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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 8:10-CV-1327-JST (RNBx)

IN RE BECKMAN COULTER, INC.
SECURITIES LITIGATION

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY
SETTLEMENT APPROVAL AND
SETTING A FAIRNESS HEARING
FOR FEBRUARY 27, 2012 AT 10:00
A.M.**

1 Before the Court is an unopposed Motion for preliminary settlement approval filed
2 by Lead Plaintiff Arkansas Teacher Retirement System and Iron Workers District Council
3 of New England Pension Fund (“Lead Plaintiff”). (Doc. 58.) The Motion asks the Court
4 to preliminarily approve the proposed settlement, conditionally certify the settlement class,
5 and approve the form and method of class notice. The Court finds this matter appropriate
6 for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Having
7 reviewed and considered the papers, the Court GRANTS Plaintiff’s Motion and sets a
8 fairness hearing for February 27, 2012, at 10:00 a.m.

9
10 **I. BACKGROUND**

11 In September 2010, two proposed class actions were filed against the Defendants
12 Beckman Coulter (“Beckman”) and other individual defendants in the United States
13 District Court for the Central District of California captioned, respectively, *City of*
14 *Southfield Fire & Police Ret. Sys. v. Beckman Coulter, Inc.*, Case No. 8:10-cv-1327 (C.D.
15 Cal. Sept. 3, 2010) and *Pinchuck v. Beckman Coulter, Inc.*, Case No. 8:10 cv-1334 (C.D.
16 Cal. Sept. 7, 2010). On December 8, 2010, the Court consolidated these cases into the
17 present action and appointed Arkansas Teacher Retirement System and Iron Workers
18 District Council of New England Pension Fund as Lead Plaintiff. (Doc. 34.) The Court
19 also appointed Labaton Sucharow LLP and Berger & Montague, P.C. as Lead Counsel for
20 the putative Class. (*Id.*)

21 Lead Plaintiff filed a Consolidated Class Action Complaint for violations of federal
22 securities laws (“Complaint”) on February 7, 2011, asserting claims under Section 10(b)
23 and 20(a) of the Securities Exchange Act of 1934 on behalf of any person or entity who
24 purchased or otherwise acquired Beckman common stock between July 31, 2009 and July
25 22, 2010, inclusive (the “Class Period”) and who were allegedly damaged thereby.
26 (Compl. ¶¶ 1, 177-91, Doc. 46.) Specifically, Lead Plaintiff alleges that on March 22,
27 May 14, and July 22 of 2010, Defendants made allegedly corrective disclosures that
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1 negatively impacted Beckman's common stock price. (*Id.* at ¶¶ 170-74.) Each of these
2 allegedly corrective disclosures related to Beckman's alleged non-compliance with FDA
3 pre-market notification requirements concerning modifications made to Beckman's
4 troponin tests and the effects of such non-compliance on Beckman's operations, products,
5 and prospects. (*Id.*) On April 22, 2011, Defendants filed a motion to dismiss. (Doc. 53.)

6 On June 9, 2011, Lead Plaintiff and the Defendants participated in a mediation
7 regarding settlement, which was facilitated by a retired judge, the Honorable Daniel
8 Weinstein. (Stipulation of Settlement ¶ G, Doc. 59, Ex. 1.) During the mediation process,
9 the parties exchanged confidential mediation statements and information regarding their
10 respective views of the merits of the claims and of alleged damages. (*Id.*)

11 Following the mediation, the parties reached a settlement agreement (the
12 "Settlement Agreement"). The Settlement Agreement provides for a settlement amount of
13 \$5,000,000 in cash. (*Id.* at ¶ 6.) This amount is to be deposited in an escrow account, and
14 together with any earnings on the money in the account, will form the Settlement Fund.
15 (*Id.* at ¶¶ ii, 6.) The Settlement Fund is to be used, among other purposes, to pay claims to
16 authorized claimants and to pay attorneys' fees. (*Id.* at ¶ 9.) Additionally, Beckman is to
17 pay notice and administration expenses up to \$500,000. (*Id.* at ¶ 11.)

18 19 **II. CONDITIONAL CERTIFICATION OF THE CLASS**

20 The parties have stipulated to certification of a class for settlement purposes only.
21 (Stipulation of Settlement ¶ 3.) Therefore, the Court must determine whether to certify the
22 proposed class pursuant to Rule 23(a) and 23(b)(3).

23 **A. Legal Standard**

24 Plaintiff requests conditional certification of the class pursuant to Rule 23. "To
25 obtain class certification, a class plaintiff has the burden of showing that the requirements
26 of Rule 23(a) are met and that the class is maintainable pursuant to Rule 23(b)." *Narouz v.*
27 *Charter Commc'ns, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). "Rule 23(a) ensures that
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1 the named plaintiffs are appropriate representatives of the class whose claims they wish to
2 litigate.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). “Under Rule
3 23(a), the party seeking certification must demonstrate, first, that”:

- 4 (1) the class is so numerous that joinder of all members is impracticable;
5 (2) there are questions of law or fact common to the class; (3) the claims or
6 defenses of the representative parties are typical of the claims or defenses
7 of the class; and (4) the representative parties will fairly and adequately
8 protect the interests of the class.

9 *Id.* at 2548 (citing Fed. R. Civ. P. 23(a)). “Second, the proposed class must satisfy at least
10 one of the three requirements listed in Rule 23(b).” *Id.* Rule 23(b) is satisfied if:

- 11
12 (1) prosecuting separate actions by or against individual class members
13 would create a risk of:

14
15 (A) inconsistent or varying adjudications with respect to individual
16 class members that would establish incompatible standards of
17 conduct for the party opposing the class; or

18
19 (B) adjudications with respect to individual class members that, as a
20 practical matter, would be dispositive of the interests of the other
21 members not parties to the individual adjudications or would
22 substantially impair or impede their ability to protect their interests;

- 23
24 (2) the party opposing the class has acted or refused to act on grounds
25 that apply generally to the class, so that final injunctive relief or
26 corresponding declaratory relief is appropriate respecting the class as a
27 whole; or
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2 (3) the court finds that the questions of law or fact common to class
3 members predominate over any questions affecting only individual
4 members, and that a class action is superior to other available methods
5 for fairly and efficiently adjudicating the controversy.
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7 Fed. R. Civ. P. 23(b) (paragraph breaks added). “Rule 23 does not set forth a mere
8 pleading standard,” thus “[a] party seeking class certification must affirmatively
9 demonstrate his compliance with the Rule—that is, he must be prepared to prove that there
10 are in fact sufficiently numerous parties, common questions of law or fact, etc.” *Dukes* at
11 2551. This requires a district court to conduct a “rigorous analysis” that frequently “will
12 entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.*
13

14 B. Requirements Under Rule 23(a)

15 1. **Numerosity**

16 Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is
17 impracticable.” Fed. R. Civ. P. 23(a)(1). “As a general rule, classes of forty or more are
18 considered sufficiently numerous.” *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 617
19 (C.D. Cal. 2008); *see also Harris v. Palm Springs Alpine Estates*, 329 F.2d 909, 913-914
20 (9th Cir. 1964) (“‘Impracticability’ does not mean ‘impossibility,’ but only the difficulty or
21 inconvenience of joining all members of the class.”) (internal quotation marks and citation
22 omitted). It is quite obvious that in this case the number of shareholder class members far
23 exceeds forty. Beckman common stock was actively traded on the New York Stock
24 Exchange, the Company has over 69 million shares of common stock outstanding, and
25 Lead Plaintiff estimates that the number of record holders of Beckman common stock
26 throughout the class period is in the thousands. (Pl.’s Mot. at 18.) Under similar
27 circumstances, courts have found the numerosity requirement met. *See In re Juniper*
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1 *Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009) (“Some courts have
2 assumed that the numerosity requirement is met in securities fraud suits involving
3 nationally traded stocks.”).

4 5 **2. Commonality**

6 Rule 23(a)(2) requires that “there are questions of law or fact common to the class.”
7 Fed. R. Civ. P. 23(a)(2). “Commonality requires the plaintiff to demonstrate that the class
8 members ‘have suffered the same injury.’” *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel.
9 Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). “This does not mean merely that they
10 have all suffered a violation of the same provision of law,” but instead that their claim(s)
11 “depend upon a common contention . . . of such a nature that is capable of classwide
12 resolution – which means that determination of its truth or falsity will resolve an issue that
13 is central to the validity of each one of the claims in one stroke.” *Id.* Although “for
14 purposes of Rule 23(a)(2) even a single common question will do,” *id.* at 2556 (internal
15 citation and quotation marks omitted), “[w]hat matters to class certification . . . is not the
16 raising of common ‘questions’--- even in droves --- but, rather the capacity of a classwide
17 proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Id.*
18 at 2551 (emphasis in original) (citation omitted). Moreover, in the context of securities
19 fraud litigation, “[r]epeated misrepresentations by a company to its stockholders satisfy the
20 commonality requirement of Rule 23(a)(2).” *Juniper*, 264 F.R.D. at 588.

21 Here, each of the alleged misstatements and omissions underlying this action relate
22 to the product quality, safety, and regulatory compliance of Beckman’s troponin test kits,
23 as well as the related impact on Beckman’s customer retention, recurring revenue, business
24 prospects, and earnings forecast and guidance. (Pl.’s Mot. at 2.) The alleged corrective
25 disclosures occurred on three dates: March 22, 2010, May 14, 2010, and July 22, 2010.
26 (*Id.*) The issues raised by these allegations, particularly relating to scienter and loss
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1 causation, must be addressed across the class. Therefore, Plaintiff has satisfied the
2 commonality requirement.

3 4 **3. Typicality**

5 Rule 23(a)(3) requires “the claims or defenses of the representative parties [to be]
6 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Under the rule’s
7 permissive standards, representative claims are ‘typical’ if they are reasonably coextensive
8 with those of absent class members; they need not be substantially identical.” *Dukes v.*
9 *Wal-Mart*, 603 F.3d 571, 580 (9th Cir. 2010) (en banc) (quoting *Hanlon*, 150 F.3d 1011,
10 1020 (9th Cir. 1998)), *rev’d on other grounds*, 131 S. Ct. 2541 (2011). As to the
11 representative, “[t]ypicality requires that the named plaintiffs be members of the class they
12 represent.” *Id.* at 613 (citing *Falcon*, 457 U.S. at 156). The commonality, typicality,
13 adequacy-of-representation requirements “tend to merge” with each other. *Dukes*, 131 S.
14 Ct. at 2551 at n.5 (citing *Falcon*, 457 U.S. at 157-58 n.13). As a shareholder of Beckman
15 stock during the Class Period, Plaintiff is a member of the proposed class and has suffered
16 the same injury as its fellow class members. (*See* Pl.’s Mot. at 20.) Plaintiff has therefore
17 satisfied the typicality requirement.

18 19 **4. Adequacy**

20 Rule 23(a)(4) permits certification of a class action only if “the representative
21 parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
22 23(a)(4). “This factor requires: (1) that the proposed representative Plaintiffs do not have
23 conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by
24 qualified and competent counsel.” *Dukes*, 603 F.3d at 614. In the securities fraud
25 litigation context, the Ninth Circuit has stated that no conflict exists when the lead
26 plaintiffs’ claims and the other class members’ claims arise out of the same set of facts.
27 *See, e.g., In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000)

1 (stating, in dicta, that there is no conflict between Lead Plaintiff and other class members
2 when all class members purchased in the same period). Moreover, the Court finds no sign
3 of any potential conflict between Lead Plaintiff and the rest of the class.

4 As to the adequacy of Plaintiff's counsel, the Court must consider "(i) the work
5 counsel has done in identifying or investigating potential claims in the action; (ii)
6 counsel's experience in handling class actions, other complex litigation, and the types of
7 claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the
8 resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).
9 Plaintiff's counsel has submitted the firm resumes of Labaton Sucharow LLP and Berger
10 & Montague, P.C., which include significant experience in similar securities fraud class
11 action suits. (McDonald Decl. Ex. 3-4, Doc. 59.) Based on Plaintiff's counsels'
12 experience, and their work in the matter thus far, the Court concludes that Plaintiff's
13 counsel has satisfied the adequacy requirements under Rule 23(g). Therefore, the Court
14 appoints Plaintiff's counsel as class counsel in this matter.

15
16 C. Requirements Under Rule 23(b)

17 In addition to establishing the elements of Rule 23(a), Plaintiffs must also satisfy
18 one of the three elements of Rule 23(b). Plaintiff seeks certification under Rule 23(b)(3),
19 alleging that common questions predominate over any individual issues that may exist in
20 this case. (Pl.'s Mot. at 23.) Under Rule 23(b)(3), a class action may be maintained if:
21 "[1] the court finds that the questions of law or fact common to class members
22 *predominate* over any questions affecting only individual members, and [2] that a class
23 action is *superior* to other available methods for fairly and efficiently adjudicating the
24 controversy." Fed. R. Civ. R. 23(b)(3) (emphasis added). The Court may consider:

- 25 (a) the class members' interests in individually controlling the prosecution
26 or defense of separate actions; (b) the extent and nature of any litigation
27 concerning the controversy already begun by or against class members; (c)
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1 the desirability or undesirability of concentrating the litigation of the claims
2 in the particular forum; and (d) the likely difficulties in managing a class
3 action.

4 Fed. R. Civ. R. 23(b)(3). Plaintiff's claim satisfies both the predominance and superiority
5 requirements.

6 As to the predominance factor, the Supreme Court has explained that it "tests
7 whether proposed classes are sufficiently cohesive to warrant adjudication by
8 representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "When
9 common questions present a significant aspect of the case and they can be resolved for all
10 members of the class in a single adjudication, there is clear justification for handling the
11 dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022
12 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*
13 *Procedure* § 1778 (2d ed. 1986)). Here, Plaintiff's claims under federal securities laws
14 entail nothing but common questions and issues for the class, namely whether Defendants
15 participated in and pursued the common course of conduct and fraudulent scheme alleged
16 in the Complaint, whether Defendants acted with scienter, whether the price of Beckman
17 common stock was artificially inflated during the Class Period, whether statements made
18 by Defendants to the investing public during the Class Period misrepresented material facts
19 about the business, financial performance, and management of Beckman, and to what
20 extent members of the Class have sustained damages and the proper measure of damages.
21 Though damage amounts may differ among class members, liability and the proper
22 measure of damages can be determined on a class-wide basis.

23 The Court also finds that a class action would be a superior method of adjudicating
24 Plaintiff's claim. "The superiority inquiry under Rule 23(b)(3) requires determination of
25 whether the objectives of the particular class action procedure will be achieved in the
26 particular case." *Hanlon*, 150 F.3d at 1023. "This determination necessarily involves a
27 comparative evaluation of alternative mechanisms of dispute resolution." *Id.* Here, each
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1 member of the class pursuing a claim individually would burden the judiciary and run
2 afoul of Rule 23's focus on efficiency and judicial economy. *See Vinole v. Countrywide*
3 *Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("The overarching focus remains
4 whether trial by class representation would further the goals of efficiency and judicial
5 economy."). Further, litigation costs would likely "dwarf potential recovery" if each class
6 member litigated individually. *Hanlon*, 150 F.3d at 1023. "[W]here the damages each
7 plaintiff suffered are not that great, this factor weighs in favor of certifying a class action."
8 *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1199 n.2 (9th Cir. 2001) (quoting
9 *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 652 (C.D. Cal. 1996)).

10 Considering the non-exclusive factors under Rule 23(b)(3)(A)-(D), the Court finds
11 that class members' potential interests in individually controlling the prosecution of
12 separate actions and the potential difficulties in managing the class action do not outweigh
13 the desirability in concentrating this matter in one litigation. *See Fed. R. Civ. P.*
14 *23(b)(3)(A), (C)*. This particular forum is desirable because Beckman is located in
15 California. *See Fed. R. Civ. P. 23(b)(3)*. The Court does not foresee any likely difficulties
16 in managing this case as a class action. Moreover, the Supreme Court has stated that the
17 predominance test is "readily met in certain cases alleging consumer or securities fraud."
18 *Amchem*, 521 U.S. at 625. Therefore, the Court certifies the following class for purposes
19 of settlement only:

20
21 Any person or entity who purchased or otherwise acquired
22 Beckman common stock between July 31, 2009 and July 22,
23 2010, inclusive (the "Class Period"), and who was allegedly
24 damaged thereby (the "Class"). Excluded from the Class are
25 the Defendants; any officer or director of Beckman during the
26 Class Period; members of the immediate families of each of the
27 foregoing and their legal representatives, heirs, successors or
28 assigns; and any entity in which any Defendant has or had
(during the Class Period) a controlling interest. Also excluded
from the Class are any proposed Class Members who properly
exclude themselves by filing a valid and timely request for
exclusion in accordance with the requirements set forth in the
Notice.

1 (Stipulation of Settlement ¶ e.)
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3 **III. PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

4 To preliminarily approve a proposed class-action settlement, Rule 23(e)(2) requires
5 the Court to determine whether the proposed settlement is fair, reasonable, and adequate.
6 Fed. R. Civ. P. 23(e)(2). “To determine whether a settlement agreement meets these
7 standards, a district court must consider a number of factors, including: the strength of
8 plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the
9 risk of maintaining class action status throughout the trial; the amount offered in
10 settlement; the extent of discovery completed, and the stage of the proceedings; the
11 experience and views of counsel; the presence of a governmental participant; and the
12 reaction of the class members to the proposed settlement.” *Staton v. Boeing Co.*, 327 F.3d
13 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted). “The relative
14 degree of importance to be attached to any particular factor will depend upon and be
15 dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique
16 facts and circumstances presented by each individual case.” *Officers for Justice v. Civil*
17 *Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). “It is the settlement taken as a whole,
18 rather than the individual component parts, that must be examined for overall fairness, and
19 the settlement must stand or fall in its entirety.” *Staton*, 327 F.3d at 960 (quoting *Hanlon*,
20 150 F.3d at 1026).

21 In addition to these factors, where “a settlement agreement is negotiated *prior* to
22 formal class certification,” the Court must also satisfy itself that “the settlement is not the
23 product of collusion among the negotiating parties.” *In re Bluetooth Headset Prods. Liab.*
24 *Litig.*, ---F.3d---, No. 09-56683, 2011 WL 3632604, at *8 (9th Cir. 2011) (internal citations
25 and quotations omitted). Accordingly, the Court must look for explicit collusion and
26 “more subtle signs that class counsel have allowed pursuit of their own self-interests and
27 that of certain class members to infect the negotiations.” *Id.* at *9. Such signs include (1)
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1 “when counsel receive a disproportionate distribution of the settlement . . . ,” (2) “when the
2 parties negotiate a ‘clear sailing’ arrangement providing for the payment of attorneys’ fees
3 separate and apart from class funds . . . ,” and (3) “when the parties arrange for fees not
4 awarded to revert to defendants rather than be added to the class fund.” *Id.*

5
6 A. Strength of Plaintiff’s Case

7 Plaintiff’s Motion notes that Defendants’ Motion to Dismiss is pending before this
8 Court, and there is no guarantee that Plaintiff would prevail. (Mot. at 12.) Plaintiff further
9 asserts that continuing litigation is risky, as it may not be able to prove scienter, loss
10 causation, and/or damages. (*Id.* at 13.)

11
12 B. Risk, Complexity, and Likely Duration of Further Litigation

13 Plaintiff also asserts that it would face several hurdles as litigation progresses
14 because Defendants have argued that they did not act with scienter and did not make
15 material misrepresentations. (*Id.* at 12-13.) Furthermore, in any securities fraud litigation,
16 proving loss causation and damages is challenging, and can require a “battle of the
17 experts.” (*Id.* at 13.) Plaintiff also notes that even a trial is unlikely to end litigation, as
18 one or both sides would appeal. (*Id.*) On the other hand, settlement provides immediate
19 and substantial relief.

20
21 C. Stage of the Proceedings

22 While this case is in the early stage of proceedings, the parties have a substantial
23 understanding of the strengths and weaknesses of each side’s case. Plaintiff represents that
24 it “had a thorough understanding of the facts of the case and merits of the claims due to a
25 sophisticated and extensive investigation into the claims asserted in the Complaint.” (*Id.* at
26 10.) Moreover, the parties held a mediation with Judge Daniel Weinstein of JAMS on
27 June 9, 2011, and this settlement is a result of that mediation. (*Id.* at 9-10.)

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D. Risk of Maintaining Class Certification

The Court has not been made aware of any specific risks of maintaining class certification were the case to go to trial. Accordingly, the Court need not consider this factor for settlement purposes. *See In re Veritas Software Corp. Sec. Litig.*, No. C-03-0283 MMC, 2005 WL 3096079, at *5 (N.D. Cal. Nov. 15, 2005) (favoring neither approval nor disapproval of settlement where the court was “unaware of any risk involved in maintaining class action status”), *aff’d in relevant part*, 496 F.3d 962 (9th Cir. 2007); *Murillo v. Pac. Gas & Elec. Co.*, No. CIV. 2:08-1974 WBS GGH, 2010 WL 2889728, at *7 (E.D. Cal. July 21, 2010) (favoring neither approval nor disapproval of settlement where the court was “unaware of any specific difficulty in maintaining class-action status were [the] case to continue to trial”).

E. Amount Offered in Settlement

The Settlement provides for the recovery of \$5 million in cash plus interest, which is a substantial benefit for the Class. (Stipulation of Settlement ¶ 6.) Additionally, Defendants will pay Plaintiffs’ notice and administration expenses. (*Id.* at 11.) This settlement amount is similar to class action settlements recently achieved in the Ninth Circuit. *See, e.g.*, Stipulation of Settlement at ¶ 2, *City of Westland Police and Fire Ret. Sys. and Plymouth Cnty. Ret. Sys. v. Sonic Solutions, et al.*, No. C 07-05111 CW, (N.D. Cal. Oct. 15, 2009), ECF No. 113. Therefore, the amount offered in settlement favors approval of the Settlement.

F. Experience and Views of Counsel

“The recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (internal citation and quotation marks omitted). As discussed above, Plaintiff’s

1 counsel has experience serving as plaintiff’s counsel in class actions, and, along with
2 Defendants’ counsel, has fully endorsed the settlement agreement as fair, reasonable, and
3 adequate. (Stipulation of Settlement ¶ H.) Moreover, this settlement is the result of a
4 mediation held before Judge Weinstein, a JAMS mediator. (*Id.* at ¶ G). Judge Weinstein’s
5 involvement in the settlement confirms that it is non-collusive. *Satchell v. Fed. Exp.*
6 *Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007). Therefore,
7 the recommendation of counsel also weighs in favor of approving the settlement.

8
9 G. Reaction of Class Members to Proposed Settlement

10 Plaintiff provides no evidence regarding class members’ reaction to the proposed
11 settlement. Prior to the fairness hearing, Plaintiff’s counsel shall submit a sufficient
12 number of declarations from class members, including Plaintiff, discussing their reactions
13 to the proposed settlement. Alternatively, a small number of objections at the time of the
14 fairness hearing may raise a presumption that the settlement is favorable to the class. *See*
15 *Omnivision*, 559 F. Supp. 2d at 1043.

16
17 H. Signs of Collusion

18 The Court finds no signs, explicit or subtle, of collusion between the parties.
19 According to the Settlement Agreement, attorneys’ fees are to be awarded from the
20 Settlement Fund, and therefore, there is no “clear sailing” arrangement. (Stip. to
21 Settlement ¶ 9.) Furthermore, the Court is to determine the proportion of the Settlement
22 Fund that will be awarded as attorneys’ fees. (*Id.*) Finally, the Settlement provides for any
23 balance remaining in the Settlement Fund after six months to be distributed among
24 Authorized Claimants, and then to charity if any further balance remains. (*Id.* at ¶ 28.)
25 Therefore, the Court finds that the factors weigh in favor of approval.

26
27 **IV. PRELIMINARY APPROVAL OF CLASS NOTICE FORM AND METHOD**

1 For a class certified under Rule 23(b)(3), “the court must direct to class members
2 the best notice that is practicable under the circumstances, including individual notice to all
3 members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).
4 However, actual notice is not required. *See Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir.
5 1994).

6 Plaintiff proposes mailing the notice to persons qualified to be class members
7 within 10 days of the entry of the preliminary approval order. (Proposed Order ¶ 8, Doc.
8 60) The mail will be sent to the member’s last known address as identified in Defendants’
9 records. (*Id.*) Notice by mail has been found by the Supreme Court to be sufficient if the
10 notice is “reasonably calculated . . . to apprise interested parties of the pendency of the
11 action and afford them an opportunity to present their objections.” *Mullane v. Cent.*
12 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Additionally, Plaintiff will provide
13 notice by publication in *Investor’s Business Daily* and transmission over *PR Newswire*.
14 (Pl.’s Mot. at 14.)

15 Plaintiff has provided the Court with a copy of the proposed notice. (Stipulation of
16 Settlement, Exh. A-1.) Under Rule 23, the notice must include, in a manner that is
17 understandable to potential class members, “(i) the nature of the action; (ii) the definition
18 of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member
19 may enter an appearance through an attorney if the member so desires; (v) that the court
20 will exclude from the class any member who requests exclusion; (vi) the time and manner
21 for requesting exclusion; and (vii) the binding effect of a class judgment on members
22 under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B). The proposed notice includes this
23 necessary information. (*See* Stipulation of Settlement, Ex. A-1.)
24

25 **V. NOTICE OF ATTORNEYS’ FEES MOTION**

26 In accordance with the terms of the Settlement, the Court will determine attorneys’ fees
27 following a motion to be filed by Plaintiff. The Court notes, however, the Plaintiff
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1 proposes that Lead Counsel’s request for attorneys’ fees and expenses “shall be filed with
2 the Court and served on or before twenty-eight (28) calendar days prior to the date set” for
3 the fairness hearing. (*Id.* at Ex. A.) However, the Plaintiff proposes a deadline for class
4 member objections of twenty-one days before the fairness hearing. This proposed
5 schedule potentially leaves only seven days for class members to review the fee motion
6 itself. As interpreted by the Ninth Circuit, Rule 23(h) requires that class members are
7 given “an adequate opportunity to object to the [fee] motion itself.” *In re Mercury*
8 *Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010). Therefore, the Court
9 sets a deadline of forty-two days (42 days) before the fairness hearing for the Plaintiff to
10 file its fee motion and all other papers in support of the Settlement and Plan of Allocation.

11

12 VI.CONCLUSION

13 Accordingly, the Court: (1) conditionally certifies the Class; (2) preliminarily
14 approves the Settlement Agreement; and (3) approves the form and method of class notice,
15 all of which are set forth in the Stipulation of Settlement and accompanying exhibits.

16 The Court sets a fairness hearing for February 27, 2012, at 10:00 a.m. to determine
17 whether the Settlement Agreement should be finally approved as fair, reasonable, and
18 adequate to class members. Plaintiff’s counsel shall file all additional supporting
19 documentation noted by the Court in this Order and brief(s) supporting final approval of
20 the Settlement Agreement, an award of reasonable attorney’s fees and costs, and an award
21 of a reasonable class representative service fee no later than forty-two days before the
22 fairness hearing. As indicated above, the notice shall indicate that any class member
23 seeking to object to the Settlement Agreement shall file any objection or exclusion no later
24 than twenty-one days before the fairness hearing. Plaintiff may file written replies to any
25 of the class members’ written objections no later than fourteen days before the fairness
26 hearing.

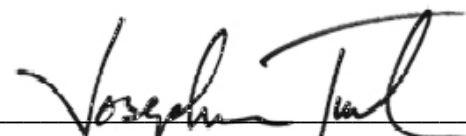
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The Court reserves the right to continue the date of the fairness hearing without further notice to class members. The Court retains jurisdiction to consider all further applications arising out of or in connection with the Settlement Agreement.

DATED: November 8, 2011



JOSEPHINE STATON TUCKER
UNITED STATES DISTRICT JUDGE