UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re Nano-X Securities Litigation	**DECISION AND ORDER** 21-CV-5517 (RPK) (PK)

Peggy Kuo, United States Magistrate Judge:

Davian Holdings Limited ("Davian Holdings") has filed an unopposed Motion for Preliminary Approval of Class Action Settlement (the "Motion," Dkt. 65), which was referred to me by the Honorable Rachel P. Kovner. (Order Referring Motion dated June 6, 2023.) For the reasons stated below, the Motion is granted.

BACKGROUND

I. Factual and Procedural Background

Daniel P. McLaughlin ("McLaughlin") brought this action on October 5, 2021 against Nano-X Imaging Ltd. ("Nano-X") and executives on behalf of himself and a putative class consisting of investors in Nano-X, alleging violations of federal securities laws. (*See* Compl., Dkt. 1.) The Amended Complaint brings claims against Nano-X, its Chief Executive Officer Ran Poliakine, and its Chief Financial Officer Itzhak Maayan (collectively, "Defendants") on behalf of all purchasers of Nano-X securities between August 21, 2020 and November 17, 2021, inclusive. (*See* Am. Compl. ¶ 1, Dkt. 24.) Pursuant to an unopposed motion, Davian Holdings was appointed as lead plaintiff in this action, and Pomerantz LLP was appointed as lead counsel. (Mem. Decision and Order, Dkt. 22.)

A separate proceeding against Defendants, *White v. Nano-X Imaging Ltd.*, No. 20-CV-04355 (WFK)(MMH) (the "*White* Action"), was commenced on September 16, 2020. The *White* Action alleges violations of federal securities laws on behalf of all purchasers of Nano-X securities between August 21, 2020 and September 15, 2020, inclusive. The entire class period in the *White* Action is encompassed by the class period in this action.

In the *White* Action, Derson Jolteus and Edward Ko were appointed as co-lead plaintiffs (together, the "*White* Lead Plaintiffs"), and Levi & Korsinsky, LLP was appointed as lead counsel ("*White* Lead Counsel"). (*White* Action, Order, Dkt. 51.) That matter is stayed pending approval of the Motion here. (*White* Action, Order Granting Motion to Stay, Dkt. 93.)

Davian Holdings alleges that Nano-X, an Israeli medical imaging company, and certain of its officers published false or misleading statements or omissions to investors and in United States Securities and Exchange Commission ("SEC") filings. (Am. Compl., Dkt. 24, ¶¶ 156-160.) Davian Holdings contends that these statements and omissions artificially inflated the price of Nano-X's stock, causing Davian Holdings and other members of the Settlement Class, defined *infra*, to suffer damages in connection with their purchases of Nano-X securities. (*Id.*)

The parties in this action and their counsel, along with the *White* Lead Plaintiffs and their counsel, engaged in a full-day mediation session on April 3, 2023 before mediator Jed Melnick, Esq. (Decl. of Justin D'Aloia in Supp. of the Mot. ("D'Aloia Decl."), Dkt. 67, ¶ 16.) On May 3, 2023, the parties informed the Court that they had reached a settlement in principle. (Joint Letter, Dkt. 64.)

In its memorandum in support of the Motion ("Pls. Mem.," Dkt. 66), Davian Holdings, with Defendants' consent, requests (1) preliminary approval of the proposed Settlement Agreement ("Settlement Agreement," Dkt. 67-1); (2) preliminary certification of a class for settlement purposes only, (3) preliminary appointment of Davian Holdings and the *White* Lead Plaintiffs as class representatives for the proposed settlement class, (4) preliminary appointment of the law firms of

Pomerantz LLP and Levi & Korsinsky, LLP as class counsel for the settlement class, and (5) approval of the proposed notice of settlement and settlement procedure. (Pls. Mem. at 1-2; *see also* Settlement Agreement; Proposed Prelim. Approval Order ("Proposed Order"), Dkt. 72-1; Long Form Notice ("Notice"), Dkt. 72-3[1]; Proof of Claim and Release Form ("Claim Form"), Dkt. 72-5; Proposed Final Judgment, Dkt. 72-9.)

II. The Settlement Agreement and Procedure

On or about June 2, 2023, Davian Holdings, the *White* Lead Plaintiffs, and Defendants (collectively, the "Settling Parties") executed the Settlement Agreement. The Settling Parties stipulate, for settlement purposes only, to the certification of a Fed. R. Civ. P. 23(a) and 23(b)(3) settlement class ("Settlement Class") comprised of:

> all Persons and entities who purchased or otherwise acquired Nano-X securities during the Settlement Class Period and who were damaged thereby.

(Settlement Agreement ¶ 1.42.) The "Settlement Class Period" is defined as the period between August 21, 2020 and November 17, 2021, inclusive. (*Id.* ¶ 1.44.) The Settlement Class excludes:

> (i) Defendants; (ii) the parent entity, officers, and directors of Nano-X, at all relevant times; (iii) members of the immediate families of such officers and directors of Nano-X, and their legal representatives, heirs, successors or assigns; and (iv) any entity in which Defendants have or had a direct or indirect controlling interest. Also excluded from the Settlement Class is any Settlement Class Member that validly and timely requests exclusion in accordance with the requirements set by the Court.

(*Id.* ¶ 1.42.)

Under the terms of the Settlement Agreement, in exchange for payment of a Settlement Amount of $8,000,000, the putative Settlement Class shall release:

> any and all claims, demands, losses, rights, and causes of action of every nature and description, including both known claims and Unknown Claims, whether arising under federal, state, common, or foreign law, by Released Plaintiff Parties, whether brought directly or indirectly against any of the Released Defendant Parties, that have been or could have been asserted in the Litigation or could in the future be asserted in any forum, whether foreign or domestic, and which: (a) relate to any of the allegations,

[1] The Notice page references are to ECF pagination.

> transactions, events, disclosures, statements, acts, or omissions that were asserted, involved, set forth, asserted, or referred to, or could have been asserted, by a Released Plaintiff Party in the Litigation; or (b) arise out of, are based upon, or relate in any way, directly or indirectly, to the purchase, acquisition, holding, sale, disposition, or ownership of Nano-X securities during the Settlement Class Period.

(*Id.* ¶¶ 1.38, 1.41.) The Settlement Amount plus all interests and accretions (the "Settlement Fund") (*id.* ¶ 1.45), will be used to pay taxes, notice and settlement administration expenses, attorneys' fees and expenses, any awards to lead plaintiffs, and any other fees, payments, or awards approved by the Court. (*Id.* ¶ 2.7.) The parties have not stipulated to an amount for attorneys' fees and expenses, and class counsel intends to apply for reasonable attorneys' fees and expenses, including an award to lead plaintiffs for costs and expenses pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"). (*Id.* ¶¶ 1.12, 5.2.)

After these payments are made, the remaining "Net Settlement Fund" will be distributed to claimants on a *pro rata* basis pursuant to the Court-approved Plan of Allocation to all authorized claimants who are entitled to a distribution of at least $10.00. (Pls. Mem. at 6, 18; Settlement Agreement ¶¶ 5.1, 5.9; Notice at 16-17.) Any remaining amount following the distribution due to uncashed or returned checks will be redistributed as feasible. (Notice at 17.) All Settlement Class members will receive the same distribution depending on the number of shares they held at various points in the Settlement Class Period as set forth in the Plan of Allocation. (*Id.*) The Plan of Allocation will be applied uniformly to all members of the Settlement Class that submit valid and timely claims. (*Id.*)

Only claimants who submit a Claim Form shall receive settlement proceeds. (Notice at 5.) Potential Settlement Class members may also exclude themselves from the Settlement Class, preserving their claims against Defendants, or object to the settlement. (*Id.* at 20, 22.) Potential class members who do not exclude themselves, object, or submit a Claim Form will waive any claims they may have against Defendants and will not participate in the settlement. (*Id.* at 24.)

After a bidding process, Epiq Global (the "Claims Administrator") was selected to administer notice of the settlement and the claims process. (D'Aloia Decl. ¶ 20.) The Claims Administrator will mail or email the Notice with a link to the Claims Administrator's website and its mailing address and telephone number, to members of the Settlement Class who can be identified with reasonable effort; post the Notice, Claim Form, this Order, and Settlement Agreement on a website maintained by the Claims Administrator; upon request, mail copies of the Notice and/or Claim Form; and disseminate a Summary Notice (Dkt. 72-7) over PR Newswire or another similar national newswire service. (Pls. Mem. at 19; Settlement Agreement ¶ 2.9.)

The Claims Administrator will also use reasonable efforts to give notice to nominee purchasers, such as brokerage firms, who purchased or otherwise acquired Nano-X securities during the Settlement Class Period as record owners but not as beneficial owners. Such nominee purchasers will be directed to either forward copies of the Notice and Claim Form to the relevant beneficial owners or, alternatively, to provide the Claims Administrator with contact information for relevant beneficial owners, and the Claims Administrator will send a copy of the Notice and Claim Form to such identified beneficial owners. Nominee purchasers who elect to send the Notice and Proof of Claim to the beneficial owners themselves will notify the Claims Administrator confirming that the mailing was made as directed. (Notice at 25.)

The Claims Administrator will review the Claim Forms and distribute the Net Settlement Fund to claimants pursuant to the Plan of Allocation in the Notice. (Pls. Mem. at 20; Settlement Agreement ¶ 5.5.)

DISCUSSION

I. Preliminary Approval of Proposed Settlement Agreement

A. Standard of Review

Class settlements under Federal Rule of Civil Procedure Rule 23 require court approval. Fed. R. Civ. P. 23(e).

"A class action settlement approval procedure typically occurs in two stages: (1) preliminary approval—where 'prior to notice to the class, a court makes a preliminary evaluation of fairness,' and (2) final approval—where 'notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019) (alteration in original) (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-CV-5450 (NRB), 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016)).

Under Rule 23(e), in considering a motion for preliminary approval of a proposed settlement, a court must consider whether "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(i)-(ii). Factors relevant to the Court's decision whether to approve a proposed class action settlement include "(1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (citing Fed. R. Civ. P. 23(e)(2)).

Courts look to the nine "*Grinnell* factors to fill in any gaps and complete the analysis." *Cymbalista v. JPMorgan Chase Bank, N.A.*, No. 20-CV-456 (RPK)(LB), 2021 WL 7906584, at *5 (E.D.N.Y. May 25, 2021) (collecting cases), *R&R adopted*, Order dated Nov. 22, 2021. These include:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount

> of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *accord Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013).

B. Discussion

Considering both the procedural and substantive factors set forth in Fed. R. Civ. P. 23(e)(2), as well as the *Grinnell* factors, I find that the Court will likely be able to approve the parties' proposed settlement agreement as fair, reasonable, and adequate.

i. Rule 23(e)(2) Factors

a. Adequate Representation by Class Representatives and Class Counsel – Fed. R. Civ. P. 23(e)(2)(A)

In determining the adequacy of representation by class representatives and class counsel, courts consider "whether (1) plaintiff's interests are antagonistic to the interest[s] of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Mikhlin v. Oasmia Pharm. AB*, No. 19-CV-4349 (NGG)(RER), 2021 WL 1259559, at *4 (E.D.N.Y. Jan. 6, 2021) (alteration in original) (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)).[2] "An adequate class representative is one who has 'an interest in vigorously pursuing the claims of the class' and 'no interests antagonistic to the interests of other class members.'" *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "Courts find class counsel qualified when they are experienced and 'knowledge[able] in the area of complex class actions.'"

[2] "Because this factor is 'nearly identical to the Rule 23(a)(4) prerequisite of adequate representation in the class certification context,'" the Court's consideration of this factor is guided by Rule 23(a)(4) case law. *Mikhlin*, 2021 WL 1259559, at *4 n.3 (quoting *In re Payment Card*, 330 F.R.D. at 30 n.25).

Cymbalista, 2021 WL 7906584, at *5 (alteration in original) (quoting *In re Payment Card*, 330 F.R.D. at 33).

The parties in the instant action seek preliminary approval of Davian Holdings and the *White* Lead Plaintiffs (Derson Jolteus and Edward Ko) as representatives of the Settlement Class. (Pls. Mem. at 9, 23.) The parties also seek preliminary approval of Pomerantz LLP and *White* Lead Counsel (Levi & Korsinsky, LLP) as co-lead counsel. (*Id.*) This arrangement is proposed in light of the parties' contemplation of a global settlement among the parties here and the parties in the *White* Action. (Settlement Agreement ¶¶ 1.19, 1.20, 3.2.) Davian Holdings and Pomerantz LLC were respectively appointed as lead plaintiff and lead counsel in this action. (Mem. Decision and Order, Dkt. 22.) In the *White* Action, Judge William F. Kuntz, II appointed Derson Jolteus and Edward Ko as the *White* Lead Plaintiffs and Levi & Korsinsky, LLP as the *White* Lead Counsel. (*White* Action, Order, Dkt. 51.)

Plaintiffs Davian Holdings, Derson Jolteus, and Edward Ko's interests are not antagonistic to those of the Settlement Class members. Davian Holdings alleges that they and all Settlement Class members, which include the *White* Lead Plaintiffs, "have suffered damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for Nano-X securities" (Am. Compl. ¶ 159); "[Davian Holdings] and the Class would not have purchased Nano-X securities at the prices they paid, or at all, if they had been aware that the market prices had been artificially and falsely inflated by Nano-X and the Individual Defendants' misleading statements" (*id.*); and "[Davian Holdings] and the other members of the Class suffered damages in connection with their purchases of Nano-X securities during the Class Period." (*Id.* ¶ 160.)

Pomerantz LLC has ably litigated this case for over two years, including by investigating the alleged fraudulent misrepresentations, filing the Complaint and Amended Complaint (including conducting expert consultations and witness interviews abroad), and opposing Defendants' Motion to Dismiss. (Pls. Mem. at 9.) Pomerantz LLC and *White* Lead Counsel together coordinated with

Davian Holdings and the *White* Lead Plaintiffs to explore settlement options for the Settlement Class, including engaging in a successful full-day, in-person mediation after submitting detailed mediation statements. (*Id.* at 5.)

This factor weighs in favor of preliminary approval. Davian Holdings, Derson Jolteus, and Edward Ko are hereinafter referred to collectively as the "Lead Plaintiffs," and Pomerantz LLC and Levi & Korsinsky, LLP are hereinafter referred to collective as "Co-Lead Counsel."

b. Arm's Length Negotiation – Fed. R. Civ. P. 23(e)(2)(B)

A class settlement "reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation … 'enjoy[s] a presumption of fairness.'" *In re GSE Bonds*, 414 F. Supp. 3d at 693 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000)); *accord Mikhlin*, 2021 WL 1259559, at *5.

The parties reached the settlement after participating in a full-day mediation session with an experienced, professional mediator and after negotiating a term sheet which they executed on April 28, 2023. (D'Aloia Decl. ¶¶ 16-17.) The settlement was negotiated "at arms-length, with the assistance of JAMS mediator Jed Melnick, Esq. after years of litigation." (*Id.* ¶ 4.)

This factor weighs in favor of preliminary approval.

c. Adequate Relief for the Class – Fed R. Civ. P. 23(e)(2)(C)

In evaluating whether the proposed settlement provides adequate relief for the class, the Court considers: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including the timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C).

i. <u>Costs, Risks, and Delay of Trial and Appeal – Fed. R. Civ. P. 23(e)(2)(C)(i)</u>

The first factor set forth under Rule 23(e)(2)(C), "the 'costs, risks, and delay of trial and appeal,' 'subsumes several *Grinnell* factors,' including the complexity, expense and likely duration of litigation, the risks of establishing liability, the risks of establishing damages, and the risks of maintaining the class through trial." *Mikhlin*, 2021 WL 1259559, at *5 (quoting *In re Payment Card*, 330 F.R.D. at 36); *accord Cymbalista*, 2021 WL 7906584, at *6.

Courts favor settlement when it "results in 'substantial and tangible present recovery, without the attendant risk and delay of trial.'" *In re Payment Card*, 330 F.R.D. at 36 (quoting *Sykes v. Harris*, No. 09-CV-8486 (DC), 2016 WL 3030156, at *12 (S.D.N.Y. May 24, 2016) (citation omitted)). Class action lawsuits "have a well-deserved reputation as being most complex." *Id.* (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (citation omitted)); *see also Garland v. Cohen & Krassner*, No. 08-CV-4626 (KAM)(RLM), 2011 WL 6010211, at *7 (E.D.N.Y. Nov. 29, 2011) ("Given the complexity of any class action lawsuit . . . it is reasonable to assume that absent the instant Settlement, continued litigation would have required extensive time and expense.").

"In considering the risks of establishing liability, the court 'need only assess the risks of litigation against the certainty of recovery under the proposed settlement.'" *Mikhlin*, 2021 WL 1259559, at *5 (quoting *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004)). "Settlement is favored in cases in which 'plaintiffs would have faced significant legal and factual obstacles to proving their case.'" *Id.* (quoting *In re Glob. Crossing*, 225 F.R.D. at 459).

The parties have been engaged for over two years in litigation, including substantial motion practice. (Pls. Mem. at 8.) The parties and their counsel state their familiarity with the strengths and weaknesses of their position in the litigation. (*Id.*) A settlement avoids potentially unnecessary time and expenditure on litigation to expediently facilitate relief for members of the Settlement Class. (*See id.* at 14-17.)

The parties additionally note that Nano-X is a company with a limited operating history and needs to obtain additional financing to implement its business plan such that without the settlement, Lead Plaintiffs may be unable to proceed with their litigation for several years. (Pls. Mem. at 22.) The parties state that Nano-X "might well lose access to capital markets and its solvency would not be assured." (*Id.*) A settlement avoids the risk of Nano-X being unable to participate in lengthy, complex litigation or being unable to pay any resultant judgment against it.

The parties request Rule 23 class certification for settlement purposes only. (Pls. Mem. at 2.) If this case were to proceed, Defendants are at liberty to oppose class certification. *See In re Payment Card*, 330 F.R.D. at 40 (finding this factor "'weighs in favor of settlement' where 'it is likely that defendants would oppose class certification' if the case were to be litigated" (quoting *Garland*, 2011 WL 6010211, at *8)).

In sum, the "costs, risks and delay of trial and appeal" are significant and weigh in favor of preliminary approval of the proposed settlement. Fed. R. Civ. P. 23(e)(2)(C)(i).

ii. Effectiveness of Proposed Method of Distributing Relief – Fed. R. Civ. P. 23(e)(2)(C)(ii)

A court must consider the effectiveness of the parties' "proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). "[U]niform relief to all [class members] … constitutes effective distribution." *Berni v. Barilla G. e R. Fratelli, S.p.A.*, 332 F.R.D. 14, 33 (E.D.N.Y. 2019), *vacated and remanded on other grounds sub nom. Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020). "A plan for allocating settlement funds 'need not be perfect[,]'" and "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Mikhlin*, 2021 WL 1259559, at *6 (first quoting *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-CV-10240 (CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007); and then quoting *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)).

As discussed in Section II, *supra*, the Notice contains a Plan of Allocation which will be applied uniformly to all members of the Settlement Class that submit valid and timely claims. Co-Lead Counsel have selected a nationally recognized class action settlement administrator with extensive experience with large, complex securities class action administrations. (Lead Counsel Decl. ¶ 20.)

The proposed Notice, Claim Form, and Summary Notice describe the terms of the Settlement Agreement and provide clear explanations of how to make a claim, opt out of the class, or object. (*See, e.g.*, Notice at 17, 20, 22.)

The distribution plan appears fair and equitable. This factor, therefore, weights in favor of preliminary approval.

iii. Terms of Proposed Award of Attorneys' Fees, Including Timing of Payment – Fed. R. Civ. P. 23(e)(2)(C)(iii)

"When analyzing the proposed settlement agreement for final approval, this Court will review Plaintiffs' application for attorneys' fees, taking into account the interests of the class." *Hart v. BHH, LLC*, 334 F.R.D. 74, 79 (S.D.N.Y. 2020). One method for calculating attorneys' fees, which is the trend in this Circuit, is the "'percentage of the fund' method." *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 384 (S.D.N.Y. 2017). Under this method, the Court considers whether the requested fees are reasonable as compared to the settlement amount. *Id.* at 385. Factors to consider include fees awarded in similar cases, the risks to Class Counsel, and the lodestar calculation. *Id.* at 384 (citing *Goldberger*, 209 F.3d at 43).

Co-Lead Counsel will apply for an award of attorneys' fees not to exceed one-third of the $8,000,000 Settlement Amount and litigation expenses not to exceed $250,000, plus interest on these amounts at the same rate as earned by the Settlement Fund. (Pls. Mem. at 20; Notice at 22.) Lead Plaintiffs will seek an award of up to $3,000 each (totaling up to $9,000) to compensate them for their time spent in connection with their representation of the Settlement Class. (Pls. Mem. at 20; Notice at 22.) Co-Lead Counsel have not yet submitted a lodestar calculation. The Court, therefore, cannot

assess the reasonableness of the requested attorneys' fees until a motion for final settlement approval is filed.

This factor does not weigh against preliminary approval.

d. Equitable Treatment of Class Members Relative to Each Other – Fed. R. Civ. P. 23(e)(2)(D)

A court must consider whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). A court may consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

As stated *supra*, the method of distribution appears fair and reasonable. The proposed Plan of Allocation treats all claimants uniformly—each claimant will receive a *pro rata* distribution of the Net Settlement Amount based on the number of shares they held at various points in the Settlement Class Period as set forth in the Plan of Allocation. (Pls. Mem. at 18; Notice at 16.)

This factor weighs in favor of preliminary approval.

ii. Remaining *Grinnell* Factors

The *Grinnell* factors not covered by Rule 23(e)(2)(C)(i) are the reaction of the class to the settlement, the stage of the proceedings and the amount of discovery completed, the ability of the defendants to withstand a greater judgment, the range of the settlement fund in light of the best possible recovery, and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. A court's consideration of the stage of the proceedings and the amount of discovery completed "is intended to assure the Court 'that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them.'" *In re Glob. Crossing*, 225 F.R.D. at 458 (quoting *Klein ex rel. Ira v. PDG Remediation, Inc.*, No. 95-CV-4954 (DAB), 1999 WL 38179, at *2-3 (S.D.N.Y. Jan. 28, 1999)).

The Court cannot consider the class's reaction to the proposed settlement until after notice has been provided to the class. The Court is, therefore, unable to consider this factor at this stage of the proceedings. *See Mikhlin*, 2021 WL 1259559, at *4 n.2; *Caballero ex rel. Tong v. Senior Health Partners, Inc.*, Nos. 16-CV-0326 (CLP), 18-CV-2380 (CLP), 2018 WL 4210136, at *11 (E.D.N.Y. Sept. 4, 2018).

With regard to the remaining factors, Co-Lead Counsel engaged in "significant effort and investigation" into the claims, including consulting with experts and witnesses, and reviewing and responding to Defendants' Motion to Dismiss. (Pls. Mem. at 9, 10.) The parties were thus able to weigh their positions based on extensive investigation and information. There is some risk that Nano-X may not be able to withstand greater judgment in light of its status as an early stage biotechnology company whose solvency is not assured. *See Whiteley v. Zynerba Pharms., Inc.*, No. 19-CV-4959, 2021 WL 4206696, at *5 (E.D. Pa. Sept. 16, 2021) (the fact that biotechnology company had no FDA-approved products or revenues weighed in favor of settlement approval). Finally, Lead Plaintiffs estimate that the Settlement Amount represents 4.5% of approximately $177.7 million in damages (approximately $91.0 million in this action and $86.7 million in the *White* action). (Pls. Mem. at 11.) This percentage is within the average range of settlement amounts for securities fraud class actions. *In re China Sunergy Sec. Litig.*, No. 07-CIV-7895 (DAB), 2011 WL 1899715 (S.D.N.Y. May 13, 2011) ("settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses") (quoting *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, No. 03-CV-4372 (DMC), 2009 WL 4730185 (D.N.J. Dec. 4, 2009)).

iii. Identification of Other Agreements

Rule 23(e)(3) requires the parties to identify "any agreement made in connection with the proposal." The parties disclosed that they have entered into a confidential Supplemental Agreement concerning the criteria for when the Settlement Agreement may be withdrawn or terminated based on

the opt-out of Settlement Class members, which was not filed with the Court. (Settlement Agreement ¶ 7.3.) Lead Plaintiffs state that the Supplemental Agreement is confidential "to avoid creating incentives for a small group of class members to opt out solely to leverage the threshold to exact an individual settlement." (Pls. Mem. at 21.) The limited function of the Supplemental Agreement does not appear to bear on the fairness of the settlement. *See Christine Asia Co. v. Yun Ma*, No. 15-MD-02631 (CM)(SDA), 2019 WL 5257534 at *15 (S.D.N.Y. Oct. 16, 2019) ("This type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the [s]ettlement.").

* * *

Having weighed the Rule 23(e)(2) and *Grinnell* factors, I find that the Court will likely be able to approve the proposed settlement as fair, reasonable, and adequate.

II. Preliminary Certification of Rule 23 Settlement Class

Davian Holdings moves to provisionally certify, with Defendants' consent, a class for settlement purposes only comprised of:

> all Persons and entities who purchased or otherwise acquired Nano-X securities during the Settlement Class Period and who were damaged thereby.

(Settlement Agreement ¶ 1.42.) The Settlement Class excludes:

> (i) Defendants; (ii) the parent entity, officers, and directors of Nano-X, at all relevant times; (iii) members of the immediate families of such officers and directors of Nano-X, and their legal representatives, heirs, successors or assigns; and (iv) any entity in which Defendants have or had a direct or indirect controlling interest. Also excluded from the Settlement Class is any Settlement Class Member that validly and timely requests exclusion in accordance with the requirements set by the Court.

(Id. ¶ 1.42.)

Lead Plaintiffs have asked for certification of the class; however, "[t]he ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." Fed. R. Civ. P. 23 advisory committee's note to 2018 Amendment. The Court

may, however, grant preliminary approval when it will "likely be able to . . . certify the class for purposes of judgment on the proposal." *In re Payment Card*, 330 F.R.D. at 50 (quoting Fed. R. Civ. P. 23(e)(1)(B)(ii)).

To qualify for certification, a class must meet the prerequisites set forth in Rule 23 of the Federal Rules of Civil Procedure. A plaintiff seeking certification under Rule 23 has the burden to establish (1) numerosity, (2) commonality, (3) typicality, (4) adequacy of representation, (5) superiority of the class action over other procedures, and (6) predominance. *Mazzei v. Money Store*, 829 F.3d 260, 270 (2d Cir. 2016); *see* Fed. R. Civ. P. 23(a), (b)(3). The Second Circuit has also recognized an implied requirement of ascertainability. *Brecher v. Republic of Arg.*, 806 F.3d 22, 24 (2d Cir. 2015) ("Like our sister Circuits, we have recognized an 'implied requirement of ascertainability' in Rule 23 of the Federal Rules of Civil Procedure" (citation omitted)); *see McBean v. N.Y.C.*, 260 F.R.D. 120, 132-33 (S.D.N.Y. 2009).

The parties have stipulated that, for purposes of settlement, the proposed class meets the requirements of Rule 23. (Pls. Mem. at 23.) However, "[n]otwithstanding the parties' willingness to stipulate to the facts necessary for the certification of the class for settlement purposes, the Court bears an independent responsibility to make a determination that every Rule 23 requirement is met before certifying a class." *Farinella v. PayPal, Inc.*, 611 F. Supp. 2d 250, 260-261 (E.D.N.Y. 2009).

To certify a class, a district court must definitively assess each class certification element and find that each requirement is "established by at least a preponderance of the evidence." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) (quoting *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010)).

A. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

The parties do not know the exact number of Settlement Class members, but estimate that in light of the approximately 46.6 million shares issued and outstanding during the Settlement Class Period, with an average daily trading volume during that period of about 1,944,540 shares, the numerosity requirement is met. (Pls. Mem. at 23.) The Court agrees and finds numerosity satisfied.

B. Commonality

Under Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The questions must be capable of "class[-]wide resolution—which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 80 (2d Cir. 2015) (alteration in original) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

The proposed Settlement Class members share common questions of law and fact regarding whether Defendants made misleading statements and omissions, Defendants' scienter, and the resultant damages sustained by investors. These types of common questions are sufficient to satisfy commonality. *Rodriguez v. CPI Aerostructures, Inc.*, No. 20-CV-0982 (ENV)(CLP), 2021 WL 9032223, at *8 (E.D.N.Y. Nov. 10, 2021).

C. Typicality

The requirement for typicality is met "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997)) (quotations omitted). "The commonality and typicality requirements often 'tend to

merge into one another, so that similar considerations animate analysis' of both." *Brown*, 609 F.3d at 475 (quoting *Marisol A.*, 126 F.3d at 376). "The crux of both requirements is to ensure that maintenance of a class action is economical and that the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Kaye v. Amicus Mediation & Arb. Grp., Inc.*, 300 F.R.D. 67, 78 (D. Conn. 2014) (quoting *Marisol A.*, 126 F.3d at 376 (alterations and citations omitted)).

Lead Plaintiffs' claims are typical of the class. Their claims, and the claims of each class member, arise from Defendants' alleged misrepresentations resulting in inflated stock prices and financial harms to investors. The claims are so interrelated that the class claims will be fairly and adequately protected by Lead Plaintiffs. The typicality requirement is satisfied.

D. Adequacy

In assessing adequacy, "the primary factors are whether the class representatives have any 'interests antagonistic to the interests of other class members' and whether the representatives 'have an interest in vigorously pursuing the claims of the class.'" *In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F. App'x 760, 764 (2d Cir. 2020) (quoting *Denney*, 443 F.3d at 268). "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997).

As discussed in Section I.B.i.a., *supra*, Lead Plaintiffs and Co-Lead Counsel are adequate representatives of the class, and the adequacy requirement is met.

E. Ascertainability

The implied requirement of ascertainability demands "only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec. Litig.*, 862 F.3d 250, 264 (2d Cir. 2017).

The putative class is easily ascertainable. The Settlement Class is limited to persons who purchased or otherwise acquired Nano-X securities during a discrete time period, and potential Settlement Class members must submit documentation of their transactions and holdings to demonstrate their eligibility. (*See* Claim Form at i.)

F. Rule 23(b)(3)

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

i. Predominance

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and is achieved "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (quoting *Amchem*, 521 U.S. at 623).

Here, common issues predominate as all members of the Settlement Class suffered the same alleged harms resulting from the same alleged misrepresentations, which are subject to generalized proof and applicable to the entire class. The Settlement Class is thus sufficiently cohesive to meet the predominance requirement.

ii. Superiority

Matters pertinent to superiority include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). In assessing a settlement-only class certification, "a district court need not inquire whether the case, if tried, would present intractable management problems," because there will not be a trial. *Amchem*, 521 U.S. at 620.

Some members of the proposed Settlement Class are also members of the contemplated class in the *White* Action, which remains pending. However, the Settlement Agreement anticipates dismissal of that action. (Settlement Agreement ¶ 3.2.) Otherwise, at this time there is no other indication that other Settlement Class members, who may be spread across the country, have commenced other litigation or have any interest in controlling a separate action, and Settlement Class members may lack the resources to bring a separate action. Concentrating the adjudication of the claims in the Eastern District of New York is a logical and efficient use of judicial resources. The superiority requirement is met because a class action is superior to alternative forms of adjudication of these claims.

* * *

For the foregoing reasons, the Court finds that preliminary certification of the Settlement Class is warranted under Federal Rules of Civil Procedure 23(a) and 23(b)(3) because the Court will likely be able to certify the class after the final approval hearing.

III. Distribution of the Class Notice and Notice Procedure

Once a court has determined that it will likely be able to approve the proposed settlement and certify the class, it "must direct notice in a reasonable manner to all class members who would be bound by the proposal . . . ." Fed. R. Civ. P. 23(e)(1)(B).

The PSLRA requires that any proposed settlement agreement disseminated to the class must include (1) a statement of plaintiff recovery, (2) a statement of potential outcome of case, (3) a statement of attorneys' fees or costs sought, (4) an identification of lawyers' representatives, (5) the reason for settlement, and (6) any other information as required by the Court. 15 U.S.C. § 78u-4(a)(7).

For Rule 23(b)(3) classes, "the court must direct to class members the best notice that is practicable under the circumstances" which includes "individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice "must clearly and concisely state in plain, easily understood language" the following information:

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. Civ. P. 23(c)(2)(B).

"There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements . . . . Notice is 'adequate if it may be understood by the average class member.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (citation omitted). At the same time, "[c]ourts in this Circuit have explained that a Rule 23 Notice will satisfy due process when it describes the terms of the settlement generally, informs the class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing." *Mikhlin*, 2021 WL 1259559, at *12 (quoting *In re Payment Card*, 330 F.R.D. at 58).

The proposed Notice includes a statement of plaintiff recovery (Notice at 4), a statement of potential outcome of case (*id.* at 12-13), a statement of attorneys' fees or costs to be sought (*id.* at 4), an identification of lawyers' representatives (*id.* at 6), and the reason for settlement (*id.* at 10-11), thus satisfying the requirements of the PSLRA. The Notice also provides a summary of the nature of the action (*id.* at 8-10), a description of the settlement class (*id.* at 12), the class claims, issues, or defenses (*id.* at 8-9); that a class member may enter an appearance through an attorney if the member so desires (*id.* at 23); that the court will exclude from the class any member who requests exclusion (*id.*); the time and manner for requesting exclusion (*id.* at 20-21); and the binding effect of a class judgment on

members (*id.* at 18-20). The Claim Form contains detailed instructions to assist potential Settlement Class members in determining if they are a member of the class and instructions for returning the form. (*See generally* Claim Form.)

The Notice also explains that members of the class of investors alleged in the *White* Action are also members of the Settlement Class in the instant action and will be affected by the Settlement Agreement. (Notice at 5.)

Within 10 business days of this Order, Nano-X will provide Lead Plaintiffs with a list of registered owners of Nano-X securities during the Settlement Class Period, including names and addresses. (Proposed Prelim. Approval Order ¶ 9.) Within 21 days of this Order, the Claims Administrator will mail the Notice and Claim Form to all identified Settlement Class members and additionally post the Settlement Agreement, Notice, and Claim Form on a website dedicated to the administration of the Settlement Agreement. (*Id.* ¶ 11.) No more than 10 days after the Notice is mailed, the Claims Administrator will publish the Summary Notice in PR Newswire or a similar national newswire service. (*Id.* ¶ 13.) Claimants must return the Claim Form within 90 days of the date the Claims Administrator must mail the Notice and Claim Form. (*Id.* ¶ 16.) Claimants may opt out or register their objections up until 21 days before the Settlement Hearing. (*Id.* ¶ 15.)

Because the Notice, Summary Notice, and notice procedure provide reasonable notice to Settlement Class members and clearly and concisely states in plain, easily understood language the requisite information, the Court approves the proposed Notice and notice procedure.

CONCLUSION

For the reasons stated above, the Motion is granted. Accordingly, it is hereby ORDERED that:

(1) Pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and for the purposes of settlement only, the Court preliminarily certifies a Settlement Class in this

action, consisting of all persons and entities who purchased or otherwise acquired Nano-X securities between August 21, 2020 and November 17, 2021, inclusive, and who were damaged thereby. Excluded from the Settlement Class are (i) Defendants; (ii) the parent entity, officers, and directors of Nano-X, at all relevant times; (iii) members of the immediate families of such officers and directors of Nano-X, and their legal representatives, heirs, successors, or assigns; and (iv) any entity in which Defendants have or had a direct or indirect controlling interest. Also excluded from the Settlement Class is any Settlement Class member that validly and timely requests exclusion in accordance with the requirements set forth in the Notice and this Order.

(2) This Court preliminarily finds, for purposes of settlement only, that the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that: (a) the number of Settlement Class members is so numerous that joinder of all Settlement Class members is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of Lead Plaintiffs are typical of the claims of the Settlement Class members they seek to represent; (d) Lead Plaintiffs will fairly and adequately represent the interests of the Settlement Class; (e) questions of law and fact common to the Settlement Class predominate over any questions affecting only individual members of the Settlement Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of this action.

(3) Pursuant to Rule 23 of the Federal Rules of Civil Procedure, for the purposes of settlement only, (a) Lead Plaintiffs Davian Holdings, Derson Jolteus, and Edward Ko are preliminarily certified as the class representatives on behalf of the Settlement Class; and (b) Pomerantz LLP and Levi & Korsinsky, LLP are hereby preliminarily certified as Co-Lead Counsel for the Settlement Class, and are authorized to act on behalf of the class

representatives and other Settlement Class members, with respect to all acts or consents required by or that may be given pursuant to the Settlement Agreement, including all acts that are reasonably necessary to consummate the Settlement Agreement.

(4) The Court preliminarily finds that the Settlement Agreement should be approved in that: (a) the Settlement Agreement results from good faith, arm's length negotiations, including a mediation among Lead Plaintiffs and Defendants under the direction of a highly experienced mediator, Jed Melnick, Esq., of JAMS; (b) the relief provided to the Settlement Class is adequate; (c) the proposed settlement treats Settlement Class members equitably relative to each other; (d) the proponents of the settlement are experienced in class-action securities litigation and had sufficient information to evaluate the settlement.

(5) A Settlement Hearing is scheduled to be held before the Court on February 15, 2024 at 11:00 a.m., for the following purposes:

a. to determine finally whether the proposed settlement on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate and should be approved by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure;

b. to determine whether the Proposed Final Judgment and Order, as attached as Exhibit B to the Settlement Agreement (*see* Dkt. 72-9), should be entered, dismissing this action on the merits and with prejudice as provided therein;

c. to determine whether the proposed Plan of Allocation for the distribution of the Net Settlement Fund should be approved by the Court;

d. to consider Co-Lead Counsel's Fee and Expense Application;

e. to consider any requests for Lead Plaintiffs Awards;

f. to consider any objections or requests for exclusion received by the Court; and

g. to rule upon such other matters as the Court may deem appropriate.

(6) The Court substantially approves the form, substance, and requirements of the Notice (Dkt. 72-3), Claim Form (Dkt. 72-5), and Summary Notice (Dkt. 72-7). The parties shall ensure that the table of contents set forth in the Notice, and any other internal page number cross-references, are accurate. The parties shall update any dates and deadlines prescribed in the Notice, Claim Form, and Summary Notice to conform with those set forth in this Order.

(7) The Court approves the appointment of Epiq Global as the Claims Administrator to supervise and administer the notice procedure in connection with the proposed settlement, as well as the processing of claims as more fully set forth below.

(8) Within ten (10) business days of this Order, Nano-X shall provide, or direct its transfer agent to provide, the Claims Administrator, at no cost to Lead Plaintiffs or the Settlement Class, an electronically searchable document, such as an Excel spreadsheet, or other reasonably available transfer records, containing the names and addresses of registered owners of Nano-X securities during the Class Period.

(9) The Claims Administrator shall cause a copy of the Notice and the Proof of Claim and Release, substantially in the forms annexed hereto, to be mailed, by first class mail, postage prepaid, within twenty-one (21) calendar days of this Order, to all Settlement Class members who can be identified with reasonable effort. The Claims Administrator shall use reasonable efforts to give notice to nominee purchasers, such as brokerage firms and other Persons who purchased or otherwise acquired Nano-X securities during the Class Period as record owners, but not as beneficial owners. Such nominee purchasers are directed, within ten (10) business days of their receipt of the Notice, to either forward copies of the Notice and the Claim Form to the beneficial owners who purchased or

otherwise acquired publicly traded or publicly listed Nano-X securities between August 11, 2020 and November 17, 2021, inclusive, or to provide the Claims Administrator with lists of the names and addresses of the beneficial owners who purchased or otherwise acquired publicly traded or publicly Nano-X securities between August 11, 2020 and November 17, 2021, inclusive, and the Claims Administrator is ordered to send a copy of the Notice and Claim Form promptly to such identified beneficial owners. Nominee purchasers who elect to send the Notice and Proof of Claim to the beneficial owners themselves shall send a statement to the Claims Administrator confirming that the mailing was made as directed.

(10) The Claims Administrator shall place the Settlement Agreement, the Notice, and the Claim Form on www.NanoXSecuritiesLitigation.com, the website dedicated to administration of this settlement, on or before the date that the Notice is mailed.

(11) Co-Lead Counsel may cause to be paid from the Settlement Fund, without further approval from Defendants and/or order of the Court, Notice and Administration Expenses of up to $250,000.

(12) The Claims Administrator shall cause the Summary Notice to be published once over PR Newswire or another similar national newswire service, within ten (10) calendar days after the mailing of the Notice.

(13) Co-Lead Counsel shall, at least fourteen (14) calendar days before the Settlement Hearing, file with the Court and serve on the Settling Parties proof of mailing a copy of the Notice and the Claim Form and proof of publication of the Summary Notice. At least fourteen (14) calendar days before the Settlement Hearing, the Defendants shall cause to be served on Co-Lead Counsel and filed with the Court proof, by affidavit or declaration, regarding

compliance with the notice requirements of the Class Action Fairness Act, 28 U.S.C. §1715 *et seq.* ("CAFA").

(14) The form and content of the Notice and the Summary Notice, and the method set forth herein of notifying the Settlement Class of the Settlement Agreement and its terms and conditions, meet the requirements of the Federal Rules of Civil Procedure, 15 U.S.C. §78u-4(a)(7), due process, and all other applicable laws and constitute the best notice practicable under the circumstances.

(15) In order to be entitled to participate in the Net Settlement Fund, in the event the settlement is consummated in accordance with the terms set forth in the Settlement Agreement, each Settlement Class member shall take the following actions and be subject to the following conditions:

a. Within ninety (90) calendar days after such time as set by the Court for the Claims Administrator to mail the Notice to the Settlement Class, each member claiming to be an Authorized Claimant shall be required to submit to the Claims Administrator a completed Claim Form, substantially in the form filed at Dkt. 72-5 and as approved by the Court, signed under penalty of perjury and supported by such documents as specified in the Claim Form. Claim Forms shall be timely submitted if they are postmarked (for U.S. Mail) or received by the private carrier (for FedEx, UPS, etc.), or electronically by the Claims Administrator, within ninety (90) calendar days after such time as set by the Court for the Claims Administrator to mail the Notice to the Settlement Class.

b. As part of the submission of a Claim Form, each Settlement Class member shall submit to the jurisdiction of the Court, with respect to the claim submitted, and

shall (subject to effectuation of the settlement) release all "Released Claims" as provided in the Settlement Agreement.

(16) All Settlement Class members shall be bound by all determinations and judgments in this action, whether favorable or unfavorable, regardless of whether such member seeks or obtains by any means any distribution from the Net Settlement Fund, unless they submit a Request for Exclusion from the Settlement Class in a timely and proper manner, as hereinafter provided.

(17) Any Settlement Class member who wishes to request exclusion from (*i.e.*, "opt-out" of) the Settlement Class must submit a written Request for Exclusion to the Claims Administrator so that it is postmarked (for U.S. Mail) or received by the private carrier (for FedEx, UPS, etc.) or by email **no later than twenty-one (21) calendar days before the Settlement Hearing**. As provided in the Notice, such Request for Exclusion shall clearly indicate the name, address, and telephone number of the member seeking exclusion, that the member requests to be excluded from the Settlement Class, and must be personally signed by the Settlement Class member. Members requesting exclusion are also directed to state the number of shares of Nano-X securities (ticker symbol: "NNOX") that they purchased or otherwise acquired during the Settlement Class Period, as well as the date(s) and price(s) of each purchase, acquisition, and/or sale of such securities, and to provide copies of documents (such as account statements or trading records) evidencing such transactions of Nano-X securities. The Request for Exclusion shall not be effective unless it is made in writing within the time stated above, and the exclusion is accepted by the Court. Any Settlement Class member that submits a Request for Exclusion shall have no rights under the Settlement Agreement, shall not be entitled to receive any payment out of the Net Settlement Fund, and shall not be entitled to object

to the Settlement Agreement. Unless otherwise ordered by the Court, any Settlement Class member who fails to timely and validly request exclusion from the Settlement Class in accordance with this paragraph shall be deemed to have waived their right to be excluded from the Settlement Class.

(18) Any Settlement Class member that submits a Request for Exclusion may thereafter submit to the Claims Administrator and Co-Lead Counsel a written and signed revocation of that Request for Exclusion, provided that it is received **no later than five (5) business days before the Settlement Hearing**, in which event that member will be included in the Settlement Class.

(19) The Court will consider objections to the Settlement Agreement, the Plan of Allocation, any Fee and Expense Application, and any requests for a Lead Plaintiffs Awards from any Settlement Class member who does not request exclusion from the Settlement Class. Any such member wanting to object must do so in writing and may also appear at the Settlement Hearing.

a. To the extent any member wants to object in writing, such objections and any supporting papers, accompanied by proof of Settlement Class membership and the number of shares of Nano-X securities that the objecting Settlement Class member purchased or otherwise acquired during the Settlement Class Period, as well as the date(s) and price(s) of each purchase, acquisition, and/or sale of such securities, and personally signed by the member objecting, shall be filed with the Clerk of the Court, United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201 **no later than twenty-one (21) calendar days before the Settlement Hearing**.

b. Copies of all such papers must also be served **no later than twenty-one (21) calendar days before the Settlement Hearing**, to each of the following: Nicholas I. Porritt, Levi & Korsinsky, LLP, 55 Broadway, Suite 427, New York, NY 10006 and Jeremy A. Lieberman, Pomerantz LLP, 600 Third Avenue, New York, NY 10016, on behalf of the Lead Plaintiffs and the Settlement Class; Susan L. Saltzstein, Skadden, Arps, Slate, Meagher & Flom LLP, One Manhattan West, New York, NY 10001 on behalf of Nano-X; Jeffrey J. Chapman, McGuireWoods LLP, 1251 Avenue of the Americas, 20th Floor, New York, NY 10020, on behalf of Ran Poliakine; and Hadar E. Israeli, Barnea Jaffa Lande & Co., 58 Harakevet St., 21st Floor, Tel Aviv, Israel 6777016, hisraeli@barlaw.co.il on behalf of Itzhak Maayan.

c. Objections will be deemed timely if they are postmarked (for U.S. Mail) or received by the private carrier (for FedEx, UPS, etc.) or emailed **no later than twenty-one (21) days before the Settlement Hearing.**

d. If an objector hires an attorney to represent them for the purposes of making an objection, the attorney must both effect service of a notice of appearance on counsel listed above and file it with the Court by **no later than twenty-one (21) days before the Settlement Hearing.**

e. A Settlement Class member who files a written objection does not have to appear at the Settlement Hearing for the Court to consider the objection. If the Settlement Class member intends to appear at the Settlement Hearing, the Settlement Class member must state in writing in the objection the intent to appear in person, and shall identify any witnesses they may seek to call and exhibits they intend to offer at the Settlement Hearing, and shall include copies of any such

exhibits, in the papers served, as set forth above, **no later than twenty-one (21) days before the Settlement Hearing.**

f. Any Settlement Class member who does not make their objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the Settlement Agreement, to the Plan of Allocation, to the Fee and Expense Award, and to the Lead Plaintiffs Awards, unless otherwise ordered by the Court.

g. The Settling Parties may take discovery of any Settlement Class member who objects concerning the objection and membership in the Settlement Class.

(20) The Claims Administrator, Defendants' counsel, and Co-Lead Counsel shall promptly furnish each other with copies of any and all objections that come into their possession.

(21) All papers and/or briefs in support of final approval of the Settlement Agreement, Plan of Allocation, Co-Lead Counsel's Fee and Expense Application and Lead Plaintiffs' request for a Lead Plaintiffs Awards shall be filed with the Court by Lead Plaintiffs no later than thirty-five (35) calendar days before the Settlement Hearing. All reply papers and/or briefs, including any in response to a filed objection, shall be filed and served at least seven (7) calendar days prior to the Settlement Hearing.

(22) The Court reserves the right to approve the Settlement Agreement without modification, or with such modifications as may be agreed to by the Settling Parties, and with or without further notice, and may adjourn or continue the Settlement Hearing or hold the Settlement Hearing via videoconference or telephone conference without further notice to the Settlement Class. The Court may approve the Settlement Agreement regardless of whether it has approved the Plan of Allocation, Co-Lead Counsel's Fee and Expense Application, and Lead Plaintiffs' request for a Lead Plaintiffs Awards. The Claims

Administrator and Co-Lead Counsel shall cause any change to the date, time, or manner of the Settlement Hearing to be posted on www.NanoXSecuritiesLitigation.com.

SO ORDERED:

Peggy Kuo

PEGGY KUO
United States Magistrate Judge

Dated: Brooklyn, New York
October 31, 2023