UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re TALKSPACE, INC. SECURITIES LITIGATION	:	Civil Action No. 1:22-cv-00163-PGG
	:	CLASS ACTION
	:	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs Steven Jacob Greenblatt, Montague Street LP, Greenblatt Family Investments LLC, William Greenblatt, Judith Greenblatt, the Brandon T. Greenblatt Trust, the Maggie S. Greenblatt 2015 Trust, the Steven Jacob Greenblatt 2015 Trust, and Ivan M. Baron ("Plaintiffs"), respectfully submit this memorandum of law in support of their motion for final approval of the $8,500,000 Settlement (the "Settlement Amount") reached in this action (the "Action") and approval of the Plan of Allocation (the "Plan").[1] The terms of the Settlement are set forth in the Stipulation of Settlement dated May 19, 2023 (the "Stipulation"). ECF 84.[2]

I. INTRODUCTION

Plaintiffs' $8.5 million recovery is the result of their rigorous effort to prosecute this highly complex litigation, reached following lengthy arm's-length settlement negotiations by experienced and knowledgeable counsel, overseen by a nationally renowned mediator. The Settlement represents a very good result for the Class under the circumstances and easily satisfies each of the Rule 23(e)(2) factors, as well as the factors set forth in the Second Circuit decision of *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

The Settlement is especially beneficial to the Class in light of the substantial litigation risks Plaintiffs faced. The gravamen of Plaintiffs' claims was that Defendants misrepresented and omitted

[1] This proposed Settlement also resolves all claims pending in an action pending in the Delaware Court of Chancery, entitled *Valdez v. Braunstein, et al.*, No. 2022-1148-KSJM (the "Delaware Action" and with the "Action," the "Actions").

[2] All capitalized terms not otherwise defined herein shall have the meanings set forth in the Stipulation and the Joint Declaration of Lawrence M. Rolnick and Evan J. Kaufman in Support of: (1) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) ("Joint Decl." or "Joint Declaration"), submitted herewith. Citations are omitted and emphasis is added throughout unless otherwise noted.

material facts to ensure that the Merger with private Talkspace would be approved and which caused an artificial inflation in the price of HEIC securities prior to the Merger and Talkspace securities after the Merger. Joint Decl., ¶19. On August 9, 2021, shortly after the Merger closed, Talkspace reported a $12 million adjusted EBITDA loss, and defendant Hirschhorn confirmed that "[t]he majority of the excess losses in the quarter relative to initial expectations can be attributed to this increase in customer acquisition cost" and that "advertising costs have dramatically increased during the first half of this year[.]" *Id*., ¶26. Following the news, Talkspace stock declined over 18% on August 10, 2021. *Id.* On November 15, 2021, Talkspace reported "disappointing" Q3 2021 results, missing analyst consensus on quarterly sales by nearly 20%. *Id*., ¶27. Plaintiffs allege Talkspace also revealed other facts, including matching and retention problems, Talkspace's "highly manual and complex" claims processing, that the B2B eligible lives metric was artificially inflated, and that Defendant Frank and his wife Roni Frank would be resigning, effective immediately. *Id.* Following this news, Talkspace's stock declined over 36%, causing Class Members to suffer significant financial losses and damages.

While Plaintiffs believe in the merits of their claims, Defendants had strong arguments that Plaintiffs could not establish the elements of falsity, materiality, scienter, and loss causation. Joint Decl., ¶¶42-43, 46, 48-49. Defendants also maintained that to the extent the Class suffered any damages (which Defendants vehemently denied), they were far lower than the amount calculated by Plaintiffs' expert.

As detailed in the Joint Declaration, Plaintiffs and Lead Counsel had a thorough understanding of the strengths and weaknesses of the case before reaching the Settlement, as they had conducted a significant factual investigation into the merits of the claims, engaged in briefing in connection with Defendants' motion to dismiss, and participated in formal mediation discussions

with Robert Meyer, an experienced mediator. Plaintiffs and Lead Counsel also knew that despite their belief in the merits of the claims, there existed the possibility of little or no recovery at all. Moreover, a skilled and highly reputable securities litigation mediator assisted the parties in reaching a resolution of the case for $8.5 million.

Further confirming the fairness, reasonableness, and adequacy of the Settlement is the fact that, to date, Class Members have reacted positively. Pursuant to the Order Granting Preliminary Approval Pursuant to Fed. R. Civ. P. 23(e)(1) and Permitting Notice to the Class ("Preliminary Approval Order") (ECF 86), over 12,800 Postcard Notices were sent to potential Class Members and nominees, and notice was published once over a national newswire service and once in *The Wall Street Journal*. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), dated September 22, 2023, submitted herewith. To date, Plaintiffs are not aware of a single objection to the Settlement, or request for exclusion from the Class.

Plaintiffs also request that the Court approve the proposed Plan of Allocation, which was set forth in the Notice. The Plan of Allocation governs how claims will be calculated and how Settlement proceeds will be distributed to Authorized Claimants. It was prepared in consultation with Lead Counsel's damages consultant, and is based on Plaintiffs' theory of damages and the type of Talkspace securities purchased or acquired (common stock or warrants) during the Class Period. It is fair, reasonable, and adequate, and should be approved.

Given the risks to proceeding and the recovery obtained, Plaintiffs respectfully submit that the $8.5 million Settlement and the Plan of Allocation are fair and reasonable in all respects. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement under Rule 23(e) of the Federal Rules of Civil Procedure.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Plaintiffs respectfully refer the Court to the accompanying Joint Declaration for a detailed discussion of the factual background and procedural history of the Actions, the extensive efforts undertaken by Plaintiffs and their counsel during the course of the Actions, the risks of continued litigation, and the negotiations leading to the Settlement.

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Law Favors and Encourages Settlements

"Courts examine procedural and substantive fairness in light of the 'strong judicial policy favoring settlements' of class action suits." *McMahon v. Olivier Cheng Catering & Events, LLC*, 2010 WL 2399328, at *3 (S.D.N.Y. Mar. 3, 2010) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)); *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation."). Thus, the Second Circuit has instructed that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Grinnell*, 495 F.2d at 462. *See also Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *2 (S.D.N.Y. Sept. 29, 2022) (when considering whether to approve a settlement, courts should not decide the final merits or resolve unsettled legal questions, particularly "in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation").

As set forth below, the $8.5 million Settlement here, particularly in light of the significant litigation risks Plaintiffs faced, is manifestly reasonable, fair, and adequate under all of the pertinent

factors courts use to evaluate a settlement. Accordingly, the Settlement warrants final approval from this Court.

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

Federal Rule of Civil Procedure 23(e) requires judicial approval of a class action settlement. Rule 23(e)(2) provides that courts should consider certain factors when determining whether a class action settlement is "fair, reasonable, and adequate" such that final approval is warranted:

> (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).

In addition, the Second Circuit considers the following factors (the "*Grinnell* Factors"), which overlap with the Rule 23(e)(2) factors, when determining whether to approve a class action settlement:

> 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.

Grinnell, 495 F.2d at 463; *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) (explaining that "the [new] Rule 23(e) factors . . . add to, rather than displace, the *Grinnell* [F]actors," and "there is significant overlap" between the two "as they both guide a court's substantive, as opposed to procedural, analysis"); *Rodriguez v. CPI Aerostructures, Inc.*, 2023 WL 2184496, at *28 (E.D.N.Y. Feb. 16, 2023) (same). The revision was "not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance[.]" Fed. R. Civ. P. 23(e)(2) Advisory Committee's note to 2018 Amendment.

For a settlement to be deemed substantively and procedurally fair, reasonable, and adequate, courts "must consider the four factors outlined in Rule 23(e)(2) holistically. . . ." *Moses v. New York Times Company*, 2023 WL 5281138, at *4 (2d Cir. Aug. 17, 2023). Additionally, "'[a]bsent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'" *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *4 (S.D.N.Y. Oct. 2, 2013) (second and third alterations in original); *see also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (courts should not substitute their "'business judgment for that of counsel, absent evidence of fraud or overreaching'").

Under Rule 23(e)(2), courts "must assess at the preliminary approval stage whether the parties have shown that the court will likely find that the [Rule 23(e)(2)] factors weigh in favor of final settlement approval." *Payment Card Interchange*, 330 F.R.D. at 28. As set forth in Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement, Certification of the Class, and Approval of Notice to the Class (ECF 83), and acknowledged by the Preliminary Approval Order (ECF 86), Plaintiffs meet all of the requirements imposed by Rule

23(e)(2). Courts have noted that a plaintiff's satisfaction of these factors is virtually assured where, as here, little has changed between preliminary approval and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"); *Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019) (noting in analyzing Rule 23(e)(2) that "[s]ignificant portions of the Court's analysis remain materially unchanged from the previous order [granting preliminary approval]").

C. The Proposed Settlement Is Procedurally and Substantively Fair, Adequate, and Reasonable

1. The Settlement Satisfies the Requirements of Rule 23(e)(2)

a. Plaintiffs and Lead Counsel Have Adequately Represented the Class

The determination of adequacy "typically 'entails inquiry as to whether: 1) [P]laintiff[s'] interests are antagonistic to the interest[s] of other members of the class and 2) [P]laintiff[s'] attorneys are qualified, experienced and able to conduct the litigation.'" *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007). Here, Plaintiffs' interests are not antagonistic to, and in fact are directly aligned with, the interests of other Members of the Class. Plaintiffs have "claims that are typical of and coextensive with those of other Class Members and [have] no interests antagonistic to those of other Class Members. Like other Class Members, [Plaintiffs have] an interest in obtaining the largest possible recovery from Defendants." *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *2 (S.D.N.Y July 21, 2020). Plaintiffs and Lead Counsel have adequately represented the Class by zealously prosecuting this Action, including by, among other things, conducting an extensive investigation of the relevant factual events, drafting a

highly detailed amended complaint, opposing Defendants' motion to dismiss, retaining experts, preparing for and participating in mediation sessions before Mr. Meyer, and obtaining an $8.5 million Settlement. *See generally* Joint Decl. Further, in actively overseeing and participating in the Action, Plaintiffs conferred with Lead Counsel regarding litigation strategy, reviewed the draft Complaint, and consulted with Lead Counsel regarding Settlement strategy and negotiations. *See* Declarations of Ivan M. Baron and Steven Jacob Greenblatt in Support of Plaintiffs' Motions for Final Approval of Settlement, Plan of Allocation and Award of Attorneys' Fees and Expenses, submitted herewith. Through each step of the Action, Plaintiffs and Lead Counsel have diligently and strenuously advocated for the best interests of the Class. Plaintiffs and Lead Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

b. The Proposed Settlement Was Negotiated by Experienced Counsel at Arm's Length Before an Experienced Mediator

Plaintiffs satisfy Rule 23(e)(2)(B) because the Settlement is the product of arm's-length negotiations between the parties' counsel before a neutral mediator, with no hint of collusion. Joint Decl., ¶¶62-67. Indeed, the use of the mediation process provides compelling evidence that the Settlement is not the result of collusion. *See In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 408-09 (S.D.N.Y. 2018) (settlement was procedurally fair where it was "based on the suggestion by a neutral mediator"), *aff'd sub nom. In re Facebook Inc.*, 822 F. App'x 40 (2d Cir. 2020); *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"). Moreover, the Settlement negotiations in this case were "carried out under the direction of [Plaintiffs], . . . whose involvement suggests procedural fairness." *Facebook*, 343 F. Supp. 3d at 409.

c. The Proposed Settlement Is Adequate in Light of the Litigation Risks, Costs, and Delays of Trial and Appeal

Rule 23(e)(2)(C)(i) and the first, fourth and fifth *Grinnell* Factors overlap, as they address the substantive fairness of the Settlement in light of the risks posed by continuing litigation. *Rodriguez*, 2023 WL 2184496, at *29. As set forth below, these factors weigh in favor of final approval.

(1) The Risks of Establishing Liability at Trial

In considering this factor, "the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Glob. Crossing*, 225 F.R.D. at 459. As a preliminary matter, the significant unpredictability and complexity posed by securities class actions generally weigh in favor of final approval. Indeed, "[i]n evaluating the settlement of a securities class action, federal courts, . . . have long recognized that such litigation is notably difficult and notoriously uncertain." *Signet*, 2020 WL 4196468, at *4 (internal quotations omitted); *Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *10 (S.D.N.Y. Oct. 16, 2019); *see also In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (same); *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation."). Although Plaintiffs and Lead Counsel firmly believe the claims asserted in the Action are meritorious, and that they would prevail at trial, further litigation against the Defendants posed risks that made any recovery uncertain.

As set forth above and in the Joint Declaration, at the time of the Settlement, Defendants' motion to dismiss was fully briefed and under submission. Defendants have vigorously contested their liability and have denied and continue to deny each and every claim and allegation of wrongdoing. Among other things, Defendants have argued that the allegations concerning Talkspace's inability to match customers with therapists on the platform were not sufficiently factually supported in the Complaint, and were taken out of context from statements made during an

analyst call. Joint Decl., ¶42. Defendants further argued that certain of the alleged misstatements were inactionable puffery. *Id*., ¶43. With respect to scienter, Defendants maintained, among other things, that Plaintiffs did not provide any specific allegations that any Defendant had access to contradictory information from their public statements, what that information was, or how the Defendants gained access to it. *Id*., ¶¶48-50. Defendants further argued that the SPAC transaction entailed a generalized desire to close a business deal and did not adequately support scienter. *Id.*, ¶51. Defendants also argued that non-fraudulent inferences were more compelling given that Defendants were under no compulsion to do a transaction when they announced their deal with Talkspace and argued that certain Defendants were investing in Talkspace during the relevant time period, which cuts against an inference of scienter. *Id.*, ¶49. Defendants also argued that Hudson Executive Capital LP, HEC Fund, and HEC Sponsor should be dismissed because they were not alleged to have made any statements, and Frank and Hirschhorn should be dismissed because they were not affiliated with Talkspace before the Merger. *Id.*, ¶53.[3]

(2) The Risks of Establishing Loss Causation and Damages at Trial

The risks of establishing liability apply with equal force to establishing loss causation and damages. Here, Defendants argued that Plaintiffs had not adequately alleged (and could not prove) loss causation for either of the purported corrective disclosures. *Id.*, ¶46.

Had litigation continued, Plaintiffs would have relied heavily on expert testimony to establish loss causation and damages, likely leading to a battle of the experts at trial and *Daubert* challenges. As courts have long recognized, the substantial uncertainty as to which side's experts' views might

[3] Defendants also argued that the above arguments applied with similar force to Plaintiffs' Section 14(a) claims, and that they were, in essence, "holder claims," which are not cognizable under the federal securities laws. *Id.*, ¶¶55-59.

be credited by a jury presents a serious litigation risk. *See Mikhlin v. Oasmia Pharm. AB.*, 2021 WL 1259559, at *6 (E.D.N.Y. Jan. 6, 2021) ("Both parties would present expert testimony on the issue of damages, which makes it 'virtually impossible to predict' which side's testimony would be found more credible, as well as 'which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.'"); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 193 (S.D.N.Y. 2012) ("[I]t is well established that damages calculations in securities class actions often descend into a battle of experts."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008) ("'[i]n this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found'"). If the Court determined that one or more of Plaintiffs' experts should be excluded from testifying at trial, Plaintiffs' case would become much more difficult to prove.

Thus, in light of the very significant risks Plaintiffs faced at the time of the Settlement with regard to establishing liability and damages, this factor weighs heavily in favor of final approval.

(3) The Settlement Eliminates the Additional Costs and Delay of Continued Litigation

The anticipated complexity, cost, and duration of continued litigation would be considerable. *See Advanced Battery*, 298 F.R.D. at 175 ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"). Indeed, if not for the Settlement, if the Court denied the motion to dismiss, the Action would have continued through the completion of fact and expert discovery. The subsequent motion for summary judgment, as well as the preparation for what would likely be a multi-week trial, would have caused the Action to persist for several more years before the class could possibly receive any recovery. Such a lengthy and highly uncertain process would not serve the best interests of the Class compared to the immediate, certain monetary benefits of the Settlement. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261

(S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks v. Stanley*, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

Accordingly, the Rule 23(e)(2)(C)(i) factor, as well as the first, fourth and fifth *Grinnell* Factors, all weigh in favor of final approval.

d. The Proposed Method for Distributing Relief Is Effective

With respect to Rule 23(e)(2)(C)(ii), Plaintiffs and Lead Counsel have taken appropriate steps to ensure that the Class is notified about the Settlement. Pursuant to the Preliminary Approval Order, over 12,800 Postcard Notices were mailed to potential Class Members and nominees, and the Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*. *See* Murray Decl., ¶¶5-12. Additionally, a settlement-specific website was created where key Settlement documents were posted, including the Stipulation, Notice, Proof of Claim, and Preliminary Approval Order. *Id.*, ¶14. Class Members have until October 9, 2023 to object to the Settlement and to request exclusion from the Class. While the objection and exclusion date has not yet passed, there are no objections to the adequacy of the Settlement, and no requests for exclusion from the Class have been received. *Id.*, ¶16.

Class Members have until October 23, 2023 to submit Proofs of Claim. The claims process is similar to that typically used in securities class action settlements, and provides for straightforward cash payments based on trading information provided. *See Christine Asia*, 2019 WL 5257534, at *14 ("[t]his type of claims processing and method for distributing settlement proceeds is standard in

securities and other class actions and is effective"). This claims process will "'deter or defeat unjustified claims' without imposing an undue demand on class members." *Mikhlin*, 2021 WL 1259559, at *6. This factor therefore supports final approval.

e. Lead Counsel's Request for Attorneys' Fees Is Reasonable

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Consistent with the Notice, and as discussed in Lead Counsel's accompanying Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) ("Fee Memorandum"), counsel for Plaintiffs seek an award of attorneys' fees in the amount of 30% of the Settlement Amount, and expenses in the amount of $20,891.65, in addition to interest on both amounts, to be paid at the time of award. As set forth in the accompanying Fee Memorandum, this request is in line with recent fee awards in this Circuit in similar common-fund cases. *See Nichols v. Noom, Inc.*, 2022 WL 2705354, at *10 (S.D.N.Y. July 12, 2022) (awarding fee of one-third of $56 million settlement fund, finding "fee equal to one-third of a settlement fund is routinely approved in this Circuit").[4]

Lead Counsel's fee request is reasonable, and Plaintiffs have ensured that the Class is fully apprised of the terms of the proposed award of attorneys' fees, including the timing of such payments, and to date no objections have been filed. Accordingly, this factor supports final approval of the Settlement.

[4] The Stipulation provides that any attorneys' fees and expenses awarded by the Court shall be paid to Lead Counsel when the Court executes the Judgment and an Order awarding such fees and expenses. *See* Stipulation, ¶6.2; *see also Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016) (finding this provision does "not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys get paid").

f. The Parties Have No Other Agreements Besides Opt-Outs

Rule 23(e)(2)(C)(iv) requires the consideration of any agreement required to be disclosed under Rule 23(e)(3). As previously disclosed in connection with Plaintiffs' motion for preliminary approval of the Settlement (ECF 83 at 14-15), the parties have entered into a supplemental agreement providing that, in the event that requests for exclusion from the Class exceed a certain agreed-upon threshold, Talkspace has the option to terminate the Settlement. As is standard in securities class actions, the Supplemental Agreement is being kept confidential in order to avoid incentivizing the formation of a group of opt-outs for the sole purpose of leveraging a larger individual settlement, to the detriment of the Class. This agreement has no bearing on the fairness of the Settlement, and as such, this factor weighs in favor of final approval. *See Christine Asia*, 2019 WL 5257534, at *15 (stating that opt-out agreements are "standard in securities class action settlements and ha[ve] no negative impact on the fairness of the Settlement").

g. The Settlement Ensures Class Members Are Treated Equitably

Rule 23(e)(2)(D), the final factor, considers whether Class Members are treated equitably. As discussed below in §IV, Lead Counsel developed the Plan of Allocation in consultation with its in-house damages consultant to treat Class Members equitably relative to each other by: (i) taking into account the timing of their Talkspace common stock or warrant purchases, acquisitions, and sales; and (ii) providing that each Authorized Claimant shall receive his, her, its, or their *pro rata* share of the Net Settlement Fund based on their recognized losses. Plaintiffs are subject to the same formula for distribution of the Net Settlement Fund as every other Class Member. This factor therefore merits granting final approval of the Settlement.

Based on the foregoing, Plaintiffs and Lead Counsel respectfully submit that each of the Rule 23(e)(2) factors support granting final approval of the Settlement.

2. The Settlement Satisfies the Remaining *Grinnell* Factors

a. The Lack of Objections Supports Final Approval

The reaction of the class to the settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy,'" *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007), such that the "'"absence of objections may itself be taken as evidencing the fairness of a settlement."'" *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). "'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'" *Wal-Mart Stores*, 396 F.3d at 118.

The deadline to submit objections is October 9, 2023; to date none have been filed to the adequacy of the Settlement and no requests for exclusion have been received. Murray Decl., ¶16. This positive reaction of the Class supports approval of the Settlement. *See Yuzary*, 2013 WL 5492998, at *6 (the "favorable response" from the class "demonstrates that the class approves of the settlement and supports final approval"); *Facebook*, 343 F. Supp. 3d at 410 ("[t]he overwhelmingly positive reaction – or absence of a negative reaction – weighs strongly in favor" of final approval).

b. Plaintiffs Had Sufficient Information to Make an Informed Decision Regarding the Settlement

Under the third *Grinnell* Factor, "'the question is whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of [P]laintiffs' claims, the strengths of the defenses asserted by defendants, and the value of [P]laintiffs' causes of action for purposes of settlement.'" *In re Bear Stearns Cos., Inc. SEC. Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012); *Martignago v. Merrill Lynch & Co., Inc.*,

2013 WL 12316358, at *6 (S.D.N.Y. Oct. 3, 2013) ("The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'"). Even though the parties here had not started document discovery, "[t]o satisfy this factor, parties need not have even engaged in formal or extensive discovery." *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *7 (S.D.N.Y. Dec. 19, 2014) (noting that in cases brought under the PSLRA, discovery cannot commence until the motion to dismiss is denied); *see also Glob. Crossing*, 225 F.R.D. at 458 ("Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims.").

Unquestionably, Plaintiffs and Lead Counsel had sufficient information to assess the adequacy of the Settlement. As detailed in the Joint Declaration, Plaintiffs and Lead Counsel negotiated the Settlement only after conducting an extensive factual investigation which included interviews with former Talkspace employees, opposing Defendants' motion to dismiss, and consulting with experts. Plaintiffs also participated in hard-fought settlement discussions with Defendants, overseen by an experienced and nationally renowned mediator, which ultimately resulted in the Settlement. During the mediation session, Defendants' Counsel pressed the arguments raised in their motion to dismiss, in addition to further arguments they intended to make if the case were to progress.

Accordingly, Plaintiffs and Lead Counsel "developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial." *Aeropostale*, 2014 WL 1883494, at *7 (quoting *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004)); *In re Canadian Superior Sec. Litig.*, 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011) ("although there has been no formal discovery, plaintiffs'

counsel have done an adequate factual investigation to be thoroughly apprised of the merits of their case").

c. Maintaining Class-Action Status Through Trial Presents a Substantial Risk

Although Plaintiffs had not yet moved for class certification, and are confident they would have obtained class certification here, Defendants were certain to have opposed any such motion, raising the risk that the case could be lost had the Court declined to certify the class. Even if the Court certified the class for the entirety of the alleged class period, Defendants may have later moved to decertify it or seek to shorten the Class Period. *See Christine Asia*, 2019 WL 5257534, at *13 (stating that this risk weighed in favor of final approval because "a class certification order may be altered or amended any time before a decision on the merits"); Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time). "The risk of maintaining class status throughout trial . . . weighs in favor of final approval." *McMahon*, 2010 WL 2399328, at *5.

d. Defendants' Ability to Withstand a Greater Judgment

This factor is not dispositive when all other factors favor approval. Even if Defendants could have withstood a greater judgment, a "'defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair.'" *Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, at *7 (S.D.N.Y. June 7, 2011); *see also Aeropostale*, 2014 WL 1883494, at *9 (courts "generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement"). A "defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008). Here, however, Talkspace's deteriorating financial condition was a significant consideration in agreeing to settle the Actions for $8.5 million. At the time of the Merger, Talkspace was valued at approximately $1.4

billion but its market capitalization had fallen to approximately $150 million at the time of the February mediation. Joint Decl., ¶68.

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

The adequacy of the amount offered in a settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). A court need only determine whether the settlement falls within a "range of reasonableness" that "recognizes the uncertainties of law and fact" in the case and "the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also Glob. Crossing*, 225 F.R.D. at 461 ("the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery").

Here, "[b]ecause Plaintiffs face serious challenges to establishing liability, consideration of Plaintiffs' best possible recovery must be accompanied by the risk of non-recovery." *Facebook*, 343 F. Supp. 3d at 414; *see also Bear Stearns*, 909 F. Supp. 2d at 270 (stating this *Grinnell* Factor is "a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery"). The Settlement represents a recovery of approximately 13% of estimated recoverable damages (Joint Decl., ¶104), an amount that far exceeds the 3.8% median recoveries in securities cases settled in the past decade with damages between $50 and $99 million. *See* Janeen McIntosh, Svetlana Starykh, and Edward Flores, *Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review*, at 17, Fig. 18 (NERA Economic Consulting Jan. 24,

2023), attached as Exhibit A hereto.[5] Notably, maximum recoverable damages represented approximately 44% of Talkspace's market capitalization at the time of the February 16, 2023 mediation. Joint Decl., ¶104.

Moreover, the $8.5 million Settlement Amount "was agreed upon only after careful consideration, both by competent Lead Counsel and by [a neutral mediator]" – all of whom concluded the Settlement represented a very good recovery for the Class in light of the substantial litigation risks Plaintiffs faced. *See Facebook*, 343 F. Supp. 3d at 414; *see also id.* (finding that even if the settlement "amounts to one-tenth – or less – of Plaintiffs' potential recovery," such a recovery is within "the range of reasonableness" where "the risk[s] of a zero – or minimal – recovery scenario are real"). This factor weighs in favor of final approval.

In sum, both the Rule 23(e)(2) factors and the *Grinnell* Factors, individually and collectively, weigh strongly in favor of the Court's approval of the Settlement.

IV. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

If the Court approves the proposed Settlement, upon completion of the claims administration process, the Net Settlement Fund will be distributed to Authorized Claimants according to the Plan of Allocation set forth in the Notice. The standard for approval of the Plan of Allocation is the same as the standard for approving the Settlement as a whole: namely, "fair, reasonable, and adequate." *Signet*, 2020 WL 4196468, at *13. "[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). "'When formulated by competent and

[5] Not surprisingly, Defendants contended that damages were much less, if not zero, due to the absence of any liability and loss causation.

experienced class counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'" *Advanced Battery*, 298 F.R.D. at 180; *see also Christine Asia*, 2019 WL 5257534, at *15-*16. A plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *IMAX*, 283 F.R.D. at 192. However, a plan of allocation does not need to be tailored to fit each and every class member with "mathematical precision." *PaineWebber*, 171 F.R.D. at 133. Court's enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among . . . class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978).

Here, as set forth in the Notice, the Plan of Allocation was prepared with the assistance of Lead Counsel's damages consultant and has a rational basis, as it is based on the Complaint's allegations that (i) Defendants' materially false and misleading statements and omissions artificially inflated the price of Talkspace securities during the Class Period; (ii) that a series of public disclosures that partially corrected the challenged statements removed the inflation from the securities; and (iii) that the Proxy contained materially false and misleading statements and omissions. Joint Decl., ¶78. *See Facebook*, 343 F. Supp. 3d at 414 (plan of allocation was fair where it was "prepared by experienced counsel along with a damages expert – both indicia of reasonableness"). This is a fair method to apportion the Net Settlement Fund among Authorized Claimants, as it is based on, and consistent with, the claims alleged.

The Net Settlement Fund will be distributed to Authorized Claimants who timely submit valid Proofs of Claim that are approved for payment from the Net Settlement Fund under the Plan of Allocation. The Plan of Allocation treats all Class Members equitably, as everyone who submits a valid and timely Proof of Claim, and does not otherwise exclude himself, herself, itself, or themselves from the Class, will receive a *pro rata* share of the Net Settlement Fund in the proportion

that the Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants, so long as such Authorized Claimant's payment amount is $10.00 or more. *See id.*; *see also* Murray Decl., Ex. A (Notice) at 11-15.

No objections to the Plan of Allocation have been filed.

Plaintiffs and Lead Counsel believe that the Plan of Allocation is fair and reasonable. Therefore, it is respectfully submitted that the Court should approve the proposed Plan of Allocation.

V. THE COURT SHOULD FINALLY CERTIFY THE CLASS FOR PURPOSES OF EFFECTUATING THE SETTLEMENT

In their motion for preliminary approval of the Settlement, Plaintiffs requested that the Court certify the Class for settlement purposes so that notice of the Settlement, the Settlement Hearing, and the rights of Class Members to object to the Settlement, request exclusion from the Class, or submit Proofs of Claim, could be issued. *See* ECF 83 at 19-22. In the Preliminary Approval Order, the Court addressed the requirements for class certification as set forth in Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court found that Plaintiffs had met the requirements for certification of the Class for purposes of settlement. ECF 86 at ¶¶2-3. In addition, the Court preliminarily certified Plaintiffs as Class Representatives and Lead Counsel as Class Counsel. *Id.*, ¶4.

Nothing has changed since the Court's entry of the Preliminary Approval Order to alter the propriety of the Court's preliminary certification of the Class for settlement purposes. Thus, for all of the reasons stated in Plaintiffs' motion for preliminary approval (incorporated herein by reference), Plaintiffs respectfully request that the Court affirm its preliminary certification and finally certify the Class for purposes of carrying out the Settlement pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), and appoint Plaintiffs as Class Representatives and Lead Counsel as Class Counsel.

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

Rule 23 requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," Fed. R. Civ. P. 23(c)(2)(B), and that it be directed to class members in a "reasonable manner." Fed. R. Civ. P. 23(e)(1)(B). Notice of a settlement satisfies Rule 23(e) and due process where it fairly apprises "'members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores*, 396 F.3d at 114; *Vargas v. Cap. One Fin. Advisors*, 559 F. App'x 22, 26-27 (2d Cir. 2014). Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (citing *Wal-Mart Stores*, 396 F.3d at 114).

The method used to disseminate notice to potential Class Members satisfy these standards. The Court-approved Notice amply informs Class Members of, among other things: (i) the pendency of the Actions; (ii) the nature of the Actions and the Class's claims; (iii) the essential terms of the Settlement; (iv) the proposed Plan of Allocation; (v) Class Members' rights to request exclusion from the Class or object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; (vi) the binding effect of a judgment on Class Members; and (vii) information regarding Lead Counsel's motion for an award of attorneys' fees and expenses. The Notice also provides specific information regarding the date, time, and place of the Settlement Hearing, and sets forth the procedures and deadlines for: (i) submitting a Proof of Claim; (ii) requesting exclusion from the Class; and (iii) objecting to any aspect of the Settlement, including the proposed Plan of Allocation and the request for attorneys' fees and expenses.

The Notice also contains all the information required by the PSLRA, including: (i) a statement of the amount to be distributed, determined in the aggregate and on an average-per-security basis; (ii) a statement of the potential outcome of the case; (iii) a statement indicating the attorneys' fees and expenses sought; (iv) identification and contact information of counsel; and (v) a brief statement explaining the reasons why the parties are proposing the Settlement.

In accordance with the Preliminary Approval Order, Gilardi & Co. LLC ("Gilardi"), the Court-approved Claims Administrator, commenced the mailing of the Postcard Notice by First-Class Mail to potential Class Members, brokers, and nominees on July 21, 2023. As of September 22, 2023, over 12,800 Postcard Notices have been mailed. Murray Decl., ¶11. Gilardi also published the Summary Notice in *The Wall Street Journal* and transmitted it over *Business Wire*. *Id.*, ¶12, Ex. D. Additionally, Gilardi posted the Notice Packet, as well as other important documents, on the website established and maintained for the Settlement. *Id.*, ¶14.

The combination of individual First-Class Mail to all potential Class Members who could be identified with reasonable effort, supplemented by mailed notice to brokers and nominees and publication of the Summary Notice in a relevant, widely-circulated publication and internet newswire, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also Padro v. Astrue*, 2013 WL 5719076, at *3 (E.D.N.Y. Oct. 18, 2013) ("'Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members.'"). Indeed, this method of providing notice has been routinely approved for use in securities class actions and other similar class actions. *E.g.*, *Rodriguez*, 2023 WL 2184496, at *10, *25 (finding that direct First-Class Mail combined with print and Internet-based publication of settlement documents was "the best notice practicable under

the circumstances"); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 123-24 (S.D.N.Y. 2001) (same).

VII. CONCLUSION

The $8.5 million Settlement obtained by Plaintiffs and Lead Counsel represents a very good recovery for the Class, particularly in light of the significant litigation risks Plaintiffs faced, including the very real risk of the Class receiving no recovery at all. For the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate.

DATED: September 25, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on September 25, 2023, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Evan J. Kaufman

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Mailing Information for a Case 1:22-cv-00163-PGG Baron v. Talkspace, Inc. et al

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)

EXHIBIT A

NERA
ECONOMIC CONSULTING

24 January 2023

Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review

Federal Filings Declined for the Fourth Consecutive Year

Average and Median Settlement Values Increased by More than 50% Compared to 2021

By Janeen McIntosh, Svetlana Starykh, and Edward Flores

Insight in Economics™

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24 January 2023

Foreword

I am excited to share NERA's Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review with you. This year's edition builds on work carried out over more than three decades by many members of NERA's Securities and Finance Practice. This year's report continues our analyses of trends in filings and settlements and presents new analyses related to current topics such as event-driven litigation. Although space does not permit us to present all the analyses the authors have undertaken while working on this year's edition or to provide details on the statistical analysis of settlement amounts, we hope you will contact us if you want to learn more about our research or our work related to securities litigations. On behalf of NERA's Securities and Finance Practice, I thank you for taking the time to review our work and hope you find it informative.

Dr. David Tabak, Managing Director

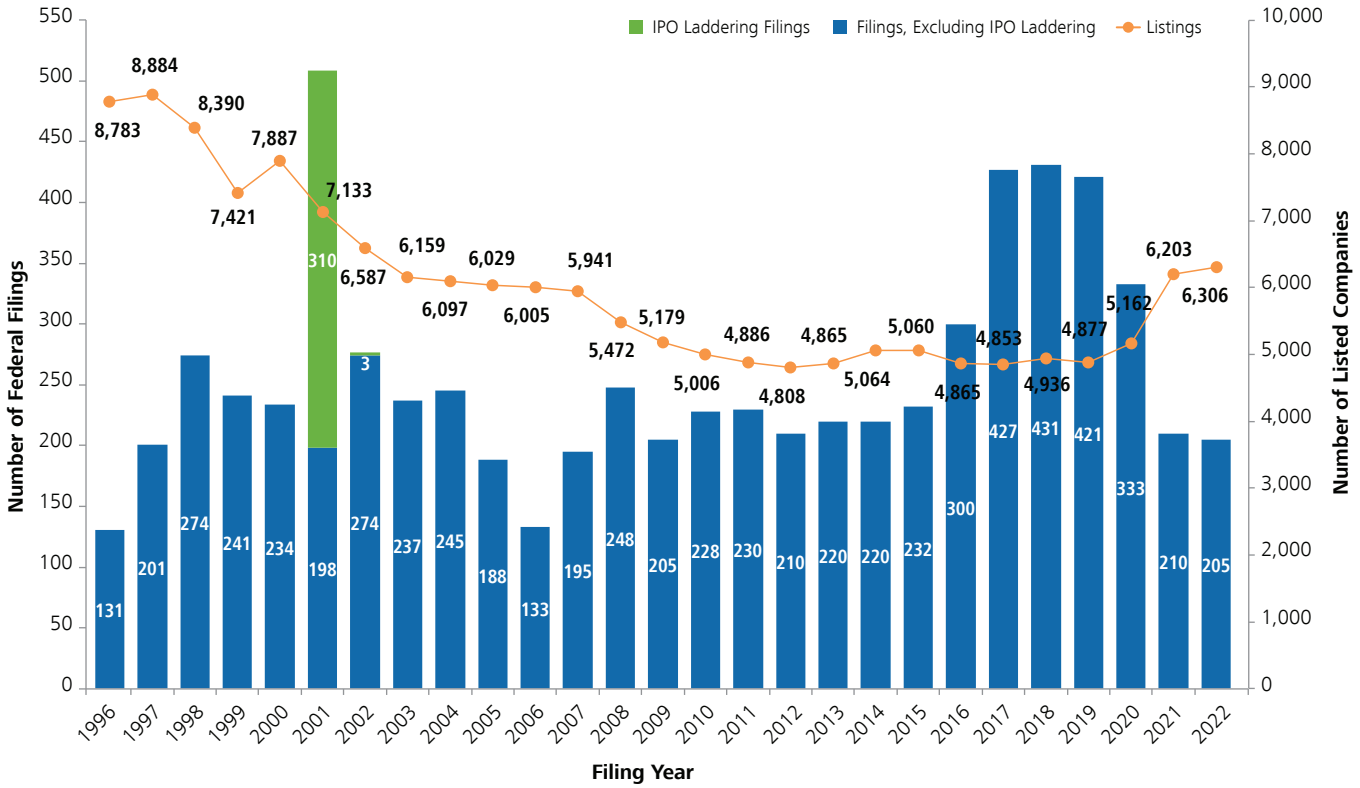
Introduction

Filings of new securities class actions declined each year from 2019 through 2022. In 2022, there were 205 new federal securities class action suits filed. This significant decline from the 431 cases filed in 2018 was largely due to the lower number of merger-objection and Rule 10b-5 cases filed in 2022. Similarly, there were fewer cases resolved in 2022 than in 2021. The decline in resolutions, since 2021, was driven by the decrease in dismissed non-merger-objection and non–crypto unregistered securities cases, a category that declined by more than 30%.[2] The aggregate settlement amount for cases settled in 2022 was $4 billion, which is approximately $2 billion higher than the inflation-adjusted amount for 2021. With more cases settling for higher values in 2022 compared to 2021, the average settlement value increased by over 70% to $38 million and the median settlement value increased by over 50% to $13 million.

Trends in Filings

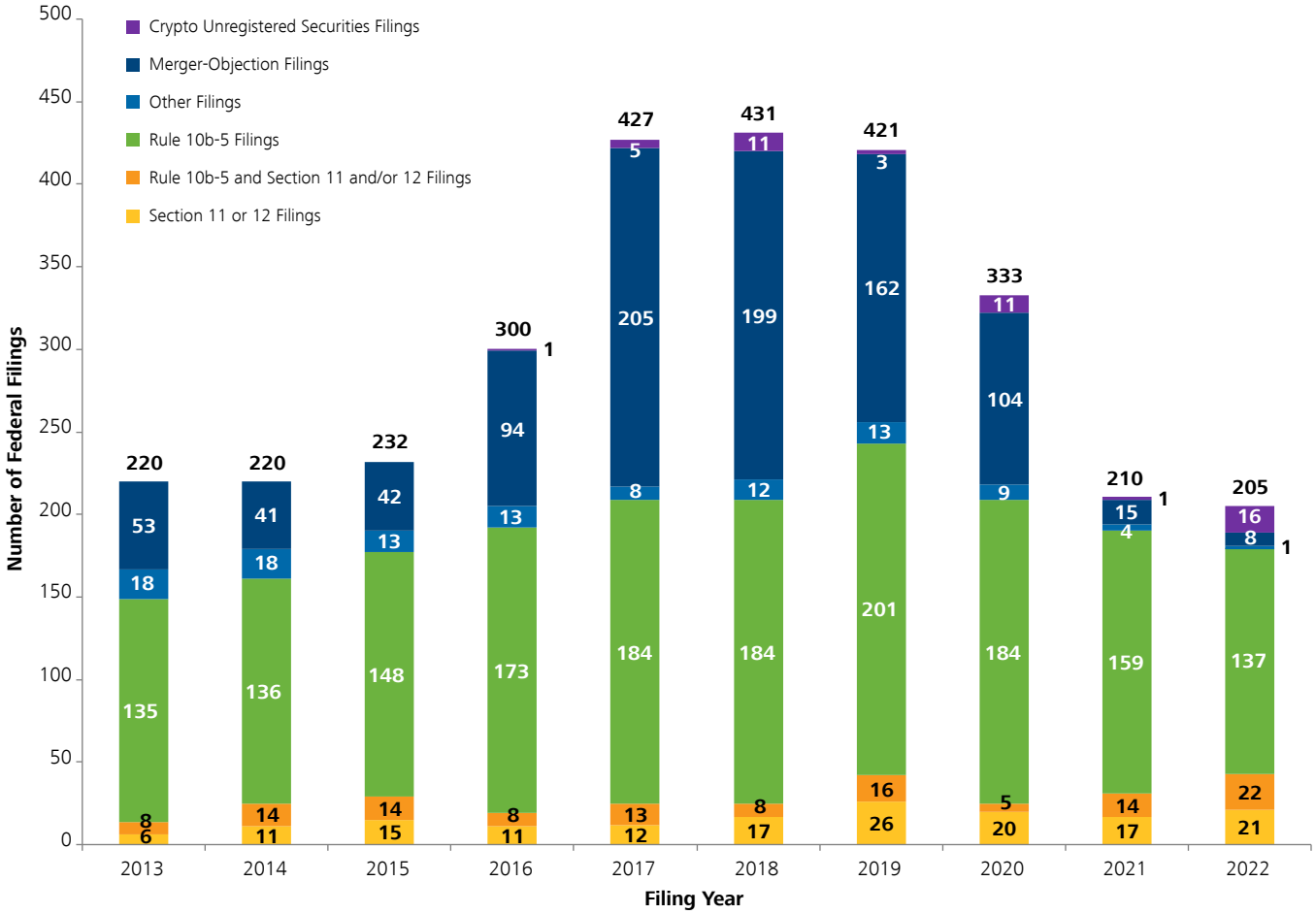
For the fourth consecutive year, there was a decline in the number of new federal securities class action suits filed (see Figure 1).[3] In 2022, there were 205 new cases filed, a decline from the 210 new cases filed in 2021. This decline is a continuation of the downward trend observed since 2018, when more than 400 cases were recorded. This decline has been driven by the lower levels of merger-objection cases and cases with only Rule 10b-5 claims filed in each year (see Figure 2). Of the cases filed in 2022, suits against defendants in the health technology and services sector and the electronic technology and services sector were the most common, each accounting for 27% of total cases (see Figure 3). Although there was a decline in the aggregate number of cases filed in the Second, Third, and Ninth Circuits to the lowest level within the 2018–2022 period, the majority of new filings continue to be concentrated in these jurisdictions (see Figure 4). Of the cases filed in 2022, 33% included an allegation related to misled future performance, the most common allegation for the year. The proportion of cases with an allegation related to a regulatory issue increased from 19% in 2021 to 26% in 2022 (see Figure 5).[4]

Figure 1. **Federal Filings and Number of Companies Listed in the United States**
January 1996–December 2022



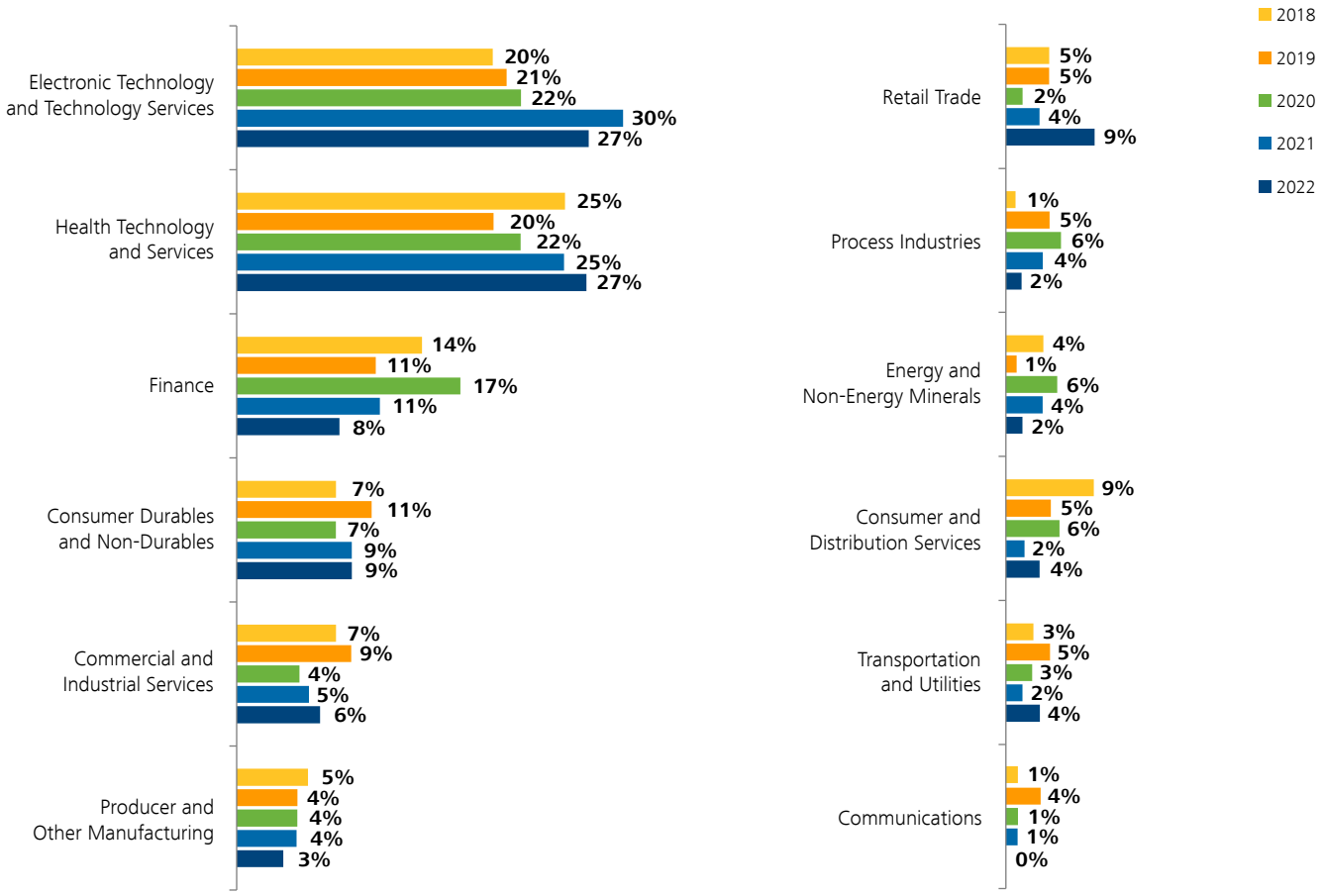
Note: Listed companies include those listed on the NYSE and Nasdaq. Listings data obtained from World Federation of Exchanges (WFE). The 2022 listings data is as of November 2022.

Figure 2. **Federal Filings by Type**
January 2013–December 2022



For the fourth consecutive year, there was a decline in the number of new federal securities class action suits filed.

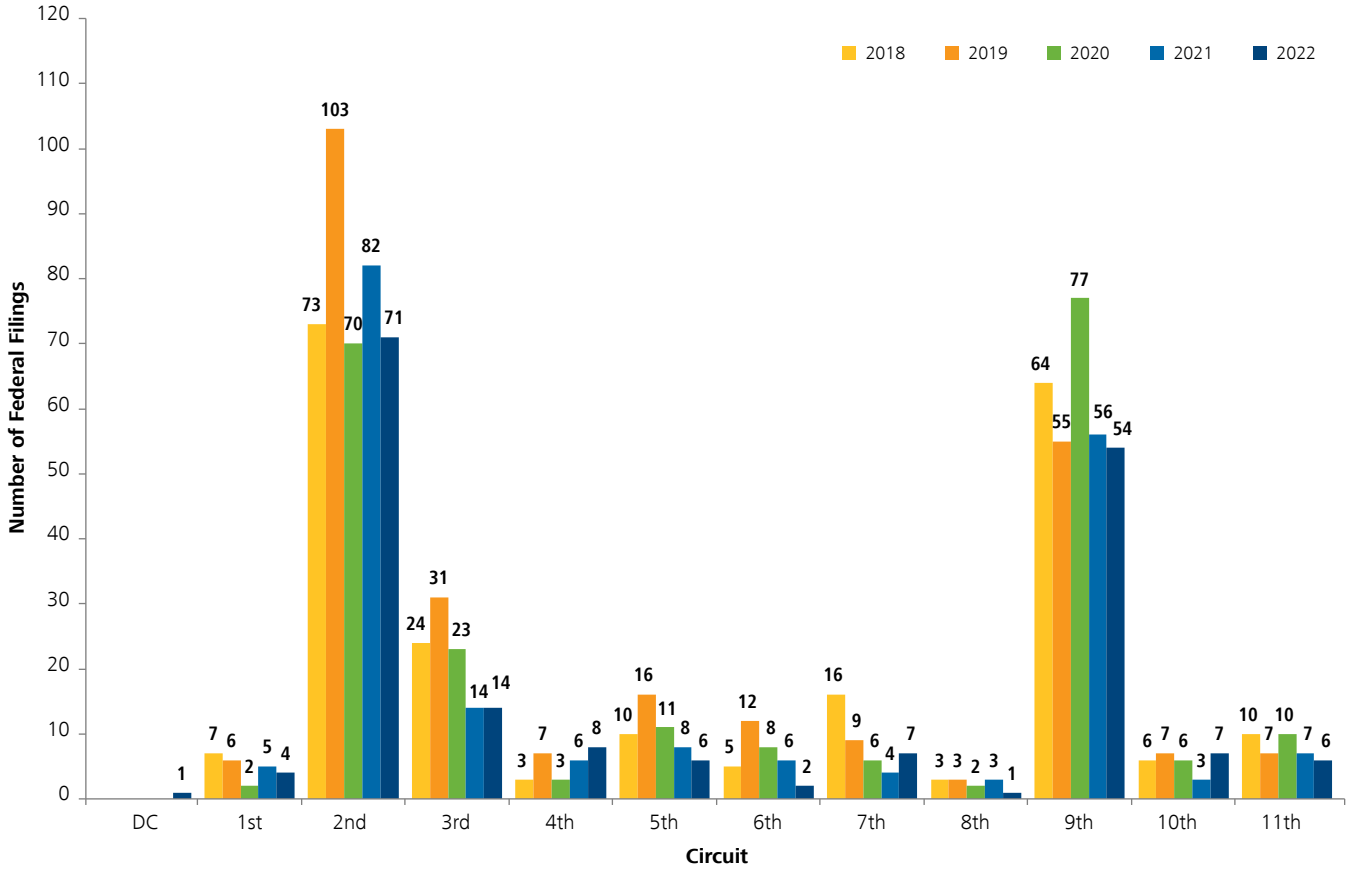
Figure 3. **Percentage of Federal Filings by Sector and Year**
Excludes Merger Objections and Crypto Unregistered Securities
January 2018–December 2022



Note: This analysis is based on the FactSet Research Systems, Inc. economic sector classification. Some of the FactSet economic sectors are combined for presentation.

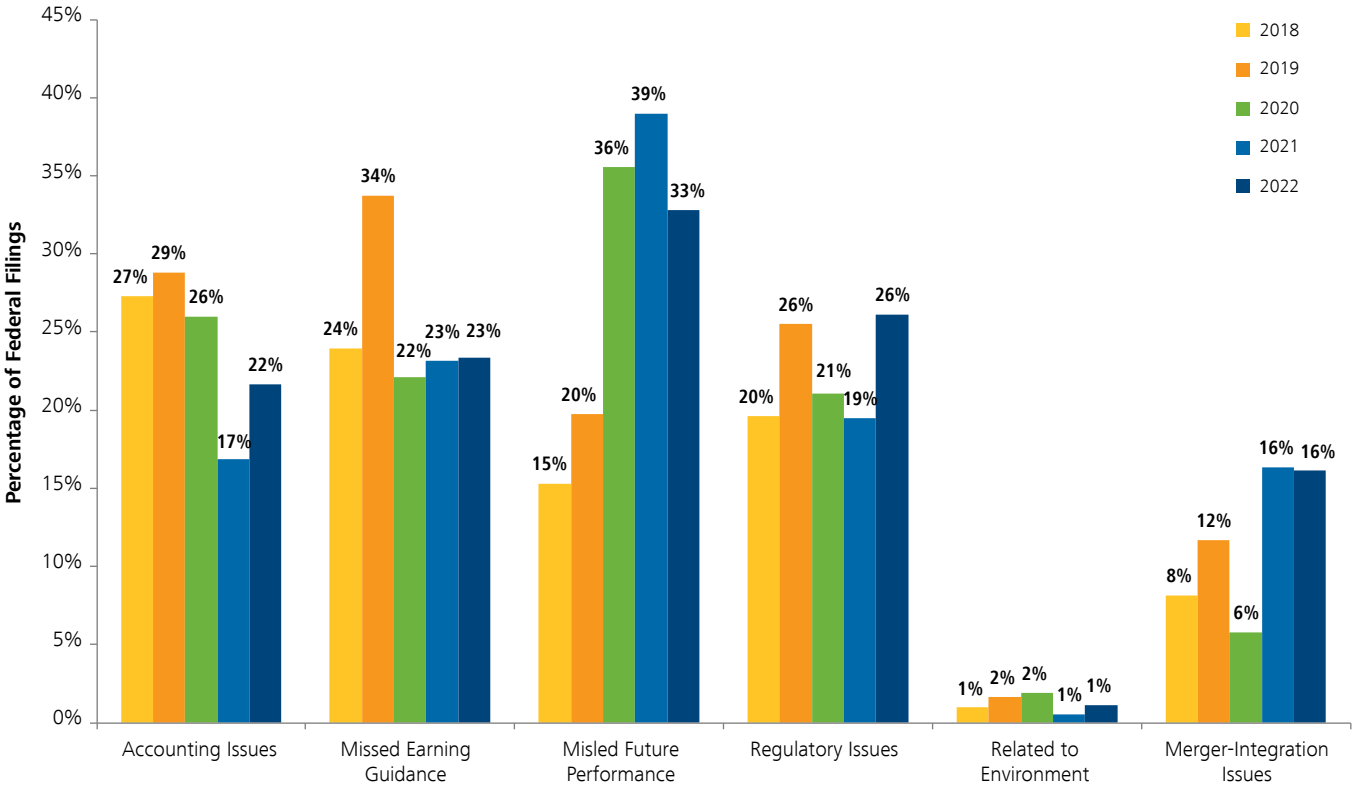
Filings against defendants in the health technology and services sector and the electronic technology and services sector were the most common in 2022, each accounting for 27% of total cases.

Figure 4. **Federal Filings by Circuit and Year**
Excludes Merger Objections and Crypto Unregistered Securities
January 2018–December 2022



Although there was a decline in the aggregate number of cases filed in the Second, Third, and Ninth Circuits to the lowest level within the 2018–2022 period, the majority of new filings continue to be concentrated in these jurisdictions.

Figure 5. **Allegations**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2018–December 2022



Event-Driven and Special Cases

Here we summarize activity and trends in filings over the 2019–2022 period in potential development areas we have identified for securities class actions (see Figures 6 and 7).[5]

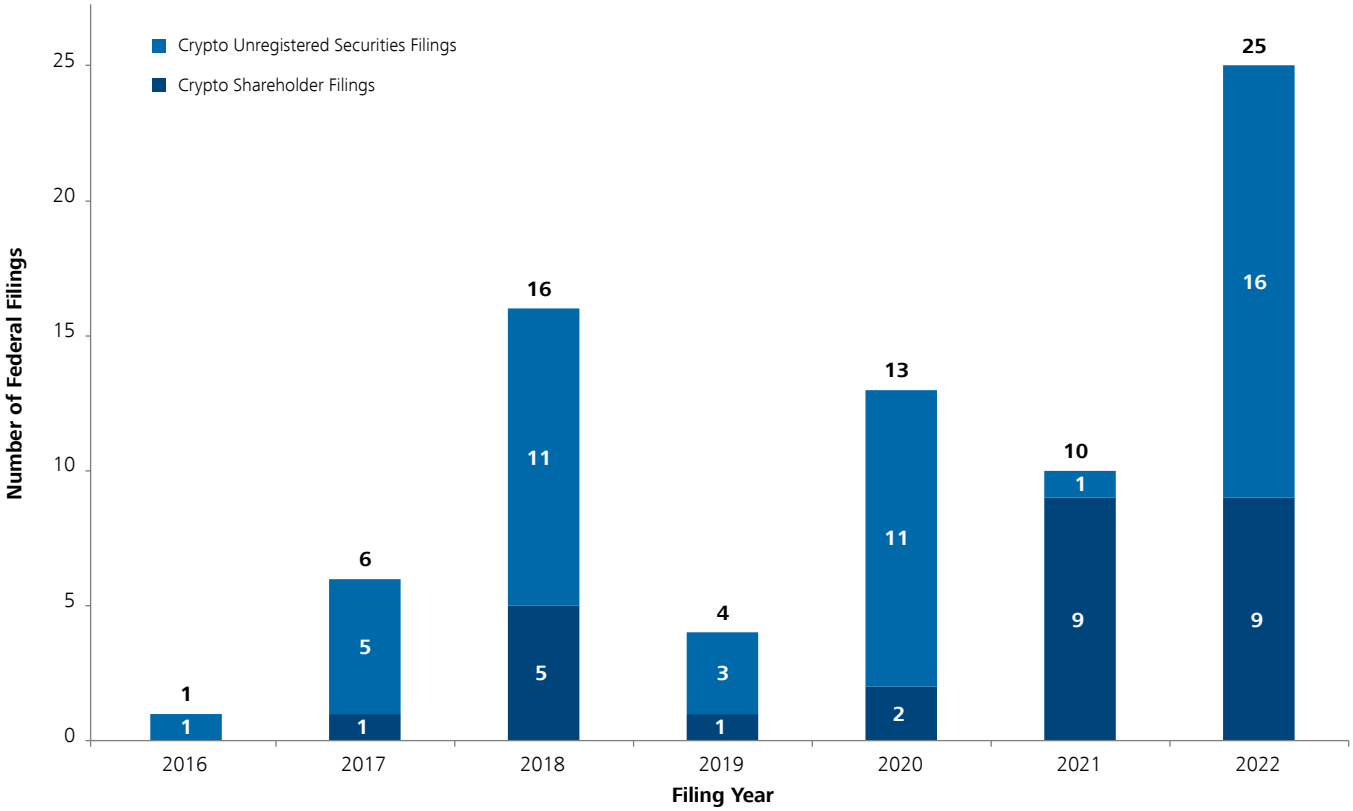
ESG Cases

Environmental, social, and governance (ESG) disclosures and companies' commitments to meet disclosure guidelines have been a developing area of interest to investors and government agencies such as the Securities and Exchange Commission over the recent decade.[6] Along with that interest have come waves of lawsuits filed by plaintiffs alleging fraud related to ESG disclosures. For example, in a securities class action suit filed against CBS Corporation in 2018, plaintiffs alleged the defendant made false and misleading statements and/or failed to disclose that CBS executives engaged in widespread workplace sexual harassment and that the defendant's purported policies were inadequate to prevent the conduct. This suit was settled in 2022 for $14,750,000. Similarly, in the ongoing securities suit filed against Activision Blizzard, Inc., in 2021, plaintiffs allege the defendant made false and misleading statements and/or failed to disclose that there was discrimination against women and minority employees and the existence of numerous complaints about unlawful harassment, discrimination, and retaliation made to human resources that were not addressed. As focus and interest in this area continues, this may lead to a higher number of ESG-related cases being filed.

Crypto Cases

The first securities class action related to cryptocurrency was filed against GAW Miners, LLC, in June 2016. Since 2017, there have been year-to-year fluctuations in the number of new crypto federal filings each year. In 2022, there were 25 crypto federal class actions suits filed. This is more than double the number of similar suits filed in 2021. This uptick was driven by the increase in the number of crypto unregistered securities cases.

Figure 6. **Number of Crypto Federal Filings**
January 2016–December 2022



Bribery/Kickbacks

Over the 2019–2020 period, there were 14 cases filed related to allegations of bribery or kickbacks. In 2021, there was a reduction in the number of these cases filed, with only one bribery/kickback-related case filed in that year. In 2022, four such cases were filed.

Cannabis

In 2019 and 2020, there were seven and six securities class action cases filed against defendants in the cannabis industry, respectively. Since then, there has only been one suit filed against these defendants each year.

Cybersecurity Breach

Since 2019, there have been at least three securities class action suits filed each year related to a cybersecurity breach. More specifically, between 2019 and 2020, there were a total of six such cases filed, and an additional five suits brought in 2021. In 2022, the number of new federal suits declined slightly to three filings.

COVID-19

Since the emergence of the COVID-19 pandemic in March 2020, 77 securities class action suits have been filed with claims related to the pandemic. Between March 2020 and December 2020, 33 cases were filed with COVID-19-related claims. In 2021, the number of suits filed declined to 20, but then increased slightly to 24 in 2022.

Environment

Over the 2019–2022 period, 12 environment-related securities class action suits have been filed. Of these, only three were filed in 2021–2022.

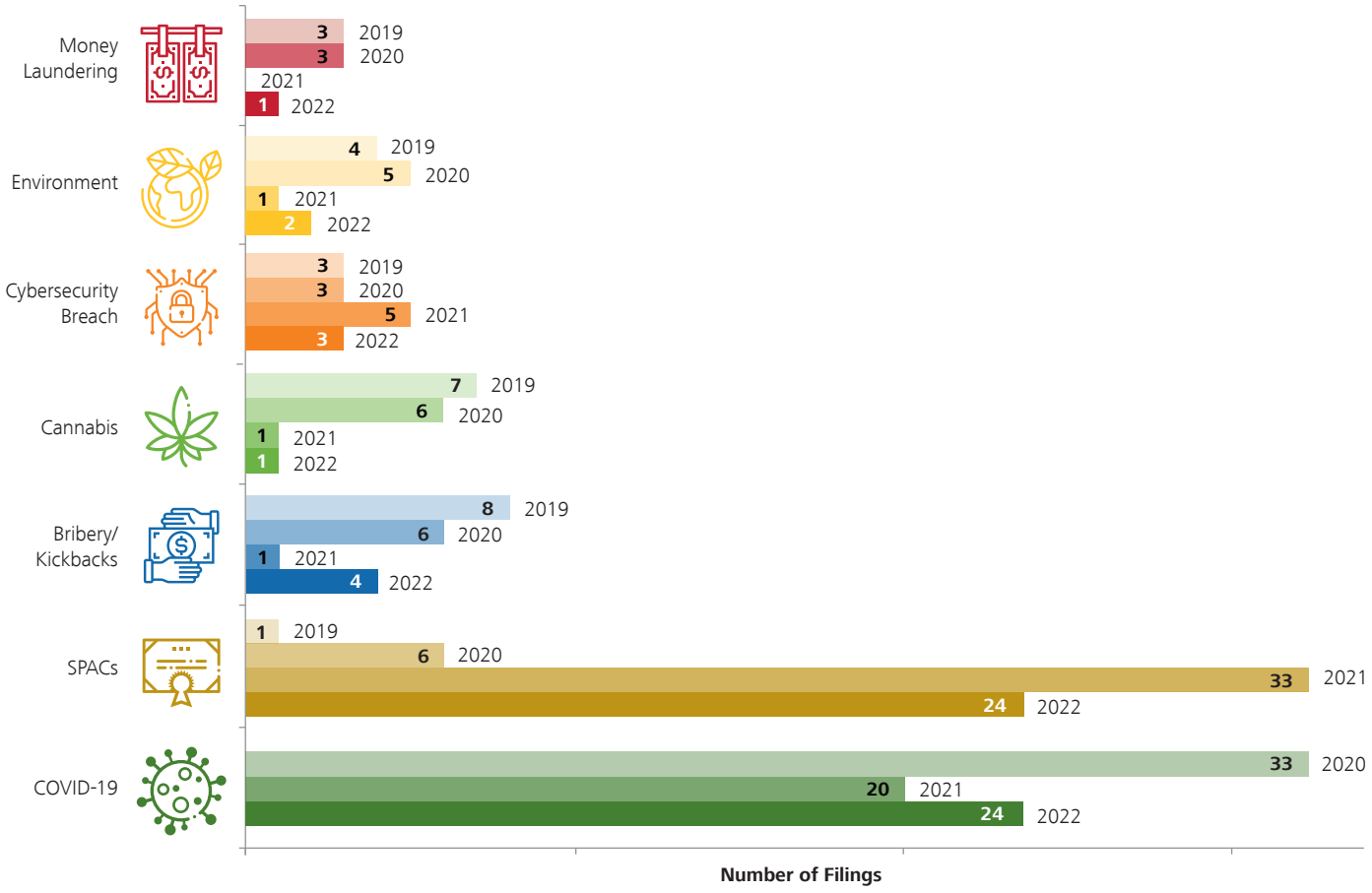
Money Laundering

In 2019 and 2020, there were three cases filed each year with claims related to money laundering. Between 2021 and 2022, only one such suit has been filed.

SPAC

In 2019, only one case related to special purpose acquisition companies (SPACs) was filed. Since then, new federal cases related to these claims have increased substantially, with six filings in 2020 and 33 cases filed in 2021. During 2022, there were 24 securities class action suits filed related to SPACs, a 27% decline from 2021.[7]

Figure 7. **Event-Driven and Other Special Cases by Filing Year**
January 2019–December 2022



Trends in Resolutions

The number of resolved cases—dismissed and settled cases—declined in 2022 to 214 from 248 in 2021 (see Figure 8).[8] Although 2022 was a record-setting year for the number of settled non-merger-objection, non–crypto unregistered securities cases during the 2013–2022 period, there was a larger decrease in the number of dismissed non-merger-objection, non–crypto unregistered securities cases, which led to a decline in overall resolutions. In addition, in 2022, the number of merger-objection cases resolved declined to 14, a substantial decrease from the 2017–2020 period, when more than 130 such cases were resolved each year. Of the cases filed since 2015, as of 31 December 2022, a larger portion has been dismissed than have settled (see Figure 9). This is consistent with historical trends, which indicate that settlements occur later in the litigation cycle and dismissals tend to occur in the earlier stages. Taking the time between first complaint and resolution to represent the length of time taken to resolve a suit, more than half the cases resolve between one and three years, and 17% of cases resolve more than four years after the first complaint was filed (see Figure 10).

Figure 8. **Number of Resolved Cases: Dismissed or Settled**
January 2013–December 2022

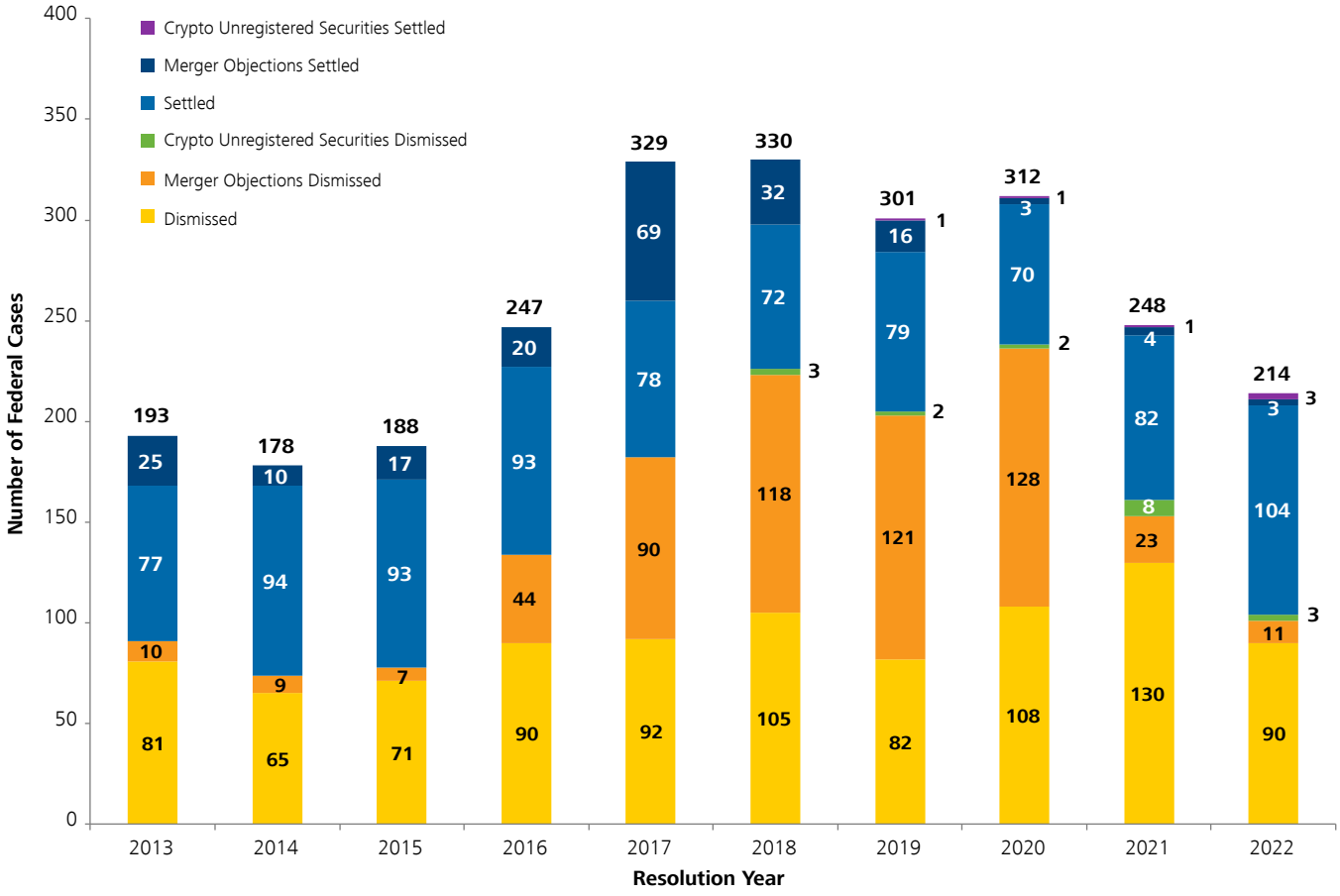
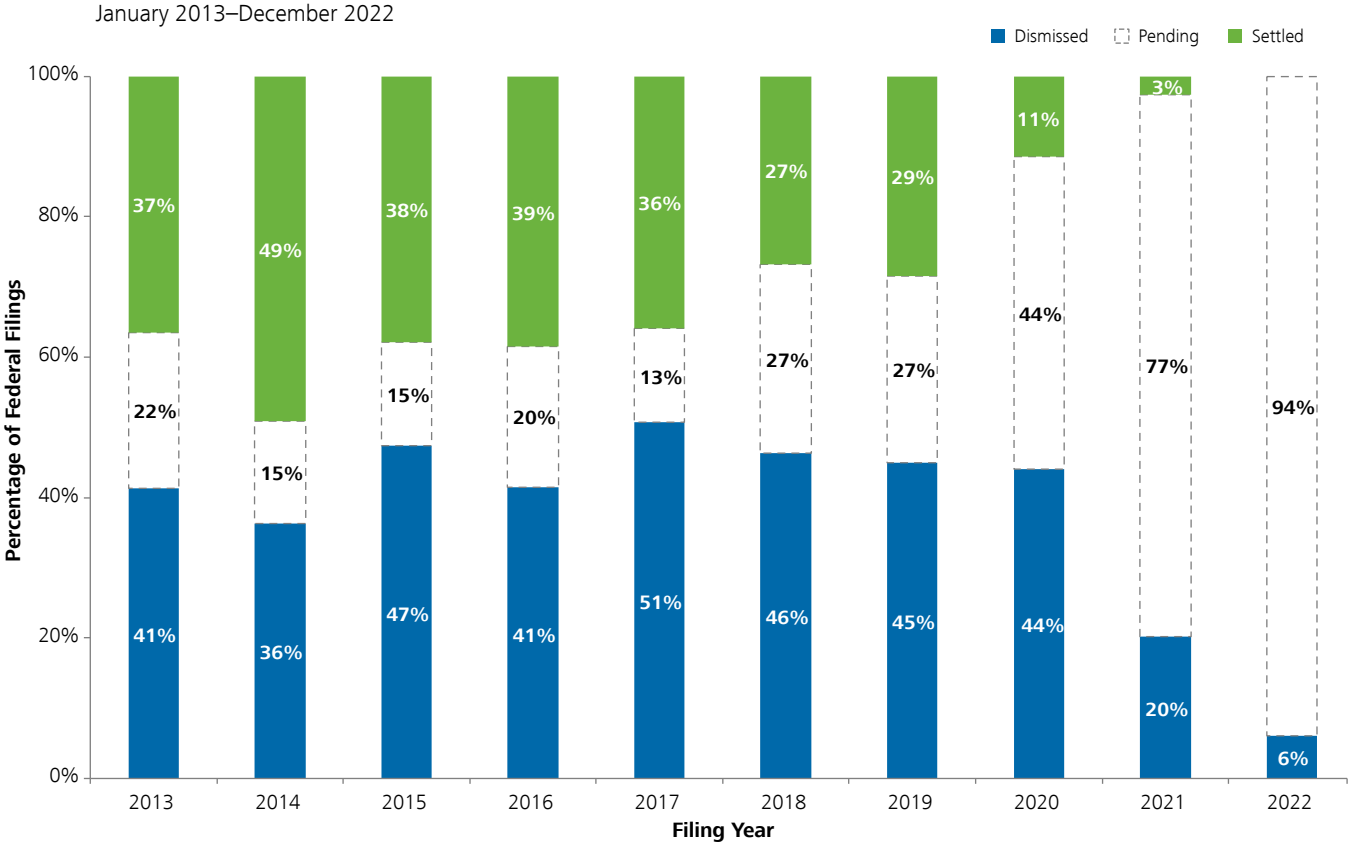
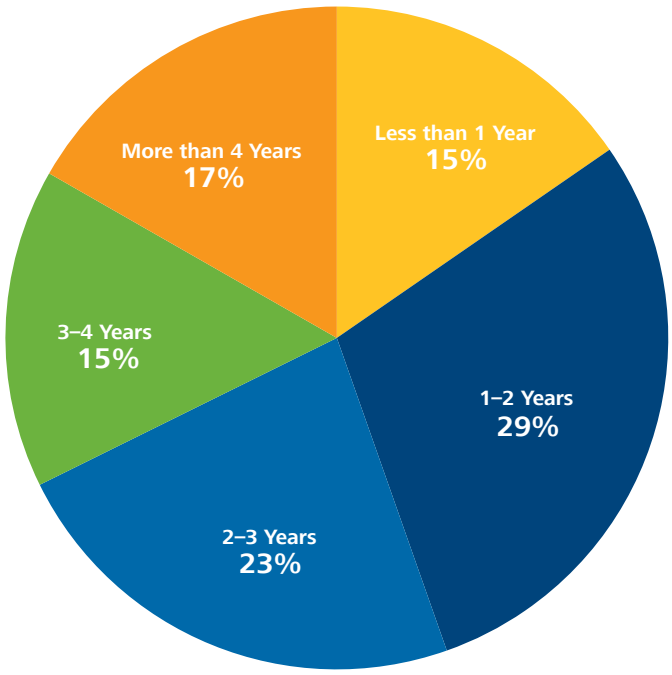


Figure 9. **Status of Cases as Percentage of Federal Filings by Filing Year**
Excludes Merger Objections, Crypto Unregistered Securities, and Verdicts
January 2013–December 2022



Note: Dismissals may include dismissals without prejudice and dismissals under appeal. Component values may not add to 100% due to rounding.

Figure 10. **Time from First Complaint Filing to Resolution**
Excluding Merger Objections and Crypto Unregistered Securities
Cases Filed January 2003–December 2018 and Resolved January 2003–December 2022



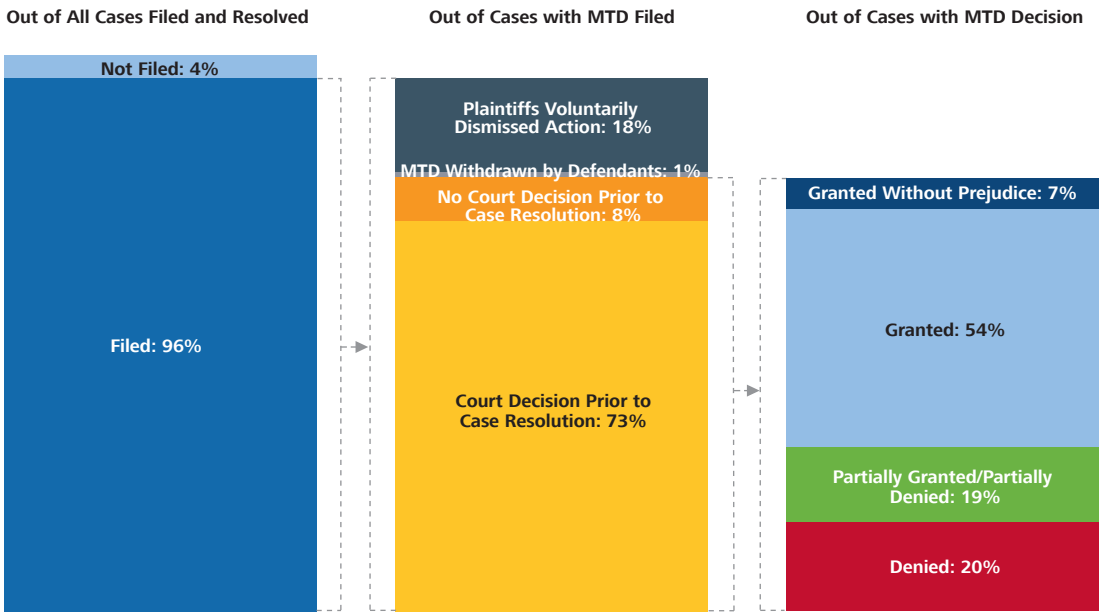
Analysis of Motions

NERA's federal securities class action database tracks filing and resolution activity as well as decisions on motions to dismiss, motions for class certification, and the status of any motion as of the resolution date. For this analysis, we include securities class actions that were filed and resolved over the 2013–2022 period in which purchasers of common stock are part of the class and in which a violation of Rule 10b-5, Section 11, and/or Section 12 is alleged.

Motion to Dismiss

A motion to dismiss was filed in 96% of the securities class action suits filed and resolved. A decision was reached in 73% of these cases, while 18% were voluntarily dismissed by plaintiffs, 8% settled before a court decision was reached, and 1% of the motions were withdrawn by defendants. Among the cases where a decision was reached, 61% were granted (with or without prejudice) and only 20% were denied (see Figure 11).

Figure 11. **Filing and Resolutions of Motions to Dismiss**
Cases Filed and Resolved January 2013–December 2022



Motion for Class Certification

A motion for class certification was filed in only 17% of the securities class action suits filed and resolved, as most cases are either dismissed or settled before the class certification stage is reached. A decision was reached in 60% of the cases where a motion for class certification was filed. Almost all of the other 40% of cases were resolved with a settlement. Among the cases where a decision was reached, the motion for class certification was granted (with or without prejudice) in 86% of cases (see Figure 12). Approximately 65% of decisions on motions for class certification occur within three years of the filing of the first complaint, with nearly all decisions occurring within five years (see Figure 13). The median time was about 2.7 years.

Figure 12. **Filing and Resolutions of Motions for Class Certification**
Cases Filed and Resolved January 2013–December 2022

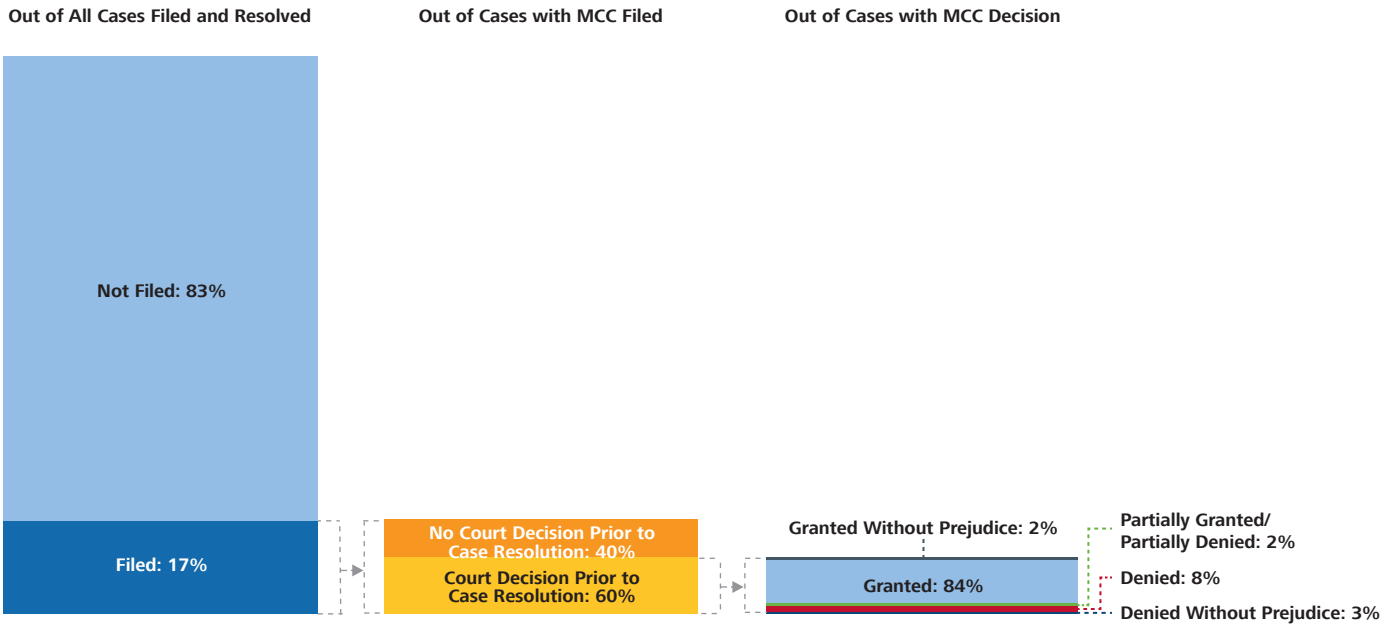
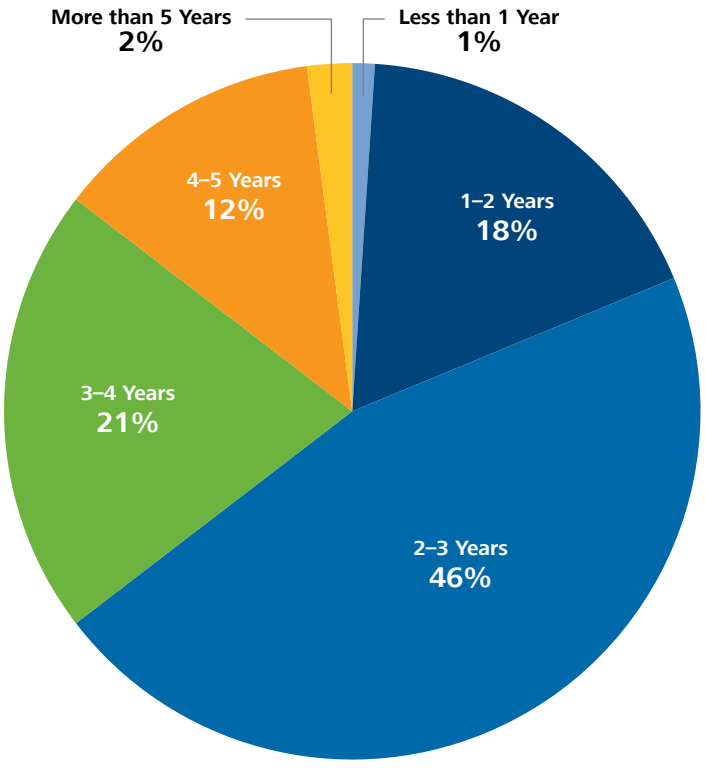


Figure 13. **Time from First Complaint Filing to Class Certification Decision**
Cases Filed and Resolved January 2013–December 2022



Trends in Settlement Values

Aggregate settlements for 2022 totaled $4 billion, which is more than double the inflation-adjusted total for 2021 of $1.9 billion.[9] In 2022, the average settlement value was $38 million, an increase of more than 70% compared to the 2021 inflation-adjusted average settlement value (see Figures 14 and 15). The distribution of 2022 settlement values differed from the settlements in 2021, with more cases settling for higher values, and more consistent with the distribution of settlement values observed in 2020 (see Figure 16). This shift is also evident in the median settlement values. The median settlement value for 2022 is $13 million, which is approximately $5 million higher than the 2021 inflation-adjusted median value of $8 million (see Figure 17).[10]

Figure 14. **Average Settlement Value**
Excludes Merger Objections, Crypto Unregistered Securities, and Settlements for $0 to the Class
January 2013–December 2022

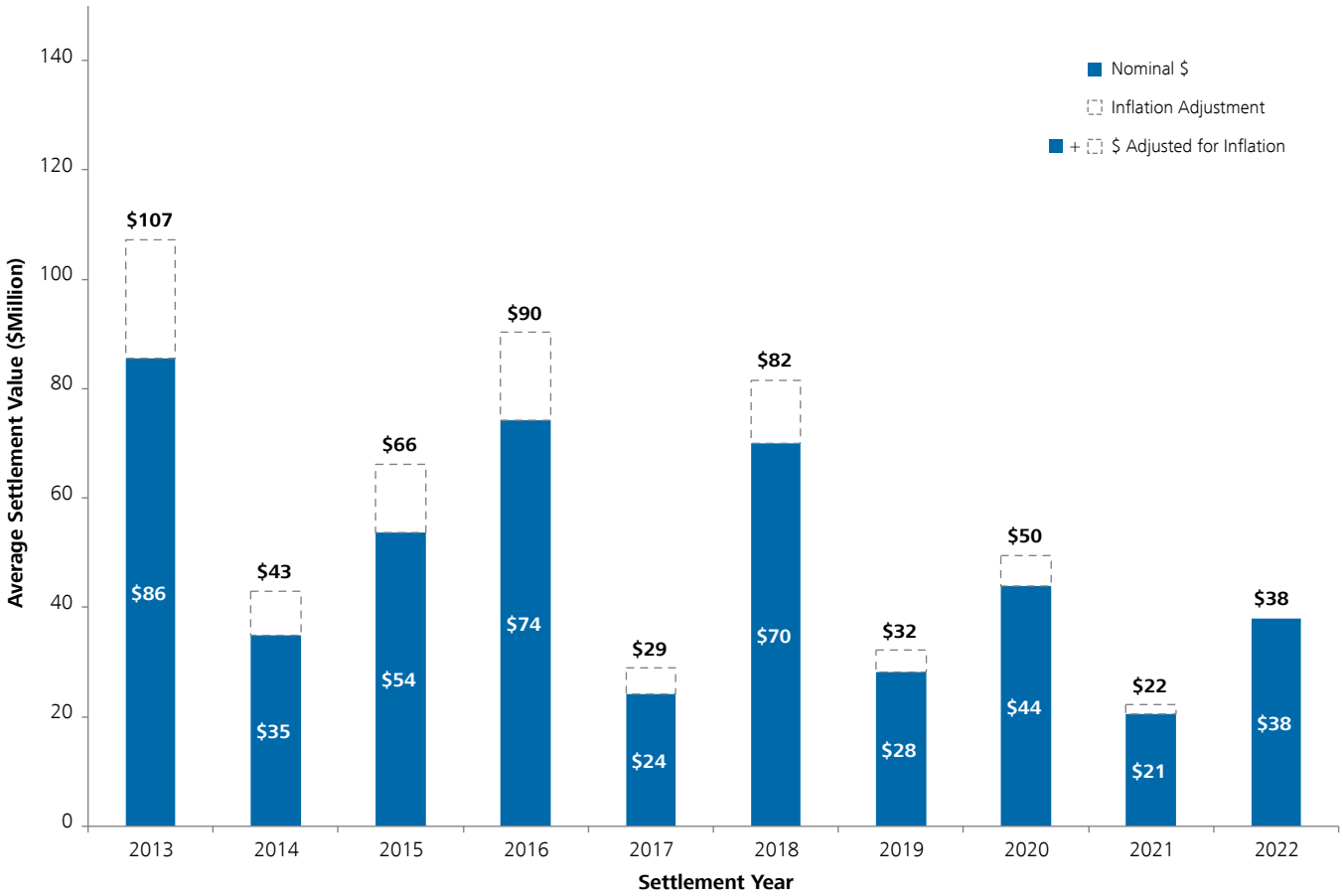


Figure 15. **Average Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, Crypto Unregistered Securities, and Settlements for $0 to the Class
January 2013–December 2022

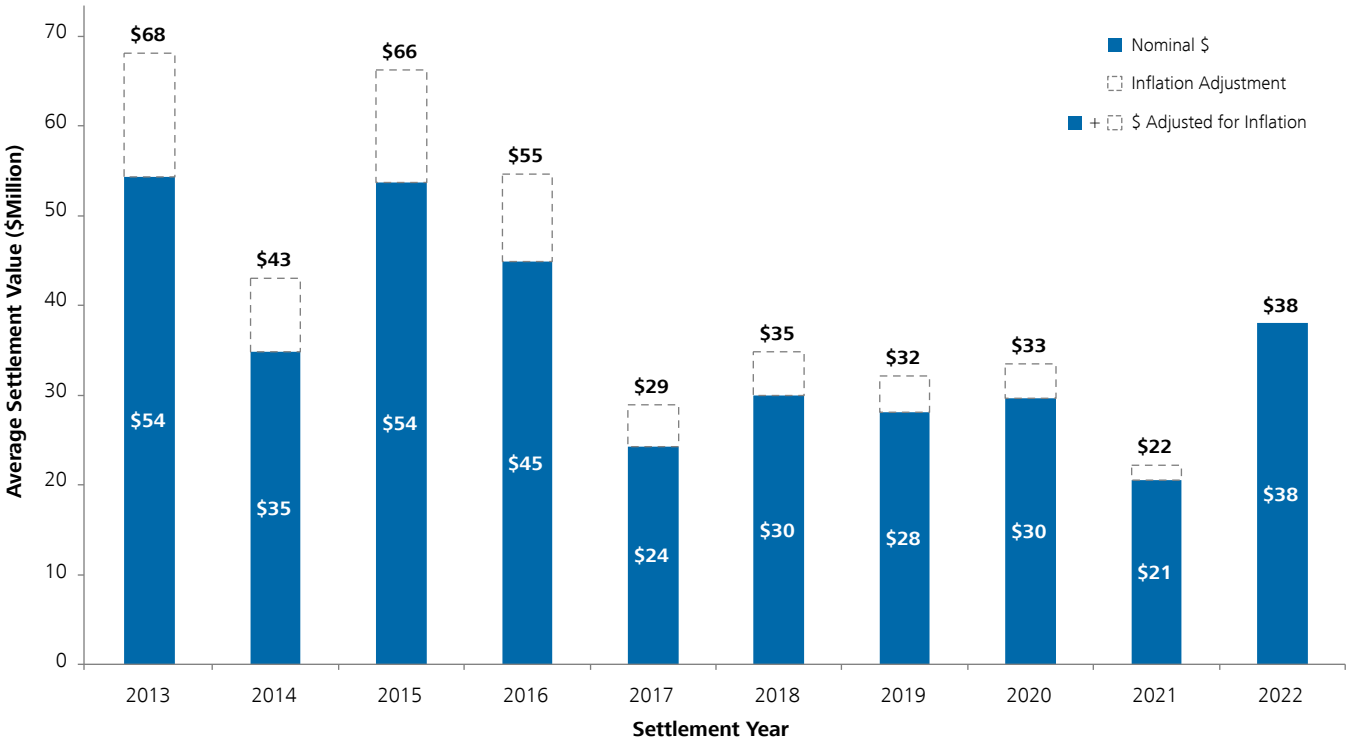


Figure 16. **Distribution of Settlement Values**
Excludes Merger Objections, Crypto Unregistered Securities, and Settlements for $0 to the Class
January 2018–December 2022

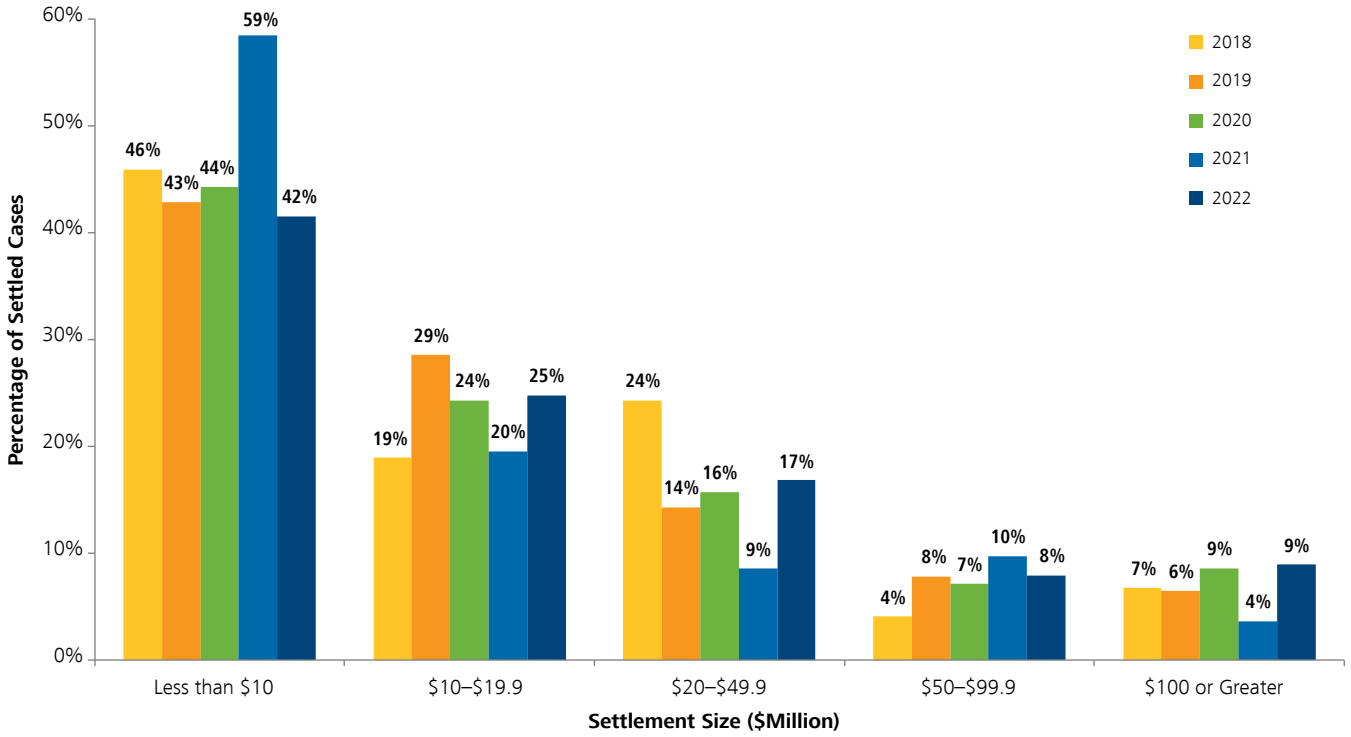
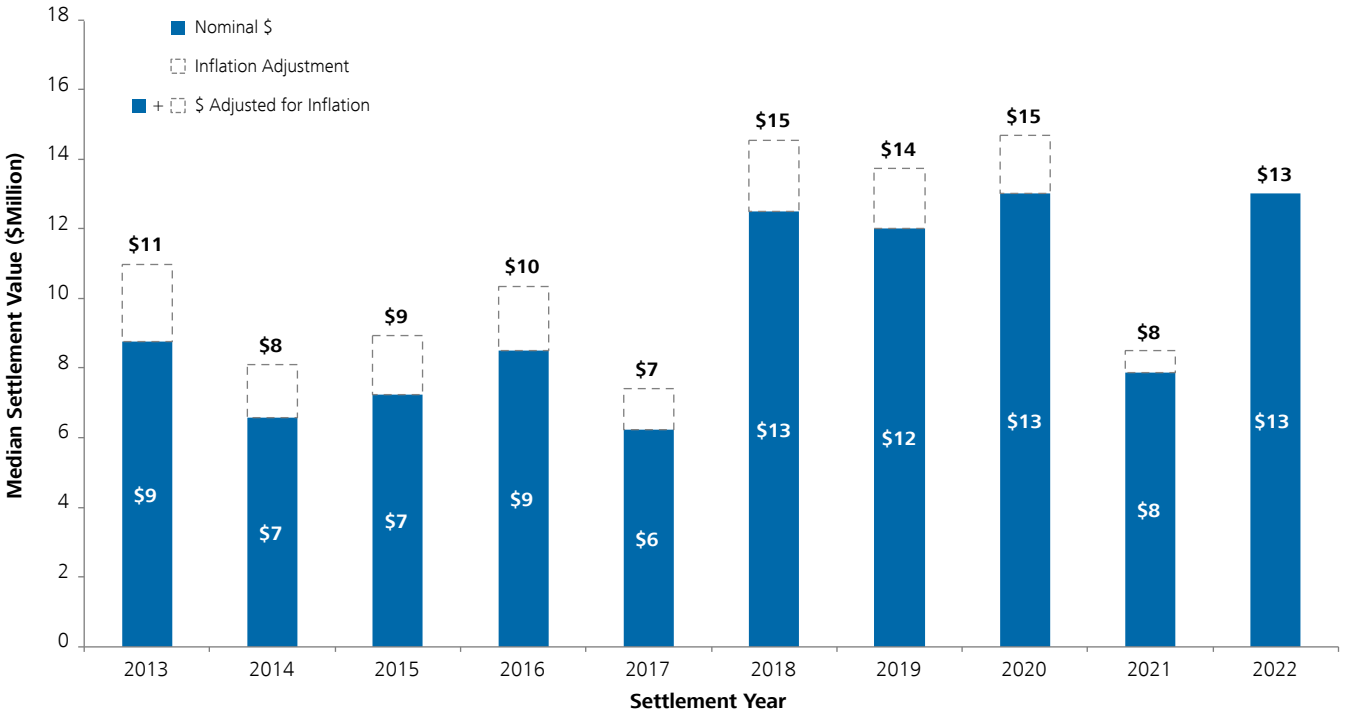


Figure 17. **Median Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, Crypto Unregistered Securities, and Settlements for $0 to the Class
January 2013–December 2022



Top Settlements

The top 10 settlements in 2022 ranged from $98 million to $809.5 million and totaled $2.2 billion. The highest settlement reached was against Twitter, Inc., for a case filed in California in 2016 (see Table 1).

Table 1. **Top 10 2022 Securities Class Action Settlements**

Ranking	Defendant	Filing Date	Settlement Date	Total Settlement Value ($Million)	Plaintiffs' Attorneys' Fees and Expenses Value ($Million)	Circuit	Economic Sector
1	Twitter, Inc.	16 Sept 16	11 Nov 22	$809.5	$185.7	9th	Technology Services
2	Teva Pharmaceutical Industries Ltd.	6 Nov 16	2 Jun 22	$420.0	$109.3	2nd	Health Technology
3	Luckin Coffee Inc.	13 Feb 20	22 Jul 22	$175.0	$31.3	2nd	Consumer Non-Durables
4	BlackBerry Ltd.	4 Oct 13	29 Sept 22	$165.0	$59.5	2nd	Technology Services
5	Granite Construction Inc.	13 Aug 19	24 Feb 22	$129.0	$21.7	9th	Industrial Services
6	Endo International plc.	14 Nov 17	23 Feb 22	$113.4	$20.9	3rd	Health Technology
7	Walgreen Co.	10 April 15	7 Oct 22	$105.0	$31.1	7th	Retail Trade
8	Novo Nordisk A/S	11 Jan 17	27 Jun 22	$100.0	$31.7	3rd	Health Technology
9	Stamps.com, Inc.	13 Mar 19	24 Jan 22	$100.0	$17.3	9th	Commercial Services
10	Mattel, Inc.	24 Dec 19	2 May 22	$98.0	$14.8	9th	Consumer Durables
	Total			**$2,214.9**	**$523.4**		

The top 10 federal securities class action settlements, as of 31 December 2022, consists of settlements ranging from $1.14 billion to $7.24 billion. From 2018 to 2021, this list remained unchanged because there were no settlements reached in excess of $1.1 billion during this time. In 2022, this list was updated to incorporate the $1.21 billion partial settlement in the ongoing suit against Valeant Pharmaceuticals International, Inc. (see Table 2).

Table 2. **Top 10 Federal Securities Class Action Settlements** (As of 31 December 2022)

Ranking	Defendant	Filing Date	Settlement Year(s)	Total Settlement Value ($Million)	Codefendent Settlements		Plaintiffs' Attorneys' Fees and Expenses Value ($Million)	Circuit	Economic Sector
					Financial Institutions Value ($Million)	Accounting Firms Value ($Million)			
1	ENRON Corp.	22 Oct 01	2003–2010	$7,242	$6,903	$73	$798	5th	Industrial Services
2	WorldCom, Inc.	30 Apr 02	2004–2005	$6,196	$6,004	$103	$530	2nd	Communications
3	Cendant Corp.	16 Apr 98	2000	$3,692	$342	$467	$324	3rd	Finance
4	Tyco International, Ltd.	23 Aug 02	2007	$3,200	No codefendant	$225	$493	1st	Producer Manufacturing
5	Petroleo Brasileiro S.A.- Petrobras	8 Dec 14	2018	$3,000	$0	$50	$205	2nd	Energy Minerals
6	AOL Time Warner Inc.	18 Jul 02	2006	$2,650	No codefendant	$100	$151	2nd	Consumer Services
7	Bank of America Corp.	21 Jan 09	2013	$2,425	No codefendant	No codefendant	$177	2nd	Finance
8	Household International, Inc.	19 Aug 02	2006–2016	$1,577	Dismissed	Dismissed	$427	7th	Finance
9	Valeant Pharmaceuticals International, Inc.*	22 Oct 15	2020	$1,210	$0	$0	$160	3rd	Health Technology
10	Nortel Networks	2 Mar 01	2006	$1,143	No codefendant	$0	$94	2nd	Electronic Technology
	Total			**$32,334**	**$13,249**	**$1,017**	**$3,358**		

*Denotes a partial settlement, which is included here due to its sizable amount. Note that this case is not included in any of our resolution or settlement statistics.

NERA-Defined Investor Losses

To estimate the potential aggregate loss to investors as a result of investing in the defendant's stock during the alleged class period, NERA has developed a proprietary variable, NERA-Defined Investor Losses, using publicly available data. The NERA-Defined Investor Loss measure is constructed assuming investors had invested in stocks during the class period whose performance was comparable to that of the S&P 500 Index. Over the years, NERA has reviewed and examined more than 2,000 settlements and found, of the variables analyzed, this proprietary variable to be the most powerful predictor of settlement amount.[11]

A statistical review reveals that settlement values and NERA-Defined Investor Losses are highly correlated, although the relationship is not linear. The ratio is higher for cases with lower NERA-Defined Investor Losses than for cases with higher Investor Losses (see Figure 18). Since 2013, annual median Investor Losses have ranged from a high of $972 million to a low of $358 million. For cases settled in 2022, the median Investor Losses were $972 million, which is 33% higher than the 2021 value and the highest recorded value during the 2013–2022 period. Between 2020 and 2022, the median ratio of settlement amount to Investor Losses has been stable at 1.8% (see Figure 19).

Figure 18. **Median Settlement Value as a Percentage of NERA-Defined Investor Losses**
By Investor Losses
Cases Filed and Settled December 2011–December 2022

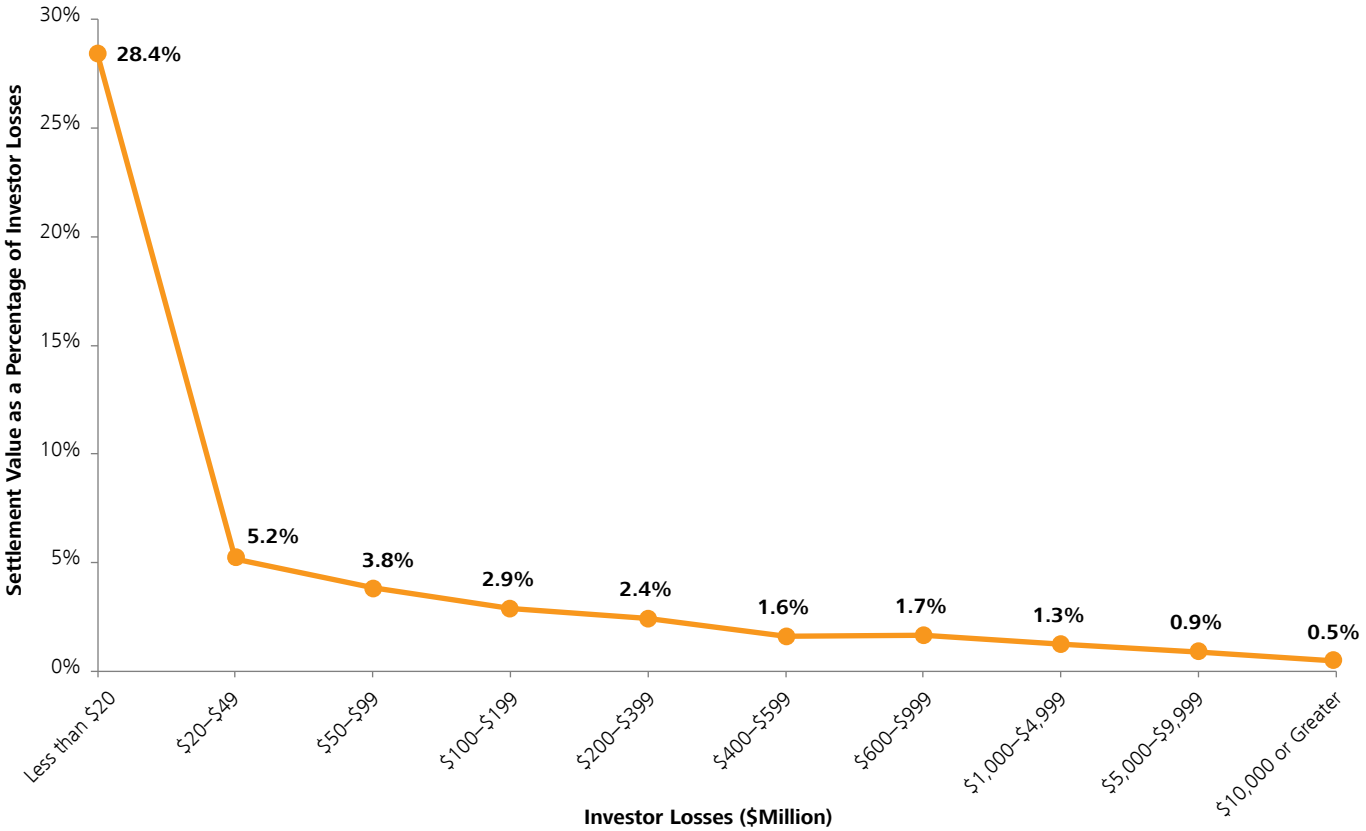
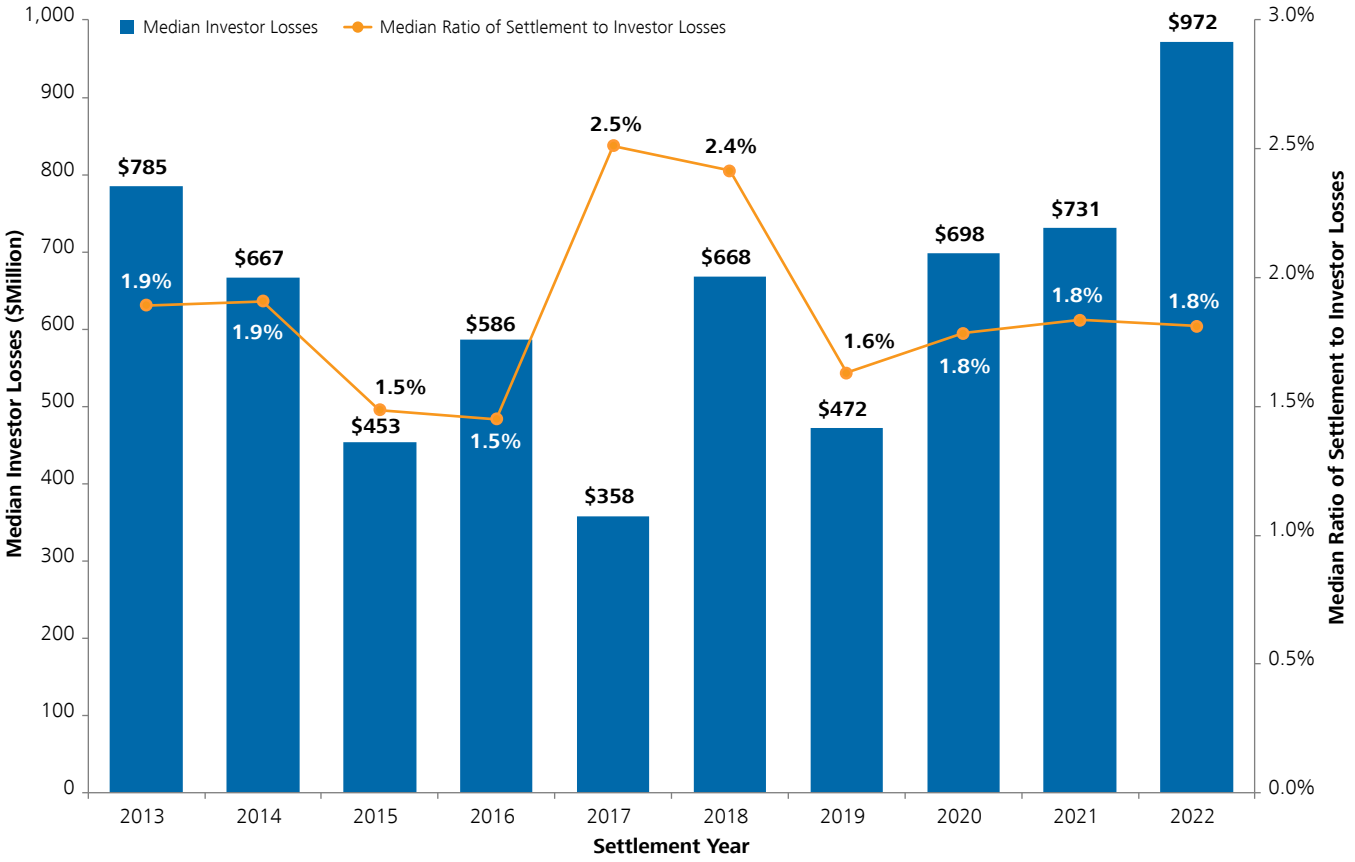


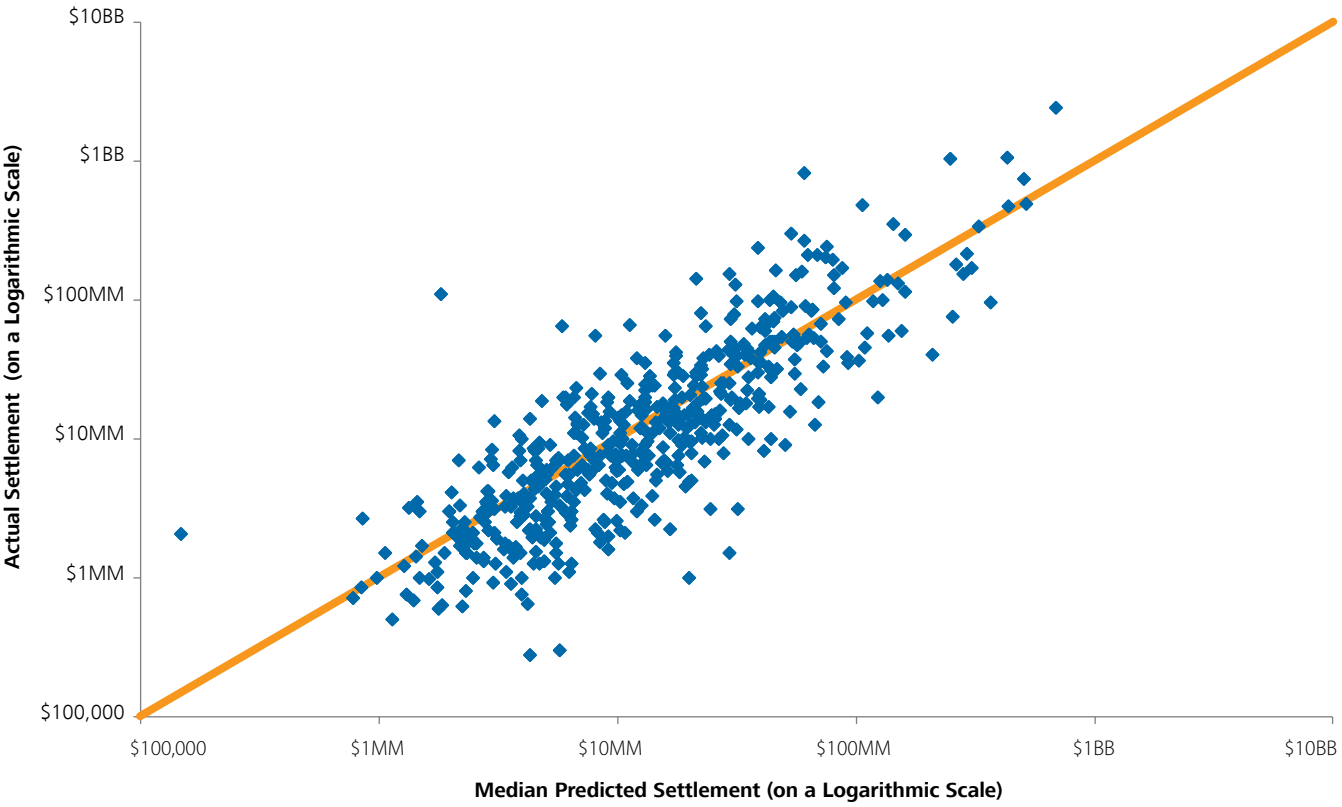
Figure 19. **Median NERA-Defined Investor Losses and Median Ratio of Settlement to Investor Losses by Settlement Year**
January 2013–December 2022



NERA has identified the following key factors as driving settlement amounts:

- NERA-Defined Investor Losses;
- The market capitalization of the issuer immediately after the end of the class period;
- The types of securities (in addition to common stock) alleged to have been affected by the fraud;
- Variables that serve as a proxy for the merit of plaintiffs' allegations (e.g., whether the company has already been sanctioned by a government or regulatory agency or paid a fine in connection with the allegations);
- The stage of litigation at the time of settlement; and
- Whether an institution or public pension fund is named lead plaintiff (see Figure 20).

Figure 20. **Predicted vs. Actual Settlements**
Investor Losses Using S&P 500 Index
Cases Settled December 2011–December 2022



Among cases settled between December 2011 and December 2022, factors in NERA's statistical model account for a substantial fraction of the variation observed in actual settlements.

Trends in Plaintiffs' Attorneys' Fees and Expenses

In 2022, aggregate plaintiffs' attorneys' fees and expenses amounted to $1 billion (see Figure 21). This marks the first year since 2018 that aggregate plaintiffs' attorneys' fees and expenses exceeded $1 billion. The 2022 aggregate fees and expenses is double the amount observed in 2021, driven by an increase in the aggregate fees and expenses associated with settlements between $10 million and $499.9 million and by the $186 million in fees and expenses associated with settlements between $500 million and $999.9 million. Although there are year-to-year fluctuations in the aggregate fees and expenses, the trend in the median of plaintiffs' attorneys' fees and expenses as a percentage of settlement amount has remained stable (see Figure 22). The data reveal that fees and expenses represent an increasing percentage of settlement value as settlement value decreases—a pattern that is consistent in cases settled since 2013 as well as in cases settled between 1996 and 2012. For cases settled in the recent period with a settlement value of $1 billion or higher, fees and expenses accounted for 8.8% of the settlement value. This percentage increases to more than 30% for cases with a settlement value under $10 million.

Figure 21. **Aggregate Plaintiffs' Attorneys' Fees and Expenses by Settlement Size**
January 2013–December 2022

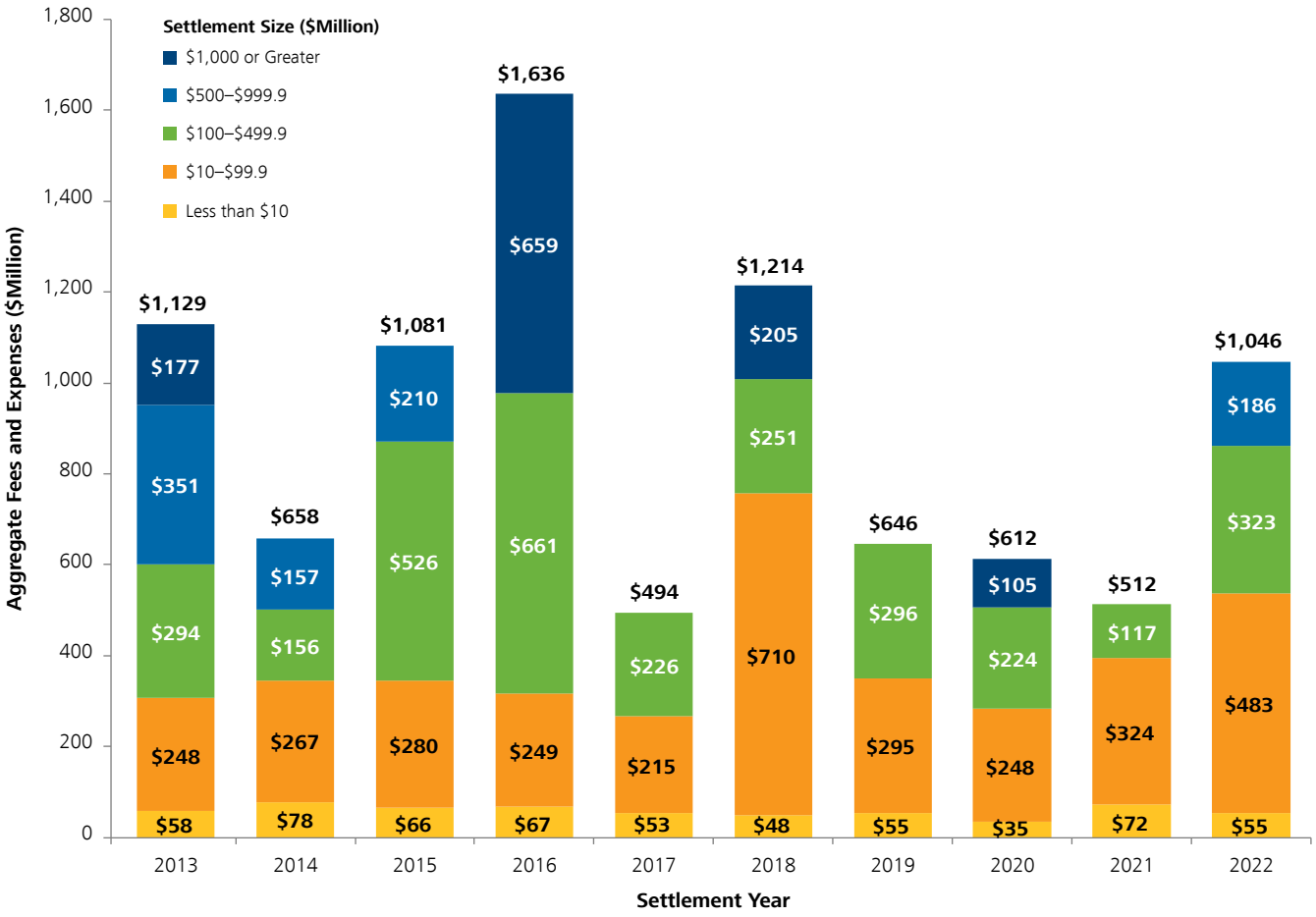
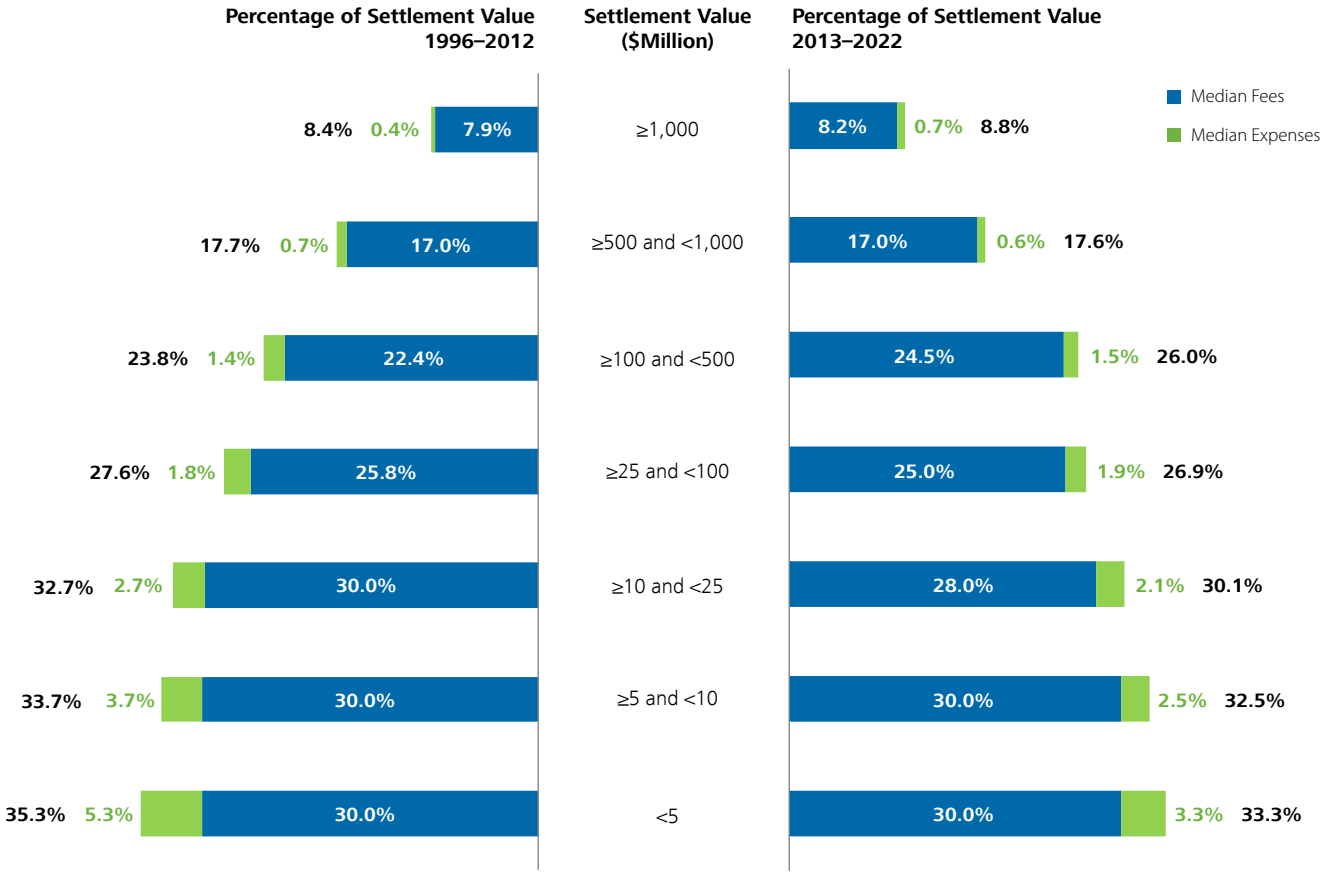


Figure 22. **Median of Plaintiffs' Attorneys' Fees and Expenses by Size of Settlement**
Excludes Merger Objections, Crypto Unregistered Securities, and Settlements for $0 to the Class



Note: Component values may not add to total value due to rounding.

Conclusion

In 2022, new filings of federal securities class actions declined for the fourth consecutive year as a result of fewer merger-objection and Rule 10b-5 cases filed. Of the 205 cases filed in 2022, more than 20% were SPAC or crypto-related filings. Total resolutions declined by 14% from 248 in 2021 to 214 in 2022 due to the continued reduction in non-merger-objection and non-crypto unregistered cases. The average settlement value and median settlement value for cases settled in 2022 were $38 million and $13 million, respectively, an increase over the 2021 values.

Notes

1 This edition of NERA's report on "Recent Trends in Securities Class Action Litigation" expands on previous work by our colleagues Lucy P. Allen, Dr. Vinita Juneja, Dr. Denise Neumann Martin, Dr. Jordan Milev, Robert Patton, Dr. Stephanie Plancich, and others. The authors thank Dr. David Tabak and Benjamin Seggerson for helpful comments on this edition. We thank Vlad Lee and other researchers in NERA's Securities and Finance Practice for their valuable assistance. These individuals receive credit for improving this report; any errors and omissions are those of the authors. NERA's proprietary securities class action database and all analyses reflected in this report are limited to federal case filings and resolutions.

2 In this study we introduced a new category of "special" cases, crypto cases, which consist of two mutually exclusive subgroups: (1) crypto shareholder class actions, which include a class of investors in common stock, American depositary receipts/ American depositary shares (ADR/ADS), and/or other registered securities, along with crypto- or digital-currency-related allegations; and (2) crypto unregistered securities class actions, which do not have class investors in any registered securities that are traded on major exchanges (New York Stock Exchange, Nasdaq). We include crypto shareholder class actions in all our analyses that include standard cases. Crypto unregistered securities class actions are excluded from some analyses, which is noted in the titles of our figures.

3 NERA tracks securities class actions that have been filed in federal courts. Most of these cases allege violations of federal securities laws; others allege violations of common law, including breach of fiduciary duty, as with some merger-objection cases; still others are filed in federal court under foreign or state law. If multiple actions are filed against the same defendant, are related to the same allegations, and are in the same circuit, we treat them as a single filing. The first two actions filed in different circuits are treated as separate filings. If cases filed in different circuits are consolidated, we revise our count to reflect the consolidation. Therefore, case counts for a particular year may change over time. Different assumptions for consolidating filings would probably lead to counts that are similar but may, in certain circumstances, lead observers to draw a different conclusion about short-term trends in filings. Data for this report were collected from multiple sources, including Institutional Shareholder Services, Dow Jones Factiva, Bloomberg Finance, FactSet Research Systems, Nasdaq, Intercontinental Exchange, US Securities and Exchange Commission (SEC) filings, complaints, case dockets, and public press reports.

4 Most securities class action complaints include multiple allegations. For this analysis, all allegations from the complaint are included and thus the total number of allegations exceeds the total number of filings.

5 It is important to note that due to the small number of cases in some of these categories, the findings summarized here may be driven by one or two cases.

6 ESG securities class action cases filed in federal courts are included in NERA's database and the analyses in this report. For this update, no analyses have been prepared on this development area specifically.

7 Report updated on 7 February 2023. Analyses for the "SPACs" group were updated to incorporate "blank check" company-related cases and cases that were not originally classified as SPACs prior to publishing.

8 Here "dismissed" is used as shorthand for all class actions resolved without settlement; it includes cases in which a motion to dismiss was granted (and not appealed or appealed unsuccessfully), voluntary dismissals, cases terminated by a successful motion for summary judgment, or an ultimately unsuccessful motion for class certification.

9 While annual average settlement values can be a helpful statistic, these values may be affected by one or a few very high settlement amounts. Unlike averages, the median settlement value is unaffected by these very high outlier settlement amounts. To understand what more typical cases look like, we analyze the average and median settlement values for cases with a settlement amount under $1 billion, thus excluding these outlier settlement amounts. For the analysis of settlement values, we limit our data to non-merger-objection and non–crypto unregistered securities cases with settlements of more than $0 to the class.

10 For our analysis, NERA includes settlements that have had the first settlement-approval hearing. This means we do not include partial settlements or tentative settlements that have been announced by plaintiffs and/or defendants. As a result, although we include the Valeant partial settlement in Table 2 due to its sizable amount, this case is not included in any of our resolution or settlement statistics.

11 NERA-Defined Investor Losses is only calculable for cases involving allegations of damages to common stock based on one or more corrective disclosures moving the stock price to its alleged true value. As a result, we have not calculated this metric for cases such as merger objections.

About NERA

NERA Economic Consulting (**www.nera.com**) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For more than six decades, we have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real-world industry experience to issues arising from competition, regulation, public policy, strategy, finance, and litigation.

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