plaintiff's request in part. ECF No. 184.

106. **Dispute Regarding Defendants' Interrogatories**: The Parties were also unable to reach agreement regarding whether, in response to Defendants' interrogatories: (i) Lead Plaintiff was required to include any person with whom Lead Plaintiff consulted or conferred before engaging in Align securities transactions; and (ii) whether Lead Plaintiff was required to identify any person, including financial advisors or portfolio managers, who was involved in or responsible for advice concerning the investment strategy relevant to Lead Plaintiff's Align securities transactions. On May 18, 2021, the Parties filed an eight-page joint discovery letter to Judge DeMarchi describing the dispute, and the issue was heard by Judge DeMarchi during the June 1, 2021 discovery hearing. ECF No. 178.

107. In her June 3, 2021 order, Judge DeMarchi noted that "the parties' disagreement might not be material to SEB's interrogatory answers." ECF No. 182. Judge DeMarchi nonetheless ordered Lead Plaintiff to amend its responses in accordance with her order or advise Defendants in writing that Lead Plaintiff's responses did not require amendment as they fully responded to Defendants' interrogatories. *Id.*

H. Motion for Class Certification

108. While the Parties reached the Settlement before the deadline for filing a motion for class certification, Lead Counsel had already put significant effort into its anticipated motion for class certification.

109. *First*, as discussed above, Lead Counsel served fifty unique RFAs to support its class certification motion. On May 21, 2021, Defendants served their responses and objections to each of the RFAs. Lead Counsel systematically reviewed each of Defendants' responses to determine its potential benefit to Lead Plaintiff's motion for class certification.

110. *Second*, Lead Counsel had started conducting comprehensive legal research to support its anticipated motion, including a detailed review of the Court's and the Ninth Circuit's class certification jurisprudence. Using the legal research completed, Lead Counsel began drafting its opening class certification motion. By the time the Action resolved, Lead Counsel had also put substantial work into drafting its opening class certification motion.

111. *Third*, as described in further detail below, Lead Counsel retained an expert, Chad Coffman, C.F.A. of Global Economics Group, LLC, to opine on market efficiency and damages. Prior to resolution of the Action, Lead Counsel had engaged in multiple discussions with Mr. Coffman regarding market efficiency, price impact, and damages, and Mr. Coffman had begun preparing a report to submit in connection with Lead Plaintiff's class certification motion.

I. Lead Plaintiff's Work with Experts

112. Over the course of the litigation, Lead Counsel consulted with three experts in the fields of loss causation and damages. At the outset of the Action, Lead Counsel consulted with Michael L. Hartzmark, Ph.D. of Hartzmark Economics Litigation Practice, LLC, as a non-testifying consultant regarding loss causation and damages issues relevant to pleading Lead Plaintiff's claims. Hartzmark Economics Litigation Practice, LLC is a Chicago-based economic consulting firm that applies academic-based empirical and theoretical analysis to matters relating to securities litigation such as damages analytics for Section 10b-5 cases and loss causation assessments.

113. After the Second Motion to Dismiss was denied, in part, Lead Counsel retained Zach Nye, Ph.D. of Stanford Consulting Group, Inc., a firm based in Redwood City, California specializing in research, analysis, and expert testimony in complex business litigation and regulatory proceedings, to serve as Lead Plaintiff's consultant and expert regarding market efficiency, loss causation, and damages. In that role, Dr. Nye consulted with Lead Counsel regarding loss causation and damages issues in connection with the first mediation. Ultimately, however, Dr. Nye had scheduling conflicts that prevented him from acting as Lead Plaintiff's expert under the schedule that the Court entered in January 2021.

114. Lead Counsel then retained Chad Coffman, C.F.A., to serve as Lead Plaintiff's consultant and expert regarding market efficiency, loss causation, and damages. Mr. Coffman is the President of Global Economics Group LLC, a Chicago-based firm that specializes in the application of economics, finance, statistics, and valuation principles to facts that arise in a variety of contexts, including litigation. As discussed above, in that role, Mr. Coffman began preparing a report to submit in connection with class certification. Lead Counsel also consulted with Mr. Coffman regarding damages and loss causation issues in connection with the second mediation. In addition, Lead Counsel worked with Mr. Coffman to develop the proposed Plan of Allocation in this matter.

J. June 2021 Mediation

115. On June 10, 2021, in accordance with the Court's May 6, 2021 order referring the Parties to private mediation (ECF No. 171), the Parties participated in another formal arm's-length meditation session with Mr. Lindstrom. In preparation for the mediation, Lead Counsel carefully reviewed Defendants' supplemental mediation statement and the 23 additional exhibits attached thereto, as well as all of the discovery materials exchanged between the Parties.

116. During the June 2021 mediation, the Parties again discussed the merits of the Action in detail, including the strengths and weaknesses of each side's position. After lengthy and hard-fought negotiations, the Parties reached an agreement in principle to resolve the Action for $16 million, and executed a binding Term Sheet the following day, on June 11, 2021.

IV. THE SETTLEMENT

117. The Settlement currently before the Court provides for a cash recovery of $16 million. As set forth above, the Settlement achieved here is the result of contentious litigation, as well as protracted arm's-length negotiations by fully informed Lead Counsel and Lead Plaintiff. Lead Counsel is requesting attorneys' fees in an amount below the Ninth Circuit's 25% benchmark, there is no clear sailing agreement, and under the terms of the Stipulation, Defendants have no right to the return of any portion of the Settlement Fund for any reason upon the occurrence of the Effective Date.

118. As set forth herein, the Settlement provides Settlement Class Members with certain, near-term benefits and eliminates the significant risks of continued litigation where a favorable outcome was not guaranteed.

A. Settlement Negotiations

119. The Settlement is the result of rigorous arm's-length negotiations, following extremely contentious litigation, dispositive motion practice, extensive discovery, multiple discovery disputes requiring judicial intervention, and consultations with experts. The Parties' settlement efforts included two full days of formal mediation.

120. Initially, on November 23, 2020, the Parties participated in a remote mediation session with Mr. Lindstrom, a neutral mediator highly experienced in the resolution of securities class actions.

121. Before the November 2020 mediation, Lead Counsel thoroughly reviewed the Court's MTD Order, the AC, the relevant case law, and all of the available factual evidence. At the direction of Mr. Lindstrom, the Parties prepared and submitted detailed mediation statements and supporting exhibits advocating their respective positions on the relevant law and facts.

122. During the November 2020 mediation, the Parties engaged in discussions about the merits of the case and presented the strengths and weaknesses of their respective positions and arguments. At the conclusion of the mediation session, the Parties remained too far apart in their respective positions to resolve the Action at that time.

123. Seven months later, while engaged in highly contentious discovery efforts and pursuant to the Court's order referring the Parties to private mediation (ECF No. 171), the Parties reopened settlement negotiations and agreed to participate in a second mediation with Mr. Lindstrom on June 10, 2021.

124. Prior to the June 2021 mediation, Lead Counsel reviewed all of the relevant factual evidence and case law, as well as the Parties' mediation statements and the opinions of the Court in this Action. Additionally, the Parties exchanged multiple rounds of settlement demands and offers. Along with Lead Plaintiff, Lead Counsel painstakingly evaluated each of the settlement demands and offers.

125. On June 10, 2021, the Parties participated in a protracted remote mediation session, which continued late into the night and the following day. During the mediation, the Parties advocated the merits of their respective positions and discussed at length the strengths and weaknesses of each side. After extensive discussions, the Parties reached an agreement-in-principle to settle all claims in the Action for $16 million, and executed a binding Term Sheet setting forth the material terms of their agreement on June 11, 2021.

126. Thereafter, the Parties engaged in additional weeks of negotiations over the specific terms of their agreement, exchanging multiple drafts of the Stipulation and its exhibits as well as a confidential supplemental agreement regarding requests for exclusion ("Supplemental Agreement").[7] During this same time, Lead Counsel requested and reviewed detailed bids obtained from several organizations specializing in class action notice and claims administration, and conducted follow-up communications with certain of these organizations. As a result of this bidding process, Lead Counsel selected JND to serve as the Claims Administrator for the Settlement. Lead Counsel also worked closely with Lead Plaintiff's damages consultant to develop the proposed Plan of Allocation. *See infra* Part VI. The Parties executed the Stipulation, along with the Supplemental Agreement relating to requests for exclusion, on June 30, 2021.

[7] The Supplemental Agreement sets forth the conditions under which Align may terminate the Settlement in the event that requests for exclusion from the Settlement Class exceed an agreed-upon, confidential opt-out threshold. *See* Stipulation, ¶ 39. Pursuant to its terms, the Supplemental Agreement was submitted to the Court in connection with preliminary approval, with the out-out threshold filed under seal. ECF No. 188-5.

B. Preliminary Approval of the Settlement and Certification of the Settlement Class for Settlement Purposes

127. On July 12, 2021, the Parties filed a joint motion to stay the case deadlines. ECF No. 186. By order dated July 13, 2021, the Court granted a one-week extension of all case deadlines, providing Lead Plaintiff until July 15, 2021, to file a motion for preliminary approval of the Settlement. ECF No. 187.

128. On July 15, 2021, Lead Plaintiff filed its unopposed motion for preliminary approval of the Settlement ("Preliminary Approval Motion") along with the Stipulation and its exhibits and a supporting memorandum. ECF Nos. 188-89. Specifically the Preliminary Approval Motion moved the Court for an order: (i) certifying the proposed Settlement Class for settlement purposes, (ii) granting preliminary approval of the Settlement on the terms set forth in the Stipulation, (iii) authorizing the retention of JND as the Claims Administrator for the Settlement, (iv) approving the form and manner of notice of the Settlement to the Settlement Class, and (v) setting a hearing date for final approval of the Settlement ("Final Approval Hearing") as well as the schedule for various deadlines in connection with the Settlement. ECF No. 189.

129. On October 21, 2021, the Court held a hearing by videoconference on the Preliminary Approval Motion. ECF Nos. 193, 195. During the hearing, the Court requested Lead Counsel incorporate certain changes into the proposed Notice. Lead Counsel made the Court's requested edits and submitted the updated Settlement documents to the Court on November 1, 2021. ECF No. 197.

130. On November 2, 2021, the Court entered its Preliminary Approval Order. ECF No. 198. The Preliminary Approval Order, among other things, granted preliminary approval of the Settlement, approved the form and manner of class notice, and scheduled the Final Approval Hearing for April 28, 2022. *Id.*

131. In addition, the Parties stipulated to certification of the following Settlement Class for purposes of effectuating the Settlement (*see* Stipulation, ¶ 2):

> [A]ll persons and entities who purchased or otherwise acquired the common stock of Align between May 23, 2018 and October 24, 2018, both dates inclusive, and who were damaged thereby. Excluded from the Settlement Class are: (I) Defendants; (II) present or former executive officers and directors of Align during the Settlement Class Period and their Immediate Family Members; (III) any of the foregoing entities' and individuals' legal

> representatives, heirs, successors or assigns; and (IV) any entity in which Defendants have or had a controlling interest, or any affiliate of Align. For the avoidance of doubt, "affiliates" are persons or entities that directly, or indirectly through one or more intermediaries, control, are controlled by or are under common control with one of the Defendants. Also excluded from the Settlement Class are any persons and entities who or which submit a request for exclusion from the Settlement Class that is accepted by the Court.

Id.

132. In its Preliminary Approval Order, the Court found, pursuant to Rule 23(e)(1)(B)(ii) of the Federal Rules of Civil Procedure, that it "will likely be able to certify the Settlement Class for purposes of the proposed Settlement" and "will likely be able to appoint Lead Plaintiff as Class Representative for the Settlement Class and to appoint Lead Counsel Kessler Topaz Meltzer & Check, LLP as Class Counsel for the Settlement Class pursuant to Rule 23(g) of the Federal Rules of Civil Procedure." ECF No. 198, ¶¶ 2-3. In connection with final approval of the Settlement, the Court will be asked to finally certify the Settlement Class and finally approve the appointment of SEB as Class Representative for the Settlement Class and the appointment of KTMC as Class Counsel for the Settlement Class. In accordance with the Preliminary Approval Order, notice of the Settlement was provided to the Settlement Class, advising of, among other things, the terms of the Settlement, the reasons for the Settlement and the key procedural dates related to the Settlement, such as the objection, exclusion, and claim-submission deadline, and the date and time of the Final Approval Hearing.

C. Reasons for Settlement

133. As explained fully above, the Settlement is the result of lengthy arm's-length negotiations by fully informed Lead Plaintiff and Lead Counsel and resolves this extremely contentious litigation. At the time the Parties reached their agreement-in-principle to resolve this Action, Lead Plaintiff and Lead Counsel had sufficient materials to evaluate the strengths and weaknesses of the claims alleged in the AC. In particular, Lead Counsel's extensive discovery efforts (including review and analysis of nearly 20,000 pages of discovery), exhaustive legal analysis, and consultations with consultants, allowed Lead Plaintiff and Lead Counsel to undertake a comprehensive evaluation of the strengths and weaknesses of the claims alleged in the AC. Based on that evaluation, Lead Counsel (a firm with extensive experience in the

prosecution of complex securities litigation) together with Lead Plaintiff (a large and sophisticated institutional investor) determined that the Settlement was in the best interests of the Settlement Class.

134. In particular, Lead Counsel and Lead Plaintiff understood that while their case had merit, there were also a number of factors that made the outcome of continued litigation uncertain. This is particularly true considering the Court's September 2020 MTD Order, which dismissed with prejudice all but one of the alleged misleading statements and the Section 20A insider trading claim. As a result, the Settlement Class's ability to recover was entirely dependent on the interpretation of the single remaining statement made by one of the individual Defendants. There was no way for Lead Counsel to predict how the Court or a jury would interpret this statement or what conclusions they would draw based on the evidence and testimony presented at the summary judgment stage or at trial. With no alternate misstatements or omissions, an adverse ruling could have easily foreclosed any recovery for the Settlement Class. Further, Defendants have adamantly denied any culpability throughout the Action, and were prepared to mount aggressive defenses at class certification and summary judgment. If the Court at class certification and summary judgment or a jury at trial sided with Defendants on even one of their defenses, it could have substantially decreased or potentially foreclosed any recovery at all for the Settlement Class. Moreover, even if Lead Plaintiff prevailed at trial, Defendants gave every indication that they intended to pursue every avenue for appeal, injecting additional risk (as well as delay) into the process.

135. Several of the most serious risks of an adverse outcome faced by the Settlement Class are discussed in the following paragraphs. Lead Counsel and Lead Plaintiff carefully evaluated and considered each of these substantial risks and costs throughout the pendency of the Action and during settlement discussions with Defendants. Ultimately, Lead Counsel and Lead Plaintiff came to the conclusion that, considering the risk of a drastically-reduced—or even entirely-foreclosed—recovery, the Settlement represented an excellent result for the Settlement Class.

1. Risks in Establishing Elements of Securities Fraud

136. Lead Plaintiff faced significant risks in establishing that each of the elements of securities fraud was met. More specifically, at summary judgment and trial, Lead Plaintiff would have had the burden

to establish falsity, materiality, scienter, loss causation, and damages. At the motion to dismiss stage, Defendants vehemently argued that Lead Plaintiff could not establish that they made a materially false and misleading statement, that the information they allegedly misrepresented and omitted was not material, and that they did not act knowingly or with deliberate recklessness, i.e., with scienter. Based on these arguments, the Court found that the CC did not adequately allege materiality, falsity, or scienter for any statement. Even after Lead Plaintiff amended the CC to include additional allegations, the Court only found that the AC adequately alleged falsity, materiality, and scienter for a single statement. As they did at the motion to dismiss stage, Defendants would have continued to argue that Lead Plaintiff could not establish falsity, materiality, and scienter for that single statement at every possible opportunity, including during the summary judgment and trial stages. As a result, had the Action continued, establishing falsity, materiality, and scienter would have presented a substantial obstacle to recovery in this case.

137. For example, as they did at the motion to dismiss stage, Defendants would have continued to argue that Lead Plaintiff was misinterpreting the single remaining false and misleading statement. More specifically, Defendant Hogan made the statement at issue in response to the following analyst question:

> First one on just competition, Joe, is there anything—since some of the competitors launched back in May [at the AAO], that you're hearing in terms of how they're approaching their and potentially your customer bases with respect to trialing or getting some initial kind of traction in the field? Or has it been relatively kind of quiet? And then with respect to the guidance question and competition, is there anything at all factored into your 2018 growth outlook, including the revised one? Any kind of impact from competition?

¶ 82.

138. At summary judgment and trial, Defendants would have continued to argue the statement at issue was made in response to "a multi-compound series of questions from an analyst" (ECF No. 147 at 3) and Defendant Hogan's statement "there's not a momentum piece or anything that we're adjusting the business around right now" was in response to the first portion of the question regarding competitors "approaching their and potentially your customer bases with respect to trialing or getting some initial kind of traction in the field," not the second portion of the question regarding whether there has been "[a]ny kind of impact from competition."

139. In the MTD Order, the Court explained that "Hogan's statement is ambiguous as to whether Hogan was responding to the first portion of the question, about competitors using trials to gain traction in the market, or whether he was addressing the second question, regarding the impact of competition more generally." ECF No. 138 at 19. The Court nevertheless found falsity adequately pled because "the Court must adopt Plaintiff's interpretation that Hogan was discussing the impact of competition generally because the Court may not resolve any disputes about the actual meaning of the statement in this procedural posture" and "on a motion to dismiss, the Court must construe the pleadings in 'the light most favorable to the nonmoving party.'" *Id.* Lead Plaintiff and Lead Counsel recognize, however, that there is no guarantee that the Court, on a fully evidentiary record, or ultimately a jury would agree with Lead Plaintiff's interpretation of the disputed statement. Had the Court or jury sided with Defendants and held that the statement was not in response to the portion of the question regarding the "impact from competition," there was the real risk that the Settlement Class would have recovered nothing.

140. Defendants would also have been prepared to argue at summary judgment and trial, as they had at the motion to dismiss stage, that their failure to disclose the 3Q18 Discounting Promotion was not materially misleading, given that the market was already fully aware that Align regularly engaged in marketing and promotional activities and further disclosed that such activities could negatively impact Align's ASPs.

141. Indeed, even at the motion to dismiss stage, the Court found that whether the AC adequately alleged falsity and materiality for the disputed statement was a "close call":

> In sum, the Court finds that Plaintiff's allegation as to Statement 5 has adequately stated a claim for violation of § 10(b) of the Exchange Act and Rule 10b-5. Although the Court finds that it is a close call with respect to both the falsity and the materiality of the statement in light of Defendants' repeated disclosures about the existence of promotional discounts, the Court finds it inappropriate to prematurely resolve that factual dispute on a motion to dismiss.

ECF No. 138 at 23. Although it was "inappropriate to prematurely resolve" the falsity and materiality questions at the motion to dismiss stage, Defendants would have continued to aggressively push this argument at summary judgment and trial. Although Lead Plaintiff believed that it had strong responses, it

also recognized that there was significant risk that the Court or a jury might ultimately agree with Defendants and dismiss the sole remaining statement on falsity and/or materiality grounds.

142. Moreover, Defendants would have asserted, as they have throughout this litigation, that the 3Q18 Discounting Promotion was not put into place in response to any competitive threat, but was instead just a run of the mill promotion of the sort that Align ran all of the time. For instance, in their Second Motion to Dismiss, Defendants argued that "the use of promotions was a regular part of Align's marketing tools, of which the summer program was yet another." ECF No. 122 at 16; *see also id.* at 20 (arguing that "the 3Q promotion" was "one of many in Align's history as a routine part of running its business"). Although Lead Plaintiff believed that discovery ultimately would have borne out its claims, had the Court or jury agreed with Defendants, the Settlement Class likely would have recovered nothing.

143. Thus, even though the Court found that the AC adequately pled that the alleged misstatement was materially false and misleading, Lead Plaintiff understood that materiality and falsity are questions typically reserved for the trier of fact. As a result, Lead Plaintiff recognized that materiality and falsity presented a significant risk going forward. Fundamentally, Defendants had viable arguments which easily could have resonated with a jury, particularly given that the entire case turned on the jury's view of just one remaining statement.

144. In addition to the very real risks that Lead Plaintiff faced in establishing that the alleged statement was materially false and misleading, and that the relevant truth was not known to the market throughout the Settlement Class Period, Lead Plaintiff was also required to prove that Defendants knew or recklessly disregarded that their statement was false and misleading when made. Defendants were no doubt prepared to mount a strong scienter defense and would have continued to argue that Defendant Hogan did not act with either knowledge or deliberate recklessness when making the alleged misstatement.

145. In particular, Defendants argued vigorously throughout the Action that they did not realize until the very end of the third quarter that the 3Q Discounting Promotion would have a detrimental effect on ASPs. In particular, Defendants would have argued, as they did at the motion to dismiss stage, that the impact on ASPs was entirely unexpected because Align saw "much higher than expected uptake on some

of these promotions" in "the upper end of our customer segment" while "[w]e did not get engagement in the lower end that we anticipated" and so customers unexpectedly "achiev[ed] higher overall discounts" than anticipated. ECF No. 122 at 20. In other words, according to Defendants, "[t]hat the 3Q promotion . . . failed to achieve well-intentioned goals is not securities fraud." *Id.*

146. While Lead Plaintiff of course strongly believed in its claims, there was no guarantee that the Court or a jury would agree with Lead Plaintiff's ultimate assessment of the discovery record. Indeed, because trial would ultimately have turned on what a jury concluded was in the minds of the Defendants, the risk of losing the votes of one or more jurors, where consensus was required, was significant.

2. Risks of Class Certification and the Anticipated Costs of Expert Discovery in Connection with Class Certification

147. The Settlement Class also would have faced risk at the class certification stage. At the class certification stage, the burden lies with Lead Plaintiff to demonstrate that the putative class meets all of the applicable prerequisites set forth in Rule 23(a) and 23(b). Failing to satisfy a single requirement had the potential to preclude class certification.

148. Specifically, Lead Plaintiff faced some risk in proving that the proposed class satisfied Rule 23(b)(3). Defendants likely would have vigorously argued that the failure to prove predominance would have precluded class certification. Proving predominance likely would have required detailed expert reports from each side regarding the fraud on the market presumption and lengthy depositions of these experts. Clearly, the expert discovery that would be required in connection with class certification would have increased the costs of the litigation and thus reduced the Settlement Class's recovery.

149. Moreover, because of the large number of geographically-dispersed potential class members who transacted in Align common stock and because the recovery of each of those individual class members would not have been considerable enough to file an individual action, an order denying class certification likely would have jeopardized the recovery of all class members.

150. Additionally, even if the Court certified the class, Defendants would have had the option to pursue an interlocutory appeal of the certification to the Ninth Circuit pursuant to Rule 23(f). A Rule 23(f) appeal not only would have threatened certification of the class, but would have substantially increased

costs for the putative class and could have significantly delayed discovery and resolution of the case had the Ninth Circuit elected to stay the case entirely pending its review.

3. Risks of Expert Discovery in Connection with Proving Loss Causation and Damages

151. Even if Lead Plaintiff convinced a jury to render a unanimous verdict on liability, they faced significant risks in proving loss causation and damages. At summary judgment and trial, Defendants would have likely made numerous arguments that, if accepted by the Court or jurors, could have materially reduced or, in a worst case scenario, outright precluded, any recovery for the Settlement Class.

152. For example, Defendants would have argued that a large portion of Align's ASP decline and resulting stock price decline on October 25, 2018, was not caused by promotional activity but instead by non-fraud related factors like a change in the exchange rate and a shift in Align's product mix. In fact, on October 25, 2018, Defendants publicly represented that just 36% of the ASP decline was the result of promotional activities, with the remainder attributable to the product mix and exchange rate shifts. If Defendants' argument succeeded, recoverable damages would have decreased by approximately $307 million—or 64%.

153. Moreover, given that Defendants' position that Align regularly engaged in promotional programs, Defendants were also likely to argue that some portion of the 36% ASP decline attributable to promotional programs were the result of discounting promotions other than the 3Q18 Discounting Promotion discussed in the AC. Lead Plaintiff believed that it had strong arguments that—had other promotional programs caused some portion of the ASP decline—such declines would still be causally connected to Defendants' misleading statements and omissions. To the extent that the Court or jury disagreed, however, such arguments had the potential to further decrease the damages that the Settlement Class could ultimately recover.

154. Under any circumstances, the issues of loss causation and damages would likely come down to a battle of the experts. Accordingly, Lead Plaintiff and Lead Counsel recognized that the Court and the jury would be presented with very different opinions from highly qualified experts. If the Court or the jury

found Defendants' expert's testimony to be more credible, it would be likely that Lead Plaintiff and the Settlement Class would recover nothing at all.

155. Accordingly, substantial risks of establishing loss causation and damages still remained in the case at the time the Settlement was reached.

V. COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL ORDER AND REACTION OF THE SETTLEMENT CLASS TO DATE

156. By its Preliminary Approval Order, the Court authorized Lead Counsel to retain JND as the Claims Administrator to supervise and administer the notice procedure in connection with the Settlement as well as the processing of Claims. ECF No. 198, ¶ 7. In accordance with the Preliminary Approval Order, JND, working under Lead Counsel's supervision: (i) emailed or mailed copies of the Notice Packet by first-class mail, postage prepaid to those members of the Settlement Class who could be identified through reasonable effort, including in the records provided by Defendants in accordance with the Stipulation; (ii) mailed a copy of the Notice Packet to the brokers and nominees ("Nominees") contained in JND's Nominee database; and (iii) published the Summary Notice in *The Wall Street Journal* and over *PR Newswire*. The Notice Packet contains, among other things, a description of the Settlement, information regarding the lawsuit, the Plan of Allocation, and the right of Settlement Class Members to: (i) participate in the Settlement; (ii) object to any aspect of the Settlement, the Plan of Allocation, and/or the Fee and Expense Application; or (iii) exclude themselves from the Settlement Class. The Notice Packets also inform recipients of Lead Counsel's intent to apply for an award of attorneys' fees not to exceed twenty percent (20%) of the Settlement Fund, and for reimbursement of Litigation Expenses in an amount not to exceed $250,000.

157. As of February 23, 2022, JND has disseminated 135,086 copies of the Notice Packet to potential members of the Settlement Class and Nominees, as set forth in the Segura Declaration filed concurrently herewith. Segura Decl., ¶ 10. Moreover, in accordance with the Preliminary Approval Order, on December 13, 2021, JND caused the Summary Notice to be published in the national edition of *The Wall Street Journal* and transmitted over *PR Newswire*. *Id.*, ¶ 11.

158. Lead Counsel also worked with JND to establish a website dedicated to the Settlement (i.e., www.AlignSecuritiesLitigationSettlement.com). Segura Decl., ¶ 14. The website provides Settlement Class Members and other interested parties with information concerning the Settlement and access to downloadable copies of the Notice and Claim Form, as well as a copy of the Stipulation, the Preliminary Approval Order, and the AC. *Id*. Additionally, JND established and maintains a toll-free telephone number and interactive voice response system to respond to inquiries from Settlement Class Members regarding the Settlement and how to obtain and complete a Claim Form. *Id.*, ¶ 12. Lead Counsel will work with JND to ensure that the claims process progresses smoothly and, when necessary, to assist Settlement Class Members with their Claim Forms and related inquiries.

159. As set forth above and in the notices, the deadline for members of the Settlement Class to request exclusion from the Settlement Class or to file an objection to the Settlement, the Plan of Allocation, and/or the Fee and Expense Application is March 31, 2022. To date, there has been only one request for exclusion from the Settlement Class. Segura Decl., ¶ 17. And, as of this submission, there have been no objections of any kind. Should any objections or additional requests for exclusion be received, Lead Counsel will address them in its reply submission to be filed on or before April 21, 2022.

VI. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

160. In accordance with the Preliminary Approval Order, and as explained in the Notice, Settlement Class Members who wish to participate in the distribution of the Net Settlement Fund (i.e., the Settlement Fund less: (i) Taxes; (ii) Notice and Administration Costs; (iii) any Litigation Expenses awarded by the Court; (iv) any attorneys' fees awarded by the Court; and (v) any other costs or fees approved by the Court) must submit a timely and valid Claim Form and all required supporting documentation to the Court-authorized Claims Administrator, JND, postmarked (if mailed), or online through the Settlement Website, no later than March 31, 2022. As provided in the Notice, the Net Settlement Fund will be

distributed to Authorized Claimants[8] in accordance with the plan for allocating the Net Settlement Fund among Authorized Claimants approved by the Court.[9]

161. Lead Plaintiff's proposed plan for allocating the net proceeds of the Settlement (i.e., the Plan of Allocation) is set forth in Appendix A to the Notice. Segura Decl., Ex. A. The objective of the Plan is to equitably distribute the Net Settlement Fund to those members of the Settlement Class who purportedly suffered economic losses as a result of the alleged violations of the federal securities laws set forth in the AC, as opposed to economic losses caused by market or industry factors or Align-specific factors unrelated to the allegations in the AC.

162. The Plan was prepared in consultation with Lead Plaintiff's damages consultant, Mr. Coffman, and his team at Global Economics Group, LLC. Lead Plaintiff's damages consultant calculated the estimated amount of alleged artificial inflation in the per share price of Align common stock over the course of the Settlement Class Period that was allegedly proximately caused by Defendants' alleged materially false or misleading statement. As explained in the Notice, the Plan is not a formal damages analysis and is not intended to measure the amounts that Settlement Class Members could recover after a trial.

163. Under the Plan, a "Recognized Loss Amount" will be calculated for each share of Align common stock purchased or otherwise acquired between May 23, 2018 and October 24, 2018, inclusive, that is listed in a Claimant's Claim Form and for which adequate documentation is provided. In order to have a Recognized Loss Amount pursuant to the Plan, a Claimant must have purchased or otherwise acquired Align common stock between May 23, 2018 and October 24, 2018, inclusive (i.e., the Settlement

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[8] An "Authorized Claimant" is a Settlement Class Member who or which submits a Claim Form to the Claims Administrator that is approved by the Court for payment from the Net Settlement Fund pursuant to the terms of the Court-approved Plan of Allocation. Stipulation, ¶ 1(e).

[9] As also set forth in the Notice, if the Court approves the maximum amount of attorneys' fees and Litigation Expenses to Lead Counsel and the estimated amount of Notice and Administration Costs, the Settlement Class will receive approximately $12,175,000 of the Settlement Amount. *See* Segura Decl., Ex. A, pp. 1-2.

Class Period) and held such Align common stock through the alleged corrective disclosure after the close of market on October 24, 2018, that removed the alleged artificial inflation.

164. A Claimant's Recognized Loss Amount will depend on a number of factors, such as: (i) the amount of Align common stock purchased or otherwise acquired during the Settlement Class Period; (ii) the timing of the purchase(s) or acquisition(s) of Align common stock; and (iii) the timing of the sale(s) of such Align common stock, if any.

165. Under the Plan, the calculation of Recognized Loss Amounts also take into account the PSLRA's statutory limitation on recoverable damages, whereby losses on eligible Align common stock cannot exceed the difference between the purchase price paid for the stock and the average price of the stock during the 90-day period subsequent to the Settlement Class Period ("90-day Look-Back Period") if the stock was held through January 22, 2019 (i.e., the end of the 90-day Look-Back Period). For eligible Align common stock sold *during* the 90-day period subsequent to the Settlement Class Period, losses cannot exceed the difference between the purchase price paid for the stock and the average price of the stock during the portion of the 90-day Look-Back period elapsed as of the date of the sale ("90-day Look-Back Value") as set forth in Table 1 of the Plan of Allocation.

166. In addition, the Plan takes into account the Court's September 9, 2020 MTD Order dismissing with prejudice all claims related to allegedly false and misleading statements made between May 23, 2018 through July 25, 2018. Because of the dismissal of these claims, it is far less likely that Lead Plaintiff could have prevailed on these claims if the Action continued, as doing so would have required successfully appealing the Court's decision dismissing those claims. Accordingly, Recognized Loss Amounts resulting from purchases or other acquisitions during this time period are discounted by 90% to reflect the increased litigation risks on the dismissed claims.

167. As explained in the Plan, the Net Settlement Fund will be distributed to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. Specifically, a "Distribution Amount" will be calculated for each Authorized Claimant, which will be the Authorized Claimant's Recognized Claim divided by the total Recognized Claims of all Authorized Claimants,

multiplied by the total amount in the Net Settlement Fund. Under the Plan, if an Authorized Claimant's *pro rata* payment calculates to less than $10.00, no distribution will be made to that Authorized Claimant.

168. Once JND has processed all submitted Claim Forms and provided Claimants with an opportunity to cure any deficiencies in their Claims or challenge the rejection of their Claims, Lead Counsel will file a motion for approval of JND's determinations with respect to all submitted Claims and authorization to distribute the Net Settlement Fund to Authorized Claimants. As set forth in the Plan, JND will conduct distributions of the Net Settlement Fund until it is determined that a further distribution would not be cost-effective. Subject to Court approval, any funds remaining in the Net Settlement Fund after it has been determined that a further distribution would not be cost-effective shall be contributed to Charitable Smiles, a 501(c)(3) organization helping people who cannot afford dental treatment get the care they need (*see* www.charitablesmiles.org).[10]

169. As discussed in the Settlement Memorandum, the structure of the Plan is comparable to plans of allocation that have been used in numerous securities class actions. Lead Counsel submits that the Plan of Allocation is fair and reasonable and should be approved together with the Settlement. In addition, to date, no objections to the Plan have been received.

VII. LEAD COUNSEL'S FEE AND EXPENSE APPLICATION

170. In addition to seeking final approval of the Settlement and approval of the Plan of Allocation, Lead Counsel is applying for an award of attorneys' fees and payment of Litigation Expenses incurred during the course of the Action. Specifically, Lead Counsel is applying for attorneys' fees in the amount of 20% of the Settlement Fund and for reimbursement of Litigation Expenses in the total amount of $190,419.50.[11] As noted above, Lead Counsel's Fee and Expense Application is consistent with the

[10] The Parties do not have any relationship to the proposed *cy pres* recipient.

[11] KTMC's detailed lodestar and expenses are set forth in the declaration of Jennifer L. Joost filed in support of the Fee and Expense Application ("Joost Fee and Expense Declaration"). The Joost Fee and Expense Declaration sets forth the names of the attorneys and professional support staff members from KTMC who worked on the Action and their hourly rates, the lodestar value of the time expended by such attorneys and professional support staff, and the expenses incurred by Lead Counsel.

amounts set forth in the Notice and, to date, no objections to Lead Counsel's requests for fees and expenses have been received.[12]

171. Below is a summary of the primary factual bases for Lead Counsel's Fee and Expense Application. A full analysis of the factors considered by courts in this Circuit when evaluating requests for attorneys' fees and expenses from a common fund, as well as the supporting legal authority, is presented in the accompanying Fee Memorandum.[13]

A. Lead Counsel's Fee Request Is Fair and Reasonable and Warrants Approval

1. The Favorable Settlement Achieved

172. Courts have consistently recognized that the result achieved is a key factor to be considered in making a fee award. *See* Fee Memorandum, § II.D.1. Here, the Settlement provides a $16 million common fund. While total potential damages for the non-dismissed claims are approximately $482 million as estimated by Lead Plaintiff's damages consultant, if any of Defendants' arguments prevailed going forward, the potential recovery available for the Settlement Class would have substantially decreased. For example, as noted above, if the Action continued, Defendants would have argued that a large portion of Align's ASP decline and resulting stock price decline on October 25, 2018, was caused by non-fraud related factors like a change in the exchange rate and a shift in Align's product mix and not by the promotional activity at issue in the Action. Indeed, on October 25, 2018, Defendants publicly represented that just 36% of the ASP decline was the result of promotional activities, with the remainder attributable to the product mix and exchange rate shifts. If Defendants' argument prevailed, recoverable damages would have decreased significantly to $174.6 million. Thus, the $16 million Settlement represents between 3.3% and 9.1% of likely recoverable damages according to Lead Plaintiff's damages consultant. This result is significant when considered in view of the substantial risks and obstacles to obtaining a larger recover

[12] Lead Counsel will address any objections received in its reply to be filed by April 21, 2022.

[13] Courts in this Circuit consider the following factors when determining whether a fee percentage sought from a common fund is fair and reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; (6) the reaction of the class; and (7) the amount of a lodestar cross-check. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002).

(or, any recovery) were the Action to continue towards trial. Here, as a result of the Settlement, numerous Settlement Class Members will benefit and receive compensation for their losses and avoid the substantial risks to recovery in the absence of settlement.

2. The Risks of Litigation and the Need to Ensure the Availability of Competent Counsel in High-Risk Contingent Cases

173. The risks faced by Lead Counsel in prosecuting this Action are highly relevant to the Court's consideration of an award of attorneys' fees, as well as its approval of the Settlement. Here, Defendants adamantly deny any wrongdoing and, if the Action had continued, would have aggressively litigated their defenses through class certification, summary judgment, a trial, and the appeals that would likely follow. As detailed in Section IV(C) above, Lead Counsel and Lead Plaintiff faced significant risks to proving Defendants' liability, loss causation, and damages at all stages of litigation.

174. These case-specific litigation risks are in addition to the risks accompanying securities litigation generally, such as the fact that this Action is governed by stringent PSLRA requirements and case law interpreting the federal securities laws and was undertaken on a contingent-fee basis. From the outset, Lead Counsel understood that this would be a complex, expensive, and potentially lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and financial expenditures that vigorous prosecution of the case would require. In undertaking that responsibility, Lead Counsel was obligated to ensure that sufficient resources (in terms of attorney and support-staff time) were dedicated to prosecuting the Action, and that funds were available to compensate vendors and consultants and to cover the considerable out-of-pocket costs that a case like this typically demands. With an average lag time of several years for these cases to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an hourly, ongoing basis. Lead Counsel has dedicated over 4,675 hours in prosecuting this Action for the benefit of the Settlement Class, yet has received no compensation for its efforts.

175. Lead Counsel also bore the risk that no recovery would be achieved. Lead Counsel is aware that despite the most vigorous and competent efforts, a law firm's success in contingent litigation such as this is never guaranteed. Moreover, it takes hard work and diligence by skilled counsel to develop the facts

and theories that are needed to sustain a complaint or win at trial, or to persuade sophisticated defendants to engage in serious settlement negotiations at meaningful levels. Lead Counsel is aware of many hard-fought lawsuits in which, because of the discovery of facts unknown when the case commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by plaintiff's counsel produced no fee.

176. The United States Supreme Court and numerous other courts have repeatedly recognized that the public has a strong interest in having experienced and able counsel enforce the federal securities laws through private actions. *See, e.g.*, *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide '"a most effective weapon in the enforcement' of the securities laws and are a 'necessary supplement to [SEC] action'") (citations omitted). Vigorous private enforcement of the federal securities laws can only occur if private investors can obtain some parity in representation with that available to large corporate defendants. If this important public policy is to be carried out, courts should award fees that adequately compensate plaintiffs' counsel, taking into account the risks undertaken in prosecuting a securities class action as well as the economics involved.

177. Lead Counsel's efforts, in the face of substantial risks and uncertainties, have resulted in what Lead Counsel believes to be a significant and certain recovery for the Settlement Class. In these circumstances, and in consideration of Lead Counsel's hard work and the favorable result achieved, Lead Counsel believes the 20% fee request is fair and reasonable and should be approved.

3. The Work of Lead Counsel and the Lodestar Cross-Check

178. Lead Counsel has devoted substantial time to the prosecution of the Action. As more fully described above, Lead Counsel: (i) conducted an exhaustive investigation into the Settlement Class's claims, including interviews with numerous former Align employees; (ii) researched and prepared two detailed complaints, including the operative AC; (iii) opposed two motions to dismiss; (iv) issued document requests and served requests for admission and interrogatories on Defendants and engaged in numerous meet and confers regarding the scope of the discovery requested and the objections thereto; (v) reviewed and analyzed Defendants' resulting production of 19,690 pages of documents; (vi) responded

to Defendants' document requests and interrogatories; (vii) filed and argued four discovery-related motions before Judge DeMarchi; (viii) consulted with experts and consultants in the areas of market efficiency, loss causation, and damages; (ix) made substantial progress in preparing Lead Plaintiff's anticipated motion for class certification; and (x) prepared for and engaged in settlement negotiations with Defendants, including two formal mediation sessions facilitated by Mr. Lindstrom. *See supra* paragraphs 25-126. Here, Lead Counsel's efforts were driven and focused on advancing the litigation to achieve the most successful outcome for the Settlement Class, whether through settlement or trial, by the most efficient means possible.

179. Throughout the litigation, Lead Counsel maintained an appropriate level of staffing that avoided unnecessary duplication of effort and ensured the efficient prosecution of this Action. As the lead partner on this case, I personally monitored and maintained control of the work performed by other lawyers at KTMC throughout the course of the litigation. Other experienced attorneys at my firm were also involved in the drafting of pleadings, motion papers, and in the settlement negotiations. More junior attorneys and paralegals worked on matters appropriate to their skill and experience level.

180. The time devoted to this Action by Lead Counsel is set forth in the Joost Fee and Expense Declaration. Exhibit A to the Joost Fee and Expense Declaration is a schedule that summarizes the time expended by the attorneys and professional support staff employees at KTMC. Specifically, Exhibit A reports the amount of time spent by each attorney and professional support staff employee who worked on the Action and their resulting "lodestar," i.e., their hours multiplied by their hourly rates. Exhibit B to the Joost Fee and Expense Declaration provides a breakdown of Lead Counsel's time by litigation category.

181. The hourly rates of Lead Counsel range from $820 to $850 per hour for partners, $385 to $690 per hour for other attorneys, $305 per hour for a paralegal, and $350 to $500 per hour for in-house investigators. *See* Joost Fee and Expense Declaration, Ex. A. These hourly rates are reasonable for this type of complex litigation. *See* Fee Memorandum, § II.C.2.

182. In total, from the inception of this Action through February 17, 2022, Lead Counsel expended over 4,675 hours on the investigation, prosecution, and resolution of the claims against

Defendants for a total lodestar of $2,766,489.50.[14] Thus, pursuant to a lodestar "cross-check," Lead Counsel's fee request of 20% of the Settlement Fund (or $3.2 million plus interest), if awarded, would yield a modest multiplier of approximately 1.16 on Lead Counsel' lodestar, which falls well within the range of fee multipliers typically awarded in comparable securities class actions and in other class actions involving significant contingency fee risk, in this Circuit and elsewhere. *See* Fee Memorandum, § II.C.2.

4. The Quality of Lead Counsel's Representation

183. The skill and diligence of Lead Counsel also supports the requested fee. As demonstrated by KTMC's resume (*see* Joost Fee and Expense Decl., Ex. D), Lead Counsel is a highly experienced and skilled law firm in the securities litigation field, with a long and successful track record representing investors in such cases, and is consistently ranked among the top plaintiffs firms in the country. The substantial result achieved for the Settlement Class here reflects the superior quality of this representation.

184. The quality of the work performed by Lead Counsel in obtaining the Settlement should also be evaluated in light of the quality of opposing counsel. Defendants in this case were represented by experienced counsel from the nationally prominent litigation firm Wilson Sonsini Goodrich & Rosati, P.C. This firm vigorously and ably defended the Action for nearly three years. In the face of this formidable defense, Lead Counsel was nonetheless able to develop a case that was sufficiently strong to persuade Defendants to settle the Action on terms that are favorable to the Settlement Class.

5. Lead Plaintiff's Support of the Fee and Litigation Expense Request

185. Lead Plaintiff is a sophisticated institutional investor that has closely supervised, monitored, and actively participated in the prosecution and settlement of the Action. Lead Plaintiff has evaluated and fully supports Lead Counsel's fee request. The 20% fee request is also authorized by and made pursuant to an agreement made between Lead Plaintiff and Lead Counsel at the outset of the Action. Lead Plaintiff's

[14] Lead Counsel will continue to perform legal work on behalf of the Settlement Class should the Court approve the Settlement. Additional resources will be expended assisting Settlement Class Members with their Claim Forms and related inquiries and working with the Claims Administrator, JND, to ensure the smooth progression of claims processing. No additional legal fees will be sought for this work.

endorsement of Lead Counsel's fee request further demonstrates its reasonableness and this endorsement should be given meaningful weight in the Court's consideration of the fee award.

B. Lead Counsel's Request for Litigation Expenses Warrants Approval

186. Lead Counsel seeks reimbursement from the Settlement Fund of $190,419.50 for expenses that were reasonably and necessarily incurred by Lead Counsel in connection with the Action. The Notice informs the Settlement Class that Lead Counsel will apply for reimbursement of Litigation Expenses in an amount not to exceed $250,000. The amount of Litigation Expenses requested by Lead Counsel is below the maximum expense amount set forth in the Notice.[15]

187. From the inception of this Action, Lead Counsel was aware that it might not recover any of the expenses it incurred in prosecuting the claims against Defendants and, at a minimum, would not recover any expenses until the Action was successfully resolved. Lead Counsel also understood that, even assuming the Action was ultimately successful, an award of expenses would not compensate counsel for the lost use or opportunity costs of funds advanced to prosecute the claims against Defendants. Lead Counsel was motivated to, and did, take appropriate steps to avoid incurring unnecessary expenses and to minimize costs without compromising the vigorous and efficient prosecution of the Action.

188. Lead Counsel's expenses are summarized in Exhibit B to the Joost Fee and Expense Declaration, which identifies each category of expense and the amount incurred for each category.[16] Lead Counsel's expenses include charges for, among other things: (i) experts and consultants in connection with various stages of the litigation; (ii) a database to house the documents produced in discovery; (iii) online

[15] In addition, as noted in the Notice, the Claims Administrator, based on an analysis conducted at the outset of the notice program (ECF No. 189-7, ¶ 15), estimated that Notice and Administration Costs (i.e., the costs for providing notice of the Settlement to the Settlement Class and processing claims) would be between $300,000 and $375,000. Notice and Administration Costs are separate from the Litigation Expenses sought by Lead Counsel and are not included in the Fee and Expense Application.

[16] As set forth the Joost Fee and Expense Declaration, the Litigation Expenses incurred by Lead Counsel are reflected on the books and records maintained by KTMC. These books and records are prepared from expense vouchers, check records, and other source materials, and are an accurate record of the expenses incurred. These expense items are billed separately and are not duplicated in KTMC's hourly rates.

factual and legal research; (iv) mediation; and (v) document reproduction. Courts have consistently found that these kinds of expenses are payable from a fund recovered by counsel for the benefit of a class.

189. The largest component of Lead Counsel's expenses (i.e., $115,626.57, or approximately 60.7% of its total expense request) was incurred for experts and consultants. As noted above, Lead Counsel consulted with experts in preparing the complaints, in preparation for mediation, in preparing its anticipated class certification motion, and in connection with the development of the proposed Plan of Allocation. *See supra* paragraphs 112-14. These experts and consultants were essential to the prosecution of the Action.

190. The next largest expense (i.e., $30,213.59, or approximately 15.9% of Lead Counsel's total expenses) was incurred for legal and factual research. This amount includes charges for computerized research services such as Lexis, Westlaw, and PACER. It is standard practice for attorneys to use online services to assist them in researching legal and factual issues, and indeed, courts recognize that these tools create efficiencies in litigation and ultimately save money for clients and the class.

191. Lead Counsel also incurred a total of $9,294.62 for document hosting and management/litigation support. In addition, Lead Counsel incurred $25,750.00 for charges related to the two formal mediations with Mr. Lindstrom.

192. The other expenses for which Lead Counsel seeks payment are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, court fees, copying costs, and delivery expenses. All of the Litigation Expenses incurred by Lead Counsel were reasonable and necessary to the successful litigation of the Action.

VIII. CONCLUSION

193. For all the reasons set forth above, Lead Counsel respectfully submits that the Settlement and the Plan of Allocation should be approved as fair, reasonable, and adequate. Lead Counsel further submits that the requested fee in the amount of 20% of the Settlement Fund should be approved as fair and reasonable, and the request for reimbursement of Lead Counsel's Litigation Expenses in the amount of $190,419.50 should also be approved.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 24th day of February, in San Francisco, California.

/s/ Jennifer L. Joost
JENNIFER L. JOOST