UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: SUNEDISON, INC. SECURITIES LITIGATION This Document Relates To: *Horowitz et al. v. SunEdison, Inc. et al.*, Case No. 1:16-cv-07917-PKC	Civil Action No. 1:16-md-2742-PKC

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff the Municipal Employees' Retirement System of Michigan ("MERS") and Named Plaintiff Arkansas Teacher Retirement System ("ATRS," and together with MERS, "Plaintiffs"), on behalf of themselves and the other members of the certified Class, respectfully submit this memorandum of law in support of their motion for final approval of: (i) the proposed settlement (the "Settlement") resolving all claims in the above-captioned action (the "Action"), and (ii) the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

After more than three years of intense litigation, including substantial motion practice, certification of a litigation class, extensive discovery, and a protracted, multi-year settlement mediation process, Plaintiffs have agreed to settle all claims in the Action in exchange for a cash payment of $74 million, with a possible additional recovery of up to $2 million. Plaintiffs respectfully submit that the proposed Settlement, which is the product of a mediator's recommendation, is a very favorable result for the Class and satisfies the standards for final approval of a settlement under Rule 23 of the Federal Rules of Civil Procedure.

At the time the Settlement was reached, Plaintiffs and their counsel were well-informed of the strengths and weaknesses of their case based on their extensive, hard-fought prosecution of the claims asserted in the Action. As detailed in the Graziano Declaration,[2] Lead Counsel, *inter alia*:

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[1] All capitalized terms that are not otherwise defined have the meanings assigned in the Stipulation and Agreement of Settlement, dated July 11, 2019 (ECF No. 316-1) (the "Stipulation") or in the Declaration of Salvatore J. Graziano in Support of (I) Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (the "Graziano Declaration"), filed herewith. In this memorandum, citations to "¶ __" refer to paragraphs in the Graziano Declaration and citations to "Ex. __" refer to exhibits to the Graziano Declaration.

[2] The Graziano Declaration is an integral part of this submission and, for the sake of brevity in this Memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the nature of the claims asserted (¶¶ 14-15); the history of the Action (¶¶ 16-223); the negotiations leading to the

(i) conducted an extensive investigation into the alleged fraud, including interviews with numerous former employees of SunEdison, consultation with multiple experts, a thorough review and analysis of the voluminous public information relating to SunEdison's collapse, such as SEC filings, press releases and other public statements, media and new reports, analyst reports, and court filings from the Company's Chapter 11 bankruptcy proceeding and whistleblowers actions brought against Defendants (¶¶ 32-33, 58-59);

(ii) researched and drafted two extensive amended complaints, including the operative Second Amended Consolidated Securities Class Action Complaint (the "Complaint") (¶¶ 31-32, 58-59);

(iii) briefed Plaintiffs' opposition to, and defeated in part, Defendants' motions to dismiss the Complaint (¶¶ 65-73, 78-79);

(iv) engaged in substantial fact and expert discovery, including drafting and serving document requests on Defendants and on nearly two dozen nonparties, serving and responding to interrogatories, obtaining and reviewing more than 2,260,000 pages of documents produced by Defendants and third parties, producing close to 40,000 pages of documents to Defendants, deposing 19 fact witnesses (including nine former senior executives or high-ranking employees of SunEdison or related companies TerraForm Power and TerraForm Global, four former directors of SunEdison, and six representatives of the Underwriter Defendants), exchanging with Defendants ten expert reports from nine different experts, and litigating numerous discovery disputes against Defendants and third parties (¶¶ 94-160, 183-96);

(v) successfully moved for class certification (¶¶ 161-78);

(vi) responded to several thorough summary judgment pre-motion letters filed by Defendants, including by submitting over 100 exhibits (¶¶ 197-215); and

(vii) worked extensively with experts in market efficiency, damages, director due diligence, underwriter due diligence, and cash-flow management (¶¶ 183-86).

The Settlement is the product of protracted, arm's-length settlement negotiations, including three separate in-person mediation sessions, spanning six days, facilitated by highly respected mediators, Judge Layn R. Phillips and Gregory P. Lindstrom of Phillips ADR (the "Mediators"). The mediation process began in December 2016, when the Court granted Defendants' request for a onetime stay for the Parties to participate in mediation. Over a series of four days (February 10, 2017, February 27, 2017, March 2, 2017, and March 3, 2017), Lead Counsel and Defendants'

Settlement (¶¶ 216-23); the risks and uncertainties of continued litigation (¶¶ 7-9, 224-33); and the terms of the Plan of Allocation (¶¶ 242-48).

Counsel, along with counsel in other actions consolidated as part of the multi-district litigation pending before the Court, participated in an initial mediation session before the Mediators. Prior to the first mediation, the Parties exchanged detailed mediation statements, which addressed the issues of liability, damages, and class certification. The session ended without any agreement being reached to resolve the Action, and the stay expired on March 31, 2017.

On October 6, 2017, while Defendants' motion to dismiss the Complaint was pending, the Parties participated in a second mediation session before the Mediators, which was also unsuccessful. A third mediation session before the Mediators was held on June 12, 2018 amid fact discovery. While the Parties did not reach an agreement to resolve the Action during this mediation session, negotiations continued under the Mediators' supervision as active litigation continued. Following numerous additional discussions with the Mediators, on June 2, 2019, Judge Phillips made a mediator's recommendation that the Parties settle the Action for $74,000,000, with the possibility of a supplemental payment of up to $2,000,000 provided certain conditions are met. The Parties accepted that recommendation and reached an agreement in principle to settle the Action on June 11, 2019. Judge Phillips has submitted a declaration describing the Parties' mediation efforts, including his opinion that the Settlement "reflects a reasonable recovery for the investor class under the circumstances, and is a fair and reasonable compromise of the claims in the action." Declaration of Layn R. Phillips (Ex. 1) at ¶ 6.

The Settlement is a particularly positive result for the Class when considered in light of the considerable risks associated with this Action. As set forth in greater detail below and in the Graziano Declaration, throughout the litigation, Defendants maintained a series of defenses that, if successful, could well have undercut Plaintiffs' ability to defeat a motion for summary judgment and/or secure a meaningful recovery at trial, or even any recovery at all, on behalf the Class. For

example, Plaintiffs faced substantial challenges in proving that, after the Court's decision on the motion to dismiss, the one remaining alleged misstatement for the Exchange Act claims—Defendant Chatila's September 2, 2015 statement concerning the timing of the Company's cash flows—was false when made and was not protected as a forward-looking statement; that Chatila intended to mislead investors when he made the statement; and that the alleged misstatement was the cause of the losses suffered by the Exchange Act Subclass. If Plaintiffs failed to establish any of these elements, the Class could receive nothing for their Exchange Act claims. Plaintiffs also faced significant challenges in overcoming Defendants' negative-causation arguments, which could have reduced damages under the Securities Act by half. Finally, even if Plaintiffs were successful in securing a substantial judgement at trial, they faced a virtual certainty that they would be unable to fully recover on that judgment because Chatila, the sole remaining Exchange Act Defendant, has limited assets. The available insurance coverage was a wasting asset that had been, and would continue to be, depleted by the costs of defending and settling numerous related actions brought against SunEdison's officers and directors in the aftermath of the Company's collapse.

Indeed, in the absence of the Settlement, Plaintiffs faced the prospect of protracted litigation through the remainder of expert discovery, summary judgment, a trial, post-trial motion practice, individual class member loss causation and damages challenges, and likely ensuing appeals. The Settlement avoids these risks and delays while providing a substantial, certain, and immediate benefit to the Class in the form of a $74 million cash payment, with a possible additional recovery of up to $2 million, if any additional insurance funds are remaining. *See* Stipulation ¶ 9 and Exhibit C thereto.

Plaintiffs, sophisticated institutional investors with a significant financial stake in the litigation, have closely supervised the prosecution of the Action and fully support the Settlement.

See Declaration of Brian LaVictoire (Ex. 2) ("LaVictoire Decl.") at ¶¶ 5-7; Declaration of Rod Graves (Ex. 3) ("Graves Decl.") at ¶¶ 7-9. Moreover, Lead Counsel, which is experienced in prosecuting securities class actions, believes that this Settlement is in the best interests of the Class.

In light of the considerations detailed below, the standards under Rule 23, and the factors articulated by the Second Circuit in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell*"), Plaintiffs respectfully submit that the Settlement warrants final approval. In addition, Plaintiffs request that the Court approve the Plan of Allocation, as set forth in the Settlement Notice mailed to Class Members. The Plan of Allocation, which Lead Counsel developed in consultation with Plaintiffs' damages expert, provides a reasonable method to allocate the Net Settlement Fund among Class Members who submit valid claims based on damages they allegedly suffered on purchases of SunEdison Securities during the relevant time periods.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims. *See* Fed. R. Civ. P. 23(e). A class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

The Second Circuit has recognized that public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Wal-Mart*") ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted). In ruling on final approval of a class settlement, the court should examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See id.*; *In re Citigroup Inc. Sec. Litig.*, 2014 WL 2112136, at *2-3 (S.D.N.Y. May 20, 2014).

Rule 23(e)(2), as amended on December 1, 2018, provides that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

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

Fed. R. Civ. P. 23(e)(2). These factors strongly support approval of the Settlement here.

In addition, the Second Circuit has held that district courts should consider following factors set forth in *Grinnell* in evaluating a class action settlement:

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

495 at 463 (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Wal-Mart*, 396 F.3d at 117.

The Advisory Committee Notes to the 2018 amendments to the Federal Rules of Civil Procedure indicate that the four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by the Court of Appeals, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Advisory Committee Notes to 2018 Amendments.

Accordingly, Plaintiffs will discuss the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four factors set forth in Rule 23(e)(2), but will also discuss the application of relevant, non-duplicative *Grinnell* factors. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) ("The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors.").

A. Plaintiffs and Lead Counsel Have Adequately Represented the Class

In determining whether to approve a class action settlement, the court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A); *see generally In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 99 (S.D.N.Y. 2016) (noting that "the adequacy requirement 'entails inquiry as to whether: 1) plaintiffs' interests are antagonistic to the interest of other members of the class and 2) plaintiffs' attorneys are qualified, experienced and able to conduct the litigation'").

Here, Plaintiffs and Lead Counsel have adequately represented the Class in both their vigorous prosecution of the Action and in the negotiation and achievement of the Settlement. Plaintiffs have claims that are typical of and coextensive with those of other Class Members and have no interests antagonistic to the interests of other Class members. On the contrary, Plaintiffs—like other Class Members—have an interest in obtaining the largest possible recovery from Defendants. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.")(citation omitted). In addition, Court-appointed Lead Counsel is highly qualified and experienced in securities litigation, as set forth in its firm resume (*see* Ex. 5A-3), and was able to successfully conduct the litigation against skilled opposing counsel.

Accordingly, as the Court previously found in certifying the Class and appointing Plaintiffs

as class representatives and Lead Counsel as class counsel, Plaintiffs and Lead Counsel have and will adequately represent the Class. *See* ECF No. 287 at 26, 37, 39-40.

B. The Settlement Was Reached After Arm's-Length Negotiations with the Assistance of Experienced Mediators and Following Substantial Discovery

In weighing approval of a class action settlement, the Court must consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts have traditionally considered other related circumstances in determining the "procedural" fairness of a settlement, including (i) counsel's understanding of the strengths and weakness of the case based on factors such as "the stage of the proceedings and the amount of discovery completed,"[3] (ii) the absence of any indicia of collusion;[4] and (iii) the involvement of a mediator.[5] All of these circumstances strongly support the approval of the Settlement here.

As discussed above, the Settlement is the product of a mediator's recommendation and was reached only after extensive arm's-length negotiations between the Parties, which included three separate rounds of in-person mediation under the auspices of Judge Layn R. Phillips and Gregory P. Lindstrom of Phillips ADR, both experienced mediators of securities class actions and other complex litigation. ¶¶ 51-52, 74-75, 93, 216-21. *See In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) ("*Bear Stearns*") (finding a settlement fair where the parties engaged in "arm's length negotiations," including mediation before "retired

[3] *See Grinnell*, 495 F.2d at 463 (third factor); *see also In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015) ("*Facebook*") ("the question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement"), *aff'd*, 674 F. App'x 37 (2d Cir. 2016).

[4] *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) ("the absence of any indication of collusion, the protracted settlement negotiations, the ability and experience of plaintiffs' counsel, [and] the extensive discovery preceding settlement . . . are important indicia of the propriety of settlement negotiations").

[5] *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure").

federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (a settlement was entitled to a presumption of fairness where it was the product of "arms-length negotiation" facilitated by Judge Phillips, "a respected mediator"); *Roberti v. OSI Sys. Inc.,* 2015 WL 8329916, at *3 (C.D. Cal. Dec. 8, 2015) (approving settlement reached through mediator's "double-blind Mediator's Recommendation").

Indeed, the Settlement merits a presumption of fairness because it was achieved after extensive arm's-length negotiations between well-informed and experienced counsel after a substantial amount of discovery. *See Wal-Mart*, 396 F.3d at 116 (a class action settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arms' length negotiations between experienced, capable counsel after meaningful discovery") (citation omitted); *Facebook*, 2015 WL 6971424, at *3 (same).

In addition, as noted above, Plaintiffs and their counsel were knowledgeable about the strengths and weaknesses of the case prior to reaching the agreement to settle. Lead Counsel conducted a detailed substantive investigation prior to filing the amended complaints by, among other things, reviewing SEC filings, press releases, media and news reports, analyst reports, and court filings from the SunEdison bankruptcy proceeding and whistleblowers actions, consulting with several experts, and speaking with dozens of potential witnesses. ¶¶ 32-33, 58-59. Lead Counsel also performed extensive legal research in preparing the amended complaints, briefing in opposition to Defendants' motion to dismiss the Complaint and Defendant Chatila's motion for judgment on the pleadings, and briefing in support of Plaintiffs' motion for class certification. ¶¶ 31, 59, 65-73, 78-79, 89-92, 161-78. After the Court's ruling on the motion to dismiss, Lead Counsel obtained and reviewed a substantial amount of fact discovery, including more than

2,260,000 pages of documents produced by Defendants and non-parties, and engaged in extensive deposition discovery. ¶¶ 94-117. Lead Counsel also consulted extensively with experts in market efficiency, damages, director due diligence, underwriter due diligence, project finance, and the Company's cash flow management to enhance their understanding of the complex subject matters involved in the Action, and responded to Defendants' letters concerning anticipated summary judgment arguments, citing over 100 exhibits. ¶¶ 183-86, 197-215. Finally, the Parties engaged in extensive settlement negotiations, including exchanging detailed mediation statements, which further informed the Parties of the strength of each side's arguments. ¶¶ 51-52, 74-75, 93, 216-21.

The conclusion of Plaintiffs that the Settlement is fair and reasonable and in the best interests of the Class further supports its approval. Plaintiffs are sophisticated institutional investors that took an active role in supervising this litigation, as envisioned by the PSLRA, and have strongly endorsed the Settlement. *See* LaVictoire Decl. at ¶¶ 5-7; Graves Decl. at ¶¶ 7-9. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

In addition, the judgment of Lead Counsel, which is highly experienced in securities class action litigation, that the Settlement is in the best interests of the Class is entitled to "great weight." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation").

C. The Relief that the Settlement Provides for the Class is Adequate, Taking into Account the Costs and Risks of Further Litigation and All Other Relevant Factors

In determining whether a class action settlement is "fair, reasonable, and adequate," the

Court must consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" as well as other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). In most cases, this will be the most important factor for the Court to consider in its analysis of the proposed settlement. *See Grinnell*, 495 F.2d at 455 ("The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.") (citation omitted).[6]

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation omitted). Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006). This case was no exception.

As discussed in detail in the Graziano Declaration and below, continued litigation of the Action presented numerous risks that Plaintiffs would be unable to establish liability and damages. ¶¶ 224-33. In addition, continuing the litigation through trial and appeals would impose substantial additional costs on the Class and would result in extended delays before any recovery could be achieved, assuming Plaintiffs could collect on any Exchange Act judgment in light of the limited personal assets of the sole remaining Exchange Act Defendant and the Company's rapidly depleting insurance coverage. The Settlement, which provides a $74 million cash payment for the

[6] Indeed, this factor under Rule 23(e)(2)(C) essentially encompasses at least six of the nine factors of the traditional *Grinnell* analysis. *See Grinnell*, 495 F.2d at 463 ("(1) the complexity, expense and likely duration of the litigation; . . . (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; . . . (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation") (citations omitted).

benefit of the Class, with a possible additional recovery of up to $2 million, avoids those further costs and delays, and the risks associated with the continued litigation of the Action.

1. The Risks of Establishing Liability, Loss Causation, and Damages Support Approval of the Settlement

While Plaintiffs and Lead Counsel believe that the claims asserted against Defendants in the Action are meritorious, they recognize that this Action presented substantial risks to establishing liability, loss causation, and damages.

(a) Risks To Proving Liability, Loss Causation, and Damages Under the Exchange Act

The Court's decision on the motion to dismiss the Complaint dismissed all of Plaintiffs' Exchange Act claims except for a single claim under Section 10(b) against Defendant Chatila arising out of his September 2, 2015 public statement that SunEdison would "generat[e] cash for a living" by "early 2016." Defendant Chatila vigorously contested and would have continued to argue that this challenged statement was not false or misleading. While Chatila's arguments were not successful at the motion to dismiss stage, he could have succeeded on these arguments at subsequent stages of the litigation.

For example, Plaintiffs argued that Chatila's September 2015 statement was false in part because it was contradicted by a late-August 2015 Board of Directors presentation showing that SunEdison did not expect positive total cash flows until the second quarter of 2016 at the earliest. However, that presentation also included certain financial metrics that were actually projected to be positive by the first quarter of 2016. Chatila argued, and would have continued to argue, that his September 2015 statement referred to those metrics, and that his statement was therefore not false or made with the intent to deceive necessary to prove liability. ¶¶ 8, 38, 67, 89-90, 199, 225-26. If Chatila prevailed on either of those arguments, or in establishing that his September 2015 statement was insulated from liability under the PSLRA safe harbor as a "forward looking"

projection accompanied by adequate cautionary language, Plaintiffs would have failed to achieve any recovery on behalf of common stock investors in this Action.

Plaintiffs also faced a significant risk in proving loss causation and damages for the remaining Exchange Act claims. In order to establish loss causation, Plaintiffs would need to prove that Chatila's alleged September 2015 misstatement was the cause of investors' losses in SunEdison common stock. However, Chatila would likely argue that many of the corrective disclosures for which Plaintiffs claimed damages—such as the announcement of a lawsuit by Latin American Power against SunEdison for breach of a share repurchase agreement (Complaint ¶ 227)—do not relate to his alleged false statement concerning the timing of the Company's cash flows. Chatila's loss causation argument was potentially even more compelling in light of SunEdison's statement on November 10, 2015 indicating that SunEdison would not generate positive cash flows until mid-2016. If Chatila prevailed on his loss-causation arguments, recoverable damages for the Exchange Act Subclass would have been dramatically reduced. ¶ 226.

(b) Risks To Proving Liability and Damages under the Securities Act

If litigation would have continued through summary judgment and trial, Plaintiffs would have also faced significant risks in proving liability and damages on their Securities Act claims. For example, Plaintiffs risked being unable to prove that each of the statements and omissions underlying the Securities Act claims were materially false and misleading. The claims brought under the Securities Act are based on three alleged misstatements and omissions relating to SunEdison's August 18, 2015 Preferred Offering: (i) Defendants' failure to disclose a margin call (the "Margin Call") that the Company received on an outstanding $410 million margin loan (the "Margin Loan") on August 7, 2015; (ii) Defendants' failure to disclose a $169 million second-lien loan from Goldman Sachs Bank USA (the "Second-Lien Loan") that closed and was funded on

August 11, 2015; and (iii) the Company's inaccurate characterization of the Margin Loan as non-recourse debt, when it was in fact recourse to the Company. ¶¶ 203-205, 227-28. Regarding the Margin Call, Defendants would have likely argued that investors knew or should have known when the Margin Call occurred based on SunEdison's prior disclosures that provided many (if not all) of the metrics used in the formula to calculate the triggers for any margin calls, such as the amount of collateral posted for the Margin Loan (in the form of 32.2 million shares of TerraForm Power stock) and the loan-to-value ratio the Company was obligated to maintain on the Margin Loan. Defendants maintained that investors could have monitored the share price of TerraForm Power and determined exactly when the value of the collateral dropped, triggering a margin call and requiring the Company to post additional collateral. ¶¶ 203, 227. Further, Defendants could have succeeded on their argument that the amount of the Margin Call was not material and, therefore, investors were not misled by Defendants' failure to disclose it. *Id*.

Regarding the Second-Lien Loan, Defendants argued that the $169 million amount of the loan was not material, and that the terms of the Second-Lien Loan (including the interest rate and fees that Goldman Sachs charged) would not have been material to investors. ¶¶ 204, 228. Defendants introduced and developed evidence to support those arguments, including testimony and documents suggesting that the Second-Lien Loan's interest rate as disclosed in a November 2015 filing was actually incorrect and overstated, and that the fees disclosed at that time were also incorrect and were substantially inflated by legal fees for unrelated work. ¶ 228. If the jury concluded that the interest rate and fees for the Second-Lien Loan were lower than Plaintiffs contended, and therefore did not indicate any underlying difficulty by the Company accessing the capital markets or other financial problems at SunEdison, Plaintiffs may not have been able to establish Defendants' liability. Further, regarding the recourse nature of the Margin Loan,

Plaintiffs risked Defendants prevailing on arguments that the amount of the loan was not material, and that, given other disclosures prior to the Preferred Offering that did accurately describe the Margin Loan, investors were not misled. *Id*.

Plaintiffs also faced the significant risk that Defendants could prevail on "negative causation" arguments by establishing as a matter of law, or proving to a jury, that declines in the price of SunEdison preferred stock after November 9, 2015 were due to reasons other than the alleged misstatements and omissions underlying Plaintiffs' Securities Act claims. Specifically, Defendants would contend that the Company had fully disclosed and corrected the three items underlying the Securities Act claims (the Margin Call, the Second-Lien Loan, and the recourse nature of the Margin Loan) by the time that SunEdison's Form 10-Q was filed on November 9, 2015, and thus all subsequent stock price declines must be attributed to other, unrelated reasons. If the Court or a jury agreed and found that Defendants proved negative causation for declines in the value of SunEdison preferred stock after November 9, 2015, the amount of recoverable damages would have been reduced by approximately 50%. ¶¶ 229, 233.

Further, Plaintiffs faced the risk that the Underwriter Defendants and/or Director Defendants would prevail on summary judgment or at trial in proving their defense that they conducted adequate due diligence and thus cannot be liable. The Underwriter Defendants could have proven that, among other things, they conducted due diligence through their retention of experienced counsel in connection with the Preferred Offering, as well as based on previous diligence conducted for SunEdison in connection with other offerings and at various points leading up to the Preferred Offering. ¶¶ 206, 230. Similarly, the Director Defendants could have prevailed on such a defense because the Audit Committee of the SunEdison Board reviewed the Company's quarterly and annual filings incorporated into the Prospectus Supplement for the Preferred

Offering, those filings were also reviewed by counsel and the Company's outside auditors, and because, they would contend, they were not aware of any "red flags" prior to the Preferred Offering that triggered any additional or heightened due-diligence obligations. *Id*.

2. Risks of Collecting on Any Judgment After Trial Weigh in Favor of Approval of the Settlement

Plaintiffs also submit that the Settlement is a favorable result for the Class in light of the very substantial risk that certain of the Defendants would be unable to satisfy a significant judgment after trial, assuming Plaintiffs were successful in overcoming Defendants' credible challenges to liability and loss causation described above. Regarding Plaintiffs' Section 10(b) claim, based on the Court's ruling on the motion to dismiss, Chatila is the only remaining Defendant in the Action, but he lacks any significant personal assets to contribute to any settlement or post-trial judgment, including because he held his SunEdison stock until it completely declined in value. Further, SunEdison, as a bankrupt, liquidating entity, is not a Defendant in this Action, and any recovery on Plaintiffs' Section 10(b) claim would be paid solely from the Company's available insurance proceeds. ¶¶ 7, 232. Indeed, the risk of non-recovery in this Action is highlighted by the Court's concern, expressed during a conference on April 17, 2018, "that there will not be sufficient assets to satisfy anything close to a judgment. There may not even be assets or insurance proceeds available to have any kind of a meaningful settlement." *See, e.g., In re SunEdison, Inc. Sec. Litig.*, Civil Action No. 1:16-md-2742-PKC, Apr. 17, 2018 Tr. at 31:17-20, ECF No. 356 (Ex. 10).[7] Considering the fact that Plaintiffs have been pursuing their claims for over three years, the insurance available to fund a settlement or post-trial judgment

[7] *See also id.*, Jan. 31, 2018 Tr. at 12:8-19, ECF No. 299 (Ex. 11) ("[defendants] Chatila and Wuebbels have dwindling personal resources and a limited pool of insurance coverage. … The diminishing insurance coverage is a factor in considering the reasonableness of the settlement, and so the settlement certainly was negotiated not only with the difficulty and risks of establishing liability and damages as a major concern, but also the defendants' ability to withstand a greater judgment.").

has been severely depleted, as it has been used both to defend against and resolve several governmental investigations and private actions, including class actions on behalf of TerraForm Power and TerraForm Global shareholders, a derivative action on behalf of TerraForm Global shareholders, individual actions by large institutions raising Securities Act claims concerning the August 2015 Preferred Offering, and one or more investigations by the U.S. Department of Justice.

Moreover, the Settlement is reasonable in comparison to the range of potential recoveries in the Action if Plaintiffs prevailed at trial, which, again, was far from certain for the reasons noted above. The potential recoverable damages that could be established with respect to the Securities Act claims ranged from $159.2 million, assuming Defendants were successful on their "negative causation" defense cutting off damages as of November 9, 2015, up to a maximum of $297 million. Accordingly, the $54.5 million that will be available for members of the Securities Act Subclass represents 18% to 34% of the maximum recoverable damages for that subclass. ¶ 233. While the $19.5 million recovered for the Exchange Act Subclass under the Settlement represents a smaller percentage of the possible maximum damages for that subclass, considering Chatila's inability to pay a substantial judgment and the diminished and rapidly depleting amount of insurance remaining, any such maximum damages were entirely theoretical. *Id*. Indeed, any analysis of the adequacy of the settlement of the Exchange Act Subclass claims must be considered in light of amounts that could actually be recovered. *Id*.

Furthermore, the Parties structured the contingent Supplemental Payment in an attempt to maximize insurers' contributions to the Settlement and to potentially provide additional recovery for the Class by creating an obligation for insurers to pay an additional amount of up to $2 million if insurance funds are not exhausted by insurers' other obligations (such as obligations to pay

ongoing defense costs for certain officers and directors). ¶ 234. Once all litigation for which insurance coverage requests have been made has been resolved, any remaining Side A insurance funds (those that cover claims against Chatila) up to $2 million will be paid to the Class. While Plaintiffs reasonably expect some payment will be received pursuant to the Supplemental Payment, no payment is guaranteed, and Plaintiffs submit that the $74 million Current Settlement Amount is sufficient by itself to make the Settlement fair, reasonable, and adequate. *Id*.

3. The Costs and Delays of Continued Litigation Support Approval of the Settlement

The substantial costs and delays that would be required before any recovery could be obtained through litigation also strongly support approval of the Settlement. Courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks*, *Ltd*., 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007).

While this case settled after certification of the Class and after substantial document discovery, achieving a litigated verdict in the Action would have required substantial additional time and expense. In the absence of the Settlement, achieving a recovery for the Class would have required: (i) the conclusion of complex and expensive expert discovery (including taking numerous depositions, of which nine had already been scheduled and for which substantial preparations had already been made at the time the Settlement was reached); (ii) summary judgment briefing; (iii) a trial on complex subject matter involving substantial fact and expert testimony; and (iv) post-trial motions, including a contested individual claims procedure. Finally, whatever the outcome at trial, it is virtually certain that appeals would be taken from any verdict. The foregoing would pose substantial expense for the Class and delay the Class's ability to recover—assuming, of course, that Plaintiffs and the Class were ultimately successful on their claims. ¶ 264.

In contrast to costly, lengthy, and uncertain litigation, the Settlement provides an immediate, significant, and certain recovery of $74 million, with a possible additional recovery of up to $2 million.

4. All Other Factors Set Forth in Rule 23(e)(2)(C) Support Approval of the Settlement

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;" "the terms of any proposed award of attorney's fees, including timing of payment;" and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors also supports approval of the Settlement or is neutral and does not suggest any basis for inadequacy of the Settlement.

First, the procedures for processing Class Members' claims and distributing the proceeds of the Settlement to eligible claimants are well-established, effective methods that have been widely used in securities class action litigation. Here, the proceeds of the Settlement will be distributed to class members who submit eligible Claim Forms with required documentation to the Court-authorized Claims Administrator, Analytics. Analytics, an independent company with extensive experience handling the administration of securities class actions, will review and process the claims under the supervision of Lead Counsel, will provide claimants with an opportunity to cure any deficiencies in their claims or request review of the denial of their claim by the Court, and will then mail or wire claimants their *pro rata* share of the Net Settlement Fund (as calculated under the Plan of Allocation) upon approval of the Court.[8] This type of claims

[8] The Settlement is not a claims-made settlement. If the Settlement is approved, Defendants will have no right to the return of any portion of Settlement based on the number or value of Claims submitted. *See* Stipulation ¶ 15.

processing is standard in securities class actions and has long been used and found to be effective. Such claim filing and processing is necessary because neither Plaintiffs nor the Company possess individual investors' trading data that would allow the Parties to create a "claims-free" process to distribute Settlement funds.

Second, the relief provided for the Class in the Settlement is also adequate when the terms of the proposed award of attorney's fees are taken into account. As discussed in the accompanying Fee Memorandum, the proposed attorneys' fees of 21% of the Settlement Fund, to be paid upon approval by the Court, are reasonable in light of the efforts of Lead Counsel and the risks in the litigation. Most importantly with respect to the Court's consideration the fairness of the Settlement, is the fact that approval of attorneys' fees is entirely separate from approval of the Settlement, and neither Plaintiffs nor Lead Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. *See* Stipulation ¶ 19.

Lastly, the amended Rule 23 asks the court to consider the fairness of the proposed settlement in light of any agreements required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). Here, the only such agreement (other than the Stipulation itself) is the Parties' confidential Termination Agreement that set forth the conditions under which Defendants would have been able to terminate the Settlement if the number of Class Members who requested exclusion reached a certain threshold. In this case, the Termination Agreement is moot because the Court did provide Class Members with a second opportunity to request exclusion from the Class in connection with the Settlement Notice. [9]

[9] The Notice of Pendency of Class Action ("Class Notice"), previously disseminated to potential Class Members in April 2019, provided Class Members with an opportunity to request exclusion from the Class. 28 requests for exclusion were received. ECF No. 319.

D. The Settlement Treats Class Members Equitably Relative to Each Other

The proposed Settlement treats members of the Class equitably relative to one another. As discussed below in Part II, pursuant to the Plan of Allocation, eligible claimants approved for payment by the Court will receive their *pro rata* share of the recovery based on the transactions in SunEdison Securities. Plaintiffs will receive precisely the same level of *pro rata* recovery (based on their Recognized Claims as calculated under the Plan of Allocation) as all other similarly-situated Class Members.

E. The Reaction of the Class to the Settlement

One factor set forth in *Grinnell* but not included in Rule 23(e)(2) that should be considered is the reaction of the Class to the proposed Settlement, which is an important factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *Bear Stearns,* 909 F. Supp. 2d at 265-66; *FLAG Telecom*, 2010 WL 4537550, at *16; *Veeco*, 2007 WL 4115809, at *7.

Pursuant to the Preliminary Approval Order, Analytics began mailing copies of the Settlement Notice Packet (consisting of the Settlement Notice and Claim Form) to potential Class Members and nominees on July 30, 2019. *See* Declaration of Richard W. Simmons (Ex. 4) (the "Simmons Decl."), at ¶ 6. Through September 19, 2019, a total of 287,016 Settlement Notice Packets have been disseminated to potential Class Members and nominees. *See id*. ¶ 7. In addition, the Summary Settlement Notice was published in the *Wall Street Journal* and transmitted over the *PR Newswire* on August 13, 2019. *See id*. ¶ 8. The Settlement Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to object to any aspect of the Settlement and the procedure for submitting Claims.

While the October 4, 2019 deadline set by the Court for Class Members to object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation have been received. As provided in the Preliminary Approval Order, Plaintiffs will file reply

papers no later than October 18, 2019 addressing any objections that may be received.

* * *

In sum, all of factors to be considered under Rule 23(e)(2) support a finding that the Settlement is fair, reasonable, and adequate.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate. *See In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012); *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as it has a "rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See IMAX*, 283 F.R.D. at 192. A plan of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *In re PaineWebber Ltd. P'ship Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997). In determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See Giant Interactive*, 279 F.R.D. at 163.

Here, the proposed plan of allocation (the "Plan of Allocation"), which was developed by Lead Counsel in consultation with Plaintiffs' damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Class Members who submit valid Claim Forms. Under the proposed Plan of Allocation, the Net Settlement Fund will be divided into two separate funds for purposes of making allocations to Authorized Claimants: (i) the "Exchange Act Claim Fund," which will compensate members of the Exchange Act Subclass and (ii) the "Securities Act Claim Fund," which will compensate members of the Securities Act Subclass. Settlement Notice

¶ 86. The entire portion of the Settlement Amount that was paid by or on behalf of the Underwriter Defendants will be allocated to the Securities Act Claim Fund; the portion of the Current Settlement Amount that was paid by or on behalf of the SunEdison Defendants will be divided between the two Claim Funds in proportion to Plaintiffs' damages expert's estimate of the size of total damages for the Exchange Act Subclass and the Securities Act Subclass; and any amounts paid as part of the Supplemental Payment allocated to the Exchange Act Claim Fund. *Id.* ¶ 87. Based on these calculations, the Exchange Act Claim Fund will be allocated $19.5 million, as well as any amounts paid as part of the potential Supplemental Payment of up to $2 million, and the Securities Act Claim Fund will be allocated $54.5 million. *Id.*[10]

Under the Plan of Allocation, Recognized Loss Amounts for purchases and acquisitions of SunEdison preferred stock are calculated based on the statutory formula for damages under Section 11 of the Securities Act, 15 U.S.C. § 77k(e). *Id.* ¶¶ 95-98. Recognized Loss Amounts for purchases and acquisitions of SunEdison common stock, which have only 10(b) claims, are calculated principally based on the difference between the amount of estimated alleged artificial inflation in SunEdison common stock at the time of purchase and at the time of sale, or the difference between the actual purchase price and sales price of the stock, whichever is less. *Id*. ¶¶ 90-94. Claimants who purchased and sold all their shares of SunEdison common stock before the first alleged corrective disclosure, which occurred after the close of trading on November 9, 2015, or who purchased and sold all their shares of SunEdison common between two consecutive disclosure dates, will have no Recognized Loss Amount under the Plan of Allocation for those transactions because any loss suffered on those sales would not be the result of the alleged misstatements. *Id*.

[10] Court-approved attorneys' fees, Litigation Expenses, Taxes, and Notice and Administration Costs for the Settlement will be deducted proportionally from the two Claim Funds based on the relative sizes of the funds.

¶ 92. The Plan of Allocation also limits Claimants based on whether they had an overall market loss in their transactions in SunEdison Securities during the relevant Class Periods. *Id*. ¶¶ 106-109.

Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as result of the conduct alleged in the Action. ¶ 95. Moreover, as noted above, through September 19, 2019, more than 287,000 copies of the Settlement Notice, which contains the Plan of Allocation, and advises Class Members of their right to object to the Plan of Allocation, have been sent to potential Class Members and their nominees. *See* Simmons Decl. ¶ 7. To date, no objections to the proposed Plan of Allocation have been received. ¶ 248.

III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Settlement Notice disseminated to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Settlement Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable"—*i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114 (citation omitted).

Both the substance of the Settlement Notice and the method of its dissemination to potential members of the Class satisfied these standards. The Court-approved Settlement Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Class; (iii) the amount of the Settlement; (iv) a description of the

Plan of Allocation; (v) an explanation of the reasons why the Parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Class Members' right to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.[11]

As noted above, Analytics, the Court-approved Claims Administrator, began mailing the Settlement Notice Packet to potential Class Members on July 30, 2019. *See* Simmons Decl. ¶ 6. Through September 21, 2019, a total of 287,016 Settlement Notice Packets have been sent to potential Class Members and nominees. *See id*. ¶ 7. In addition, Lead Counsel caused the Summary Settlement Notice to be published in the *Wall Street Journal* and transmitted over the *PR Newswire* on August 13, 2019. *See id*. ¶ 8. Copies of the Settlement Notice, Claim Form, and Stipulation were made available on the case website maintained by Analytics beginning on July 30, 2019, and copies of those documents were also made available on Lead Counsel's website. *See* Simmons Decl. ¶ 9; Graziano Decl. ¶ 241. This combination of individual notice to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 182-83 (S.D.N.Y. 2014); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *12-13 (S.D.N.Y. Dec. 23, 2009).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate.

[11] As noted above, the Class Notice, previously disseminated to potential Class Members in April 2019, provided Class Members with an opportunity to request exclusion from the Class.

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Respectfully submitted,

/s/ *Salvatore J. Graziano*

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