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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN RE STEC, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS	No. SACV 09-01304-JVS (MLGx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, PLAN OF ALLOCATION, AND CLASS CERTIFICATION** Hearing Date: May 20, 2013 Time: 1:30 p.m. Judge: Honorable James V. Selna Courtroom: 10C

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Lead Plaintiff State of New Jersey, Department of Treasury, Division of Investment ("New Jersey" or "Lead Plaintiff"), representative plaintiffs International Brotherhood of Electrical Workers, Local 103 ("Local 103") and Norfolk County Retirement System ("Norfolk County") (together with Lead Plaintiff, "Plaintiffs") and plaintiff Dr. Mark V. Ripperda (collectively, with Plaintiffs, the "Class Representatives"), respectfully submit this memorandum of points and authorities in support of their motion for (i) final approval of the proposed settlement (the "Settlement") of the above-captioned action (the "Action"); (ii) final approval of the proposed Plan of Allocation; (iii) final certification of the Class for the purposes of the Class Representatives' claims under the Securities Act of 1933 ("Securities Act"), for purposes of this Settlement only; and (d) final certification of Dr. Mark V. Ripperda as a Class Representative for the Class for purposes of this Settlement only.[1]

PRELIMINARY STATEMENT

The Settlement provides for the payment of Thirty-Five Million Seven Hundred Fifty Thousand Dollars in cash ($35,750,000) by and on behalf of Defendants for the benefit of the Class. The Settlement represents an extraordinary benefit that falls well within a range of reasonableness in light of the myriad risks of continued litigation.

While Class Representatives are confident in the merits of the claims, Defendants have mounted vigorous defenses that add substantial risk to Class Representatives' ability to prove liability and damages at trial. Nonetheless, Class Representatives have secured a Settlement that represents a large percentage of the

[1] For ease of reference, all capitalized terms not otherwise defined herein are the same as those defined in the Declaration of Thomas A. Dubbs in Support of Class Representatives' Motion for Final Approval of Proposed Class Action Settlement, Plan of Allocation, and Award of Attorneys' Fees and Expenses ("Dubbs Declaration" or "Dubbs Decl."), submitted herewith.

potential recovery at trial and provides cash relief to Class Members now, and in accordance with a fair and coherent Plan of Allocation.

As set forth in detail in the Dubbs Declaration,[2] an agreement to settle this Action was reached only after lengthy litigation, which included, *inter alia*, Co-Lead Counsel's defeat of Defendants' efforts to dismiss the complaint for failure to state a claim; extensive fact discovery and marshalling of evidence; the exchange of expert reports; multiple motions for class certification; Co-Lead Counsel's defeat of Defendants' efforts to reduce the amount of Class Members' alleged damages; and extensive, arm's length settlement negotiations with former Federal Judge Layn R. Phillips (*see* Declaration of Layn R. Phillips, Ex. 10.[3]). The Settlement and Plan of Allocation should be approved.

THE EXTENSIVE NOTICE PROGRAM

On February 11, 2013, after a hearing on Class Representatives' renewed motion for preliminary approval of the Settlement, the Court entered a tentative Order preliminarily approving the Settlement (ECF No. 361). A formal Preliminary Approval Order was entered on March 7, 2013 (ECF No. 372). Pursuant to and in compliance with those Orders, through records maintained by STEC, information gathered from brokerage firms and requests made by individuals and brokerage firms, The Garden City Group, Inc. ("GCG"), the Court-appointed Claims Administrator, caused the Notice and Proof of Claim and Release form to be mailed to more than 125,482 Class Members. *See* Ex. 2 ¶¶ 3-6.

[2] The Dubbs Declaration contains a detailed description of the summary of the allegations and claims, the procedural history of the Action and the events that led to the Settlement, and other matters.

[3] All exhibits referenced herein are annexed to the Dubbs Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___-___." The first numerical reference refers to the designation of the entire exhibit attached to the Dubbs Declaration and the second reference refers to the exhibit designation within the exhibit itself.

On February 25, 2013, the Notice and Proof of Claim were posted on the case-dedicated website established by GCG for purposes of this Settlement. *Id*. ¶ 8.

The Notice provides means by which Class Members or other interested persons can call, email or write to GCG or Co-Lead Counsel with inquiries. As of April 2, 2013, the toll-free telephone line received 451 calls from potential Class Members and other interested persons. *Id*. ¶ 9.

On March 8, 2013, the Summary Notice was published in *Investor's Business Daily* and was issued over *PR Newswire*. *Id*. ¶ 7 & Ex. 2-B and 2-C.

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE UNDER THE APPLICABLE STANDARD AND SHOULD BE APPROVED

A. The Standard for Final Approval of Class Action Settlements

Rule 23(e) of the Federal Rules of Civil Procedure provides that the claims of a certified class may be settled only with the approval of the Court, and only on a finding, after reasonable notice to the class and a hearing, that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see In re Heritage Bond Litig.*, 546 F.3d 667, 674-75 (9th Cir. 2008) ("A district court may approve a proposed settlement in a class action only if the compromise is fundamentally fair, adequate, and reasonable.") (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (same).

In making this determination, courts in the Ninth Circuit consider and balance a number of factors, including:

> (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental

participant; and (8) the reaction of class members to the proposed settlement.[4]

See Churchill Vill. L.L.C. v. Gen. Elec., 361 F.3d 566, 575-76 (9th Cir. 2004) (citing *Hanlon*, 150 F.3d at 1026); *Officers for Justice v. Civil Serv. Comm'n of City & Cnty of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982) (same).

Courts have also considered "(9) the procedure by which the settlement was arrived at, and (10) the role taken by the lead plaintiff in that process, a factor somewhat unique to the PSLRA." *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (internal citation omitted); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) ("In addition, the settlement may not be the product of collusion among the negotiating parties.") (citing *Class Plaintiffs*, 955 F.2d at 1290). Not all of these factors will apply to every class action settlement and under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

The determination of whether a settlement is fair, adequate and reasonable is committed to the Court's sound discretion. *See Mego*, 213 F.3d at 458 ("Review of the district court's decision to approve a class action settlement is extremely limited.") (citing *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998)). Nonetheless, in applying the pertinent factors the Court should not prejudge the merits of the case, in part because the Court will be called upon to decide the merits if the action proceeds. *See Officers for Justice*, 688 F.2d at 625 ("[T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. . . . [I]t is the very uncertainty of outcome in litigation and

[4] With respect to this factor, Class Members have until April 22, 2013 to request exclusion from the Class or object to the matters to be considered during the Settlement Hearing. Class Representatives will file a brief responding to any objections and addressing exclusion requests no later than May 6, 2013.

avoidance of wasteful and expensive litigation that induce consensual settlements."). The Court's discretion in assessing the fairness of the settlement is also circumscribed by "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (quoting *Officers for Justice*, 688 F.2d at 626); *see Class Plaintiffs*, 955 F.2d at 1276 (same)).

B. Application of the Ninth Circuit's Criteria Supports Approval of the Settlement

1. The Strength of Class Representatives' Case and Risks Associated with Continued Litigation

To determine whether the proposed Settlement is fair, reasonable and adequate, the Court must balance the continuing risks of litigation against the benefits afforded to Class Members and the immediacy and certainty of a substantial recovery. *Mego*, 213 F.3d at 458. Although Class Representatives believe that the case against Defendants is strong, that confidence must be tempered by the fact that the Settlement is extremely beneficial and that every case involves significant risk of no recovery, particularly in a complex case such as this.

(a) Falsity Defense

Defendants have disputed, and would continue to dispute on summary judgment and at trial, the falsity of their statements, including the falsity of statements concerning the EMC Agreement. Defendants have consistently maintained that their statements were accurate and made without material omissions and have consistently asserted that their statements regarding the EMC Agreement did not have the meaning attributed to them by Plaintiffs. Thus, the meaning communicated by Defendants' statements about the EMC Agreement, *as well as* the truthfulness of that meaning, would be facts to be determined by the jury. *See* Dubbs Decl. ¶ 263.

In addition to statements regarding the EMC Agreement, the TAC alleges false statements and omissions regarding at least three other subjects: (i) sales to

the Other OEMs, (ii) STEC's 2009 second quarter revenues, and (iii) competition for the ZeusIOPS. In allowing Plaintiffs to go forward with discovery, the Court did not find it necessary to examine whether Plaintiffs' allegations regarding any of these three other subjects were plausible, which adds to the difficulty of predicting how the Court would rule on a motion by Defendants to dismiss these claims on summary judgment. Moreover, when the SEC recently filed its own complaint against Defendant Manouch Moshayedi, the SEC did not allege the falsity of any statements regarding any of these three other subjects. *Id*. ¶ 264.

(b) Scienter Defense

Even if any of Defendants' statements were found by a jury to have been false, Defendants cannot be liable under the Securities Exchange Act of 1934 (the "Exchange Act") for such falsity, unless Defendants made the statements with scienter—*i.e*., knowledge of their falsity, or reckless disregard for whether the statements were true or false. Even under the Securities Act, if the statements were forward looking statements, Defendants cannot be liable, unless they made such forward looking statements with knowledge of their falsity. *Id*. ¶ 265; 15 U.S.C. § 78u-5(c)(1)(B); *In re Cutera Sec. Litig*., 610 F.3d 1103, 1112 (9th Cir. 2010).

Whether Defendants reasonably believed that their statements about the EMC Agreement were true, may depend, in part, on what they had been told by EMC, and on whether they reasonably doubted what EMC had told them. Thus, the ability of Class Representatives to prove Defendants' scienter may depend not only on the credibility of Defendants, but also, on the credibility of the EMC witnesses—an additional factor to be determined by the jury. Dubbs Decl. ¶ 266.

(c) Safe Harbor Defense

Defendants have persistently asserted that the majority of the alleged misstatements were "forward looking" statements made in the context of cautionary language. Under the so called "safe harbor" of the PSLRA, Defendants cannot be held liable for forward looking statements made in the context of other,

cautionary language about the same subject, even if the forward looking statements were knowingly false. Therefore, regardless of whether Defendants made knowingly false statements, Defendants may be able to escape liability, if they can show that the statements were forward looking statements made in the context of other, adequately cautionary language, regarding the same subjects. *See* Dubbs Decl. ¶ 267; *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co*., 353 F.3d 1125, 1132 (9th Cir. 2004).

(d) Loss Causation and Damages Defenses

Another risk in continuing the litigation is the difficulty in proving loss causation, which would be hotly contested by Defendants at summary judgment, in pretrial *Daubert* motions and at trial. The United States Supreme Court has confirmed that the law requires that "a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." *Dura Pharms*., *Inc. v. Broudo*, 544 U.S. 336, 346 (2005).

In moving to dismiss the CAC, Defendants argued that Plaintiffs had failed to allege that any of the stock drops following any of the alleged corrective disclosures—whether on September 17, 2009, November 3, 2009, or February 23, 2010—had been *caused* by a disclosure of any truth concealed by Defendants' alleged misstatements. ECF No. 147 at 21-24. Because the CAC was dismissed for other reasons, the Court never ruled on Defendants' argument, and it is likely that similar arguments would be made by Defendants on a motion for summary judgment and at trial. If the Court or a jury were to determine that Defendants' statements did not cause Class Members' losses, Class Members would not be able to recover anything, regardless of whether or not Defendants' statements were knowingly false. Dubbs Decl. ¶ 268.[5]

[5] *See also* Dubbs Decl. ¶¶ 269-71 for a discussion of additional risks concerning Class Members' ability to recover damages for the stock drops on February 23, 2010, September 17, 2009 and November 9, 2009, respectively.

Resolution of these issues would no doubt involve the testimony of expert witnesses and the Parties would end up in a "battle of experts" where it would be impossible to predict with any certainty which arguments would find favor with a jury *See*, *e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 (S.D.N.Y 1985), *aff'd*, 798 F.2d 735, 744-45 (2d Cir. 1986) (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").

In sum, as a result of the availability to Defendants of the various defenses described, *supra* and in the Dubbs Declaration, it is possible that, even if a jury were to find that Defendants knowingly made misleading statements, Class Members would recover no damages, or damages in an amount smaller than the amount of the Settlement.

2. The Expense and Likely Duration of Further Litigation

Final approval is also supported by the expense and likely duration of an action. *See Torrisi*, 8 F.3d at 1376 ("the cost, complexity and time of fully litigation the case all suggest that this settlement was fair"). "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 Telecommc'ns. Coop v. DIRECTV,* 221 F.R.D. 523, 526 (C.D. Cal. 2004). Here, the expense and duration of motion practice on summary judgment, trial preparation, the trial itself, post-trial motions, and any appeals would be significant and could match the substantial time and money already spent. Barring a settlement, there is no question that this case would be litigated for years, taking a considerable amount of court time and costing millions of additional dollars, with the possibility that the end result would be no better for the class, and might even

be worse. *See id*. at 526-27 ("Given the length, complexity, and number of issues involved, it is very possible that a jury may not have reached a unanimous verdict on all issues. Furthermore, even if it did reach unanimous verdicts, it is likely that an appeal would have followed. Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.").

Given the uncertain prospects of success, settlement at this time is highly beneficial to the Class. Class Representatives are prepared to resume litigation full-tilt if the Court declines to approve the Settlement. However, if the case goes to trial and Defendants obtain a favorable verdict, the Class will be left with no recovery, and only after lengthy and costly additional proceedings. The Settlement, therefore, provides sizeable and tangible relief to the Class now, without subjecting Class Members to the risks, duration and expense of continuing litigation. This factor weighs strongly in favor of final approval of the Settlement.

3. The Risk of Maintaining Class Action Status Through Trial

The Class was certified for Plaintiffs' Exchange Act Claims. *See* ECF No. 314. The Class was also preliminarily certified for Class Representatives' Securities Act Claims, for the purposes of settlement only. *See* ECF Nos. 361 and 372. As set forth in great detail in the Dubbs Declaration, certification of the Class's claims under the Exchange Act was complex and hard fought and involved, *inter alia*, opposition from Defendants (including an effort to shorten the Class Period, among other things); a motion to intervene filed by non-party West Virginia Laborers' Trust Fund who sought modification of the proposed class definition to exclude the Securities Act Claims; an initial Order denying class certification; a Rule 23(f) appeal to the Ninth Circuit; efforts by Plaintiffs to identify a Securities Act plaintiff; and a renewed motion for class certification. *See* Dubbs Decl. ¶¶ 152-77. Preliminary certification of the Securities Act Claims

involved all of the above and was the subject of extensive briefing on Class Representatives' motion for preliminary approval of the Settlement. *See, e.g.,* ECF Nos. 333, 335, 353, 358, 360.

Therefore, although the Class has been certified, certification was unusually difficult to obtain and there is no certainty that the Class will maintain certification through trial. Under Rule 23(c)(1)(C), the Court's prior grant of certification "may be altered or amended before final judgment." It is possible, therefore, that the Class could be decertified or modified if the litigation were to continue. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (noting that even if a class is certified, "there is no guarantee the certification would survive through trial, as Defendants might have sought decertification or modification of the class); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *10 (C.D. Cal. June 10, 2005) (addressing the possibility of decertification of the class in light of the complexity of the class action). In light of the complexities surrounding class certification of the claims in the Action, maintaining class action status poses a real risk to Class Representatives and weighs in favor of approving the Settlement.

4. Amount Offered in the Settlement

In evaluating the fairness of a settlement, a fundamental question is how the value of the settlement compares to the amount the class potentially could recover at trial, discounted for risk, delay and expense. In this regard, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Mego*, 213 F.3d at 459. Indeed, "[t]here is a range of reasonableness with respect to a settlement – a range which 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[.]" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005).

The proposed $35.75 million Settlement is well within a range of reasonableness in light of the best possible recovery at trial and the risks of continued litigation. According to analyses prepared for settlement purposes by Class Representatives' consulting damages expert, using a conservative model suitable for trial, the maximum aggregate damages Class Representatives could have obtained at trial is estimated to be $233 million. *See* Dubbs Decl. ¶ 252 n. 25. The $35.75 million settlement represents 15.3% of this estimated damages amount. This percentage falls well within the range of possible approval, and courts have generally approved other settlements in PSLRA cases that recover a comparable or far smaller percentage of maximum damages. *See*, *e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at 810 (S.D.N.Y. Feb. 1, 2007) ("The Settlement Fund is approximately $40.3 million. The settlement thus represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class actions securities litigations.").

A statistical study published by Cornerstone Research recently found that between 1996 and 2011 and 2012, court-approved securities class action settlements recovered a median of 3.3 percent and 1.8 percent of estimated damages, respectively. *See* Ellen M. Ryan & Laura E. Simmons, Securities Class Action Settlements: 2012 Review and Analysis, at 8 (Cornerstone Research 2013), Ex. 11. Cornerstone also found that where, as here, maximum estimated damages are between $125 million and $249 million, settlements during 1996-2011 and 2012 recovered a median of only 3.6 percent and 1.5 percent of such damages respectively. *Id.* Moreover, settlements between 1996 and 2012 which involved claims under both Section 10(b) of the Exchange Act *and* claims under Section 11 of the Securities Act recovered a median of 3.5% of such estimated damages. *Id.* at 11. Therefore, viewed as a percentage of the potential recovery at trial, this Settlement provides a recovery that appears to be much greater than many court-

approved PSLRA settlements in general.[6] Class Representatives therefore submit that the Settlement clearly falls within a range of reasonableness. *See*, *e.g.*, *Omnivision*, 559 F. Supp. 2d at 1042 (settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").[7]

5. The Extent of Discovery Completed and the Stage of the Proceedings

The stage of the proceedings and the amount of discovery completed is also one of the factors courts consider in determining the fairness, reasonableness and adequacy of a settlement. *See Mego*, 213 F.3d at 459. As set forth in extensive detail in the Dubbs Declaration, Class Representatives and Co-Lead Counsel had a very thorough understanding of the facts of the case and the strengths and weaknesses of the claims. When the Parties agreed to a Settlement, Plaintiffs had successfully litigated Defendants' motions to dismiss, obtained class certification on the Exchange Act Claims, completed merits discovery, and exchanged expert reports with Defendants.

Merits discovery was comprehensive and involved, among other things, the review of more than 1.7 million pages of documents produced by Defendants and over one million pages of documents produced by non-parties; 25 depositions taken by Plaintiffs; over two hundred pages of detailed answers by Plaintiffs to contention interrogatories served by Defendants; and extensive motion practice on discovery disputes with Defendants as well as certain non-parties including EMC and the Underwriters. *See* Dubbs Decl. § V.A.-C.

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[6] Courts have relied on earlier versions of the Cornerstone study in approving class action settlements. *See, e.g., In re Canadian Superior Sec. Litig.*, No. 09 Civ. 10087 (SAS), 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM), 2010 WL 4537550, at *20 (S.D.N.Y. Nov. 8, 2010); *Portal Software,* 2007 WL 4171201, at *3.

[7] Moreover, in cases involving corresponding SEC actions, like the SEC action here against defendant Manouch Moshayedi, for settlements through 2012, the median settlement amount is $13 million. *See* Ex. 11 at 16.

In connection with expert discovery, Plaintiffs filed an expert report in support of their November 21, 2011 motion for class certification and defended this expert's deposition. *Id*. ¶¶ 114, 148-49. Plaintiffs filed initial expert reports on July 10, 2012 and rebuttal expert reports on July 24, 2012. In total, 12 expert reports were exchanged among the Parties. The Parties had also begun taking expert depositions when the Parties agreed to postpone expert discovery during the course of mediation of a settlement. *Id*. ¶¶ 116-43.

In short, Plaintiffs had a complete understanding of the likelihood of success and the potential recovery at trial at the time the Settlement was agreed to. *See Portal Software*, 2007 WL 4171201, at *4 ("The settlement reflects three and a half years of completed work including pre-filing investigation, locating and interviewing over twenty-one witnesses, . . . and plaintiff's analysis of defendants' motion for summary judgment . . . As a result, the true value of the class's claims were well known."). This factor supports final approval of the Settlement.[8]

6. The Experience and Views of Counsel

The Ninth Circuit has stated that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *see also DIRECTV*, 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.") (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.), *aff'd,* 117 F.3d 721 (2d Cir. 1997).

Co-Lead Counsel and all other Plaintiffs' Counsel firmly believe the Settlement is fair, adequate and reasonable, and particularly so in view of the risks,

[8] *See Mego*, 213 F.3d at 459 (noting that "Class Counsel had worked with damages and accounting experts throughout the litigation"); *McPhail v. First Command Fin. Planning, Inc.*, No. 05cv179-IEG-JMA, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (noting that "[a]t the time of settlement, the parties were finishing expert discovery and Class Counsel was preparing for trial").

burdens and expense of continued litigation. Further, it is respectfully submitted that Co-Lead Counsel and all Plaintiffs' Counsel are experienced and able lawyers in this area of practice (*see* Exs. 4-8) and "[t]here is nothing to counter the presumption that Lead Counsel's recommendation is reasonable." *Omnivision*, 559 F. Supp. 2d at 1043. Accordingly, this factor strongly favors approval of the Settlement.

7. The Settlement is Not the Product of Collusion

Another factor is whether there is any evidence that the settlement is the result of collusion. *See Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011); *see also Mego*, 213 F.3d at 458. "The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair." *Linney v. Cellular Alaska P'Ship*, No. C 96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998).

The presumption is entirely proper here. The Settlement is the product of extensive and informed arm's length negotiations that were undertaken over the course of nearly nine months with the assistance of the Honorable Layn R. Phillips, a former Federal Judge and recognized mediator.[9] Dubbs Decl. ¶ 247.

The first mediation session with Judge Phillips took place on January 5, 2012 and was preceded by the Parties' exchange of detailed mediation statements. While the mediation session narrowed some of the Parties' differences and despite the Parties' good faith efforts, the Parties did not reach an agreement. *Id*. ¶¶ 249-50.

[9] *See In re Bear Stearns Cos., Inc. Sec., Derivative & "ERISA" Litig.*, No. 08 MDL 1963, 2012 WL 5465381, at *3 (S.D.N.Y. Nov. 9, 2012) ("The parties. . . . engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases.").

In the wake of the completion of fact discovery, in May 2012, the Parties agreed to reconvene for another mediation session. This session took place on July 30, 2012 before Judge Phillips and was also preceded by the exchange of detailed mediation statements informed by the Parties' extensive mutual discovery. Although this mediation session focused on the key areas of dispute and narrowed the settlement range, the Parties did not reach an agreement. *Id*. ¶¶ 252-53. The Parties therefore agreed to meet again for a third mediation session before Judge Phillips on September 5, 2012. At the close of the third day of mediation, the Parties had narrowed their areas of dispute but were unable to reach an agreement. *Id*. ¶ 256.[10] For two days following the third mediation session, the Parties engaged in additional discussions, by telephone, and reached an agreement. A Memorandum of Understanding was signed on September 11, 2012. *Id*. ¶ 257.

The fact that the settlement discussions were facilitated by an experienced mediator, who has considerable knowledge and expertise in the field of federal securities law, evidences the non-collusive nature of the negotiations. *See Satchell v. Fed. Express Corp*., No. C03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive"). Additionally, the fact that the mediation sessions were initially unsuccessful, and required further negotiations, supports the inference that the Settlement is the product of arm's length negotiations. *See*, *e.g*., *Hicks v. Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *5 (S.D.N.Y. Oct. 24, 2005) ("[a] breakdown in settlement negotiations can tend to display the negotiation's arms-length and non-collusive nature.")

[10] The first two mediation sessions were attended by Co-Lead Counsel, a Deputy Attorney General on behalf of Lead Plaintiff and counsel for Defendants. The third mediation session was also attended by Co-Lead Counsel, an Assistant Attorney General on behalf of Lead Plaintiff, counsel for Class Representative Dr. Ripperda and counsel for Defendants. *See* Dubbs Decl. ¶¶ 249, 252, 256.

Finally, the recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor… is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (citation omitted). Lead Plaintiff is a sophisticated institutional investor; indeed it is one of the largest pension systems in the United States. *See* ECF No. 356 ¶ 22. Lead Plaintiff took an active role in all aspects of this Action, as envisioned by the PSLRA, including extensive efforts in discovery and direct participation in settlement negotiations. Ex. 1 ¶¶ 5-10. Lead Plaintiff approves the Settlement. *Id*. ¶¶ 11-12.

Accordingly, this factor, like the others discussed above, strongly favors approval of the Settlement. Class Representatives respectfully submit that the Settlement is fundamentally fair, adequate and reasonable and should be approved.

II. THE PLAN OF ALLOCATION OF THE NET SETTLEMENT FUND IS FAIR, ADEQUATE AND REASONABLE AND SHOULD BE APPROVED

Approval of a plan of allocation of settlement proceeds is governed by the same overarching standard of fairness applied to the settlement. *See Portal Software*, 2007 WL 4171201, at *5 ("The court turns next to the proposed plan of allocation, which must be fair, reasonable and adequate.") (citing *Class Plaintiffs*, 955 F.2d at 1284).

"When formulated by competent and experienced counsel," a plan of allocation "need have only a reasonable, rational basis." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (internal quotation marks and citation omitted). A reasonable plan may consider the relative strengths of different claims and differing positions of class members. *See Portal Software*, 2007 WL 4171201, at *6 ("Courts endorse distributing settlement proceeds

according to the relative strengths and weaknesses of the various claims.") (citing cases).

The Plan of Allocation is set forth in full on pages 10-15 of the Notice. Dubbs Decl. ¶ 276; Ex. 2-A at 10-15. The Plan of Allocation was formulated with the assistance of Class Representatives' damages and causation expert, Dr. John Finnerty, and provides for the distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on a formula tied to liability and damages. Dr. Finnerty calculated the reasonable amount of artificial inflation present in STEC's common stock throughout the Class Period that was purportedly caused by the alleged fraud. Dr. Finnerty's analysis entailed studying the price declines associated with STEC's allegedly corrective disclosures, adjusted to eliminate the effects attributable to general market or industry conditions. *Id*. ¶¶ 278-79.

The Plan provides a 25% premium for Class Members who purchased or acquired STEC common stock pursuant to the registration statement filed in connection with STEC's secondary offering on August 6, 2009 – *i.e.*, Class Members with claims under Section 11 of the Securities Act – in recognition that Securities Act Claims are generally considered more valuable than Exchange Act claims. *See In re Stacs Elecs. Sec. Litig*., 89 F.3d 1399, 1403-04 (9th Cir. 1996), *cert. denied sub. nom. Anderson v. Clow*, 520 U.S. 1103 (1997); *see also* ECF No. 279 at 12 (". . . [U]nder Section 10(b) of the Exchange Act and Rule 10(b)(5), Plaintiffs must prove scienter, reliance, and loss causation . . . . In contrast, to prevail on a Section 11 or Section 12(a)(2) claim under the Securities Act, a plaintiff need only prove a material misrepresentation of fact in a registration statement or prospectus.") (citation omitted).

Accordingly, the Recognized Loss with respect to Class Members who have Securities Act Claims is multiplied by 1.25 under the Plan, thus enhancing the Recognized Claims of Class Members with Securities Act Claims by 25% over

those with only Exchange Act Claims. As previously set forth by Class Representatives' Reply in Further Support of their Motion for Preliminary Approval of Class Action Settlement (ECF No. 335), this premium is consistent with plans of allocation developed in other cases. *See*, *e.g.*, *In re Countrywide Fin. Corp. Sec. Litig.*, Case No. CV 07-05295 MRP (MANx) (C.D. Cal. Aug. 2, 2010) at 17 (ECF No. 335-3) ("The applicable factor is 1.25 for Eligible Securities with Section 11 claims because Section 11 claims, as opposed to Section 10(b) claims, do not require evidence of fraudulent or reckless intent, and accordingly would likely be easier to prove at trial").[11] Likewise, Dr. Finnerty examined plans of allocation created in numerous cases involving the settlement and release of both Exchange Act and Securities Act claims and opined that a premium of 25% for the Securities Act claims is reasonable, as it represents the "median" premium granted to the Securities Act claimants in similar cases. *See* ECF No. 354-5 at 7-8.

Accordingly, for all of the reasons set forth herein and in the Dubbs Declaration, the Plan of Allocation is fair, reasonable and adequate and should be approved.

III. THE COURT SHOULD GRANT FINAL CLASS CERTIFICATION FOR SETTLEMENT PURPOSES

In June 2012, the Court entered an Order certifying the Class for Plaintiffs' claims under the Exchange Act. *See* ECF No. 314; Dubbs Decl. ¶ 176. Following several rounds of extensive briefing and two hearings before this Court, the Court preliminarily certified, for the purposes of the Settlement only, the Class's claims under the Securities Act and certified Dr. Ripperda as a Class Representative. *See* ECF Nos. 361 and 372. The Court should now finally certify the Class for the purposes of Class Representatives' claims under the Securities Act.

[11] *See also* ECF No. 353 at 13 (citing class settlement notices where a 25% premium was provided to Section 11 claimants); ECF No. 360 at 9-10 (same).

Under Rule 23, class actions must meet the following four prerequisites for class certification: (1) numerosity; (2) commonality of questions of law or fact; (3) typicality of the named plaintiff's claims and defenses; and (4) the adequacy of the named plaintiff. *See* Fed. R. Civ. P. 23(a); *Staton v. Boeing Co*., 327 F.3d 938, 952 (9th Cir. 2003). Additionally, the Court must also find that common questions of law predominate and that a class action is the superior method of adjudication. *See* Fed. R. Civ. P. 23(b)(3).

A. Numerosity

In its prior order granting certification of the Class for Plaintiffs' Exchange Act claims, the Court found the numerosity criterion was satisfied. *See* ECF No. 314 at 5. *See also* ECF No. 279 at 6-7. The proposed Class is even more numerous, since it also includes persons or entities who have Securities Act Claims. *See* ECF No. 346 at 8 ("Adding the Securities Claims would only increase the number of members in the Class. . ."). Numerosity is therefore satisfied.

B. Commonality

The commonality requirement of Rule 23(a)(2) requires only the existence of "questions of fact and law which are common to the class." The Ninth Circuit construes this requirement "permissively," and has stated that "[a]ll questions of fact and law need not be common to satisfy the rule." *Hanlon*, 150 F.3d at 1019. The Court both in its Order denying class certification (ECF No. 279 at 7-8) and its Order denying Plaintiffs' motion for preliminary approval (ECF No. 346 at 9), found the commonality requirement had been satisfied. *See also* ECF No. 314 at 5. All Class Members who purchased STEC common stock were allegedly injured by Defendants' material misrepresentations and omissions, which artificially inflated the market price of STEC's common stock. Accordingly, the commonality requirement is met because "[the] action involves a common core of salient facts as well as common questions of fact and law." ECF No. 346 at 9.

C. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The Ninth Circuit has held that typical claims need only be 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Crossen v. CV Therapeutics*, No. C 03-03709 SI, 2005 WL 1910928, at *4 (N.D. Cal. Aug. 10, 2005) (quoting *Hanlon*, 150 F.3d at 1020). Typicality is interpreted "permissive[ly]." *In re Juniper Networks Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009).

Here, the Class Representatives and Class Members seek to recover damages for losses caused by the same alleged course of conduct by Defendants: dissemination to the investing public of materially false and misleading statements in the run up to the Offering. In previously certifying the Class in this case for Plaintiffs' claims under the Exchange Act, the Court found that Plaintiffs were typical for purposes of the Exchange Act claims. ECF No. 314 at 7; *see also* ECF No. 279 at 8.

Regarding the Securities Act Claims, Dr. Ripperda has standing to advance the Securities Act Claims, as pleaded in the TAC, since he bought STEC common stock on the Offering and did not sell it until after September 17, 2009, when it was revealed to the market that Defendants' assertion that they had "no competition at this stage" was false and STEC's common stock price dropped as a result. In preliminarily certifying the Class's claims under the Securities Act, the Court found that Dr. Ripperda's claims are "reasonably co-extensive with those of absent class members" (ECF No. 361 at 4) and he therefore satisfies the typicality requirement set forth by Rule 23(a)(4) for the Securities Act Claims.[12]

[12] That Dr. Ripperda did not hold his STEC shares until the February 23, 2010 Corrective Disclosure does not defeat typicality. *See In re Connectics Corp. Sec. Litig.*, 257 F.R.D. 572, 578 (N.D. Cal. 2009) (reasoning, where the lead plaintiff *(continued . . .)*

Thus, the Class Representatives respectfully submit that the Court should find that Dr. Ripperda satisfies the typicality requirement with respect to the Securities Act Claims alleged in the TAC.

D. Adequacy

Rule 23(a)(4) requires that class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In making this determination, courts must consider two questions: '"(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Evon v. Law Offices of Sidney Mickell*, 688 F. 3d 1015, 1031 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020).

In certifying the Class for the Exchange Act Claims, the Court previously found that Lead Plaintiff and Local 103 are adequate Class Representatives. *See* ECF No. 314 at 6. The Court should also find adequacy satisfied for the Securities Act Claims. Here, Dr. Ripperda's history of trading in STEC stock, the successful pleading of, and voluminous discovery regarding, the facts underlying the Securities Act Claims—the results of which Dr. Ripperda received and reviewed before participating in the settlement and "plan of allocation" negotiations—and the appropriately generous relief allocated to Securities Act claimants in the proposed Plan of Allocation, all demonstrate that Dr. Ripperda is an adequate representative plaintiff for Class Members with Securities Act Claims.

1. There Are No Conflicts of Interest Between Dr. Ripperda and the Other Class Members Who Have Alleged Securities Act Claims

"There is considerable overlap between the typicality prerequisite of Rule 23(a)(3) and the adequate representation requirement of Rule 23(a)(4). Although a

(. . . continued)
sold all of its holdings of the stock at issue prior to the final alleged corrective disclosure, that the typicality requirement was nonetheless satisfied).

court may consider potential conflicts of interest, the Ninth Circuit has observed that courts generally decline to consider conflicts at the outset, unless the conflict is apparent and at the very heart of the suit." *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 636 (C.D. Cal. 2009) (quoting *In re Unioil Sec. Litig.*, 107 F.R.D. 615, 622 (C.D. Cal. 1985)). Here, every claim alleged in the TAC, whether pled under the Exchange Act or the Securities Act, is based on the same factual predicate—specifically, that investors purchased shares of STEC stock whose price had been inflated by misstatements made by Defendants, and were injured thereby.

As noted in Section III.C. *supra*, Dr. Ripperda has standing to assert the Competition Claim because he bought STEC common stock on the Offering and held shares at least until after the September 17, 2009 corrective disclosure. Dr. Ripperda sustained losses as a result of the same material misrepresentations and omissions regarding the demand for STEC's flagship product that allegedly injured Class Members as well. Moreover, as set forth in Class Representatives' renewed motion for preliminary approval of class action settlement, Dr. Ripperda felt it was important to step forward to represent those who purchased stock on the Offering. *See* ECF No. 354-4 ¶ 3. The Court should therefore find that Dr. Ripperda satisfies the first prong of the adequacy requirement because he has standing to assert the Securities Act Claims alleged in the TAC, his interests are co-extensive with those of Class Members, and no conflict in those interests exists.

2. Dr. Ripperda Benefited from Plaintiffs' Vigorous Prosecution of the Securities Act Claims

Dr. Ripperda had the benefit of Plaintiffs' vigorous prosecution of the alleged Securities Act Claims. Following briefing on Class Representatives' renewed motion for preliminary approval, the Court agreed with Class Representatives' assertion that Dr. Ripperda "had the benefit of Plaintiffs' vigorous prosecution of the alleged Securities Act Claims." ECF No. 361 at 4, *quoting Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238-40 (9th Cir. 1998) ("In the

context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement") (internal quotations and citations omitted).

Moreover, as the Exchange Act claims and the Securities Act Claims alleged in the Action are based on the same factual predicate, every misstatement or omissions alleged under the Sections Act is identical to one or more of the misstatements or omissions alleged under the Exchange Act. Therefore, every effort to discover evidence sufficient to prove the elements of the Exchange Act claims was, necessarily, an effort to prove the smaller set of elements comprising the related Securities Act Claims. *See* Dubbs Decl. ¶ 208.

Additionally, the Competition Claim and the subject of competition for the ZeusIOPS was a focus during discovery. As set forth in great detail in the Dubbs Declaration, Co-Lead Counsel questioned numerous witnesses about competition for STEC's ZeusIOPS and investigated, *inter alia*, whether EMC was planning not to renew the EMC Agreement because it expected to start purchasing more cheaply from competitors and whether STEC knew that and whether the Other OEMs were refraining from purchasing from STEC because they were expecting competition to emerge and force STEC to lower its pricing. *See Id*. ¶ 205. Co-Lead Counsel also questioned analysts about whether the issue of developing competition was important to them and what they thought ultimately was disclosed about competition. *Id*. Additionally, Plaintiffs served Defendants with the report of Plaintiffs' expert on accounting and SEC regulations, Dr. Steven L. Henning, devoted in part to a duty of disclosure alleged in the SAC, which was alleged only under the Securities Act. *Id*. ¶¶ 235, 245.

Counsel for Dr. Ripperda benefited from all of that work as well. Dr. Ripperda's counsel received and reviewed the results of Plaintiffs' extensive fact and expert discovery, *see* ECF No. 327 at 5-6, and vigorously concluded the mediation efforts commenced by Lead Plaintiff, *see id*. at 6; *see also* ECF No. 354-

2 ¶ 11; ECF No. 354-3 ¶ 7. Dr. Ripperda's counsel was present at the September 5, 2012 mediation session that followed his entry into the case, and Dr. Ripperda himself was available by telephone during that mediation, evidencing his active role on behalf of himself and Class Members who have Securities Act Claims. Dubbs Decl. ¶ 256. Finally, at the "plan of allocation" mediation, counsel for Dr. Ripperda were again present and actively participated. *See id*. ¶ 258. Indeed, during those negotiations, it was Dr. Ripperda's counsel who suggested the amount of the premium for the Securities Act Claims that ultimately was agreed to by Lead Plaintiff and Dr. Ripperda. *Id*. ¶ 259.

Therefore, as this Court previously found in granting Class Representatives' renewed motion for preliminary approval of the Settlement, and since nothing has changed since the entry of that Order, the should finally find that the adequacy requirement has been met.

E. Common Questions of Law and Fact Predominate

In certifying the Class for the Exchange Act Claims, the Court previously found predominance satisfied under Rule 23(b)(3). *See* ECF No. 314 at 5; *see also* ECF No. 279 at 15-16. The Court should also find predominance satisfied for the Securities Act Claims. "[T]he predominance requirement of Rule 23(b)(3) is readily met in securities-fraud class actions." *Hicks v. Morgan Stanley & Co*., No. 01 Civ. 10071 (HB), 2003 WL 21672085, at *1 n. 8 (S.D.N.Y. July 16, 2003) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). That is because "[t]he predominant questions of law or fact at issue in [such] case[s] are the alleged misrepresentation[s] Defendants made during the Class Period and are common to the class." *In re Emulex Corp. Sec. Litig*., 210 F.R.D. 717, 721 (C.D. Cal. 2002) (granting motion for class certification). The critical issues of fact and law that predominate in this matter are common to all Class Members. Those issues relate to alleged false statements disseminated by Defendants that damaged all Class Members. There are no significant, let alone predominant, individual

issues that could preclude class certification, as the Court previously concluded in its previous class certification order.

F. A Class Action is the Superior Means of Adjudicating This Controversy

Rule 23(b)(3) also requires that class resolution be "superior to other available methods for fairly and efficiently adjudicating the controversy." If Class Representatives and each Class Member brought individual actions, each would be required to prove the same wrongdoing by Defendants to establish liability. *See In re Micron Techs., Inc. Sec. Litig.*, 247 F.R.D. 627, 635 (D. Idaho 2007) (noting this, and stating that this repetitive process would "unnecessarily burden the judiciary"). Class certification promotes judicial efficiency by permitting common claims and issues to be tried only once, with binding effect on the named parties and on class members. *See*, *e.g.*, *Juniper*, 264 F.R.D. at 592 ("Where thousands of identical complaints would have to be filed, it is superior to concentrate claims through a class action in a single forum.").

In certifying the Class for Plaintiffs' Exchange Act claims, this Court concluded that a class action was superior to individual actions or any other alternative means of adjudicating this controversy. *See* ECF No. 314 at 5; *see also* ECF No. 279 at 15-18. That finding remains appropriate. The superiority requirement is met.

CONCLUSION

For the foregoing reasons, Class Representatives respectfully request that this Court grant final approval to the proposed Settlement, approve the Plan of Allocation of the Net Settlement Fund, grant final class certification of the claims under the Securities Act, for settlement purposes, grant final certification of Mark Ripperda as a Class Representative for the Class and enter the proposed Final Judgment and Order of Dismissal and proposed Order Approving Plan of Allocation of Net Settlement Fund submitted herewith.

Dated: April 8, 2013

Respectfully submitted,

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