The Honorable Richard A. Jones

In The United States District Court
For The Western District Of Washington

Chris Hunichen, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Atonomi LLC, a Delaware LLC, CENTRI Technology, Inc., a Delaware Corporation, Launch Capital, LLC, a Delaware LLC, M37 Ventures, Inc., a Nevada corporation, Vaughan Emery, David Fragale, Rob Strickland, Kyle Strickland, Don Deloach, Wayne Wisehart, Woody Benson, Michael Mackey, James Salter, and Luis Paris,

Defendants.

No. 2:19-cv-00615-RAJ-SKV

Atonomi LLC, a Delaware LLC,

Counterclaimant,

v.

Chris Hunichen,

Counter-Defendant.

Atonomi LLC, a Delaware LLC,

Third Party Plaintiff,

v.

David Patrick Peters, Sean Getzwiller, David Cutler, Chance Kornuth, and Dennis Samuel Blieden,

Counter-Defendants.

Motion For Preliminary Approval of Partial Class-Wide Settlement

Note for Hearing: June 18, 2021

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases **Page(s)**

ARD LAW GROUP PLLC
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Statutes

Other Authorities

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I. Introduction and Relief Requested

Plaintiff and proposed settlement Class Representative Chris Hunichen ("Hunichen") respectfully moves this Honorable Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for preliminary approval of the proposed partial settlement (the "Settlement") of this class action.[1]

The Settlement is made with "Settling Defendants" Launch Capital LLC ("Launch"), Steven J. "Woody" Benson ("Benson"), and David Fragale ("Fragale"), who have agreed to pay $6,037,500 in cash for a non-reversionary common fund. Hunichen submits that this partial Settlement, which provides certainty of a recovery for investors while Hunichen continues to pursue the Non-Settling Defendants,[2] is fair, adequate, and reasonable. Hunichen now respectfully requests that the Court decide:

1. Whether the proposed $6,037,500 partial settlement of this Action is within the range of fairness, reasonableness, and adequacy to warrant the Court's preliminary approval.

2. Whether the "Settlement Class Members", comprised of:

> *all individuals who either (i) purchased ATMI tokens via a Series 1 or Series 2 Simple Agreement for Future Tokens (SAFT) with Atonomi in 2018; or (ii) purchased ATMI tokens through a "public sale" that occurred on or around June 6, 2018, except persons who properly exclude themselves from the Settlement, any person, firm, trust, corporation, or entity affiliated with Defendants, or any judge, justice, judicial officer or judicial staff of the Court*

should be preliminarily certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3).[3]

3. Whether Hunichen should be preliminarily appointed as Representative for the proposed Settlement Class, and his counsel appointed as Class Counsel for the Settlement Class;

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[1] Unless otherwise noted, defined terms used herein have the same meaning as in the *Stipulation of Class Action Settlement and Release* (the "Settlement Agreement") attached as Exhibit A to the Declaration of Angus Ni filed concurrently herewith.

[2] The Non-Settling Defendants are Atonomi LLC, CENTRI Technology, Inc., Vaughan Emery, Rob Strickland, Don Deloach, Wayne Wisehart, Michael Mackey, and James Salter.

[3] In support of a settlement class including SAFT-purchasers, Hunichen incorporates the arguments and evidence made in his Motion for Class Certification filed on May 7, 2021. Dkts. 197-199.

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4. Whether the Plan of Allocation to the Settlement Class Members, the proposed manner and content of settlement Notice, and the proposed Proof of Claim form should be approved;

5. Whether JND Legal Administration should be appointed as settlement Administrator; and

6. Whether Signature Bank should be appointed as Escrow Agent for the Settlement.

Should the Court answer the above questions in the affirmative, Hunichen respectfully requests the Court preliminarily approve the Settlement, set a schedule for the Settling Parties and the Administrator to effectuate Notice to the Class Members, and set a date for a Final Approval Hearing, by entering an order substantially conforming to the proposed Preliminary Approval Order attached as Exhibit C of the Ni Declaration filed concurrently herewith.

II. Procedural History

In this Action, Plaintiff alleged that, over the first half of 2018, Defendants conducted an Initial Coin Offering ("ICO") of Atonomi tokens ("ATMI") in exchange for the cryptocurrency Ethereum ("ETH"). The ICO, which occurred at the very height of the 2017-2018 cryptocurrency bubble, raised 45,549.75 ETH by June 6, 2018.

Plaintiff alleged the ICO was not exempt from registration, and Atonomi did not register the offering with any regulator, state or federal. Plaintiff accordingly alleged that Defendants were strictly liable under the Washington State Securities Act ("WSSA") for conducting a non-exempt, unregistered securities offering. Defendants dispute Plaintiff's claim and deny liability. The remainder of the factual background of the case is set forth in more detail in Plaintiff's Motion for Class Certification (the "Certification Motion"). *See* Dkt No. 197. This motion will therefore focus on the procedural posture and the background of the proposed Settlement. Should the Court grant this Motion, additional details regarding Plaintiff's prosecution of this case will be provided in connection with the motion for final approval of the Settlement.

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A. Motion Practice and Discovery

The Action was commenced on April 25, 2019 and a First Amended Complaint was filed on June 20, 2019. Dkts. 1 & 15. The initial defendants were Atonomi LLC, CENTRI Technology, Inc., Vaughan Emery, David Fragale, Rob Strickland, Don Deloach, Wayne Wisehart, Michael Mackey, James Salter, Woody Benson, Kyle Strickland, and Luis Paris.

On July 22, 2019, these Defendants moved to compel arbitration. Dkt. 31. Plaintiff opposed. Dkt. 36. The Honorable Magistrate Judge Theiler recommended denying the motion on October 28, 2019. Dkt. 40. Objections were briefed between November 11, 2019 and November 21, 2019. Dkts. 41-43. On April 21, 2020, the Court adopted Judge Theiler's recommendation and denied Defendants' motion to compel. Dkt. 66.

Meanwhile, on January 30, 2020, Plaintiff moved for a Preliminary Injunction, which was briefed by February 21, 2020. Dkts. 44-61. On April 22, 2020, Defendants' initial counsel withdrew and were replaced by current counsel. Dkt. 67.

On May 15, 2020, Defendants answered the First Amended Complaint. Dkts. 70-80. Simultaneously, Defendants also filed Counterclaims against Plaintiff (Dkt. 81) and Third-Party claims against various of Plaintiff's associates that also invested in the Atonomi ICO. Dkt. 82.

On June 2, 2020, Judge Theiler recommended granting a preliminary injunction, finding a high likelihood of success on the merits. Dkt. 86. Objections were filed and briefed by June 30, 2020. Dkts. 90 and 95.

On July 20, 2020, Plaintiff as Counter Defendant and the Third-Party Defendants ("TPDs") moved to dismiss the claims against them. Dkts. 96-102. Defendants, meanwhile, moved to bifurcate the ongoing discovery. Dkt. 117. On September 28, 2020, Judge Theiler denied the motion to bifurcate. Dkt. 123. On October 5, 2020, Judge Theiler also recommended denying Plaintiff and Third-Party Defendants' motion to dismiss due to the presence of factual disputes. Dkt. 126.

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On October 27, 2020, Plaintiff and TPDs answered the counterclaims. Dkts. 132-133. On October 22, 2020, Plaintiff also moved to amend to add additional defendants Launch Capital LLC ("Launch") and M37 Inc. Dkt. 131.

On November 6, 2020, Judge Theiler granted the motion to amend (Dkt. 136), and Plaintiff filed a Second Amended Complaint on November 9, 2020. Dkt 137.

On November 23, 2020, the original Defendants answered the Second Amended Complaint. Dkts. 157-168. Simultaneously, the Court also adopted Judge Theiler's recommendation to deny Plaintiff and TPDs' motion to dismiss without prejudice. Dkt. 156.

On December 7, 2020, Plaintiff and the TPDs moved for judgment on the pleadings, seeking judgment as a matter of law, rather than as a matter of undisputed fact as in the motion to dismiss. Dkt. 171. The motion remains pending.

On December 10, 2020, newly added Defendants Launch and M37 answered the Second Amended Complaint. Dkts. 173, 176. On December 22, 2020, with these Defendants added, the Court declined to adopt Judge Theiler's preliminary injunction recommendation. Dkt. 177. The Court did not disturb Judge Theiler's finding of a high likelihood of success on the merits. *Id.*

On February 2, 2021, Defendant Vaughan Emery engaged new counsel. Dkt. 184.

On February 5, 2021, Plaintiff stipulated to dismiss Defendants Kyle Strickland and Luis Paris. Dkt. 195.

Discovery has been ongoing since late 2020, and Defendants have produced approximately 20,000 documents. Ni. Decl. ¶ 23.

B. Mediation and Settlement

With discovery ongoing, and after Defendants disclosed their insurance arrangements, the parties engaged in informal discussions starting in December 2020. *Id.*, ¶ 10. These discussions led to a full one-day mediation between Plaintiff and all Defendants (not including the TPDs), conducted by Mr. Lou Peterson of Hillis Clark Martin & Peterson P.S. on March 4, 2021. *Id.*, ¶¶ 11-18. Defendants outlined their response to Plaintiff's claim, including, among other points, their view that the SAFT offering was exempt from securities registration requirements, that the ATMI

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token sold in the public sale is not a security, and, even if the ATMI tokens were found to be securities, the public sale was separate from (not integrated with) the SAFT offering and therefore the securities registration requirements would not apply to the SAFTs. *Id.*

The matter did not settle during the March 4, 2021 mediation. *Id.* Formal and informal settlement discussions continued, directly between counsel and with Mr. Peterson, from March 4, 2021 through March 30, 2021, during which the parties exchanged additional documents and information relevant to settlement. *Id.*, ¶ 19. On March 30, 2021, Plaintiff reached settlement terms with Defendants Launch and Benson. *Id.*, ¶ 20. After settlement terms with Launch and Benson were disclosed, Plaintiff's counsel continued negotiations with the non-settling Defendants, and exchanged additional information relevant to settlement. *Id.*, ¶ 21. Those negotiations were unsuccessful as to the Non-Settling Defendants, but Plaintiff was able to reach proposed terms with Fragale on April 23, 2021. *Id.*, ¶ 22. Following further negotiation on the finer points of the proposed Settlement, Notice and other administrative issues, this Motion follows.

1. Settlement Consideration and Plan of Allocation

The proposed Settlement provides that the Settling Defendants will pay $6,037,500 million in cash into an Escrow Account for the benefit of the Settlement Class. Ni Decl., Ex. A ("Settlement Agreement" referencing drafts of the proposed Final Approval Order, Preliminary Approval Order, Proof of Claim form, and Summary Notice as Exhibits 1-4 to the Agreement, which Exhibits 1-4 are separately submitted hereto as Exhibits B, C, D, and E to this motion).

This "Settlement Amount" is intended to pay Notice and Administration Costs, taxes and tax expenses, any Fee and Expense Award to proposed Class Counsel and a Service Award to Hunichen at the Court's discretion, and of course a Net Settlement Fund to be distributed among Settlement Class Members who submit a timely and valid Proof of Claim. *Id.*, Ex. A, ¶¶ 24, 26, 27. The Net Settlement Fund will be paid out *pro rata* based on the $USD value of consideration paid by Settlement Class Members for the allegedly unregistered securities on the date of investment, minus the $USD value of any consideration received from a sale of the securities, on the date any selling consideration was received. *Id.*, § I.W, and ¶ 26. This formula is to be "in accordance with

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[RSW] 21.20.430(1)", a simple formula provided by the Washington State Securities Act to calculate losses for the class wide claims alleged by Hunichen. *Id.; Cf.* Dkt. 137 (Second Amended Complaint alleging violation of RSW 21.20.430(1)).

The Net Settlement Fund will be reduced dollar for dollar for each valid Claim received. *Id.*, 26(c). If valid Claims do not exhaust the Fund, each Settlement Class Member will receive the same positive multiplier to fully exhaust it. *Id.* If the Fund is oversubscribed, the same negative multiplier will be applied to each Claim received. *Id.* The proposed Administrator will review claims and determine what is sufficient evidence to support a valid Claim. *Id.*, ¶ 26(d). Claim rejections can be contested by Settlement Class Members, who are allowed to cure perceived deficiencies. *Id.*, ¶¶ 29-30. Class Counsel and the Administrator can also waive non-material deficiencies in a Claim Form, and have the discretion to accept late Claims. *Id.*, ¶¶ 28, 31.

If claimants do not cash their Settlement Claim checks within a reasonable time, uncashed funds may be re-distributed to those Settlement Class members that did take custody of their Claim funds. Ni Decl., Ex. A, ¶ 26(E). Once it is determined that additional redistributions are not cost effective, the remaining balance will be contributed to non-sectarian, not-for-profit, 501(c)(3) organization(s), to be recommended by Class Counsel and approved by the Court. *Id.*

Hunichen and proposed Class Counsel believe the Settlement is fair, reasonable, and adequate, as it extracts a substantial amount from the Defendants most equipped to hamper the ongoing prosecution of the action, while allowing the case to continue against the primary, original Defendants.

2. Contribution Bar

When the parties present the Settlement for final approval, the proposed judgment will bar claims against the Settling Defendants for contribution or indemnity arising from or related to the allegations in the Complaint. Settlement Agreement, ¶ 57 & Ex. 1 ¶ 14. The interests of the Non-Settling Defendants will also be protected because the bar order will reduce any judgment obtained by the class against them by the greater of the Settlement Amount or the percentage of fault attributed to the Settling Defendants. *Id.*

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Although not before the Court on this preliminary approval motion,[4] Plaintiff notes that federal courts regularly grant contribution bar orders as essential to provide settling defendants the peace of mind to facilitate settlement. *Franklin v. Kaypro Corp.,* 884 F.2d 1222, 1231-32 (9th Cir. 1989), *cert denied,* 498 U.S. 890, 111 S. Ct 232 (1990) (affirming contribution bar in favor of settling defendants in securities class action, subject to modification on remand); *In re Wash. Pub. Power Supply Sys. Secs. Litig.,* 1988 WL 158947, at **1, 5-10 (W.D. Wash. Jul. 28, 1988) (granting contribution bar in favor of settling defendant in securities class action).[5] And, under Washington law, a determination by this Court that the settlement is reasonable discharges the Settling Defendants from "all liability for contribution." RCW 4.22.060(2).

3. Proposed Notice

The Agreement provides for direct emailing of Summary Notice to SAFT Investors, with first class mail as backup. Ni Decl., Ex. A, ¶ 36; Ex. E (Summary Notice). Atonomi has produced all SAFT Investors' names, e-mails, and addresses. *Id.*, ¶ 8. Atonomi's records of Public Sale Investors, produced so far, do not list their names, but do list e-mails and ETH addresses used to send ETH and receive ATMI tokens, and the ETH amount invested by Public Sale Investors, which can be used to verify claims and claimed amounts. *Id.*, ¶ 9. Given the availability of this contact information, direct email notice will also be made.

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[4] "[A]t this preliminary approval stage, the court need only 'determine whether the proposed settlement is within the range of possible approval.'" *West v. Circle K Stores, Inc.*, 2006 WL 1652598, at *11 (E.D. Cal. June 13, 2006)(citation omitted). If non-settling defendants can establish standing to object to the partial settlement, such an objection would be heard at the final approval hearing. *Smith v. Arthur Andersen LLP* , 421 F.3d 989 (9th Cir. 2005) (affirming trial court's decision after fairness hearing to grant final approval of partial settlement including a bar order); *see also In re PNC Fin. Servs. Group, Inc. Sec. Litig.*, 440 F. Supp. 2d 421, 444-55 (W.D. Pa. 2006); *In re Wilshire Tech. Sec. Litig.*, 887 F. Supp. 236, 237-38 (S.D. Cal. 1995).

[5] Following *Kaypro*, courts in this district have regularly issued contribution bar orders to facilitate partial settlements in multi-defendant cases. *See e.g. Nautica Condo. Owners Ass'n v. Aspen Specialty Ins. Co.*, 2018 WL 272851 (W.D. Wash. Jan. 2, 2018); *King County v. Travelers Indem. Co.*, 2017 WL 785186 (W.D. Wash. March 1, 2017); *Canal Indem. Co. v. Global Dev., LLC*, 2015 U.S. Dist. LEXIS 8774 (W.D. Wash. Jan. 26, 2015); *Cadet Mfg. Co. v. Am. Ins. Co.,* 2006 WL 910000 (W.D. Wash. Apr. 7, 2006).

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Phone: (206) 701-9243

Even though Hunichen and proposed Class Counsel believe they have contact information for most, if not all, of the proposed Settlement Class Members, the Agreement also provides for supplemental Summary Notice *via* publication on platforms like Facebook, Twitter and PRNewswire. *Id.*, Ex. A, ¶ 37; Segura Decl. re Notice and Settlement Admin., ¶ 5. The email, mail, and publication Notice will all provide links to the Settlement Website that will have the Long Form Notice, important documents about the case, an Electronic Claim Form, as well as a mailing address, email address and a toll-free number to contact the Administrator. Segura Decl., ¶ 4; Ni Decl., Ex. A, ¶ 39(E).

The content of the Notice itself was drafted in plain language to be consistent with the Federal Judicial Center's Guidelines *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide. Id.,* ¶ 38, *cf.* Ni Decl., Ex. E (Summary Notice), and Ex. F (Long Form Notice). The Long Form Notice contains all the elements necessary for Class Members to learn about the case and the Settlement, about Class Counsel's requested Fee and Expense Award and Service Award for Hunichen, how to exclude themselves or object, how to file a Claim and the Plan of Allocation, and the date and time of the Final Approval Hearing and procedures for appearing at their own expense if desired. *Id.*

III. Argument

A. The Court Should Grant Preliminary Approval of The Proposed Settlement

Strong judicial policy favors settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998); *West v. Circle K Stores, Inc.*, 2006 WL 1652598, at *1 (E.D. Cal. June 13, 2006). Settlements of complex cases greatly contribute to the efficient utilization of scarce judicial resources and achieve the speedy resolution of justice.

The Court "must satisfy itself that the proposed class-wide settlement is fair, adequate, and reasonable to the class." *David v. Bankers Life & Cas. Co.*, No. 14-cv-00766-RSL, 2019 U.S. Dist. LEXIS 92431, at *2 (W.D. Wash. June 3, 2019) (citing Rule 23(e) and *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). In conducting such analysis, federal courts consider

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the following factors: "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Id.*

If a settlement is reached before class certification, a court must have a "higher level of scrutiny for evidence of collusion or other conflicts of interest." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (citing *Hanlon* at 1026). The district court must also feel confident "that the settlement is 'not the product of collusion among the negotiating parties" including "subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.*, at 947 (noting signs of collusion such as "class receives no monetary distribution but class counsel are amply rewarded," a "clear sailing" agreement for payment of attorneys fees, and when fees not awarded revert to defendants but are not added to the class fund). Because some of the factors bearing on the propriety of a settlement cannot be assessed prior to the final approval hearing, "a full fairness analysis is unnecessary at this stage." *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008).

Ultimately, a motion seeking preliminary approval of a class settlement should be granted if, "[1] the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of possible approval ...." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citing MANUAL COMPLEX LITIG., Second § 30.44). Applying these standards, the Settlement should be preliminarily approved.

1. The Proposed Settlement Is The Product Of Good Faith, Arm's Length Negotiations Mediated By An Experienced Private Mediator

"The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place

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creates a presumption that the agreement is fair." *Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997).

Here, Seattle's preeminent securities litigation mediator mediated the proposed Settlement. *See* Ni Decl., Ex. G (Peterson CV). As courts have found, "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Federal Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *see also In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable") (citation omitted).

During the mediation and follow-up, the parties fully explored the strengths and weaknesses of their respective claims and defenses, as well as the benefits of settlement. Ni Decl., ¶¶ 10-18. Negotiations focused on the highly complex and heavily disputed issues of class size and the proper measure of damages, if any. *Id.*, ¶¶ 13-16. Throughout this process, Hunichen was actively involved and informed of the negotiations. *Id.*, ¶ 17.

The all-day mediation failed, and it took Hunichen nearly a month thereafter to negotiate basic deal terms with Launch and Benson, and nearly two months after the mediation to reach a deal with Fragale, throughout which period Mr. Peterson continued to mediate and pass communications between all parties. *Id.*, ¶¶ 18-22. The fact that the initial mediation session was unsuccessful, and required lengthy further negotiations with the assistance of the mediator, supports an inference that the Settlement was the product of arm's-length negotiations. *See Id.* ¶ 17-22; *cf.*, *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *5 (S.D.N.Y. Oct. 24, 2005) ("A breakdown in settlement negotiations can tend to display the negotiation's arms-length and non-collusive nature.") (citation omitted). Indeed, the Settlement is with only some of the Defendants, the rest have rejected Settlement in favor of continued litigation. This further demonstrates the arms-length and hard-fought nature of the negotiations.

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Moreover, there are no indications of collusion or favoritism. During all settlement negotiations, Hunichen and proposed Class Counsel negotiated only on behalf of putative class members, and refused to discuss or negotiate the counterclaims against Hunichen or the third party defendants. Ni Decl., ¶ 13. While Class Counsel are entitled to seek a Fee and Expense Award, and a Service Award for Hunichen, the Agreement provides no clear sailing provision or specific amounts, and leaves such payments where they belong, in the sole discretion of the District Court. *Id.,* ¶¶ 66-67, 71-72. And as discussed in the next section, Hunichen is only entitled to his same *pro rata* share of recovery as all other Settlement Class Members.

2. The Proposed Settlement Has No Obvious Deficiencies And Does Not Improperly Grant Preferential Treatment To Class Representatives Or Segments Of The Settlement Class

The Settlement "has no obvious deficiencies [and] does not improperly grant preferential treatment to class representatives or segments of the class[.]" *Young v. Polo Retail, LLC*, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) (citation omitted). Here, the $6,037,500 recovery constitutes a significant and certain benefit for Settlement Class Members.

As a Settlement Class Member, Hunichen is entitled to receive the same *pro rata* distribution from the Net Settlement Fund in accordance with the Plan of Allocation based on the WSSA. Ni Decl., Ex. A, ¶ 26. In addition, SAFT Investors have the same formula for determining their Claims as do Public Sale Investors, such that no segment of the proposed Settlement Class is favored over another. *Id.*

3. The Stage And Complexity Of Litigation and Discovery Favor Preliminary Approval

This case has been pending for more than two years, and the parties have undergone several merits related motions that would inform the parties' opinions about the strengths and weaknesses of this case. *See* Dkt. 31 (Motion to dismiss and to compel arbitration); 44 (motion for preliminary injunction). Moreover, Defendants have collectively produced approximately 20,000 documents going to the issues of class certification and merits and answered numerous other discovery requests. Ni Decl., ¶¶ 23-24. Hunichen has responded to dozens of interrogatories and requests

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for admissions, and produced approximately 1774 pages of documents on his own behalf. Ni Decl., ¶ 25. Thus, Hunichen and Class Counsel were fully informed about the strengths and weaknesses of the case when they negotiated and agreed to the Settlement before the Court.

This is a relatively novel case, the application of state securities laws to a cryptocurrency fundraiser on the blockchain. While Hunichen is confident of success, it is not a certainty. *Cf.* Dkt. 86 (Report and Recommendation recommending a preliminary injunction due to a high likelihood of success on the merits); and Dkt. 177 (Order denying preliminary injunction). Moreover, Launch and Benson, who are contributing $6 million of the Settlement Fund, are represented by Morrison & Forrister and Davis Wright Tremaine, both formidable opponents. During settlement negotiations, they indicated they were willing and able to litigate this case on every issue, including through appeals of any novel legal issues. Ni Decl., ¶ 26. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004) (citing risk, expense, complexity, and likely duration of further litigation as factors supporting final approval of settlement); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) ("the Settlement amount of almost $ 2 million was roughly one-sixth of the potential recovery, which, given the difficulties in proving the case, is fair and adequate.")

Moreover, Courts give considerable weight to the opinion of experienced and informed counsel who support settlement. In deciding whether to approve a proposed settlement of a class action, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (citation omitted). In *OmniVision*, the court held that the recommendation of counsel weighed in favor of settlement given their familiarity with the dispute and their significant experience in securities litigation. *Id.*; *see also Int'l Brotherhood of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.,* 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *7 (C.D. Cal. July 21, 2008). Here, Class Counsel have a thorough understanding of the merits of the Action and extensive experience in securities class action litigation. Dkt. 199, Ex. 50 (*Curriculum Vitae* of Joel Ard), Ex. 51 (CV of Angus Ni), Ex. 52

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(CV of William Restis). Class Counsels' (and Hunichen's) recommendation as to the fairness and reasonableness of this Settlement warrants a presumption of reasonableness.

4. The Proposed Settlement Falls Well Within The Range Of Reasonableness And Warrants Notice And A Hearing On Final Approval

"[A]t this preliminary approval stage, the court need only 'determine whether the proposed settlement is within the range of possible approval.'" *West*, 2006 WL 1652598, at *11 (citation omitted). Hunichen and proposed Class Counsel believe the proposed $6,037,500 Settlement is an excellent result for the Settlement Class in light of all of the risks of continued litigation, and falls well within a range of what is considered fair, reasonable, and adequate.

Estimates of total damages presented by the parties during mediation discussions ranged from approximately $6 million to over $31 million US dollars. Ni. Decl., ¶ 16. The potential damages here are not guesswork, because the parties all know the amount of funds Atonomi raised from the ICO. *Id.*.

Thus, putting aside claim discounts for proceeds Class Members received if they sold their tokens, this *partial* Settlement will obtain approximately 20% of the monies (excluding interest) that Hunichen would be able to recover if he were to prevail on all claims at trial for the broadest possible class. Based on the progress of the litigation thus far, Hunichen and Class Counsel fully expect to obtain significant additional recoveries from the Non-Settling Defendants as well. Thus, the Agreement is well within the range of reasonableness. *In re Mego*, 213 F.3d at 459 (affirming approval with "roughly one-sixth of the potential recovery"); *also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving a settlement amount of 6%, after attorney's fees, of the total possible damages and noting that that was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, 2005 WL 1594389, *9 (C.D. Cal. June 10, 2005) (noting that the median amount recovered in settlement was 2.7% in 2002, 2.8% in 2003, and 2.3% in 2004); *In re Portal Software, Inc. Sec. Litig.,* 2007 U.S. Dist. LEXIS 88886, at *9 (N.D. Cal. Nov. 26, 2007) (Noting the "median percentages for all securities class actions in 2005 and 2006, which were

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approximately 3.1% and 2.4% respectively. [Citation] For securities class action settlements below $50 million, median settlements as a percentage of estimated damages were 10.5% through year end 2005 and 8.8% in 2006. [Citation]. Accordingly, the amount here favors settlement.")

B. The Proposed Settlement Class Also Meets The Prerequisites For Class Certification Under Rule 23

In addition to preliminarily reviewing fairness, "a court must make a preliminary determination that certification of the proposed class is appropriate under Rule 23(a) and one of the subsections of Rule 23(b)." *Bronzich v. Persels & Assocs., LLC*, 2012 U.S. Dist. LEXIS 127765, at *3-4 (E.D. Wash. Sep. 7, 2012).

In this case, the Settlement Class Members sought to be certified are: *all individuals who either (i) purchased ATMI tokens via a Series 1 or Series 2 Simple Agreement for Future Tokens (SAFT) with Atonomi in 2018; or (ii) purchased ATMI tokens through a "public sale" that occurred on or around June 6, 2018, except persons who properly exclude themselves from the Settlement, any person, firm, trust, corporation, or entity affiliated with Defendants, or any judge, justice, judicial officer or judicial staff of the Court.*

In the motion for class certification, filed May 07, 2021, Hunichen sought certification of a class consisting of: *All persons who purchased ATMI tokens via a Series 1 or Series 2 Simple Agreement for Future Tokens (SAFT) with Atonomi, LLC in 2018*. *See* Dkt 197 ("Class Cert Motion"), at 5:8-10.

The facts and law set forth in the Class Cert Motion apply equally to SAFT purchaser members of this proposed settlement class. As set forth below, certification of a settlement class including those who "purchased ATMI tokens through a 'public sale' that occurred on or around June 6, 2018" is also appropriate under Rule 23(a) and (b).

1. Rule 23(a)(1) Numerosity, (3) Typicality, and (4) Adequacy

As to ***Numerosity***, if a 76-member class of SAFT Investors is sufficiently numerous, a class with approximately 14,000 members is also sufficiently numerous. Rule 23(a)(1); Dkt 199, Exs. 31-32 (14,000 investors in the public sale).

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Concerning ***Typicality***, representative claims are 'typical' "if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Meyer v. Portfolio Recovery Associates*, LLC, 707 F.3d 1036, 1042 (9th Cir. 2012). "In determining whether typicality is met, the focus should be 'on the defendants' conduct and plaintiff's legal theory,' not the injury caused to the plaintiff." *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 734 (9th Cir. 2007); *Hanlon*, 150 F.3d 1011, 1020 (typicality is a "permissive standard[]").

Hunichen is "typical" of Public Sale Investors because he suffered the same loss in purchasing ATMI as all of the Public Sale investors, and brings the same legal claim they do under the WSSA for sale of unregistered securities during the same "integrated offering" that was the Atonomi ICO. Rule 23(a)(3); *see also Lozano*, 504 F.3d 718, 734; *SEC v. Telegram Grp., Inc.*, 2020 WL 1547383, at *1 (S.D.N.Y. Apr. 1, 2020) ("the 'security' was neither the [Token] Purchase Agreement nor the [Token] but ***the entire scheme*** that comprised the [Token] Purchase Agreements and the accompanying understandings and undertakings made by Telegram ….") (emphasis added).

Concerning ***Adequacy***, Hunichen and proposed Class Counsel are "adequate" to represent Public Sale Investors. Rule 23(a)(4); *see also Hanlon*, 150 F.3d at 1020 (Adequacy focuses on two issues: (1) whether named plaintiffs and their counsel have "any conflicts of interest with other class members," and (2) whether named plaintiffs and their counsel will "prosecute the action vigorously on behalf of the class.") Hunichen and proposed Class Counsel have vigorously litigated this case on behalf of Public Sale Investors since this case's inception on April 15, 2019. *See* Dkt. 1 ¶ 130 (class definition). They have now negotiated a substantial settlement on their behalf even though those same Public Sale Investors may be unable to sue due to arbitration clauses with class action waivers in the "Terms of Token Sale" that Public Sale Investors likely agreed to. *See* Dkt. 23-4 (public sale "Terms"); Dkt. 31 (Motion to Compel Arbitration). However, Settling Defendants "agree[d] to waive any rights they may have to compel arbitration… or rely on any arbitration agreement" if the Settlement is approved, thus ensuring Public Sale Investors are able to get some compensation from their failed investment in the ICO. Settlement Agreement ¶ 77.

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Like all proposed Settlement Class members, Hunichen's ATMI tokens are worthless, even though he paid 225 ETH for these tokens, valued at $191,250 at the time of his investment. Dkt. 199, Ex. 29. Hunichen has every interest in establishing Defendants' liability and obtaining the maximum possible recovery for himself and absent class members. As such, his interests are aligned with those of Public Sale Investors.

Finally, proposed Class Counsel are highly capable in the areas of securities litigation, class actions, and other complex litigation. Dkt 199, Ex. 50 (*Curriculum Vitae* of Joel Ard), Ex. 51 (CV of Angus Ni), Ex. 52 (CV of William Restis). Adequacy of representation is satisfied here.

2. Rule 23(a)(2) Commonality and Rule 23(b)(3) Predominance and Superiority

As to common questions as provided by Rule 23(a)(2) and predominance of those common questions as required by Rule 23(b)(3), the *same* factual and legal questions apply to determine whether Defendants are entitled to a safe harbor under SEC Rules 502 and 506. *See* Dkt. 197, § III.B.1 (discussing predominance); 17 C.F.R. §§ 230.502 and 230.506. This is because the SAFT Investors and Public Sale Investors all invested in the same "integrated offering" ICO. Dkt. 197, § III.B.1.v. As such, the same legal analysis applies to all Settlement Class Members regardless of which segment of the ICO they invested into. *Id.*

And settlement of Settlement Class Members' claims against the Settling Defendants is "superior" to other methods for adjudicating this controversy because, but for this Settlement, Public Sale Investors could well be barred from bringing claims due to an arbitration clause. *See* Dkt. 23-4 (public sale "Terms"); Dkt. 31 (Motion to Compel Arbitration). Nor will Public Sale Investors be practically able to pursue individual arbitration because they were each capped to investing a maximum of 1 ETH in the Atonomi ICO—too small an amount to justify litigation expenses. *See* Dkt. 199, Ex. 16, at Atonomi Responses to Rogs 3 and 4 (admitting approximately 14,000 public sale investors and 14,001.75 ETH raised). Because the likely alternative is that public sale investors will receive nothing, a certification of a Settlement class now is the "superior" method of adjudication.

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Finally, because this is a settlement class, not a litigation class, the Court need not concern itself with any issues of "manageability" with respect to Public Sale Investors, since there will be no trial on their claims against the Settling Defendants. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 558 (9th Cir. 2019) ("in deciding whether to certify a settlement-only class, 'a district court need not inquire whether the case, if tried, would present intractable management problems.'")

Because this case is prototypically certifiable, the elements of Rule 23 have been satisfied.

C. The Court Should Approve The Form Of Notice And Plan For Providing Notice To The Settlement Class

The Court should approve the form and content of the proposed Notice. *See* Ni Decl., Exs. A, ¶¶ 36-39; Ex. E (Summary Notice); Ex. F (Long Form Notice). Here, Hunichen proposes direct Summary Notice via email, and backup via First Class Mail (as available), with additional supplemental notice via publication, all linking back to a Settlement Website that contains a Long Form Notice and important case information. Segura Decl., ¶ 4-5.

Email contact information for both the 76 SAFT-investor Class Members and the approximately 14,000 Public Sale Investors is available. Ni Decl., ¶¶ 8-9. In addition to attempted direct email contact, the Administrator will use best efforts to publicize the proposed Summary Notice in various media that are calculated to reach cryptocurrency investors. Notably, JND will engage in a targeted marketing campaign on publications like Twitter, Facebook, and PR Newswire. Segura Decl., ¶ 5.

Similar notice plans have been deemed sufficient by numerous courts. *See In re Classmates*, No. C09-45RAJ, 2010 U.S. Dist. LEXIS 154943, at *10 (W.D. Wash. Apr. 19, 2010) ("Plaintiffs propose to use e-mail to notify class members of class certification, this settlement, and their obligations to submit a claim for either a credit or cash payment. E-mail notice is an excellent option here, where every class member provided an e-mail address to Classmates in the process of registering as a user. Given the large number of class members, e-mail notice also avoids the substantial expense of sending notice by mail. The court finds that Plaintiffs' notice procedure

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satisfies the requirements of Rule 23(c)(2)(B)"); *Ebarle v. Lifelock, Inc.*, 2016 U.S. Dist. LEXIS 128279, at *9 (N.D. Cal. Sep. 20, 2016) (approving email notice, with backup mailed notice, and supplemental notice via publication); *In re Netflix Privacy Litig.*, 2012 U.S. Dist. LEXIS 93284, at *12-14 (N.D. Cal. July 5, 2012) (same); *Evans v. Linden Research, Inc.,* 2013 U.S. Dist. LEXIS 153725, at *19-20 (N.D. Cal. Oct. 25, 2013) (same).[6]

The content of the Notice should similarly be approved. The Notice is written in plain language and features a question-and-answer format that clearly sets out the relevant information and answers most questions Settlement Class Members will have. Consistent with Rules 23(c)(2)(B) and 23(e)(1), the Notice objectively and neutrally apprises the nature of the Action, the definition of Settlement Class Members, the claims and issues, that the Court will exclude any Settlement Class Member who requests exclusion (and sets forth the procedures and deadlines for doing so), and the binding effect of a class judgment on Settlement Class Members under Rule 23(c)(3), among other disclosures.

Additionally, the Notice discloses the date, time, and location of the Final Approval Hearing and the procedures and deadlines for the submission of Proof of Claim and objections to any aspect of the Settlement, any Fee and Expense Award to Class Counsel or Service Award to Hunichen. These disclosures are complete and should be approved by the Court. *See In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 175 (E.D. Pa. 2000) (approving notice that stated

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[6] Under Rule 23(c), the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(c)(2)(B). "The notice may be by one or more of the following: United States mail, *electronic means*, or other appropriate means." *Id.* (emphasis added). "The class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice" *Chinitz v. Intero Real Estate Servs.*, 2020 U.S. Dist. LEXIS 224999, at *4-5 (N.D. Cal. Dec. 1, 2020) citing *Officers for Justice v. San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982). Individual notice must be sent to class members "whose names and addresses may be ascertained through reasonable effort." *Id.* quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974)). "If the names and addresses of class members cannot be determined by reasonable efforts, notice by publication is sufficient to satisfy the requirements of the due process clause and Rule 23." Id. The Federal Judicial Center has concluded that a notice plan that reaches at least 70% of the class is reasonable. *Id.* citing Fed. Jud. Ctr., *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 3 (2010), https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf. District courts have "broad power and discretion vested in them by [Rule 23]" in determining the parameters of appropriate class notice. *Id.,* citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979).

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the settlement terms and plan of allocation, estimated potential recovery at trial, revealed maximum request for attorney's fees and identified contact information of relevant attorneys).

D. The Court Should Approve JND As Administrator and Signature Bank as Escrow Agent

The proposed settlement Administrator is JND Legal Administration, an experienced and diligent settlement and claims administrator. *See* Segura Decl., ¶ 3. Class Counsel distributed a request for proposal ("RFP") and received bids from three potential settlement administrators. Ni Decl., ¶¶ 27-29. Given the unique characteristics of the Settlement Class Members, the RFP specifically requested that in addition to all normal and customary services, proposals should provide information on the settlement administrator's ability to:

- Conduct individual notice entirely electronically;
- Run targeted online ads, like on Facebook and Twitter;
- Allow for claims forms to be completed entirely online with electronic signatures;
- Provide an option for Settlement Class Members to receive electronic payment; and
- Work with Settlement Class Members residing outside of the United States.

Ni Decl., ¶ 28.

The estimates for the bid proposals received ranged from $120,000 to $270,000, with one bid only including time & materials rates and no cost estimates. *Id.*, ¶ 30.

Counsel ultimately selected JND Legal Administration based on a combination of their estimated costs and fees and strong reputation for competently administering complex settlements. *Id.*, ¶ 31. JND's ability to allow Claims to be completed electronically is particularly useful here, as Settlement Class Members invested in the ICO online. *Id.*, ¶ 32.

JND's estimated costs and fees are $120,000. With the lowest bid of less than 2% of the Settlement Amount, and great experience as a settlement administrator, Class Counsel believes the costs and fees are reasonable in relation to the value of the Settlement. *See Id.*, ¶ 33. The costs and fees will be paid out of the Net Settlement Fund. *See id.*, Ex. A, ¶ 24(A).

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Similarly, the Court should approve Signature Bank as Escrow Agent to handle custody of the Settlement Fund. *See* Ni Decl., Ex. A, ¶¶10-16 (discussing duties of Escrow Agent). JND routinely works with Signature Bank to handle the administration of settlements such as this one. Segura Decl., ¶¶ 10.

E. The Court Should Approve The Proposed Schedule And Set A Final Approval Hearing

In connection with preliminary approval of the Settlement, the Court must set a Final Approval Hearing date, dates for mailing and publication of the Notice and Summary Notice, and deadlines for submitting claims or for objecting to the Settlement. Hunichen respectfully proposes the following schedule for the Court's consideration, as set forth in the proposed Preliminary Approval Order:

Event	**Time For Compliance**
Deadline for serving CAFA Notices pursuant to 28 U.S.C. § 1715	No later than 10 days after Preliminary Approval Order
Deadline to launch Settlement Website	No later than 20 days after entry of Preliminary Approval Order
Deadline for completing initial Notice	Commence no later than 20 days after Preliminary Approval Order
Deadline for Class Counsel's motion for a Fee and Expense Award and Service Award	No later than 21 days after Preliminary Approval Order
Deadline for Class Counsel's motion for a Fee and Expense Award and Service Award to be posted on Settlement Website	No later than 30 days after Preliminary Approval Order
Deadline for Requests for Exclusion, Objections, and submission of Proofs of Claim	No later than 90 days after Preliminary Approval Order
Deadline for filing objections received with the Court, and for the Administrator to attest to compliance with Notice Plan	No later than 95 days after Preliminary Approval Order
Deadline for Class Counsel's motion for final approval of the proposed Settlement	No later than 110 days after Preliminary Approval Order
Deadline to file Notice of Intention to Appear at Final Approval Hearing	No later than 120 days after Preliminary Approval Order
Final Approval Hearing	Approximately 130 days from Preliminary Approval Order.

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IV. Conclusion

For the above reasons, the Court should preliminarily approve the partial Settlement, certify the Settlement Class Members, appoint Hunichen as Representative and the undersigned as Class Counsel, and appoint the Administrator and Escrow Agent to disseminate of Notice.

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June 3, 2021.

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