UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WATERFORD TOWNSHIP POLICE & FIRE RETIREMENT SYSTEM, Individually and On Behalf Of All Others Similarly Situated, Plaintiff, vs. SMITHTOWN BANCORP, INC., et al., Defendants.	Civil Action No. 1:10-cv-00864-SLT-RER (**Consolidated**) CLASS ACTION LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF DISTRIBUTION

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SECONDARY AUTHORITY

I. PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs Waterford Township Police & Fire Retirement System and Michael L. Cox (collectively, "Lead Plaintiffs"), on behalf of themselves and the Class, respectfully submit this memorandum of law in support of their motion for final approval of the settlement of the above-captioned consolidated securities class action (the "Action") and approval of the Plan of Distribution. The terms of the settlement are set forth in the Stipulation and Agreement of Settlement dated January 9, 2015 ("Stipulation" or "Settlement"), which was previously filed with the Court. ECF No. 80.[1] The Settlement provides for the payment of $1,950,000 in cash (the "Settlement Amount") for the benefit of the Class in exchange for the dismissal of all claims brought in the Action against the Defendants, and is the product of Lead Plaintiffs' vigorous efforts in prosecuting the Action, followed by arm's-length settlement negotiations among experienced and knowledgeable counsel, including a formal mediation session conducted by a nationally-recognized, neutral mediator.

The Settlement represents a very good result for the Class in light of the risks Lead Plaintiffs faced, and would have faced, had the litigation continued, including: (1) the risk that the Defendants would prevail on their pending motion for interlocutory appeal of the Court's order on the motion to dismiss ("Motion for Interlocutory Appeal"); (2) the possibility that the Class Period would be shortened; and (3) the possibility that protracted and contested litigation, including trial and likely appeals, could ultimately lead to no recovery, or a far smaller recovery, against the Defendants.

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulation and the Declaration of Samuel H. Rudman in Support of Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Distribution and Award of Attorneys' Fees and Expenses dated August 24, 2015 ("Rudman Decl."), submitted herewith.

Further confirming the fairness of the Settlement is the fact that, to date, members of the Class have reacted positively to the Settlement. Pursuant to the Order Preliminarily Approving Settlement and Providing for Notice ("Notice Order") (ECF No. 90), copies of the Notice were sent to over 9,100 potential Class Members and nominees beginning on July 7, 2015, and a Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on July 17, 2015.[2] *See* Sylvester Decl., ¶¶3-10, 13. To date, there have been no objections to any aspect of the Settlement and no requests for exclusion from the Class have been received.

Finally, Lead Counsel, who has substantial experience prosecuting securities class actions, has concluded that the Settlement is fair, reasonable, and adequate and in the best interest of the Class. Accordingly, Lead Plaintiffs respectfully request that the Court grant final approval of the Settlement, and approve the Plan of Distribution as fair and reasonable.

II. FACTUAL AND PROCEDURAL BACKGROUND

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

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Law Favors and Encourages Settlements

"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."

[2] *See* Declaration of Carole K. Sylvester Re (A) Mailing of the Notice of Pendency of Class Action and Proposed Settlement, Motion for Attorneys' Fees and Settlement Fairness Hearing and the Proof of Claim and Release Form, (B) Publication of the Summary Notice, (C) Internet Posting, and (D) Requests for Exclusion Received to Date ("Sylvester Decl."), submitted herewith on behalf of the Court-appointed Claims Administrator for the Settlement, Gilardi & Co. LLC ("Gilardi").

In re Advanced Battery Techs. Sec. Litig., 298 F.R.D. 171, 174 (S.D.N.Y. 2014); *see also In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation."); *In re Union Carbide Corp. Consumer Prods. Bus Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) ("the courts have long recognized that [complex class action] litigation 'is notably difficult and notoriously uncertain,' . . . and that compromise is particularly appropriate") (citation omitted). Therefore, when exercising discretion to approve a settlement, courts are "mindful of the 'strong judicial policy in favor of settlements.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)).

"Due to the presumption in favor of settlement, '[a]bsent fraud or collusion, courts should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'" *Advanced Battery*, 298 F.R.D. at 174 (citing *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007)). Thus, the Second Circuit has cautioned 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." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

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

Courts may approve a settlement that is binding on the class if it determines that the settlement is "'fair, adequate, and reasonable, and not a product of collusion.'" *Wal-Mart*, 396 F.3d at 116 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)). This evaluation requires

courts to consider both "the terms of the settlement and the negotiation process leading up to it." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008); *Wal-Mart*, 396 F.3d at 116.

With respect to the negotiation process, a class action settlement enjoys a "presumption of correctness" where it is the product of arm's-length negotiations between experienced and capable counsel. *See City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 U.S. Dist. LEXIS 64517, at *10 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *see also In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012). With respect to the substantive terms of a settlement, courts in the Second Circuit consider the following factors (known as the "*Grinnell* factors") when determining whether to approve a class action settlement:

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

Wal-Mart, 396 F.3d at 117 (quoting *Grinnell*, 495 F.2d at 463).

In finding that a settlement is substantively fair, reasonable, and adequate, not every factor needs to be satisfied, but "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)). As such, the court should assess the settlement as presented, without modifying its terms, and without substituting its '"business judgment for that of counsel, absent evidence of fraud or overreaching.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (quoting *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 838 F. Supp. 729, 737 (S.D.N.Y. 1993)).

Lead Plaintiffs respectfully submit that the proposed Settlement is fair, reasonable, and adequate when measured under the relevant criteria and the circumstances of this Action.

IV. THE PROPOSED SETTLEMENT IS PROCEDURALLY AND SUBSTANTIVELY FAIR, ADEQUATE, AND REASONABLE

A. The Settlement Is Entitled to a Strong Presumption of Fairness

As previously noted, a strong presumption of fairness attaches to a class action settlement reached through arm's-length negotiations among able and experienced counsel. *See Wal-Mart*, 396 F.3d at 116; *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement . . . ."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Here, the presumption of fairness and adequacy is appropriate because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations, without collusion, and following a full-day mediation session before a nationally-recognized mediator. *See Global Crossing*, 225 F.R.D. at 461; *see also* Rudman Decl., ¶46. Indeed, the participation of Jed Melnick, Esq. of JAMS, a highly-qualified mediator, strongly supports a finding that negotiations were conducted at arm's length and without collusion. *Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051 (CM) (GWG), 2014 U.S. Dist. LEXIS 126738, at *13 (S.D.N.Y. Sept. 4, 2014) ("Mr. Melnick's role in the settlement negotiations overcomes any hesitation this court might have about approving a settlement reached prior to any discovery.");[3] *see also Telik*, 576 F. Supp. 2d at 576; *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462, 465 (S.D.N.Y. 2004).

[3] Mr. Melnick has "'mediated over 750 disputes, published articles on mediation, [and] founded a nationally ranked dispute resolution journal.'" *Focus Media*, 2014 U.S. Dist. LEXIS 126738, at *13-*14 (citing Mr. Melnick's published JAMS biography).

The negotiation process that Mr. Melnick oversaw also supports the presumption of fairness. In that regard, the process included the preparation and exchange of detailed mediation statements, and candid and frank discussions about the strengths and weaknesses of the case. Thus, Lead Counsel was fully informed of the strengths and weaknesses of the case by the time the Settlement was reached. *See* Rudman Decl., ¶¶56-57; *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) (""'great weight" is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation'") (citation omitted).

These and other considerations discussed in the Rudman Declaration, therefore, confirm the reasonableness of the Settlement. Thus, the Settlement should be entitled to the presumption of procedural fairness under Second Circuit law.

B. The Settlement Satisfies the *Grinnell* Factors

1. Continued Litigation Would Be Complex, Expensive, and Protracted

Without a settlement, the anticipated complexity, cost, and duration of the Action 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"); *see also In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS), 2007 U.S. Dist. LEXIS 29062, at *36 (E.D.N.Y. Apr. 19, 2007). Not only does this Action involve many complex legal issues relating to the federal securities laws, it also involves the expense and complexities associated with litigating the accounting and disclosure rules applicable to the adequacy of loan loss reserves, which are subject to varying interpretations. Accordingly, if the litigation were to proceed, the parties would be required to conduct expensive and time consuming document and deposition discovery.

Likewise, Lead Plaintiffs would be required to retain experts, prepare expert reports, and take expert depositions and discovery. Motions for class certification and summary judgment, as well as

motions *in limine* also would have to be briefed by the parties. All of the foregoing would add years of additional delay before Class Members could enjoy the benefit of a verdict, if any, obtained by Lead Plaintiffs. *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 U.S. Dist. LEXIS 36093, at *17 (S.D.N.Y. May 1, 2008).

Even if the Class could recover a larger judgment after a trial, the additional delay posed by the trial itself, as well as post-trial motions, and the appellate process could deny the Class any recovery for years, further reducing any such recovery's value. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *16 (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.").

Finally, continued litigation necessarily would impact the amount of insurance available for funding a settlement or a judgment after trial. Indeed, if the litigation were to continue, the defense costs incurred by the Company and the Individual Defendants in order to litigate this case up to and through a trial and the inevitable appeals process, would have substantially depleted and could have exhausted the insurance available to fund a settlement or verdict achieved at trial.

The Settlement avoids these risks. Instead of the lengthy, costly, and uncertain course of further litigation, the Settlement provides for an immediate cash recovery for the Class. As a result, the Settlement outweighs the risks associated with lengthy and costly continued litigation.

2. The Lack of Objections and Requests for Exclusion to Date Supports Final Approval of the Settlement

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.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at *21 (S.D.N.Y. Nov. 7, 2007) (citation omitted); *see also In re Flag Telecom Holdings*, No. 02-CV-3400 (CM)(PED), 2010 U.S. Dist. LEXIS 119702, at

*85 (S.D.N.Y. Nov. 8, 2010). In fact, the "'"absence of objections may itself be taken as evidencing the fairness of a settlement."'" *City of Providence*, 2014 U.S. Dist. LEXIS 64517, at *15-*16 (citing *PaineWebber*, 171 F.R.D. at 126).

To date, the reaction of the Class is unanimously positive and supports approval of the Settlement. Pursuant to the Notice Order, copies of the Notice were mailed to 9,172 potential Class Members and nominees, and a Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on July 17, 2015. Sylvester Decl., ¶¶10, 13. Class Members have until September 8, 2015 to object to the Settlement or request exclusion from the Class. While the deadline for Class Members to exclude themselves from the Class or object to the Settlement has not yet passed, to date, no objections to the Settlement and no requests for exclusion have been received. Lead Plaintiffs will file papers, if necessary, on or before September 14, 2015, to address any objections and requests for exclusion that may be received following this submission.

3. Lead Plaintiffs Have Sufficient Information to Make Informed Decisions as to the Settlement of This Case

In considering 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 plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.'" *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (quoting *IMAX*, 283 F.R.D. at 190). "To satisfy this factor, parties need not have even engaged in formal or extensive discovery." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 U.S. Dist. LEXIS 177175, at *18 (S.D.N.Y. Dec. 19, 2014) (noting that discovery cannot commence in cases brought under the PSLRA until the motion to dismiss is denied); *Maley*, 186 F. Supp. 2d at 363; *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) ("[T]he Court need not find that the parties have engaged in

extensive discovery. Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make . . . an appraisal' of the Settlement.") (quoting *Plummer v. Chem. Bank*, 668 F.2d 654, 660 (2d Cir. 1982)), *aff'd sub nom. D'Amato*, 236 F.3d 78; *see also Global Crossing*, 225 F.R.D. at 458 ("[T]he question is whether the parties had adequate information about their claims.").[4]

In this case, Lead Plaintiffs and their counsel were able to negotiate a favorable settlement for the Class after conducting an extensive factual investigation and analysis relating to the events and transactions alleged in the Second Consolidated Amended Class Action Complaint (the "SAC"). This investigation included, *inter alia*: (1) reviewing and analyzing SBI's filings with the U.S. Securities and Exchange Commission ("SEC") and Federal Financial Institutions Examination Council, press releases, public statements, news articles and other publications disseminated by or concerning SBI and the other Defendants, and securities analysts' reports concerning SBI and its operations; (2) interviewing former employees of SBI; (3) drafting two amended complaints; (4) briefing on Defendants' two motions to dismiss and to strike; (5) briefing Defendants' Motion for Interlocutory Appeal; (6) filing a motion to lift the PSLRA discovery stay; (7) serving discovery on Defendants and third parties; (8) serving initial disclosures; (9) participating in a Rule 26(f) conference with Defendants; (10) preparing a comprehensive mediation statement; (11) participating in an in-person mediation with Defendants; (12) reviewing and analyzing documents produced by

[4] Although the Action settled early in the proceedings, courts encourage early settlement of class actions "because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 474 (S.D.N.Y. 2013) (early settlements should be encouraged when warranted by the circumstances of the case) (citing *In re Interpublic Sec. Litig.*, No. Civ. 6527 (DLC), 2004 U.S. Dist. LEXIS 21429, at *37 (S.D.N.Y. Oct. 26, 2004)).

Defendants;[5] and (13) researching the applicable law with respect to Lead Plaintiffs' claims and Defendants' potential defenses. *See, e.g.*, Rudman Decl., ¶¶57, 85.

As noted above, Lead Counsel prepared a detailed mediation statement that was provided to Defendants' counsel prior to the October 23, 2014 mediation session, and also held discussions with Defendants' counsel during the mediation where Defendants' counsel not only pressed the arguments raised in the motions to dismiss but also identified arguments Defendants likely would make if the case were to progress. *Id.*, ¶46. Thus, Lead Counsel had a clear picture of the strengths and weaknesses of this case and of the legal and factual defenses that Defendants would likely raise had the litigation continued.

Accordingly, Lead Plaintiffs and their counsel "have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time Settlement was reached, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial." *City of Providence*, 2014 U.S. Dist. LEXIS 64517, at *19 (citing *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 U.S. Dist. LEXIS 8608, at *10 (S.D.N.Y. May 14, 2004)).

4. Establishing Liability and Damages Involves Significant Risks

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *Veeco*, 2007 U.S. Dist. LEXIS 85629, at *22; *Austrian & German Bank*, 80 F. Supp. 2d at 177. However, the Court need not "'decide the merits of the case or resolve unsettled legal questions'" (*Cinelli v. MCS Claim Servs.*, 236 F.R.D. 118, 121 (E.D.N.Y. 2006)

[5] These documents concerned the Company's loan loss reserves, the setting of ALLL, internal audits of SBI's lending and loan operations, loan policies and guidelines, and loan reviews. *Id.*, ¶48.

(citation omitted)), or "foresee with absolute certainty the outcome of the case." *Austrian & German Bank*, 80 F. Supp. 2d at 177. Rather, the Court need only weigh the risks of litigation against the certainty of recovery offered by the Settlement. *See Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 337 (S.D.N.Y. 2005).

The risks presented by securities litigation generally weigh in favor of final settlement approval. Courts in this district """have long recognized that [securities] litigation is notably difficult and notoriously uncertain."""" *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *43 (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)); *see also In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 U.S. Dist. LEXIS 17588, at *39 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation.").

While Lead Counsel believes, based on its investigation, that the claims asserted against Defendants have merit, it also recognizes that Lead Plaintiffs would (and did) face hurdles and uncertainties in prosecuting the Action and recovering a judgment from the Defendants. Rudman Decl., ¶¶62-66. Defendants' Motion for Interlocutory Appeal was pending when the Settlement was reached. *Id.*, ¶43. In that Motion and during settlement negotiations, Defendants asserted, among other things, that Lead Plaintiffs should not be permitted to rely on the Toussie Informant allegations since they were from a confidential informant in another action. *Id.* If Defendants' Motion for Interlocutory Appeal was denied, Lead Plaintiffs would expect Defendants to gather additional evidence for each of the foregoing defenses and assert each of them at summary judgment and, potentially, trial and on appeal. *See also Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *83.

For instance, Lead Plaintiffs would have faced significant challenges in proving that Defendants made any false statements. Defendants maintained that SBI accurately disclosed all

allegedly omitted information and the precise risks that eventually came to pass. Rudman Decl., ¶64. Defendants also argued that the alleged misrepresentations were inactionable puffery or opinions. They also contended that Lead Plaintiffs could not prove facts to support a strong inference of scienter or motive and opportunity to establish scienter. *Id.* Courts have often recognized the difficulty and substantial risk of pleading and proving scienter. *See In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 426 (S.D.N.Y. 2001); *Slomovics v. All for a Dollar*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995). While Lead Plaintiffs believe that they could have satisfied their burden of establishing falsity, materiality and scienter, they recognize that overcoming these obstacles was not be a foregone conclusion.

Additionally, Lead Plaintiffs also would have faced challenges with respect to loss causation and the calculation of damages. *See AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *33 (noting that "the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages"). Defendants would likely argue that the Class Period should start on July 29, 2009 (rather than March 13, 2008), since the FDIC examination and the Toussie Information allegations all concern events that happened in the second half of 2009. Rudman Decl., ¶67.[6] Defendants would have also likely argued that the decline in SBI's share price and the resulting losses suffered by shareholders were caused by factors unrelated to Lead Plaintiffs' claims. *Id.* While Lead Plaintiffs would have been able to present a cogent and persuasive expert's view establishing loss causation and damages, Defendants also would have been able to produce a well-qualified expert who would opine against a finding of loss causation for the price decline, giving rise to the risk of a "battle of the experts." *See*

[6] Defendants would likely argue that damages during this shortened period were less than $6 million. *Id.*

Am. Bank Note, 127 F. Supp. 2d at 427 ("'In [a] "battle of experts," 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.'") (citation omitted). Lead Plaintiffs could not be certain which expert's view would prevail at trial. *See, e.g.*, *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *82. Accordingly, courts have recognized that when parties will likely rely on significant expert testimony and analysis, settlement is favored. *See Park v. Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 U.S. Dist. LEXIS 84551, at *15 (S.D.N.Y. Oct. 22, 2008).

Even if Lead Plaintiffs successfully established loss causation, there would be no guarantee that a jury would have agreed with Lead Plaintiffs' expert's calculation of damages. "Calculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." *Global Crossing*, 225 F.R.D. at 459 (citations omitted). As with loss causation, Lead Plaintiffs could not be certain which expert's view would prevail at trial.

5. Maintaining Class Action Status Through Trial Presents a Substantial Risk

While Lead Counsel believes that Lead Plaintiffs would prevail on a motion for class certification, for the Class Period alleged in the SAC, the Settlement avoids any uncertainty with respect to whether a class may be maintained and whether the proposed Class Period was appropriate. Even if the Class were certified, Defendants may have moved to decertify the Class or to shorten the Class Period before trial or on appeal, as class certification may be reviewed at any stage of the litigation. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."); Fed. R. Civ. P. 23(c)

(authorizing a court to decertify a class at any time). The presence of this risk and the uncertainty surrounding it, therefore, weighs in favor of final approval of the Settlement.

6. Defendants' Ability to Withstand a Greater Judgment

Courts generally do not find the ability of a defendant to withstand a greater judgment to be a barrier to settlement when the other factors favor the settlement. "[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *PaineWebber*, 171 F.R.D. at 129; *see also IMAX*, 283 F.R.D. at 191 ("'[A] defendant is not required to "empty its coffers" before a settlement can be found adequate.'") (citations omitted).

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

The adequacy of the amount offered in 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); *see also Wal-Mart*, 396 F.3d at 119. The Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted). The "range of reasonableness" has been described by the Second Circuit as a range that "recognizes the uncertainties of law and fact in any particular 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).

Here, the $1,950,000 Settlement is a substantial result for the Class, especially in light of the stage of litigation, the risks associated with continued litigation of this complex securities class action, including Defendants' pending Motion for Interlocutory Appeal, and the total amount of damages. The Settlement represents approximately 12% of Lead Plaintiffs' estimated maximum

damages of $16.1 million achievable if Lead Plaintiffs were to prevail on each element of their claims. Rudman Decl., ¶75; *see also In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approving settlement amounting to 5.2% of damages for common stock holders); *see also Union Carbide*, 718 F. Supp. at 1103 ("The Court of Appeals has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought. . . . The essence of settlement is compromise."); *Global Crossing*, 225 F.R.D. at 461 ("'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'") (quoting *Grinnell*, 495 F.2d at 455).

Importantly, the Settlement exceeds the median recovery of 2.7% and 2.2% in all sample securities class action lawsuits during 2005-2013 and 2014, respectively. Additionally, the Settlement compares favorably with the median recovery of 11.7% and 9.9% in securities class actions with losses under $50 million, during 2005-2013 and 2014, respectively. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2014 Review and Analysis*, at 9 (Figure 8) (Cornerstone Research 2015).

Moreover, the Settlement offers the opportunity to provide immediate relief to the Class, rather than a speculative payment years down the road. *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *44 (where the settlement fund is in escrow and earning interest for the class, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"). In light of the complex legal and factual issues present here, the fairness of the Settlement is apparent. *See, e.g.*, *Maley*, 186 F. Supp. 2d at 366-67.

Accordingly, Lead Plaintiffs respectfully submit that the immediate cash benefit is well "within the range of reasonableness" in light of the best possible recovery and all the risks of litigation.

V. THE PLAN OF DISTRIBUTION OF THE NET SETTLEMENT FUND IS FAIR AND ADEQUATE

The standard for approval of the Plan of Distribution (the "Plan") is the same as the standard for approving the Settlement as a whole. Specifically, "'it must be fair and adequate.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (quoting *Maley*, 186 F. Supp. 2d at 367). "'As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003) (citation omitted), *aff'd sub nom. Wal-Mart*, 396 F.3d 96. "'When formulated by competent and 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 (quoting *Global Crossing*, 225 F.R.D. at 462; *Am. Bank Note*, 127 F. Supp. 2d at 429-30).

The Plan, which is set forth in the Notice, was prepared by Lead Counsel's internal damages expert to create a fair method to divide the Net Settlement Fund for distribution. The Plan attempted to eliminate the effects of market forces unrelated to the alleged misrepresentations and omissions, as well as to simplify claims administration with attendant reduced cost to the Class. The Net Settlement Fund will be distributed to Authorized Claimants, *i.e.*, members of the Class who submit timely and valid Proof of Claim forms that are approved for payment from the Net Settlement Fund pursuant to the Plan. The Plan treats all Class Members in a similar manner: everyone who submits a valid and timely Proof of Claim form, and does not exclude himself, herself, or itself 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.

Indeed, it is appropriate for distributions to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of the purchases of the securities at issue. *See In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001). Otherwise, certain Class Members may receive an inequitable windfall, to the detriment of others. *PaineWebber*, 171 F.R.D. at 133.

Lead Counsel believes that the Plan is fair and reasonable and respectfully submits that it should be approved by the Court. Notably, there have not been any objections to the Plan to date, which also supports the Court's approval. *Veeco*, 2007 U.S. Dist. LEXIS 85629, at *22; *Maley*, 186 F. Supp. 2d at 367.

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

Rule 23 of the Federal Rules of Civil Procedure 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); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Additionally, notice of a settlement must be directed to class members in a "reasonable manner." Fed. R. Civ. P. 23(e)(1). 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*, 396 F.3d at 114 (citations omitted); *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26-27 (2d Cir. 2014). "Notice need not be perfect" or received by every class member, but instead be reasonable under the circumstances. *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008). Notice is adequate "if the average person understands the terms of the

proposed settlement and the options provided to class members thereunder." *Id*. (citing *Wal-Mart*, 396 F.3d at 114).

The Notice and the method utilized to disseminate the Notice to potential Class Members satisfies these standards. The Court-approved Notice and Proof of Claim form (the "Notice Packet") amply apprise Class Members of, *inter alia*: (1) the pendency of the Action; (2) the nature of the Action and the Class' claims; (3) the essential terms of the Settlement; (4) the proposed Plan; (5) Class Members' rights to request exclusion from the Class or object to the Settlement, the Plan, or the requested attorneys' fees or expenses; (6) the binding effect of a judgment on Class Members; and (7) information regarding Lead Counsel's motion for an award of attorneys' fees and expenses. *See* Sylvester Decl., Ex. A. The Notice also provides specific information regarding the date, time, and place of the Settlement Hearing, and sets forth the procedures and deadlines for: (1) submitting a Proof of Claim; (2) requesting exclusion from the Class; and (3) objecting to any aspect of the Settlement, including the proposed Plan and the request for attorneys' fees and expenses.

The Notice also contains the information required by the PSLRA, 15 U.S.C. §78u-4(a)(7), including: (1) a statement of the amount to be distributed, determined in the aggregate and on an average per share basis; (2) a statement of the potential outcome of the case (*i.e.*, whether there was agreement or disagreement on the amount of damages); (3) a statement indicating the attorneys' fees and costs sought; (4) identification and contact information of counsel; and (5) a brief statement explaining the reasons why the parties are proposing the Settlement. *See* Sylvester Decl., Ex. A; *see also In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 184 (S.D.N.Y. 2003).

In accordance with the Notice Order, Gilardi commenced the mailing of the Notice Packet by First-Class Mail to potential Class Members, brokers, and nominees on July 7, 2015. Sylvester Decl., ¶¶3-5. As of August 24, 2015, 9,172 copies of the Notice Packet have been mailed. *Id.*, ¶10.

Gilardi also published the Summary Notice in *Investor's Business Daily* and transmitted it over *PR Newswire* on July 17, 2015. *Id.*, ¶13. Additionally, Gilardi posted the Notice Packet, as well as other important documents, on the website maintained for the Settlement. *Id.*, ¶12.[7]

This combination of individual First-Class Mail to all 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). This method of providing notice has been repeatedly approved for use in securities class actions and other comparable class actions. *See, e.g.*, *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 U.S. Dist. LEXIS 19210, at *30 (E.D. La. Mar. 2, 2009) (mailing, internet publication, and newspaper publication satisfied due process notice requirements).

VII. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23

Certification of a class for settlement purposes is recognized as "the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *IMAX*, 283 F.R.D. at 186 (citation and internal quotation marks omitted). The Court has already preliminarily certified the Class for settlement purposes. Notice Order, ¶¶3-4. Nothing has changed to alter the propriety of the Court's certification. For the reasons stated in Lead Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement at 11-21 (ECF No. 79-1) (incorporated by reference herein), the Class satisfies all the elements of Rules 23(a) and (b)(3).

[7] The Notice and Summary Notice reference the Internet website for the Settlement. *See* Sylvester Decl., Exs. A and D.

VIII. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that this Court enter the proposed final Judgment approving the Settlement, approving the notice program, and certifying the Class for settlement purposes. Lead Plaintiffs also request that the Court enter an order approving the Plan of Distribution of the Net Settlement Fund.

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Respectfully submitted,

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