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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re BRIDGEPOINT EDUCATION, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	No. 3:12-cv-01737-JM-JLB CLASS ACTION LEAD PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS DATE: April 25, 2016 TIME: 10:00 a.m. CTRM: 5D, The Honorable Jeffrey T. Miller

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I. PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs, City of Atlanta General Employees Pension Fund ("Atlanta GEPF") and Teamsters Local 677 Health Services & Insurance Plan ("Local 677 Plan") (together, "Lead Plaintiffs"), submit this memorandum in support of their motion for final approval of the settlement of this securities class action for $15,500,000 in cash, and for approval of the Plan of Allocation of the settlement proceeds. The terms of the settlement are set forth in the Stipulation and Agreement of Settlement, dated October 30, 2015 ("Stipulation" or "Settlement"), which was previously filed with the Court.[1] Dkt. No. 96-2.

This Settlement represents a very good recovery for the Class particularly in light of the considerable expense, delay, and risks posed by continued litigation, including successfully opposing summary judgment, prevailing at trial, and litigating inevitable post-trial motions and appeals. As discussed below and in the accompanying Declaration of Jonah H. Goldstein in Support of Motion for (1) Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds; and (2) an Award of Attorneys' Fees and Expenses and Reimbursement of Lead Plaintiff's Expenses Pursuant to 15 U.S.C. §78u-4(a)(4) ("Goldstein Decl."), the significant risks involved in taking this litigation further and through trial, when measured against the immediate benefit of the Settlement, justify approval of this Settlement.

On December 21, 2015, the Court entered its Amended Order Preliminarily Approving Settlement and Providing for Notice and Approving Proposed Request for Exclusion Form ("Notice Order") (Dkt. No. 100), which directed that a Settlement Hearing be held on April 25, 2016, to determine the fairness, reasonableness, and adequacy of the Settlement and the Plan of Allocation. In accordance with the Notice Order, the Notice of Pendency and Proposed Settlement of Class Action (the

[1] All capitalized terms not defined herein shall have the same meanings set forth in the Stipulation.

"Notice"), the Request for Exclusion Form ("Exclusion Form"), and the Proof of Claim and Release form ("Proof of Claim") were mailed to potential Class Members and nominees, and as of February 1, 2016, over 11,900 copies were mailed. *See* Declaration of Carole K. Sylvester Regarding (A) Mailing of the Notice of Pendency and Proposed Settlement of Class Action, the Request for Exclusion Form 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."), ¶¶4-11, submitted herewith. Also, the Notice, the Proof of Claim, the Exclusion Form, the Stipulation and its Exhibits, and the Notice Order were posted on the Settlement website, and pursuant to the Notice Order, a Summary Notice was published in *Investor's Business Daily* and over the *PR Newswire* on January 12, 2016. *Id.*, ¶¶13-14.

Class Members appear to support the Settlement and Plan of Allocation. While the deadline for objecting is February 17, 2016, to date not a single Class Member has objected to any aspect of the Settlement or Plan of Allocation.[2]

In light of their informed assessment of the strengths and weaknesses of the claims and defenses asserted, the considerable risks and delays associated with continued litigation and trial, and the favorable settlement amount, Lead Plaintiffs and Lead Counsel believe that the Settlement is eminently fair, reasonable, and adequate and provides a very good result for the Class. Accordingly, Lead Plaintiffs respectfully request that the Court approve this Settlement. Moreover, the Plan of Allocation, which was developed with the assistance of Lead Plaintiffs' damages expert, is fair and reasonable and, therefore, should also be approved by the Court.

II. PROCEDURAL AND FACTUAL BACKGROUND

Lead Plaintiffs allege that Defendants violated the federal securities laws by making materially false and misleading statements related to student persistence and

[2] Should any objections be received, Lead Plaintiffs will address them in their reply memorandum due March 3, 2016.

retention rates at Bridgepoint's Ashford University ("Ashford"), as well as Defendants' efforts to improve those rates to obtain accreditation for Ashford by the Western Association of Schools and Colleges ("WASC"). *See* Consolidated Complaint for Violation of the Federal Securities Laws (Dkt. No. 26) ("Complaint"). Lead Plaintiffs further allege that Defendants' materially false and misleading statements artificially inflated the price of Bridgepoint common stock during the Class Period, and when the truth was eventually disclosed, the Class suffered substantial damages. *Id*.

Defendants vigorously opposed the action from the outset, and aggressively pursued dismissal on several theories in their motion to dismiss. Dkt. No. 28. On September 13, 2013, the Court issued an Order granting in part and denying in part Defendants' motion to dismiss. Dkt. No. 39. Specifically, the Court denied Defendants' motion to dismiss "with respect to Defendants' statements regarding Ashford's student persistence." *Id*. at 29.

On June 23, 2014, Lead Plaintiffs filed a motion for class certification and appointment of class representatives and class counsel. Dkt. No. 59. On January 15, 2015, following a continuance of the class certification briefing schedule, the Court certified "a class consisting of all persons who purchased Bridgepoint common stock between May 3, 2011, and July 13, 2012, excluding Defendants, directors and officers of Bridgepoint, and their families and affiliates," and appointed Lead Plaintiffs as class representatives and Lead Counsel as class counsel. Dkt. No. 77.

The parties have engaged in extensive discovery, including the review and analysis of nearly two million pages of documents, the taking or defending of 25 party and non-party depositions, and the exchange of expert reports. Goldstein Decl., ¶¶37-51. On August 31, 2015, Defendants filed a motion for summary judgment and a motion to exclude the testimony of Lead Plaintiffs' loss causation and damages expert. Dkt. Nos. 86, 87.[3]

[3] Defendant Daniel Devine also filed a separate motion for summary judgment. Dkt. No. 85.

During the Action, the Settling Parties engaged the services of Judge Layn R. Phillips (Ret.), a nationally recognized mediator. The parties participated in a face-to-face mediation session on March 31, 2015, at which time the parties were unable to settle the case. On September 4, 2015, after additional discovery and the filing of Defendants' motion for summary judgment, the parties again mediated with Judge Phillips and were able to reach a settlement. Goldstein Decl., ¶62.

If not for this Settlement, the case would have continued to be vigorously contested by the parties with the ultimate outcome uncertain. Defendants have demonstrated a commitment to defend this case through and beyond trial, if necessary, and are represented by well-respected and highly capable counsel from Wilson Sonsini Goodrich & Rosati. Lead Plaintiffs would face substantial risks in proving loss causation, materiality, as well as scienter. Moreover, it is possible that if litigation were to continue, certain of the alleged false statements may be found to be protected by the Safe Harbor provision of the Private Securities Litigation Reform Act of 1995 ("PSLRA").

Lead Counsel, who is well-respected and highly experienced in prosecuting securities class actions, has concluded that the Settlement is a very good result under the circumstances and is in the best interest of the Class. This conclusion is based on all the circumstances present here, including the substantial risks, expense, and uncertainties in continuing the Action through summary judgment motions, trial, and probable appeal; the relative strengths and weaknesses of the claims and defenses asserted; an analysis of the evidence obtained and the legal and factual issues presented; past experience in litigating complex actions similar to the present action; and the serious disputes between the parties concerning liability and damages. Goldstein Decl., ¶¶69-74.

For all of the reasons discussed herein and in the Goldstein Declaration, it is respectfully submitted that the Settlement should be finally approved by the Court. Moreover, the Plan of Allocation, which was developed with Lead Plaintiffs' damages

expert, reflects an assessment of the damages that may have been recovered had liability been successfully established at trial and is properly tailored to account for the specific litigation risks present during various portions of the Class Period. As a result, the Plan of Allocation provides a fair and reasonable basis for allocating the Net Settlement Fund among Class Members, and therefore should be approved.

III. THE STANDARDS GOVERNING JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

It is well-established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *see also In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2007) ("[T]he court must also be mindful of the Ninth Circuit's policy favoring settlement, particularly in class action law suits."). 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. It is beyond question that "the public has an overriding interest in securing 'the just, speedy, and inexpensive determination of every action.'" *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006);[4] Fed. R. Civ. P. 1. It is also beyond question that "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *see also Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). In deciding whether to approve a proposed settlement of a class action under Federal Rule of Civil Procedure 23(e), the court must first "hold a hearing and review the settlement agreement to determine if it is

[4] Citations are omitted throughout unless otherwise indicated.

fair, reasonable, and adequate."[5] The Ninth Circuit has provided certain factors which may be considered in evaluating whether a settlement meets this standard:

> The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of 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.

Officers for Justice, 688 F.2d at 625; *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *Woo v. Home Loan Grp., L.P.*, No. 07-CV-202 H (POR), 2008 U.S. Dist. LEXIS 65144, at *8 (S.D. Cal. Aug. 25, 2008). "'The relative degree of importance to be attached to any particular factor will depend upon . . . the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.'" *Woo*, 2008 U.S. Dist. LEXIS 65144, at *8 (quoting *Officers for Justice*, 688 F.2d at 625).

The district court must exercise "sound discretion" in approving a settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *accord Torrisi*, 8 F.3d at 1375. In exercising its discretion,

> the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit 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.

Officers for Justice, 688 F.2d at 625. The Ninth Circuit defines the limits of the inquiry to be made by the court in the following manner:

> [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation

[5] *Syncor*, 516 F. 3d at 1097; *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995); *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

> that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Id. (emphasis in original).

Courts have consistently held that, in reviewing a settlement, a court is not to rewrite the settlement agreement reached by the parties or to try the case by resolving issues intentionally left unresolved. *See, e.g.*, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. They do not decide the merits of the case or resolve unsettled legal questions."). Therefore, courts have taken a flexible approach toward approval of class action settlements, recognizing that the settlement process involves the exercise of judgment and that the concept of "reasonableness" can encompass a broad range of results. "'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). "As the Ninth Circuit has noted, 'Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.'" *In re Wells Fargo Loan Processor Overtime Pay Litig.*, No. MDL C-07-1841 (EMC), 2011 U.S. Dist. LEXIS 84541, at *11 (N.D. Cal. Aug. 2, 2011) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir. 1998)).

When examined under the applicable criteria, this Settlement is a very good result for the Class. Lead Counsel believes that there are serious questions as to whether a more favorable monetary result could be attained after summary judgment, trial, and the inevitable post-trial motions and appeals. Goldstein Decl., ¶¶69-74. The Settlement achieves a substantial and certain recovery for the Class and is superior to the possibility that were the Action to proceed to trial, there could be no recovery at

all. As discussed below, an analysis of the relevant factors demonstrates that the Settlement merits this Court's final approval.

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

A. The Settlement Enjoys a Presumption of Reasonableness Because It Is the Product of Arm's-Length Settlement Negotiations

The Settlement was extensively negotiated between the parties with the assistance of Judge Phillips (Goldstein Decl., ¶¶60-63) and provides a substantial and certain cash benefit to the Class in the amount of $15.5 million. The Ninth Circuit "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution" in approving a class action settlement. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the Settlement enjoys a presumption of fairness because it is the product of extensive arm's-length negotiations conducted by experienced and capable counsel with a firm understanding of the strengths and weaknesses of their respective client's positions.[6]

During settlement negotiations, Lead Counsel zealously advanced Lead Plaintiffs' positions and was fully prepared to continue to litigate rather than accept a settlement that was not in the best interest of the Class. The parties participated in two full-day mediation sessions, March 31, 2015 and September 4, 2015, with Judge Phillips that involved an extensive analysis of the Class' claims and the defenses that would be asserted by Defendants. Goldstein Decl., ¶¶60-62. Prior to each face-to-face mediation session, both sides submitted comprehensive mediation statements which were provided to Judge Phillips and exchanged among the parties. *Id.* The parties also submitted and exchanged detailed reply briefs prior to the March 2015 mediation. *Id.*, ¶60. The parties did not reach an agreement to settle at the

[6] *Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 U.S. Dist. LEXIS 24300, at *16 (N.D. Cal. July 18, 1997) ("the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery ha[s] taken place create[s] a presumption that the agreement is fair"), *aff'd*, 151 F.3d 1234 (9th Cir. 1998); *Ellis*, 87 F.R.D. at 18.

March 2015 mediation despite their diligent and good faith efforts. *Id.*, ¶61. It was only after continued litigation and further settlement negotiations among the parties, with the assistance of Judge Phillips, that the parties reached an agreement-in-principle to settle the Action during the September 2015 mediation session. Ultimately, following further zealous negotiations as to the settlement terms, the parties signed the Stipulation on October 30, 2015. As a result of the negotiations and mediation, there can be no question that the Settlement is the result of hard-fought, arm's-length negotiations and is "not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625.

B. The Strength of Lead Plaintiffs' Case, When Balanced Against the Risk, Expense, Complexity, and Likely Duration of Further Litigation, Supports Approval of the Settlement

In determining whether the proposed Settlement is fair, reasonable, and adequate, the Court should balance against the continuing risks of litigation, the benefits afforded to the Class and the immediacy and certainty of a substantial recovery. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979). In other words,

> [t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "It has been held proper to take the bird in hand instead of a prospective flock in the bush."

Nat'l Rural, 221 F.R.D. at 526.

In the context of approving class action settlements, courts attempting to balance these factors have recognized "that stockholder litigation is notably difficult and notoriously uncertain." *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973); *see also Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658, 667 (S.D.N.Y. 1977) (favoring settlements due to the notorious difficulties and uncertainties of stockholder litigation). This is even more so today in this post-PSLRA environment amid defendants' constant attempts to push the envelope and contours of the PSLRA. *In re*

Ikon Office Solutions, Inc., 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA"). As one court noted: "An unfortunate byproduct of the PSLRA is that potentially meritorious suits will be short-circuited by the heightened pleading standard." *Bryant v. Avado Brands, Inc.*, 100 F. Supp. 2d 1368, 1377 (M.D. Ga. 2000), *rev'd on other grounds and remanded sub nom. Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001).

While Lead Counsel believes that the Action has significant merit, it recognizes that Lead Plaintiffs faced numerous risks and uncertainties and was well aware that many other similar actions have been prosecuted in the belief that they were meritorious, only to lose on dispositive motions, at trial, or on appeal. As discussed herein and in the Goldstein Declaration, the risks of continued litigation, when weighed against the substantial and certain recovery for the Class, confirms the reasonableness of the Settlement.

1. The Risks of Proving Liability for False and Misleading Statements and Omissions

Lead Plaintiffs' case centered on allegations that Defendants misrepresented the true facts regarding Ashford's initiatives to improve student persistence and student persistence rates during the time Ashford was seeking accreditation from WASC. Lead Plaintiffs believe that based on the evidence adduced to date, including the production of nearly two million pages of documents, the taking or defending of 25 party, non-party and expert depositions, and the exchange of expert reports, they had a good case as to liability – that Defendants knowingly misrepresented Bridgepoint's business, including certain Class Period statements about Ashford's student persistence initiatives and rates, which caused the price of Bridgepoint common stock to be artificially inflated. While Lead Plaintiffs believe that their claims are strong and supported by evidence, there was certainly no guarantee that they would get past summary judgment and establish liability at trial. Defendants have adamantly denied any liability and have asserted from the outset that they possessed absolute defenses to Lead Plaintiffs' claims.

For example, there was conflicting evidence regarding the meaning of the term "persistence," and resolution of that issue would directly bear on the truth of some of the challenged statements. Additionally, Defendants' knowledge of whether the word "persistence" might have different meanings to different audiences would have affected their scienter, *i.e.*, whether Defendants acted with knowledge of or with recklessness as to the alleged falsity of their statements and omissions. Indeed, Defendants retained two student persistence and retention expert witnesses to provide testimony to support their defenses. A defendant's state of mind in a securities case is often the most difficult element of proof and one which is rarely supported by direct evidence such as an admission. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008).

In Defendants' motion for summary judgment (Dkt. No. 86) they argued that there was no triable issue of fact as to the elements of falsity and scienter. Even if Lead Plaintiffs were able to successfully overcome Defendants' motion for summary judgment, it was quite possible that they would not be able to satisfy their burden of proof on these elements at trial due to the complex nature of the facts, namely the conflicting evidence regarding the meaning of the term "persistence," and Defendants' knowledge of the degree to which the word "persistence" has different meanings to different audiences. Lead Plaintiffs could not be certain that a jury would see through the complexity of the underlying facts to the heart of the alleged fraud. The risks would be exacerbated by the risks inherent in all shareholder litigation, including the unpredictability of a lengthy and complex jury trial, the risk that witnesses could be unavailable or jurors could react to the evidence in unforeseen ways, the risk that a jury would find that some or all of the alleged misrepresentations were not material, and the risk that the jury could find that Defendants believed in the appropriateness of their actions at the time.

2. The Risks of Proving Loss Causation and Damages

Lead Plaintiffs also faced substantial risk in proving loss causation and damages. *See, e.g.*, *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) ("Proving loss causation would be complex and difficult."). In addition to proving falsity and scienter, in order to prevail on their §10(b) claims, Lead Counsel would be required to prove that Defendants' allegedly false and misleading statements and omissions inflated the price of Bridgepoint stock and the amount of the artificial inflation.

Throughout this case Defendants argued that Lead Plaintiffs could not prove loss causation or damages for either the July 9 or July 13, 2012 disclosure announcements. They argued that Lead Plaintiffs' expert could not disaggregate the causes of Bridgepoint's stock declines following the July 9 disclosure and that the July 13 disclosure was not a corrective disclosure for which Lead Plaintiffs could recover damages. If accepted by the Court at summary judgment or a jury at trial, either of these arguments had the potential to significantly decrease damages.

Moreover, even if Lead Plaintiffs established significant damages at trial, Defendants would likely insist on a lengthy and adversarial claims process, which could take years and require significant time and expense from all parties, including absent Class Members. Moreover, any judgment would likely be followed by a lengthy appeal, which could add years to the litigation and further risk. For instance, in *Household*, a large securities class action case filed in 2002 in which Robbins Geller Rudman & Dowd is serving as lead counsel, plaintiffs obtained a jury verdict and judgment in their favor on May 7, 2009 after a month-long trial and years of costly and contentious litigation. *Jaffe v. Household Int'l, Inc.*, No. 1:02cv05893 (N.D. Ill.) (Dkt. No. 1611). The judgment was overturned on appeal and a retrial on certain issues will take place. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015).

In the end, proof of damages is a complex matter that would require the presentation of expert testimony. While Lead Counsel believes that reliable and convincing expert testimony can be provided on the damages question, and that a judgment could ultimately be obtained for the full amount of damages available under the law, as discussed above, meaningful obstacles remain. Indeed, Defendants had already filed a motion *in limine* to preclude Lead Plaintiffs' damages expert's testimony under *Daubert*, which risked a decision that the expert's valuation model might not be admissible in evidence. *See, e.g.*, *In re Novatel Wireless Sec. Litig.*, 846 F. Supp. 2d 1104, 1107 (S.D. Cal. 2012) (loss causation expert's testimony was excluded because the court concluded he employed the wrong legal standard in performing his loss causation analysis). As a result, this factor also weighs in favor of the Settlement.

3. The Complexity, Expense, and Likely Duration of the Action Justifies the Settlement

The immediacy and certainty of a recovery is a factor for the Court to balance in determining whether this proposed Settlement is fair, adequate, and reasonable. Courts consistently have held that "[t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *see also Officers for Justice*, 688 F.2d at 626.

As noted above, Defendants have demonstrated a commitment to defend this case through and beyond trial, if necessary, and are represented by well-respected and highly capable counsel from Wilson Sonsini Goodrich & Rosati. If not for this Settlement, the expense and time of continued litigation would have been substantial. As the court noted in *Ikon*, which is applicable here:

> In the absence of a settlement, this matter will likely extend for . . . years longer with significant financial expenditures by both defendants and plaintiffs. This is partly due to the inherently complicated nature of large class actions alleging securities fraud: there are literally thousands of shareholders, and any trial on these claims would rely heavily on the

> development of a paper trial [sic] through numerous public and private documents.

194 F.R.D. at 179.

If this Action were to continue to be litigated, Defendants' motions for summary judgment and motion to exclude Lead Plaintiffs' damages expert's testimony would have to be further briefed and argued, a pre-trial order would have to be prepared, proposed jury instructions would have to be submitted, and motions *in limine* would have to be filed and argued. Substantial time and expense would need to be incurred in preparing the case for trial. The trial itself would have been long, expensive, and uncertain and no matter the outcome, appeals would be virtually assured. This would add considerably to the expense and duration of the Action.

The legal issues presented are complex – proving scienter, causation, and damages – and would involve expert testimony, as discussed above. The Settlement will spare the litigants the significant delay, risk, and expense of continued litigation. Many hours of the Court's time and resources have also been spared. Moreover, even if the Class could recover a larger judgment after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class any recovery for years, which would further reduce its value. The $15,500,000 Settlement, at this juncture, results in an immediate and substantial tangible recovery, without the considerable risk, expense, and delay of summary judgment motions, trial, and post-trial litigation. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now."). As the Ninth Circuit has made clear, the very essence of a settlement agreement is compromise, "'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624 ("'Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.'"); *Ellis*, 87 F.R.D. at 19 (finding that as a *quid pro quo* for

not having to undergo the uncertainties and expenses of litigation, the plaintiffs must be willing to moderate the measure of their demands).

C. Lead Plaintiffs Had Sufficient Information to Determine the Propriety of Settlement

The Settlement comes after the close of discovery, and therefore the case had reached a stage where an intelligent evaluation of the strengths and weaknesses and the propriety of settlement could be made. *See Officers for Justice*, 688 F.2d at 625; *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). As discussed above and in the Goldstein Declaration, this Action has involved extensive discovery, including the production of nearly two million pages of documents, the taking and defending of 25 party, non-party and expert depositions, and the submission of several expert reports. Goldstein Decl., ¶¶37-51. The parties also participated in extensive settlement negotiations, including two all-day face-to-face mediation sessions with Judge Phillips on March 31, 2015 and September 4, 2015, where the parties' claims and defenses were fully vetted. Prior to these mediation sessions, the parties submitted to Judge Phillips and exchanged detailed mediation statements which further highlighted the factual and legal issues in dispute. Lead Counsel was able to assess the strengths and weaknesses of the claims asserted and resolve the Action on a highly favorable basis for the Class. *See Officers for Justice*, 688 F.2d at 626 (a full and fair assessment of a proposed settlement is "nearly assured when all discovery has been completed and the case is ready for trial").

D. The Recommendations of Experienced Counsel After Extensive Litigation and Arm's-Length Settlement Negotiations Favor the Approval of the Settlement

As the Ninth Circuit observed in *Rodriquez*, "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action. 563 F.3d at 965. Courts have recognized that "'"[g]reat weight" is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Nat'l Rural*, 221 F.R.D. at 528; *accord Omnivision*, 559 F.

Supp. 2d at 1043 ("'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness'").

Lead Counsel has significant experience in securities and other complex class action litigation and has negotiated numerous other substantial class action settlements throughout the country. *See* www.rgrdlaw.com. Having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence to support the claims asserted against Defendants, the likelihood of prevailing on these claims, the risk, expense, and duration of continued litigation, and the likely appeals and subsequent proceedings necessary if Lead Plaintiffs did prevail against Defendants at trial, Lead Counsel has concluded that the Settlement is a very good result for the Class. Here, "[t]here is nothing to counter the presumption that Lead Counsel's recommendation is reasonable." *Omnivision*, 559 F. Supp. 2d at 1043. Importantly, the Lead Plaintiffs, who were active in the litigation, authorized counsel to settle it and support the reasonableness of the Settlement. *See* Declaration of John Capobianco ("Local 677 Plan Decl."), ¶4, and the Declaration of Douglas Strachan ("Atlanta GEPF Decl."), ¶4, submitted herewith.

V. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

Lead Plaintiffs also seek approval of the Plan of Allocation of the Settlement proceeds. The Plan of Allocation is set forth in full in the Notice mailed to potential Class Members.

Assessment of a plan of allocation of settlement proceeds in a class action under Rule 23 of the Federal Rules of Civil Procedure is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Ikon*, 194 F.R.D. at 184; *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). An allocation formula need only

have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992).

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 and Release. Here, the Plan of Allocation was developed by Lead Counsel with the assistance of its economic consultant and reflects an assessment of the damages that could have been recovered at trial under the theories asserted in the case by Lead Plaintiffs.[7] Goldstein Decl., ¶¶80-84. As a result, the Plan of Allocation will result in a fair distribution of the available proceeds among Class Members who submit valid claims and therefore should be approved.

VI. CONCLUSION

For all the reasons set forth above, in the Goldstein Declaration, and the entire record, the Settlement and Plan of Allocation warrant this Court's final approval.

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Respectfully submitted,

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[7] *See, e.g.*, *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 U.S. Dist. LEXIS 88886, at *15 (N.D. Cal. Nov. 26, 2007) (recognizing that settlement proceeds may be distributed in accordance with strengths and weaknesses in a case) (collecting cases) (citing *Omnivision*, 559 F. Supp. 2d at 1045 ("It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits.")); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *38 (C.D. Cal. June 10, 2005) (Concluding as fair, a plan of allocation which "'makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue.'").

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