UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE NII HOLDINGS INC. SECURITIES LITIGATION	Civ. No. 1:14-cv-00227-LMB-JFA

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Court-appointed Lead Plaintiffs Danica Pension, Livsforsikringsaktieselskab ("Danica"), Industriens Pensionsforsikring A/S ("Industriens"), Pension Trust Fund for Operating Engineers Pension Plan ("Operating Engineers Pension Trust Fund"), IBEW Local No. 58 / SMC NECA Funds ("IBEW Local No. 58 / SMC NECA Funds"), and Jacksonville Police & Fire Pension Fund ("Jacksonville P&F") (collectively, "Lead Plaintiffs" or "Class Representatives"), on behalf of themselves and the Court-certified Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement of this securities class action ("Action") and for approval of the proposed plan for allocating the net settlement proceeds to the Class (the "Plan of Allocation").[1]

I. PRELIMINARY STATEMENT

Under the Stipulation, Class Representatives, through their counsel, have obtained $41.5 million in cash for the benefit of the Class, in exchange for the dismissal of all claims brought in this Action and a full release of claims against Steven P. Dussek, Steven M. Shindler, and Gokul V. Hemmady (collectively, "Defendants" or "Individual Defendants") and the other Released Defendant Parties. As described in this memorandum and in the accompanying Joint Declaration, the proposed Settlement is an excellent result for the Class, providing a significant and certain recovery in a case that presented numerous hurdles and risks. Notably, based on Class Counsel's review of data compiled by Institutional Shareholder Services Inc. ("ISS"), the Settlement, if approved, would rank as the fifteenth largest securities class action settlement in

[1] All capitalized terms that are not defined in this memorandum have the same meanings as defined in the Stipulation and Agreement of Settlement dated as of April 18, 2016 (ECF No. 247-1) (the "Stipulation") and the Joint Declaration of Gregory M. Castaldo, Joel H. Bernstein, and Susan R. Podolsky in Support of Proposed Class Action Settlement, Plan of Allocation, and Award of Attorneys' Fees and Expenses (the "Joint Declaration" or "Joint Decl."), submitted with this memorandum. Unless otherwise noted, all emphasis in quotations is added, and internal quotation marks, citations, and footnotes are omitted.

the Fourth Circuit and the sixth largest in this District.[2] This recovery also exceeds both the median ($6.1 million) and the average ($37.9 million) settlement recoveries in securities class actions nationally in 2015.[3]

While Class Representatives and their counsel believe that the claims against Defendants are meritorious, they also recognized that, in the absence of a settlement, they faced substantial challenges to obtaining any recovery−let alone a recovery greater than the Settlement Amount. Although Class Representatives were able to overcome Defendants' motion to dismiss and obtain certification of the Class, there was no guarantee that Class Representatives would have succeeded on summary judgment or at trial. Indeed, a trial of this Action would have been especially risky. NII's bankruptcy and subsequent dismissal from the Action would interject an added level of complexity to trial, forcing Class Representatives to present their case through experts and deposition testimony, as well as through witnesses either appearing by subpoena or testifying for Defendants and adverse to the Class. In addition, given the complex and highly technical nature of the claims asserted, both Class Representatives and Defendants would have been required to rely on expert testimony−leading to an inevitable "battle of the experts." As this Court well knows, success in such a battle in a jury trial is far from guaranteed. Finally, as NII is no longer a viable source of recovery, any judgment obtained for the Class would have had to be satisfied by NII's directors' and officers' insurance policies, which were also being used to pay defense costs in this Action and/or Defendants' limited personal assets.

It is also important to recognize that this was not a case that settled early. Rather, this Action was extremely hard-fought over the course of two years and was settled just a few months

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[2] *See* www.issgovernance.com.

[3] *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2015 Review and Analysis*, at 6 (Cornerstone Research 2016) ("Cornerstone Research") (Joint Decl. Exh. 5).

before an anticipated May or June 2016 trial. Before reaching the Settlement, Class Counsel had, among other things, (i) conducted a significant legal and factual investigation into NII; (ii) drafted two detailed complaints; (iii) prevailed on Defendants' motion to dismiss; (iv) successfully moved for class certification; (v) defeated Defendants' Rule 23(f) petition to the Fourth Circuit Court of Appeals; (vi) completed document discovery, including the review of approximately 1.8 million pages of documents produced by NII, Defendants, and numerous third parties; (vii) prepared for, took, or defended a total of 18 fact witnesses' depositions, including depositions of all three Individual Defendants; (viii) consulted extensively with experts and consultants in the areas of market efficiency, damages, loss causation, and the telecommunications industry, and assisted in the preparation of two expert reports; (ix) deposed Defendants' market-efficiency expert and defended the deposition of Class Representatives' market-efficiency expert; and (x) thoroughly vetted both sides' damages assumptions, methodologies, and calculations through discovery and two mediations. As a result of these efforts, Class Counsel were well-informed when they negotiated the Settlement, which they believe is an excellent result in light of the risks of continued litigation.

Further evidence of the fairness of the Settlement can be found in the accompanying declarations of Class Representatives,[4] who are all large, sophisticated institutional investors of the type favored by Congress when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Each of them has closely monitored and participated in this litigation from the outset. They were deposed, produced documents responsive to Defendants' discovery requests,

[4] *See* Declaration of Jan Østergaard on behalf of Industriens, Declaration of H. Thomas Reed on behalf of Operating Engineers Pension Trust Fund, Declaration of E. Craig Young on behalf of IBEW Local No. 58 / SMC NECA Funds, Declaration of Beth McCague on behalf of Jacksonville P&F, and Declaration of Ole Krogh Petersen on behalf of Danica, attached as Exhibits 1, 2, 3, 4 and 18 to the Joint Declaration, respectively.

and evaluated the proposed Settlement, and they now recommend that it be approved. *See* Joint Decl., Exhs. 1-4, 18. Under these circumstances, the opinions of Class Representatives are strong evidence that the Settlement meets the threshold for final approval. Class Counsel, who are firms with extensive experience prosecuting securities class actions and other complex litigation, also strongly believe that the Settlement is in the best interests of the Class. Joint Decl., ¶¶5, 103-105, 153.

The reaction of the Class thus far also supports the Settlement. In accordance with the Court's May 16, 2016 Preliminary Approval Order (ECF No. 251), the Court-approved Claims Administrator, A.B. Data, Ltd. ("A.B. Data"), has mailed over 172,000 copies of the Notice and Claim Form (together, the "Notice Packet") to potential Class Members and nominees.[5] As ordered by the Court and stated in the Notice, requests for exclusion from the Class and objections to the Settlement, the Plan of Allocation, or the request for attorneys' fees and expenses are due to be received no later than August 26, 2016. To date, there have been no objections to any aspect of the Settlement, and only one request for exclusion has been received by A.B. Data. Joint Decl., ¶138; *see also* Schachter Decl., ¶14.

In light of the foregoing and all of the considerations discussed below, Class Representatives and their counsel firmly believe that the $41.5 million Settlement is eminently fair, reasonable, and adequate, easily satisfies the standards of Rule 23, and provides an excellent result for the Class. Accordingly, Class Representatives respectfully request that the Court grant final approval of the Settlement and approve the Plan of Allocation as a fair and reasonable method for distributing the Net Settlement Fund to the Class.

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[5] *See* Declaration of Eric Schachter Regarding (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; (C) Establishment of the Telephone Hotline; (D) Establishment of the Settlement Website; and (E) Report on Requests for Exclusion Received to Date (the "Schachter Decl."), ¶¶2-10, attached as Exhibit 6 to the Joint Declaration.

II. FACTUAL BACKGROUND

In 2009, NII−a telecommunications company that, through its subsidiaries, operated wireless voice and data networks in five Latin America countries under the Nextel brand−embarked on a major transformation to build new networks based on a more modern technology (i.e., new third-generation ("3G") networks) that would provide faster data transmission to its customers. Joint Decl., ¶13. This Action involves claims arising from NII's transition to 3G and, in particular, Defendants' issuance of alleged materially false and misleading statements and the alleged omission of material information concerning (i) NII's efforts to attract and retain "high-quality" subscribers; (ii) NII's development, testing, and launch of a new push-to-talk ("PTT") technology on the Company's newly developed 3G wireless network ("3G-PTT"); and (iii) the effect of Sprint-Nextel's shutdown of its US second-generation ("2G") integrated digital enhanced network ("iDEN") on NII's Mexican network and subscribers. Joint Decl., ¶¶13-16. Class Representatives alleged that, as a result of Defendants' misrepresentations and omissions, the prices for NII's common stock and bonds were artificially inflated during the Class Period (*i.e.*, February 25, 2010 through February 27, 2014, inclusive), resulting in damages to persons and entities that purchased or otherwise acquired these securities during this time. *Id.*, ¶17.

The initial complaint in this Action was filed in March 2014 against NII, NII Capital Corp. (a wholly owned subsidiary of NII), the Individual Defendants, and others, asserting violations of the federal securities laws, including Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5. *Id.*, ¶18. Following their appointment as lead plaintiffs, Class Representatives filed the Amended Class Action Complaint for Violations of Federal Securities Laws (ECF No. 125) and then in July 2014 filed the operative

complaint in this Action, the Second Amended Class Action Complaint for Violations of Federal Securities Laws (ECF No. 133) (the "SAC"). *Id*., ¶¶19-23.

This Action was actively litigated by the Parties for nearly two years. Joint Decl., ¶¶9, 22-102. Throughout the Action, Defendants vigorously denied, and continue to deny, all allegations of wrongdoing, or that they have committed any act or omission giving rise to any liability or violation of law. During discovery, the Parties participated in an initial mediation that did not result in a settlement. *Id*., ¶122.

Following the completion of fact discovery, service of Class Representatives' expert reports, certification of the Class, and denial of Defendants' petition for interlocutory appeal of the Court's class-certification decision, and with the Action quickly progressing towards trial, the Parties agreed to participate in their second mediation in January 2016, conducted by Jed D. Melnick, Esq., a managing partner of Weinstein Melnick LLC with an extensive background in mediating securities class actions. *Id*., ¶123. It was only after thoroughly exploring the merits of the litigation and much deliberation, with the assistance of Mr. Melnick as a mediator, that the Parties reached an agreement-in-principle to settle the Action for $41.5 million. *Id*., ¶124.

The accompanying Joint Declaration provides extensive detail regarding the efforts undertaken by Class Representatives and their counsel on behalf of the Class. For the sake of brevity and to avoid repetition, Class Representatives respectfully refer the Court to the Joint Declaration for a detailed discussion of the procedural history of the Action. *Id*., ¶¶9, 18-102, 122-127.[6]

[6] In addition to the Joint Declaration, Class Counsel are simultaneously submitting their Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses and Class Representatives' Requests for Reimbursement of Expenses ("Fee Memorandum"). The Joint Declaration and Fee Memorandum are incorporated by reference in this memorandum.

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. The Standards 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 and a hearing, that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). "Simply put, the Court must assess whether the settlement here is both fair and adequate under the circumstances." *In re MicroStrategy Inc. Sec. Litig.*, 150 F. Supp. 2d 896, 903 (E.D. Va. 2001). As a matter of public policy, courts favor the settlement of disputed claims, particularly in complex class actions. *See DeWitt v. Darlington Cty.*, No. 4:11-cv-00740-RBH, 2013 U.S. Dist. LEXIS 172624, at *11 (D.S.C. Dec. 6, 2013) ("Courts greatly favor the settlements of cases and allowing litigants to achieve their own resolution of disputes."); *Lomascolo v. Parsons Brinckerhoff, Inc.*, No. 1:08cv1310 (AJT/JFA), 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) ("there is an overriding public interest in favor of settlement, particularly in class action suits"); *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) ("settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strains such litigation imposes upon already scarce judicial resources").

Thus, "[a]lthough the district court has broad discretion in approving a settlement of a class action case, there is a strong presumption in favor of finding a settlement fair." *DeWitt*, 2013 U.S. Dist. LEXIS 172624, at *11. Moreover, in determining whether a proposed settlement is "fair, reasonable, and adequate" under Rule 23(e)(2), the Court must recognize that "[s]ettlements, by definition, are compromises which need not satisfy every single concern of the plaintiff class, but may fall anywhere within a broad range of upper and lower limits." *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-cv-00271-JFA, 2012 U.S. Dist. LEXIS 86474, at

*30-31 (D.S.C. June 22, 2012). In other words, a "settlement fairness hearing is not a trial, and the court should defer to the evaluation and judgment of experienced trial counsel in weighing the relative strengths and weaknesses of the parties' respective positions and their underlying interests in reaching a compromise." *DeWitt*, 2013 U.S. Dist. LEXIS 172624, at *11; *see also 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 relief offered in the settlement. They do not decide the merits of the case or resolve unsettled legal questions."); *Faile v. Lancaster Cty.*, No. 0:10-cv-02809-CMC, 2012 U.S. Dist. LEXIS 189610, at *12 (D.S.C. Mar. 8, 2012) ("absent fraud, collusion or the like, [the] court should be hesitant to substitute its own judgment for that of counsel") (alteration in original); *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009) ("Counsel are highly experienced in the field of securities class action litigation . . . . [Their] decision to settle the case is the product of thorough exploration and deliberation and as such, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight.").

The Fourth Circuit has adopted a bifurcated analysis to guide district courts in deciding whether to approve a proposed settlement of a securities class action, using certain factors in considering the settlement's fairness and other factors in considering its adequacy. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). In assessing the settlement's fairness—an inquiry focused on whether the proposed settlement was reached as a result of good-faith bargaining at arm's-length and without collusion—the factors to be considered are:

> (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the

> negotiations, and (4) the experience of counsel in the area of securities class action litigation.

Jiffy Lube, 927 F.2d at 159; *see also Smith v. Res-Care, Inc.*, Civ. A. No. 3:13-5211, 2015 U.S. Dist. LEXIS 145266, at *16 (S.D. Va. Oct. 27, 2015). In assessing the settlement's adequacy—an inquiry focused on the substantive terms of the proposed settlement and, in particular, whether the settlement consideration provided to class members is sufficient in light of the risks and costs of continued litigation—the factors to be considered are:

> (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expenses of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Jiffy Lube, 927 F.2d at 159. As demonstrated in this memorandum and in the accompanying Joint Declaration, the Settlement represents an excellent result for the Class and clearly satisfies the factors enumerated in *Jiffy Lube*. Accordingly, it is the considered judgment of Class Representatives and their counsel that the Settlement represents a fair, reasonable, and adequate resolution of the Action and warrants this Court's final approval.

B. The *Jiffy Lube* Factors Support Approval of the Settlement

1. An Analysis of the *Jiffy Lube* Fairness Factors Demonstrates That the Settlement Is Fair and Warrants Final Approval

a. The Case Was Close to Trial at the Time of Settlement

The first *Jiffy Lube* fairness factor focuses on the posture of the litigation at the time settlement was reached. *See, e.g.*, *Mills*, 265 F.R.D. at 254; *Muhammad v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783, at *3 (S.D. W. Va. Dec. 19, 2008). The central inquiry for the Court is whether plaintiffs and their counsel have "sufficiently developed the case such that they can appreciate the merits of the claims." *Id*. at *3.

There is no question that, at the time of the second mediation in January, Class Counsel had a thorough understanding of the strengths and weaknesses of the claims and defenses asserted and could make intelligent, informed appraisals of their chances of success had the Action continued to be litigated. As noted above and in the Joint Declaration, this case was settled after nearly two years of vigorous, hard-fought litigation, and with a trial only several months away. In particular, Class Representatives' counsel (i) conducted an extensive investigation into the Class's claims, including the review of internal NII documents and voluminous publicly available information regarding NII and interviews with former NII employees; (ii) prepared two detailed amended complaints; (iii) defeated Defendants' motion to dismiss the SAC; (iv) reviewed and analyzed approximately 1.8 million pages of documents from NII, Defendants, and third parties; (v) prepared for, took, or defended 20 depositions of fact and expert witnesses; (vi) participated in NII's bankruptcy proceedings with the assistance of Bankruptcy Counsel; (vii) engaged in efforts to resolve numerous discovery disputes without Court intervention and prepared motions to compel in connection with certain unresolved disputes; (viii) successfully moved for class certification; (ix) defeated Defendants' Rule 23(f) petition; (x) consulted extensively with multiple experts and consultants on the issues germane to the litigation and assisted in the preparation of two expert reports; and (xi) thoroughly vetted both sides' damages assumptions, methodologies, and calculations through discovery and two mediations. Joint Decl., ¶¶9, 22-102, 122-124. *See Mills*, 256 F.R.D. at 254 (posture of the case supports fairness where lead plaintiffs "filed three complaints, overc[ame] motions to dismiss and pursu[ed] the action through to class certification"); *Res-Care, Inc.*, 2015 U.S. Dist. LEXIS 145266, at *17 (finding factor supported settlement where the case "settled during discovery and only after the parties conducted a full-day mediation").

Thus, Class Representatives were fully informed regarding Defendants' factual and legal theories, arguments, and defenses and were able to thoroughly evaluate the Parties' respective positions. This record is more than sufficient to support approval of the Settlement.

b. The Extent of Discovery Conducted

As detailed in the Joint Declaration, Plaintiffs' Counsel's discovery efforts were exhaustive and challenging. Notably, despite NII's bankruptcy and the automatic stay of the Action against it, Class Representatives were able to negotiate for the rolling production of targeted categories of documents from NII in exchange for a temporary extension of the stay to the Individual Defendants. Joint Decl., ¶¶46-49. The documents obtained from NII through the "Stay Production"−including organizational charts, churn management reports, daily metric reports, minutes and agendas from key committees and NII's board, and draft scripts and questions and answers from analyst conference calls−were extremely useful, as they allowed Plaintiffs' Counsel to begin to evaluate the strengths and weaknesses of their case, as well as provided a baseline level of knowledge to efficiently structure discovery requests and target potential deponents. *Id*., ¶47.

Once the temporary stay of the Action against the Individual Defendants was lifted in July 2015, the Parties immediately embarked on full discovery. Class Representatives' discovery efforts were complicated not only by the limited window of time in which to complete discovery but also, once again, by NII's absence as a defendant. The Individual Defendants vigorously argued that the documents requested by Class Representatives were solely under the control of NII and that production of the documents must come from NII. Joint Decl., ¶¶50-59. Even in the face of these hurdles, Class Representatives were able to obtain and analyze approximately 1.8 million pages of documents from NII, the Individual Defendants, and numerous third parties, including analysts who covered NII during the Class Period and FINRA.

Id., ¶¶59, 71-73. Class Representatives also produced thousands of pages of documents collectively in response to Defendants' discovery requests, as well as responded or objected to two sets of interrogatories and requests for admissions. *Id*., ¶¶82-84.

Class Representatives also prepared for, took, or defended a total of 20 depositions both in the United States and abroad, including eight depositions of current or former NII employees other than Defendants, depositions of the three Individual Defendants, a 30(b)(6) deposition of NII (through two separate designees), and depositions of the five Class Representatives. Joint Decl., ¶¶74-81. Class Representatives also deposed Defendants' market-efficiency expert, Dr. Paul A. Gompers, and defended a deposition of Class Representatives' market-efficiency expert, Chad Coffman, CFA. *Id*., ¶9.

In addition to fact discovery, the Parties engaged in extensive expert discovery before reaching the Settlement. *Id*., ¶¶85-93 Class Representatives proffered two testifying experts concerning materiality, market efficiency, loss causation, damages, accounting, and internal controls, and served their initial expert reports just weeks before reaching the Settlement. *Id*.

This comprehensive discovery provided Class Counsel with the knowledge and perspective necessary to assess the Class's case against the Defendants, and they were thus well positioned to negotiate the Settlement. This factor strongly supports the fairness of the Settlement.

c. <u>The Circumstances of the Settlement Negotiations</u>

The third *Jiffy Lube* fairness factor requires courts to consider the circumstances surrounding the settlement negotiations in evaluating the settlement's fairness. This factor focuses on the nature of the negotiations and whether they were free from fraud or collusion. "Absent evidence to the contrary, the court may presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion." *Kirven*

v. Cent. States Health & Life Co., No. 3:11-2149-MBS, 2015 U.S. Dist. LEXIS 36393, at *12 (D.S.C. Mar. 23, 2015). There is no such evidence here.

The Settlement now before the Court is the product of vigorous and informed arm's-length negotiations. Experienced counsel on both sides participated in two in-person mediation sessions before experienced and impartial mediators. Joint Decl., ¶¶122-124. Before both mediations, the Parties submitted comprehensive mediation statements to the overseeing mediator, and before the second mediation, the Parties exchanged their mediation statements with each other. *Id*. At all times during their negotiations, counsel for the Parties zealously advocated on behalf of their clients' best interests. *See Mills*, 265 F.R.D. at 255 (finding factor weighed in favor of approval where settlement was "product of a long series of dealings" between class counsel and defendants and the negotiations were "sufficiently thorough [and] contentious"); *Strang v. JHM Mort. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501-02 (E.D. Va. 1995) (fairness requirement was met where "[p]laintiffs' counsel, with their wealth of experience and knowledge in the securities-class action area, engaged in sufficiently extended and detailed settlement negotiations to secure a favorable settlement for the Class"). Moreover, the "supervision by a mediator lends an air of fairness to agreements that are ultimately reached." *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-cv-00271-JFA, 2012 U.S. Dist. LEXIS 131201, at *31 (D.S.C. Sept. 14, 2012); *see also DeWitt*, 2013 U.S. Dist. LEXIS 172624, at *13-14 (factor supported settlement where "[t]he mediation was conducted before an [experienced mediator] and the proposed Settlement Agreement was reached after extensive, bona fide, arms-length negotiations").

Simply put, "[t]he fact that negotiations were 'adversarial' and were conducted at 'arm's length' helps dispel any concern that counsel colluded in reaching agreement." *Temp. Servs.*,

2012 U.S. Dist. LEXIS 131201, at *31; *see also In re NeuStar, Inc. Sec. Litig.*, No. 1:14cv885 (JCC/TRJ), 2015 U.S. Dist. LEXIS 129463, at *26 (E.D. Va. Sept. 23, 2015) (finding factor satisfied where parties "reached [their settlement] after one day of mediation before a Judicial Arbitration and Mediation Services neutral" and "exchanged comprehensive mediation statements and supporting evidence, including information and analyses from experts" and noting that these features "indicate an arm's length negotiation"). Accordingly, this factor supports approval of the Settlement.

d. The Experience of Counsel in Securities Litigation

The final *Jiffy Lube* fairness factor focuses on "whether counsel is competent, dedicated, qualified, and experienced enough to conduct the litigation and whether there is an assurance of vigorous prosecution." *Kirven*, 2015 U.S. Dist. LEXIS 36393, at *13. Courts have recognized that where "counsel for both sides are nationally recognized members of the securities litigation bar," "it is appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole, and to find that the proposed . . . settlement is fair." *MicroStrategy*, 148 F. Supp. 2d at 665.[7]

Here, Class Counsel−two of the most experienced and skilled firms in the securities litigation field—believe that the Settlement is in the best interests of the Class. Joint Decl., ¶¶5, 153. As Class Counsel's firm biographies (*see* Exhs. 7-C and 8-D to the Joint Declaration) demonstrate, the attorneys at Kessler Topaz Meltzer & Check, LLP and Labaton Sucharow LLP are experienced and skilled class action securities litigators, and both firms have successful track

[7] *See also Mills*, 265 F.R.D. at 255 (finding it appropriate to "pay heed to [class counsel's] judgment in approving, negotiating, and entering into a putative settlement" when they are "nationally recognized members of the securities litigation bar"); *NeuStar*, 2015 U.S. Dist. LEXIS 129463, at *26-27 (same); *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 U.S. Dist. LEXIS 72981, at *6 (S.D. W.Va. May 22, 2013) (same); *S.C. Nat'l Bank*, 749 F. Supp. at 1424 (same).

records in some of the largest securities cases throughout the country. In addition, Class Counsel have served as lead or co-lead counsel on behalf of major institutional investors in numerous class action litigations since the enactment of the PSLRA.[8] In this Action, the tenacity of Class Counsel, in the face of difficult legal and factual circumstances, clearly led to a better result for the Class. *See Anselmo v. W. Paces Hotel Grp., LLC*, No. 9:09-cv-02466-DCN, 2012 U.S. Dist. LEXIS 164618, at *8 (D.S.C. Nov. 12, 2012) ("The court gives substantial weight to [Class Counsel's] suggestion" "that settlement is the preferable alternative."). The additional Plaintiffs' counsel who did work in this Action for the benefit of the Class also have long and successful track records in the cases they have litigated and are highly regarded and experienced litigators. *See* Exhs. 9-C, 10-B, 11-C, 12-C, 13-C and 14-C to the Joint Declaration.

The quality of the work performed by Class Counsel in attaining the Settlement should also be evaluated in light of the quality of opposing counsel. *See MicroStrategy*, 148 F. Supp. 2d at 665 (noting that "counsel for *both* sides are nationally recognized members of the securities

[8] For example, Kessler Topaz has served as counsel in the following high-profile matters: *In re Tyco Int'l, Ltd. Sec. Litig.*, No. 02-1335-PB (D.N.H.) (recovering a total of $3.2 billion from Tyco International, Ltd. and its auditor on behalf of a group of institutional investors); *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MDL 2058-PKC (S.D.N.Y.) (representing two large foreign pension funds and others and recovering $2.425 billion for investors); *In re Wachovia Preferred Sec. & Bond/Notes Litig.*, No. 09-cv-06351 (RJS) (S.D.N.Y.) (representing Southeastern Pennsylvania Transportation Authority, the nation's sixth largest transportation system, and obtaining a total recovery of $627 million for investors); and *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 02017-LAK (S.D.N.Y.) (representing Alameda County Employees' Retirement Association and obtaining a combined recovery of over $615 million for investors). Likewise, Labaton Sucharow has served as counsel in the following high-profile matters: *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04-8141 (DAB)(AJP) (S.D.N.Y.) (representing the Ohio Public Employees Retirement System, State Teachers Retirement System of Ohio, and Ohio Police & Fire Pension Fund and recovering settlements of $1 billion for investors); *In re HealthSouth Corp. Sec. Litig.*, No. 03-1501 (N.D. Ala.) (representing Michigan Retirement System, New Mexico State Investment Counsel, and the New Mexico Educational Retirement Board and securing settlements of more than $600 million for investors); *In re Countrywide Sec. Litig.*, No. 07-5295-MRP (C.D. Cal.) (representing New York State and New York City Pension Funds and reaching settlements of more than $600 million for investors); and *In re Computer Sciences Corp. Sec. Litig.*, Civ. A. No. 1:11-cv-610-TSE-IDD (E.D. Va) (representing Ontario Teachers' Pension Plan Board and obtaining $97.5 million for investors).

litigation bar" when considering the fairness of the settlement). Defendants in this case were represented by the preeminent defense firm Sidley Austin LLP, which spared no effort or expense in the defense of its clients. NII was also represented by a top-tier defense firm, Jones Day, which zealously defended against Class Representatives' discovery demands. In the face of this knowledgeable and formidable defense, Class Counsel were nonetheless able to develop a case that was sufficiently strong to persuade Defendants to settle the Action for $41.5 million on terms that are favorable to the Class. Thus, this factor supports the fairness of the Settlement and weighs in favor of its approval.

2. An Analysis of the *Jiffy Lube* Adequacy Factors Demonstrates That the Settlement Is Adequate and Warrants Final Approval

The *Jiffy Lube* "adequacy" analysis focuses on whether the settlement consideration is sufficient given the risks and costs of continued litigation. Thus, the natural starting point is the settlement consideration itself. Here, Defendants have caused to be paid a total of $41.5 million to compensate damaged shareholders—a recovery that (i) ranks among the largest securities class action recoveries ever in this District and (ii) exceeds both the median ($6.1 million) and the average ($37.9 million) securities class action settlements nationally in 2015. *See* Cornerstone Research (Joint Decl. Exh. 5) at 6. Moreover, nearly 50% of the settlements approved nationally in 2015 settled for less than $5 million and 80% settled for less than $25 million. *Id*.

The $41.5 million recovery also represents approximately 5.4% to 7.5% of the Class's *maximum* recoverable damages in this Action, as estimated by Class Representatives' damages expert. Joint Decl., ¶119.[9] By way of comparison, Cornerstone Research has reported that in

[9] The term "maximum" means that this calculation assumes a complete victory for Class Representatives on all merits issues at trial, and as the Court is aware, this is a proposition inherently full of substantial risk.

2015, median securities class action settlements nationally as a percentage of estimated damages were only 1.8%, and only 1.5% for cases, like this one, with estimated damages between $500 million and $999 million. *See* Cornerstone Research (Joint Decl. Exh. 5) at 8-9; *see also MicroStrategy*, 148 F. Supp. 2d at 667 n.22 (citing *Orman v. Am. Online, Inc.*, Civ. A. No. 97-264-A (E.D. Va. Dec. 14, 1998), which approved a $35 million settlement amounting to approximately 5% of the maximum potential recovery); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("The [$40.3] settlement . . . 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 action securities litigations."). Moreover, in light of the serious ability-to-pay issues in this Action, this recovery is even more impressive. Joint Decl., ¶120. *See* §III(B)(2)(c) below. At the May 16, 2016 hearing on preliminary approval of the Settlement, the Court found this fact, in particular, to favor the Settlement. *See* May 16, 2016 Transcript at p.3 ("[A]s a practical matter, the recovery would essentially come out of the insurance, the officers' and directors' insurance policies, and that money is being dissipated for discovery and litigation costs, so the sooner this case settles, those costs stop. That leaves more money in the pot, so to speak, to satisfy the plaintiffs."). Given that "[t]he most important factor [in evaluating a settlement] is a comparison of the terms of the proposed settlement with the likely recovery that the plaintiffs would realize if they were successful at trial," this factor strongly supports approval of the Settlement. *Kirven*, 2015 U.S. Dist. LEXIS 36393, at *11.

a. The Relative Strength of Plaintiffs' Case and Existence of Difficulties of Proof or Strong Defenses

The "first and second *Jiffy Lube* [adequacy] factors . . . compel the Court to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains

in avoiding the uncertainty of a potentially difficult case." *Mills*, 265 F.R.D. at 256. Indeed, "[s]ecurities cases, like the present one, are notably difficult and notoriously uncertain." *Id.* at 255; *see also Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) ("To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action."). As discussed in the Joint Declaration, while Class Representatives were confident of the merits of their claims, they would still have had to overcome numerous defenses asserted by Defendants in order to survive dispositive summary judgment motions or to ultimately recover at trial. Joint Decl., ¶¶103-119.

(i) Risks Concerning Liability

Class Representatives faced numerous hurdles to establishing Defendants' liability. To succeed, Class Representatives would have needed to prove that (i) NII implemented marketing and sales promotions that were either intended to or obviously did attract and retain lower-quality subscribers and launched a 3G-PTT product that did not meet NII's or its subscribers' expectations; (ii) NII and Defendants made materially false and misleading statements regarding NII's efforts to attract and retain "high-quality" subscribers and whether 3G-PTT met or exceeded NII's and its customers' expectations during testing and at the time of launch; and (iii) Defendants knew or consciously disregarded the reality of the poor quality of NII's subscriber base and the failure of 3G-PTT to meet or exceed expectations, while making false statements and omissions to the market. Joint Decl., ¶111. *See MicroStrategy*, 148 F. Supp. 2d at 666 (noting that proving the elements of a Section 10(b) claim "is a heavy burden" and that "[e]lements such as scienter, materiality of misrepresentation and reliance by the class members often present significant barriers to recovery in securities fraud litigation").

Defendants vigorously disputed all elements of liability. At summary judgment and trial, Defendants would have argued, among other things, that Class Representatives could not establish that Defendants made any materially false statements or omissions, that NII and Defendants affirmatively disclosed the true state of affairs regarding the Company, its networks and it customers, and would likely have asserted that the alleged misstatements were immaterial aspirational or forward-looking statements or statements of opinion or belief that require higher levels of proof. Joint Decl., ¶112. Defendants also were expected to strongly contest scienter, asserting, among other things, that (i) NII's subscriber base was substantially higher in quality than its competitors in Brazil and that any alleged concealed information regarding the purported decline in customer quality was belied by NII's public disclosure of average revenue per user and subscriber churn rates in Brazil; (ii) Defendants and NII adequately warned investors regarding the technical and business risks of the launch of its 3G-PTT service and when performance issues arose, promptly reported that NII was halting the launch to address the issues; and (iii) Defendants and NII timely warned investors of potential service disruptions from Sprint's US iDEN shutdown and that the expected financial impact of the shutdown on NII was disclosed to investors in NII's guidance. *Id*., ¶113. In further support of their arguments against scienter, Defendants would have pointed to the absence of insider-trading allegations and their lack of motive to profit from the alleged fraud. *Id*.

While Class Representatives had solid responses to Defendants' contentions, how the issues of material falsity and scienter would be resolved by the Court at summary judgment or how a jury would have resolved them at trial was far from certain.

(ii) Risks Concerning Causation and Damages

Class Representatives also faced significant risks in proving the existence and the amount of the Class's damages. Joint Decl., ¶¶116-119. *See Dura Pharms., Inc. v. Broudo*, 544 U.S.

336, 345-46 (2005) (holding that plaintiffs bear the burden of proving "that the defendant's misrepresentations caused the loss for which the plaintiff seeks to recover").

With respect to loss causation, Class Representatives faced a risk that they would be unable to "disaggregate" the portion of the Class's losses attributable to NII and Defendants' alleged misstatements and omissions concerning the quality of the Company's subscriber base, the development and launch of 3G-PTT, and the effect of the shutdown of Sprint's US iDEN network from losses attributable to other "confounding information," e.g., other issues the Company was experiencing as it transitioned all five of its Latin American markets to new 3G networks. Joint Decl., ¶117. For example, Defendants likely would have contended that NII's stock-price drop on April 26, 2012 was due to its weaker than expected financial results for 1Q 2012 and that its weaker than expected financials for this period were caused by factors unrelated to Class Representatives' allegations, such as the negative impact of foreign exchange volatility and increased income tax expenses and higher costs on NII's bottom line. And even if Class Representatives could have established at summary judgment and trial that NII and Defendants' misstatements and omissions were a substantial factor in causing the alleged price declines of NII securities, Class Representatives still faced a significant risk that the Court or a jury would find that only a small fraction of the total losses was attributable to these misrepresentations and omissions, thus significantly reducing any recovery for the Class. Joint Decl., ¶118.

Moreover, in complex securities cases such as this, both Class Representatives and Defendants would have relied on expert testimony to assist the jury in determining damages at trial. Although Class Representatives' damages expert would have been able to present a cogent view as to loss causation and damages, there is little doubt that Defendants' expert would do the same. At best, the jury would have been confronted with a "battle of the experts" and forced to

assess the credibility of contradictory testimony from highly qualified experts. As the court explained in *MicroStrategy*,

> Defendants' experts likely would have challenged plaintiffs' estimated maximum recoverable damages . . . and argued . . . the company's stock price movement during the class period could be explained as being caused, in whole or in part, by factors other than alleged artificial inflation . . . . In this regard, the damages issue would have become a battle of experts at trial, with no guarantee of the outcome in the eyes of the jury. These risks, inherent in the divergent expert testimony reasonably anticipated in a case of this sort, further support the adequacy of the . . . settlement.

See 148 F. Supp. 2d at 666; *see also Rowles v. Chase Home Fin., LLC*, No. 9:10-cv-01756-MBS, 2012 U.S. Dist. LEXIS 3264, at *7 (D.S.C. Jan. 10, 2012) (holding that the parties' "dispute [over damages] underscores not only the uncertainty of the outcome but also why the Court finds the [settlement] to be fair, reasonable, adequate, and in the best interests of the Class Members."). Thus, the uncertainty in proving damages, including the need to rely heavily on expert testimony, weighs strongly in favor of the Settlement.

(iii) Additional Jury and Trial Risks

As discussed above and in the Joint Declaration, at the time the Settlement was reached, the Parties were just several months away from trial. Notably, NII's bankruptcy would have imposed an additional level of complexity on any trial of this Action−just as it did during the course of the litigation. Joint Decl., ¶¶106-107. As NII is now reorganized, Class Counsel would have been forced to present Class Representatives' case through experts and deposition testimony or adverse witnesses−given the void of former NII employees willing to voluntarily testify for Class Representatives. *Id*., ¶109. Indeed, the NII bankruptcy scattered potential trial witnesses all over the country, making trial presentation more complicated. In addition, the claims in this Action involve complex issues related to the telecommunications industry that would have presented factual intricacies and challenges for a jury. *Id*., ¶108.

Finally, even if Class Representatives prevailed at trial, there is no assurance that they would have recovered an amount equal to, much less greater than, the Settlement Amount obtained here.

b. The Anticipated Duration and Expense of Additional Litigation

The third *Jiffy Lube* adequacy factor is the additional time and expense that would be necessary if the litigation proceeded to trial. *See S.C. Nat'l Bank*, 749 F. Supp. at 1426 ("The likely duration and associated expenses of continued litigation likewise favor approval of the settlement.").[10] This Action, if taken to trial, would have required tremendous preparation and expense by both sides, as well as substantial Court resources. *See Kirven*, 2015 U.S. Dist. LEXIS 36393, at *15-16 ("[T]he court must weigh the settlement in consideration of the substantial time and expense litigation of this sort would entail if a settlement was not reached. This factor is based on a sound policy of conserving the resources of the Court and the certainty that [avoiding] unnecessary and unwarranted expenditure of resources and time benefit[s] all parties.") (alterations in original).

Success for Class Representatives at trial would almost certainly have resulted in an appeal by Defendants. *See MicroStrategy*, 148 F. Supp. 2d at 667 ("there is little doubt that a jury verdict for either side would only have ushered in a new round of litigation in the Fourth Circuit and beyond, thus extending the duration of the case and significantly delaying any relief for plaintiffs."). Defendants are represented by experienced counsel who would have continued to mount a zealous and thorough defense to Class Representatives' claims for relief not only

[10] *See also Smith v. Toyota Motor Credit Corp.*, No. WDQ-12-2029, 2014 U.S. Dist. LEXIS 141402, at *11 (D. Md. Oct. 2, 2014) ("If this case were to proceed without settlement, the resulting litigation would be complex, lengthy and expensive. The Settlement eliminates a substantial risk that the [class] would walk away empty handed after trial.").

before and during a full trial on the merits, but also through post-trial motions and appeals. Defendants demonstrated as much in filing their Rule 23(f) petition with the Fourth Circuit seeking to appeal the Court's decision to certify the Class. Joint Decl., ¶¶101-102, 154.

The Settlement provides a substantial, certain, and immediate recovery for the Class without subjecting it to the risks, duration, and expense of continuing litigation. In other words, "the old adage, 'a bird in hand is worth two in the bush' applies with particular force in this case." *MicroStrategy*, 148 F. Supp. 2d at 667.

c. The Solvency of Defendants and Likelihood of Recovery of a Litigated Judgment

The ability of Defendants to pay is another *Jiffy Lube* factor that the Court must consider in accessing the adequacy of the Settlement. This factor is especially relevant here, as NII−the corporate defendant in the Action−filed for bankruptcy during the course of the Action, foreclosing an important potential source of recovery for the Class. Joint Decl., ¶120. As a result, any judgment obtained for the Class would have to be satisfied by NII's limited officers' and directors' insurance, which had already been partly used for dense costs, and would continue to be depleted if the Action continued towards trial and/or the Individual Defendants' personal assets, which were understood to be only a small fraction of the Class's damages. *Id*. Courts have found similar circumstances to strongly support approval of a settlement. *See, e.g.*, *In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, No. 05-232, 2008 WL 4974782, at *8 (E.D. Pa. Nov. 21, 2008) (where the company was bankrupt and the individual defendants had limited assets, "[c]ontinuing to trial in the hopes of obtaining a higher penalty would merely deplete the insurance policy proceeds . . . leaving the class, if successful, with a lesser judgment, not a greater one. This factor weighs heavily in favor of settlement"); *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *4 (S.D.N.Y. May 14, 2004)

(limitations on the individual defendants' ability to pay and the likely depletion of D&O insurance before trial were the "overriding consideration driving the settlement negotiations" and supported approval of the settlement). Without a doubt, this factor supports the Settlement.

d. The Degree of Opposition to the Settlement

Finally, the reaction of class members to a proposed settlement "as expressed directly or by failure to object" is also a "proper consideration for the trial court." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). A low number of objections or opt-outs in comparison to the size of the settlement class evidences the fairness of the proposed settlement. *See Mills*, 265 F.R.D. at 257-58 (noting that the lack of any objections to the settlement and the small number of opt-outs strongly supports a finding of adequacy).

As of August 9, 2016, a total of 172,482 copies of the Notice have been mailed to potential Class Members and nominees and the Summary Notice was published in the *Wall Street Journal* and released electronically via PR Newswire. Schachter Decl., ¶¶10-11. While the deadline set by the Court for members of the Class to object to the Settlement or request exclusion from the Class has not yet passed, to date, there have been no objections to the Settlement and only one request for exclusion has been received by A.B. Data. Joint Decl., ¶138; Schachter Decl., ¶14. Thus, this *Jiffy Lube* factor provides additional support for approving the Settlement.[11]

IV. THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE

Following approval of the Settlement and upon the Effective Date, the Net Settlement Fund will be distributed to Authorized Claimants. The proposed Plan of Allocation contained in

[11] The deadline for submitting objections and requesting exclusion is August 26, 2016. As provided in the Preliminary Approval Order, Class Counsel will file reply papers on or before September 9, 2016 that will address any objections or requests for exclusion received after this submission. ECF No. 251.

the Notice (the "Plan") details the manner in which the Net Settlement Fund will be allocated. *See* Schachter Decl., Exh. A.

Approval of a plan of allocation is governed by the same standards by which a class action settlement is scrutinized–namely, it must be fair, reasonable, and adequate. *See In re Wachovia Corp. ERISA Litig.*, No. 3:09cv262, 2011 U.S. Dist. LEXIS 155045, at *30-31 (W.D.N.C. Oct. 24, 2011); *MicroStrategy*, 148 F. Supp. 2d at 668. In evaluating a proposed allocation plan, courts give considerable weight to the opinion of experienced class counsel. *See Mills*, 265 F.R.D. at 258 ("given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis"). Here, Class Counsel developed the Plan after careful consideration and analysis and in consultation with Class Representatives' damages expert, Chad Coffman. Joint Decl., ¶130. The Plan is consistent with the damages that Class Representatives and their counsel believe were recoverable in the Action. *Id*., ¶129.[12]

It is appropriate for plans of allocation in securities class actions to distribute settlement proceeds based on an assessment of the relative strengths and weaknesses of class members' claims. *See MicroStrategy*, 148 F. Supp. 2d at 669 (approving plan of allocation that "sensibly 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"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strength and values of different categories of claims."). Plans of allocation,

[12] In developing the Plan, Mr. Coffman calculated the daily per share artificial inflation in the price of each Eligible NII Security throughout the Class Period that allegedly was caused by Defendants' misrepresentations and omissions. Mr. Coffman's analysis entailed, among other things, an assessment of the price declines in each Eligible NII Security in reaction to certain public announcements regarding NII in which the misrepresentations and omissions were alleged to have been revealed to the market (i.e., "corrective disclosures"), adjusting for price changes that were attributable to market or industry factors. *Id*., ¶130.

however, need not be tailored to calculate each class member's claims with "scientific precision." *Mills*, 265 F.R.D. at 258. Rather, broad classifications may be used in order to promote "[e]fficiency, ease of administration and conservation" of the settlement fund. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 135 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Under the Plan, a Recognized Loss Amount will be calculated for each Eligible NII Security purchased or otherwise acquired during the Class Period (i.e., the period between February 25, 2010 and February 27, 2014, inclusive) and for which adequate documentation is provided. In order to have a Recognized Loss under the Plan, the market prices of the NII Stock or NII Bonds must have declined due to disclosure of the alleged false and misleading statements and omissions. Specifically, the NII Stock or NII Bonds purchased or acquired during the Class Period must have been held through one or more of the alleged corrective disclosures and sold in a subsequent inflation period or retained through the end of the Class Period. Joint Decl., ¶131; Schachter Decl., Ex. A at p. 9.[13] A.B. Data, as the Claims Administrator, will determine each Authorized Claimant's pro rata share of the Net Settlement Fund by dividing the Authorized Claimant's Recognized Claim (i.e., the sum of a Claimant's Recognized Loss Amounts as calculated in accordance with the Plan) by the total Recognized Claims of all Authorized Claimants, multiplied by the total amount in the Net Settlement Fund.

The Plan was fully disclosed in the Notice that was mailed to potential Class Members and nominees. To date, there have been no objections to the Plan. *Id.*, ¶138. Accordingly, for

[13] The Plan also reflects the statutory limitation on recoverable damages using the 90-day "look back" period under Section 21D(e)(1) of the PSLRA. Joint Decl., ¶131 n.17; Schachter Decl., Ex. A at p. 10, n4.

all of the reasons discussed in this memorandum and in the Joint Declaration, the Plan is fair and reasonable and should be approved.

V. NOTICE TO THE CLASS SATISFIED ALL THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Notice to the Class of the Settlement satisfied the requirements of Rule 23(c)(2)(B), which requires "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); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). "While [Rule 23] does not spell out the required contents of settlement notice, it must fairly apprise the prospective 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." *Beaulieu v. EQ Indus. Servs.*, 2009 U.S. Dist. LEXIS 133023, at *80-81 (E.D.N.C. Apr. 20, 2009); *see also Res-Care*, 2015 U.S. Dist. LEXIS 145266, at *16 ("In the context of a class action, the due process requirements of the Fifth Amendment require [r]easonable notice combined with an opportunity to be heard and withdraw from the class.") (alteration in original).

Both the substance of the Notice and the method of its dissemination to potential members of the Class satisfied these standards. The Notice contains the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Class certified by the Court; (iii) a description of the basic terms of the Settlement, including the amount of the consideration and the releases to be given; (iv) the Plan of Allocation; (v) an explanation of the reasons why the Parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Class Members' right to request exclusion from the Class or to object to the Settlement, the Plan of Allocation, or

the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members. The Notice also provides recipients with information on how to submit a Claim Form in order to be potentially eligible to receive a distribution from the Net Settlement Fund.

As noted above, in accordance with the Preliminary Approval Order, as of August 9, 2016, A.B. Data has mailed over 172,000 copies of the Notice Packet by first-class mail to potential members of the Class and nominees. *See* Schachter Decl., ¶10. In addition, A.B. Data caused the Summary Notice to be published on June 13, 2016. *Id*., ¶11. A.B. Data also established a website dedicated to the Settlement, www.niisecuritieslitigation.com, to provide members of the Class and potential claimants with information concerning the Settlement and the applicable deadlines, as well as access to downloadable copies of the Notice, including the Plan of Allocation and the Claim Form, as well as the Stipulation, the Preliminary Approval Order, and the SAC. *Id*., ¶13.

This combination of notice by individual first-class mail to all members of the Class who could be identified with reasonable effort and notice in widely circulated publications, transmitted over a newswire, and on internet websites was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., MicroStrategy*, 148 F. Supp. 2d at 669-70 (finding that notice reached as many members of the class as practicable and satisfied due process and Rule 23 where notice was mailed directly to class members, banks, brokers, and other nominees and summary notice was published); *NeuStar*, 2015 U.S. Dist. LEXIS 129463, at *30-31 (same).

VI. CONCLUSION

For the foregoing reasons, Class Representatives respectfully request that the Court approve the Settlement and the proposed Plan of Allocation. Proposed orders will be submitted

with Class Representatives' reply papers to be submitted after the deadlines for objection and seeking exclusion have passed.

Dated: August 12, 2016

By: /s/ Susan R. Podolsky

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on August 12, 2016.

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