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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

In re TINTRI, INC. SECURITIES LITIGATION	Lead Case No. 17-CIV-04312 (Consolidated with Nos. 17-CIV-04321; 17-CIV-04618; and 20-CIV-00980)
This Document Relates To: ALL ACTIONS.	CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION Date: August 22, 2024 Time: 9:00 a.m. Judge: Honorable Susan L. Greenberg Dept.: 3 Date Action Filed: 09/20/17

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Plaintiffs Rustam Mustafin, Henrik Thørring, and Laurence Clayton (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for: (i) final approval of the proposed settlement of this securities class action on the terms set forth in the Stipulation of Settlement dated July 17, 2023 (the "Stipulation" or "Settlement"); and (ii) approval of the proposed plan of allocation of the Net Settlement Fund (the "Plan of Allocation").[1]

I. INTRODUCTION

Subject to Court approval, Plaintiffs have agreed to settle all claims against Defendants in exchange for a non-reversionary cash payment of $7,000,000 for the benefit of the Class.[2] The Settlement is the culmination of vigorous litigation, and is the product of arm's-length negotiations between the Parties[3] with the substantial assistance of the Honorable Layn R. Phillips (Ret.), one of the nation's most well-respected and effective mediators of securities class actions. Lead Counsel believe that the Settlement represents a highly favorable result for the Class and warrants this Court's approval.

As further discussed below, the Settlement should be presumed fair because it was reached through arm's-length bargaining and Lead Counsel's investigation and prosecution of this case ensured that Plaintiffs entered into the Settlement on a fully informed basis. Further, Lead Counsel are experienced in securities class action litigation and there have been no objections to the Settlement or Plan of Allocation to date.

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[1] All capitalized terms not otherwise defined shall have the same meaning as set forth in the Stipulation, or in the Joint Declaration of James I. Jaconette and Yury A. Kolesnikov in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Joint Declaration"), filed with the Court on July 28, 2023. All citations to "¶__" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and Exhibits to, the Joint Declaration.

[2] "Class" and "Class Members" means, subject to certain exclusions set forth in paragraph 1.5 of the Stipulation, all Persons and entities who purchased or otherwise acquired Tintri common stock pursuant or traceable to the Registration Statement and Prospectus issued in connection with Tintri's June 30, 2017 Initial Public Offering (*i.e.*, between June 30, 2017 and December 26, 2017, inclusive).

[3] As used herein, the term "Parties" means Plaintiffs, on behalf of themselves and the Class, and defendants Tintri, Inc. ("Tintri" or the "Company"), Ken Klein, Ian Halifax, John Bolger, Charles Giancarlo, Adam Grosser, Kieran Harty, Harvey Jones, Christopher Schaepe, and Peter Sonsini (collectively, the "Individual Defendants" and, together with Tintri, the "Tintri Defendants"), Morgan Stanley & Co. LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, KeyBanc Capital Markets Inc., Needham & Company, LLC, Piper Jaffray & Co. (n/k/a Piper Sandler Companies), Raymond James & Associates, Inc., and William Blair & Company, L.L.C. (collectively, the "Underwriter Defendants" and, together with the Tintri Defendants, "Defendants").

Moreover, there is nothing to rebut the presumption of fairness. While Plaintiffs and Lead Counsel believe that the litigation has substantial merit and that they would have prevailed at trial, they also understood that no litigation is risk-free. In making the decision to resolve the case, Plaintiffs and Lead Counsel considered, *inter alia*, the numerous risks presented by the arguments Defendants made during the case and in settlement negotiations, as well as the risks to establishing liability and damages at trial. At summary judgment or trial, the trier of fact could have sided with Defendants on some or all of the determinative issues, leaving the Class with little or no recovery.

Lead Counsel, who are well-respected and experienced in prosecuting shareholder class actions, have concluded that the Settlement is a highly favorable result and in the best interest of the Class. This conclusion is based on, among other things, the substantial recovery obtained when weighed against the significant risk, expense, and delay presented in continuing this litigation through trial and probable appeal; a complete analysis of the evidence obtained; past experience in litigating complex actions similar to this Action; and the serious disputes among the Parties on both merits and damages issues.

For these reasons, as well as those set forth below and in the previously-filed Joint Declaration, Plaintiffs respectfully request that the Court grant final approval to the Settlement and approve the Plan of Allocation as fair, reasonable, and adequate to Class Members.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND OF THE LITIGATION

The Joint Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: (i) the factual background and procedural history of the litigation, and the nature of the claims asserted; (ii) Plaintiffs' efforts on behalf of the Class; (iii) the negotiations leading to the Settlement; (iv) the risks and uncertainties of continued litigation; and (v) why the Settlement is in the best interests of the Class.

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[4] This memorandum focuses primarily upon the legal standards for approving the Settlement, and evaluating the Plan of Allocation. A separate memorandum is being submitted herewith in support of the motion for an award of attorneys' fees and expenses.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Standards Governing Final Approval of Class Action Settlements

"A class action shall not be dismissed, settled, or compromised without the approval of the court . . . ." Cal. Civ. Code §1781(f). When assessing a proposed class action settlement, the court's inquiry centers on whether the settlement is "fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996).[5] The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id*.

Accordingly, the Court need not inquire into the result that might have been obtained at trial. *See Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 245 (2001), *overruled on other grounds by Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018). A review of the likely rewards of settlement and the risks and costs of continued litigation suffices. *See N. Cnty. Contractor's Ass'n v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1091 (1994) (court must determine if settlement is in the "ballpark"). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).[6] Further, longstanding public policy strongly favors settlements. *See, e.g.*, *Hamilton v. Oakland Sch. Dist. of Alameda Cnty.*, 219 Cal. 322, 329 (1933) ("[I]t is the policy of the law to discourage litigation and to favor compromises."). This policy becomes an "overriding public interest" in class actions. *Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1608 (1991).

In determining whether a settlement is fair, adequate, and reasonable, there is a "presumption of fairness . . . where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in

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[5] Unless otherwise noted, all emphasis is added and internal citations are omitted.

[6] California courts also look to the standards developed by federal courts in reviewing and approving class action settlements. *See, e.g.*, *La Sala v. Am. Sav. & Loan Ass'n*, 5 Cal. 3d 864, 872 (1971).

similar litigation; and (4) the percentage of objectors is small." *Dunk*, 48 Cal. App. 4th at 1802; *see also Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010) (same).

The court in *Dunk* set forth additional factors to be considered along with this presumption, including: (1) the settlement amount; (2) the risks of continued litigation; (3) the stage of proceedings; (4) the complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel; and (6) the reaction of class members. *Dunk*, 48 Cal. App. 4th at 1801. As discussed below, the Settlement is entitled to a presumption of fairness, and easily satisfies the additional *Dunk* factors.

B. The Settlement Should Be Accorded a Presumption of Fairness

The Settlement is presumptively fair for at least four reasons.

First, the Settlement is the result of arm's-length negotiations. On August 6, 2019, Plaintiffs and the Tintri Defendants participated in a full-day mediation with Michelle Yoshida, Esq., in an effort to settle both this Action and a related federal action. *See* ¶26. The Parties did not reach an agreement at that mediation. *See id.* More than three years passed before the Parties mediated again. On October 11, 2022, the Parties attended a full-day mediation with Judge Phillips. Although the Parties did not reach an agreement at the second mediation, Judge Phillips issued a "mediator's proposal" on October 14, 2022, which the Parties accepted. *See* ¶27.[7]

The arm's-length nature of the settlement negotiations is evidenced by both the Parties' unsuccessful attempt to settle at the first mediation (which also indicated that Plaintiffs were unwilling to take less than they believed the case was worth in order to gain a quick settlement), and the fact that the Settlement stemmed from a mediator's recommendation. *See Roberti v. OSI Sys. Inc.*, 2015 WL 8329916, at *3 (C.D. Cal. Dec. 8, 2015) (finding settlement "non-collusive" where, *inter alia*, "[t]he parties eventually agreed to settle the action following Judge Phillips' double-blind Mediator's Recommendation"). Moreover, the involvement of *two* mediators with substantial experience mediating complex securities class actions shows that the Settlement is fair and was collusion free. *See*

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[7] Prior to both mediations, the parties exchanged and provided to the mediator detailed written mediation briefs and supporting materials concerning the facts of the case, liability, and damages. *See* ¶25(m).

In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig., 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding a settlement fair where the parties engaged in "arm's length negotiations," including mediation before "retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *Todd v. STAAR Surgical Co.*, 2017 WL 4877417, at *2 (C.D. Cal. Oct. 24, 2017) ("The Proposed Settlement is the outcome of an arms-length negotiation conducted with the help of experienced mediator Michelle Yoshida of Phillips ADR.").

Second, the Parties engaged in extensive pretrial investigation and discovery and other proceedings to evaluate the strengths and weaknesses of the claims and defenses, and therefore entered into the Settlement on a fully informed basis. Among other things, Plaintiffs and their counsel:

- conducted an extensive factual investigation of the events underlying Tintri's June 30, 2017 IPO, reviewing and analyzing the representations made by the Company in the Registration Statement as well as subsequent U.S. Securities and Exchange Commission ("SEC") filings, and reviewing industry and securities analyst reports and comprehensive news reports, press releases, and other media files concerning Tintri;

- conducted extensive legal research into the claims against Defendants and drafted and filed individual complaints and the Consolidated Complaint;

- successfully briefed motions to remand in federal court;

- briefed and argued the implications of *Wong v. Restoration Robotics, Inc., et al.*, No. 18CIV02609, Slip Op. (Cal. Super. Ct., San Mateo Cnty. Sept. 1, 2020) on Defendants' then-pending motion to dismiss on *forum non conveniens* grounds as requested by the Court's September 21, 2020 order;

- briefed, argued, and successfully defeated Tintri's motion to dismiss on the basis of *forum non conveniens*;

- briefed, argued, and successfully defeated the Tintri Defendants' and the Underwriter Defendants' demurrers to Plaintiffs' §§11 and 15 claims;

- drafted and propounded RFPs to all Defendants;

- met and conferred extensively with Defendants to resolve disputes about the scope of Defendants' search for and production of documents in response to the document requests, the custodians from whom documents would be produced, the relevant time period, and the search terms to be utilized by Defendants to identify and produce relevant and responsive documents;

- obtained, searched, reviewed, and analyzed over 112,000 pages of documents produced by Defendants;

- retained and consulted with a damages consultant regarding the calculation of damages under the Securities Act of 1933 ("Securities Act");
- researched, moved for, and fully briefed Plaintiffs' motion for class certification, which was pending at the time the Settlement was reached;
- served responses and objections to Tintri's RFPs and made multiple productions of documents in response thereto;
- Plaintiffs prepared for and sat for deposition; and
- analyzed, briefed, and presented evidence in support of the claims of the Class at two separate full-day mediations. ¶¶3, 6-10, 16-23, 25-27.

Given these substantial efforts, there can be no doubt that Plaintiffs and their counsel were fully informed of the strengths and weaknesses of the claims asserted, the defenses raised, and the risks of continued litigation when they negotiated the Settlement.

Third, although the Court must independently review the Settlement, the judgment of experienced counsel regarding the Settlement is entitled to great weight and supports a presumption of fairness. *See Nat'l Rural*, 221 F.R.D. at 528 ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *Dunk*, 48 Cal. App. 4th at 1802. Here, Plaintiffs' Counsel have extensive experience and expertise in the prosecution of securities class actions in federal and state courts throughout the country.[8] Plaintiffs' Counsel fully support the Settlement, and believe that the substantial and certain recovery of $7,000,000 is a highly favorable result for the Class when weighed against the uncertainty and substantial risk and expense of continuing this litigation through trial and appeals. ¶¶30-39. The fact that qualified and well-informed counsel endorse the Settlement as being fair, adequate, and reasonable favors this Court's approval of the Settlement.

[8] *See* Plaintiffs' Counsel's firm résumés, which are attached to the concurrently filed: (i) Declaration of James I. Jaconette Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses, Ex. D; (ii) Declaration of Francis A. Bottini, Jr. Filed on Behalf of Bottini & Bottini, Inc. in Support of Application for Award of Attorneys' Fees and Expenses, Ex. E; (iii) Declaration of Kara M. Wolke Filed on Behalf of Glancy Prongay & Murray LLP in Support of Application for Award of Attorneys' Fees and Expenses, Ex. E; and (iv) Declaration of Christina D. Saler Filed on Behalf of Cohen Milstein Sellers & Toll PLLC in Support of Application for Award of Attorneys' Fees and Expenses, Ex. E; and are collectively referred to herein as "Plaintiffs' Counsel's Firm Résumés."

Finally, the reaction of the Class to the Settlement supports a presumption of fairness. Pursuant to the Court's Amended Order Preliminarily Approving Settlement and Providing for Notice ("Notice Order"), more than 7,800 copies of the Notice of Pendency and Proposed Settlement of Class Action ("Notice") were sent to potential Class Members and their nominees. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), ¶11, submitted herewith. The Notice described the nature of the litigation, the terms of the Settlement, and the manner in which the Net Settlement Fund will be allocated among Class Members. The Notice also advised Class Members of their right to object and the procedures and deadline for objecting to the Settlement, the Plan of Allocation, and/or counsel's request for an award of attorneys' fees and expenses. In addition, the Summary Notice was transmitted over *Business Wire* and published in *The Wall Street Journal* on January 26, 2024. *Id.*, ¶12. The Notice, Stipulation, Notice Order, and other relevant documents and information, including all deadlines, have been made publicly available on a case-dedicated website for the Settlement, www.TintriSecuritiesLitigation.com. *Id.*, ¶14.

Although Class Members have until July 25, 2024 to object, or August 1, 2024 to exclude themselves from the Class, Lead Counsel are unaware of any objections to the Settlement or the Plan of Allocation as of the date hereof, and no requests for exclusion from the Class have been received. *See id*., ¶16. The lack of objections by the Class to date supports a presumption of fairness.[9] *See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1153 (2000) (one factor that "lead[s] to a presumption the settlement was fair" is that only "a small percentage of objectors" came forward); *Nat'l Rural*, 221 F.R.D. at 529 (small number of objections raises strong presumption that settlement is fair).

For all the forgoing reasons, Plaintiffs respectfully submit that the Settlement is entitled to a presumption of fairness.

C. The Settlement Readily Satisfies the Additional *Dunk* Factors

Each of the additional *Dunk* factors supports final approval.

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[9] If any objections are received, Plaintiffs will address them in their reply memorandum.

1. The Settlement Amount Favors Approval

The Defendants and/or their insurers have paid $7,000,000 in cash into the Escrow Account for the benefit of the Class. This amount has been accruing interest since deposit, and if the Settlement is approved by the Court there is no right of reversion (*i.e.*, it is not claims made, and no money will revert to the Defendants regardless of the number of claims made; rather, the entire Net Settlement Fund will be distributed to Authorized Claimants). This is a highly favorable result for the Class, and it falls comfortably within the range of court-approved settlements in securities class actions such as this one. Indeed, the Settlement Amount equates to approximately 32% of the estimated recoverable damages (without the excluded entities, who are not part of the Settlement, and excluding pre-judgment interest), which is multiples of the 1.8% median percentage recovery in securities class actions in 2023,[10] and well above the 7.5% median settlement as a percentage of estimated damages courts have approved in cases only involving §§11 and/or 12(a)(2) Securities Act claims. *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements – 2023 Review and Analysis* at 8, Fig. 6 (Cornerstone Research 2024) (analyzing 84 class action settlements asserting §§11 and/or 12(a)(2) claims filed between 2014 and 2023, and finding the median settlement as a percentage of "simplified statutory damages" was 7.5%). When viewed in this context, the percentage recovery achieved here is fair and reasonable, even putting aside the substantial risks of establishing liability and damages, and the risk of an adverse ruling on the fully briefed motion for class certification that could have greatly limited, or even eliminated, any potential recovery.[11]

[10] *See* Edward Flores and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review* at 26, Fig. 22 (NERA Jan. 23, 2024).

[11] *See also Gudimetla v. Ambow Educ. Holding*, 2015 WL 12752443, at *5 (C.D. Cal. Mar. 16, 2015) (approving securities fraud class action settlement where recovery of $1.5 million was 5.6% of $26.7 million in estimated damages); *In re LJ Int'l, Inc. Sec. Litig.*, 2009 WL 10669955, at *4 (C.D. Cal. Oct. 19, 2009) (approving securities fraud class action settlement where $2 million recovery was 4.5% of $44 million maximum possible recovery); *IBEW 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving securities fraud class action settlement where recovery was 3.5% of maximum damages and noting "[t]his amount is within the median recovery in securities class actions settled in the last few years").

2. The Substantial Risks of Continued Litigation Favor Final Approval

In assessing whether the proposed Settlement is fair, reasonable, and adequate, the Court "must balance the risks of continued litigation, including the strengths and weaknesses of plaintiff's case, against the benefits afforded to class members, including the immediacy and certainty of [a] recovery." *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 831 (N.D. Cal. 2017). Here, Plaintiffs' case against Defendants involved substantial risks, both procedurally and in terms of establishing liability and damages.

a. Risks Related to Class Certification

At the time of Settlement, Plaintiffs' motion for class certification was fully briefed, but not yet decided. In their opposition to Plaintiffs' motion, Defendants asserted that Plaintiffs were inadequate and suffered from unique defenses. Defendants further argued that Plaintiffs' proposed class definition was overbroad and, if a class was certified, it should be narrowed by the Court. While Plaintiffs believed they had strong counterarguments in support of class certification, there is no doubt that there existed a material risk that the Court could deny class certification, or certify a class on terms other than those proposed by the Plaintiffs. Such a result would have essentially ended the case, or substantially reduced damages.

b. Risks Related to Proving Liability

Section 11 of the Securities Act creates a private remedy for any purchase of a security if "any part of the registration statement . . . contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(a). Plaintiffs believe they stood a good chance of establishing that the Registration Statement and Prospectus (collectively, "Registration Statement") issued in connection with the initial public offering ("IPO") included material misstatements and omissions. Specifically, Plaintiffs allege that Tintri's Registration Statement contained false and misleading statements and omitted material information concerning growing dissatisfaction and attrition among the Company's employees in the months leading up to the IPO, particularly among Tintri's engineers and sales representatives. ¶12.

Defendants, however, consistently and aggressively took the position that Plaintiffs could not prove Defendants made any materially false or misleading statements in the Registration Statement, and that there was no duty to disclose any of the allegedly omitted information. *See* Tintri and Underwriter Defendants' Demurrer, filed on January 19, 2021. Defendants also argued that all of the allegedly omitted information was the subject of detailed and ample disclosures and warnings in the Registration Statement. *See id*. While Plaintiffs would vigorously dispute Defendants' arguments, victory was by no means assured. As one court has observed:

> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

State of W. Va. v. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *see also Bellows v. NCO Fin. Sys., Inc.*, 2008 WL 5458986, at *7 (S.D. Cal. Dec. 10, 2008) ("[W]hile Class Counsel believe strongly in the merit of the class claims, they also recognize that any case encompasses risks and that settlement of contested cases is preferred in this circuit. Indeed, even if Plaintiff were to prevail at trial, risks to the class remain.") (citing *Chas. Pfizer*, 314 F. Supp. at 743-44); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *7 (C.D. Cal. June 10, 2005) ("Also favoring approval of the Settlement is the knowledge that, while Plaintiffs are confident of the strength of their case, it is imprudent to presume ultimate success at trial and thereafter.") (citing *Chas. Pfizer*, 314 F. Supp. at 743-44).

Moreover, this case presented unique obstacles to building a factual record and establishing liability. It has been approximately five years since Tintri has been a going concern. As a result, all of Tintri's former employees have moved on to different opportunities. Depositions beyond the named parties would consist of time-consuming and difficult third-party efforts, requiring locating and then serving these individuals years after the relevant events. Further, it has been approximately seven years since the events at issue. Assuming Plaintiffs were able to locate and depose Tintri's former employees, they would be reliant on these witnesses' ability to interpret documents and hamstrung by faded memories from events many years ago. *See* ¶34. Put simply, *proving* violations of the federal

securities laws is extremely hard, and it would be especially hard in this case. *See In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants following lengthy trial).

c. Risks Relating to Establishing Causation and Damages

Although Plaintiffs were confident that they could establish damages assuming a finding of liability, Plaintiffs faced a risk that the Court or jury would substantially reduce or even eliminate damages. Under §11(e) of the Securities Act, 15 U.S.C. §77k(e), a defendant can reduce or eliminate damages through a showing that the false or misleading statements or omissions were not the cause, in whole or in part, of the loss sustained by the class. Here, Defendants were likely to argue "negative causation" at both summary judgment and trial, and that cognizable class-wide damages would be a small fraction of the damages claimed by Plaintiffs. ¶33. While Plaintiffs believe they had the stronger argument, the issue still presented very real risks. *See* C*hristine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *13 (S.D.N.Y. Oct. 16, 2019) ("While Plaintiffs proceeded as though they had the better arguments, the risk remained that Defendants could have defeated loss causation, or significantly diminished damages, for the one remaining alleged corrective disclosure date."); *see also Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (overturning jury verdict of $81 million for plaintiffs against an accounting firm on loss causation grounds and entering judgment for defendants).

Moreover, the Parties' respective experts would offer sharply divergent testimony on damages at both summary judgment and trial, thus reducing the determination of this element to a "battle of the experts." *See In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) (fact that "trial would likely involve a confusing 'battle of the experts' over damages" supported approval of settlement). Plaintiffs faced a substantial risk that the fact finder would credit Defendants' contentions that damages were not linked to the misstatements in the Registration Statement, or that damages were a fraction of the amount Plaintiffs proffered. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have

been caused by actionable, rather than the myriad nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

Even if Plaintiffs were to obtain 100% of their damages, the risks would not end there. There are numerous cases in which a successful verdict has been overturned either by motion after trial or on appeal. In *In re Apple Comput. Sec. Litig.*, 1991 WL 238298, at *1 (N.D. Cal. Sept. 6, 1991), for example, the jury rendered a verdict for plaintiffs after an extended trial. Based upon the jury's findings, recoverable damages would have exceeded $100 million. The court, however, overturned the verdict, entered judgment for the individual defendants, and ordered a new trial with respect to the corporate defendant. *See also Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 433 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction under *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011)); *In re BankAtlantic Bancorp, Inc.*, 2011 WL 1585605, at *20 (S.D. Fla. Apr. 25, 2011) (after plaintiffs' jury verdict, court granted defendants' motion for judgment as a matter of law and entered judgment for defendants) (finding trial court erred, but defendants nevertheless entitled to judgment as a matter of law based on lack of loss causation), *aff'd on other grounds*, 688 F.3d 713 (11th Cir. 2012).

In sum, the risks posed by continued litigation were substantial, and they would be present at every step of the litigation if it were to continue. Accordingly, this factor weighs in favor of approving the Settlement. *See In re Mfrs. Life Ins. Co. Premium Litig.*, 1998 WL 1993385, at *5 (S.D. Cal. Dec. 21, 1998) ("[E]ven if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent – there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings.").

3. The Stage of Proceedings and Available Evidence Gave the Parties Sufficient Information to Negotiate an Adequate and Reasonable Settlement

This factor focuses on whether the parties had sufficient information to conduct an informed negotiation for a settlement that adequately reflects the merits of the case. When applying this factor,

> [t]he question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it.

In re OCA, Inc. Sec. & Deriv. Litig., 2009 WL 512081, at *12 (E.D. La. Mar. 2, 2009). Moreover, the trial court "may legitimately presume that counsel's judgment [that it has the information necessary to evaluate a settlement] is reliable." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981).

As detailed above and in the Joint Declaration, by the time the Parties reached the Settlement, Plaintiffs and their counsel had sufficiently investigated and researched the merits of their claims and Defendants' potential defenses to determine that the terms of Settlement are fair, reasonable, and adequate. *See* III.B *supra*; *see also* ¶¶3-7, 9-14, 16-23, 25-27. Counsel's reasoned judgment was obtained after more than six years of litigation, during which time they, *inter alia*, fully investigated the factual and legal underpinnings of the Action, filed multiple detailed complaints, engaged in significant motion practice and discovery, and participated in two full-day mediation sessions, prior to which the Parties drafted and exchanged mediation briefs addressing issues related to liability and damages. *See id*. Furthermore, the merits of the Parties' respective positions were extensively debated during the mediation sessions, which further highlighted the legal and factual issues in dispute. The knowledge and insight gained through these activities provided Plaintiffs' Counsel with sufficient information to evaluate the strengths and weaknesses of the Class's claims and Defendants' defenses, as well as the likelihood of obtaining a larger recovery from Defendants had the Action continued. ¶¶30-39.

4. Balancing the Certainty of an Immediate Recovery Against the Expense and Duration of Protracted Litigation, Trial, and Appeal Favors Settlement

The immediacy and certainty of a recovery balanced against the complexity, expense, and duration of continued litigation is another factor for the Court to balance in determining whether the Settlement is fair, adequate, and reasonable. *See Wershba*, 91 Cal. App. 4th at 244-45; *Dunk*, 48 Cal. App. 4th at 1801. "[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013).

In contrast to the risks posed by further litigation, approval of the Settlement will mean a significant and prompt recovery for Class Members. If not for this Settlement, the case would have continued through the completion of class certification, document and deposition discovery, expert discovery, summary judgment, trial, and likely appeals. A trial would have occupied a number of attorneys for many weeks and would have required substantial and costly expert testimony on both sides. Furthermore, a judgment favorable to the Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and further appeals, which could prolong the case for several more years. *See, e.g.*, *Warner Commc'ns*, 618 F. Supp. at 745 (delay from appeals is a factor to be considered). Therefore, delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Class Members to wait many more years for any recovery, further reducing its value. Settlement of this Action ensures an immediate recovery and eliminates the risk of no recovery at all. *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 373-74 (S.D. Ohio 2006) (explaining "the difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses, and a possible delay in recovery due to the appellate process, provide justifications for this Court's approval of the proposed Settlement").

5. The Recommendation of Experienced Counsel Favor Approval of the Settlement

In determining whether a given settlement is reasonable, the opinion of experienced counsel is also entitled to considerable weight. *See Dunk*, 48 Cal. App. 4th at 1801 (among the factors to be considered is "the experience and views of counsel"); *O'Brien v. Brain Rsch. Labs, LLC*, 2012 WL 3242365, at *12 (D.N.J. Aug. 9, 2012) ("The opinion of experienced counsel, based upon their familiarity with the facts and law and understanding of the strengths and weaknesses of their positions, is entitled to considerable weight and favors finding that the settlement is fair.").

Here, Plaintiffs' Counsel, all of whom are experienced class action securities litigators, believe that in light of all the aforementioned litigation risks, the Settlement represents an exceptional result for the Class. ¶¶37-39 & Plaintiffs' Counsel's Firm Résumés. In addition, as discussed above, this Settlement was only achieved after arm's-length settlement negotiations before a nationally recognized

mediator who has significant experience in resolving complicated securities class actions. ¶27. This factor strongly supports the fairness and reasonableness of the Settlement.

6. The Reaction of the Class Supports Approval of the Settlement

A court may also consider the reaction of the class in determining whether to approve a settlement. *Dunk*, 48 Cal. App. 4th at 1801. "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class [action] settlement . . . are favorable to the class members." *In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).

To date, no objections have been filed on this Court's docket, or received by Plaintiffs' Counsel. Thus, the reaction of the Class weighs heavily in favor of approving the Settlement. *See Dunk*, 48 Cal. App. 4th at 1802 (one of the factors leading to a presumption that the settlement is fair, reasonable, and adequate is that "the percentage of objectors is small"); *Nat'l Rural.*, 221 F.R.D. at 529 (absence of large number of objections raises a strong presumption settlement is fair to the class).

Each of the above factors fully supports a finding that the Settlement is fair, reasonable, and adequate. Accordingly, Plaintiffs respectfully request that the Court approve the Settlement.

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

Plaintiffs also seek approval of the Plan of Allocation. The Plan of Allocation is set forth in full in the Notice sent to potential Class Members. *See* Murray Decl., Ex. A (Notice at 4). Assessment of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). An allocation formula "need only have a reasonable, rational basis, particularly if recommended by experienced and competent" class counsel. *See, e.g.*, *In re Zynga Inc. Sec. Litig.*, 2015 WL 6471171, at *12 (N.D. Cal. Oct. 27, 2015). No objections to the Plan of Allocation have been filed to date.

The Plan of Allocation provides an equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Proof of Claim. The Plan of Allocation was developed by Lead Counsel with the assistance of their damages consultant, reflects an assessment of the damages

that could have been recovered at trial, and follows the statutory framework for calculating damages under §11(e) of the Securities Act. Accordingly, Plaintiffs respectfully submit that the Plan of Allocation is a fair and reasonable method for allocating the Net Settlement Fund among the members of the Class.

V. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE CLASS

In its Notice Order, the Court preliminarily certified the Class for settlement purposes, thereby recognizing that Plaintiffs had satisfied the requirements of California Code of Civil Procedure §382. Notice Order at 2-3. Since the Court's Notice Order, nothing has changed to disturb the Court's conclusion that class treatment is appropriate, and there is good reason and just cause to finally certify the Class, for settlement purposes only, under California Code of Civil Procedure §382.

VI. CONCLUSION

For all of the reasons set forth above and in the Joint Declaration, Plaintiffs respectfully request that the Court grant final approval of the Settlement and Plan of Allocation.

DATED: July 11, 2024

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on July 11, 2024, declarant caused to be served the foregoing document by email delivery to the email addresses listed below:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 11, 2024, at San Diego, California.

Teresa Holindrake