UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

In re CARTER'S, INC. SECURITIES LITIGATION	))))	Civil Action No. 1:08-CV-2940-AT

LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23(a), (b)(3), and (e) of the Federal Rules of Civil Procedure, the Court-appointed Lead Plaintiff, Plymouth County Retirement System ("Lead Plaintiff"),[1] on behalf of itself and the Settlement Class,[2] respectfully submits this memorandum of law in support of its motion for final approval of the proposed $20 million partial settlement (the "Settlement") with the Settling Defendants[3] as set forth in the Stipulation. The Consolidated Action will continue to be litigated against the sole non-settling defendant, PricewaterhouseCoopers LLP ("PwC").

Lead Plaintiff hereby requests, *inter alia*: (i) final approval of the Settlement as fair, adequate, and reasonable by entry of the proposed Final Order and

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[1] All capitalized terms used herein, unless otherwise defined, have the same meaning as that set forth in the Stipulation and Agreement of Settlement with Company and Individual Defendants (the "Stipulation"), dated December 21, 2011. (Docket No. 111-3).

[2] In its Preliminary Approval Order Providing for Notice and Hearing in Connection with Proposed Partial Class Action Settlement (the "Preliminary Approval Order"), dated January 18, 2012, the Court certified for settlement purposes only a Settlement Class of all Persons who purchased the publicly traded securities of the Company during the period from March 16, 2005 through November 10, 2009, inclusive, and were allegedly damaged thereby, other than persons who are excluded from the Settlement Class by definition or who timely and validly seek exclusion from the Settlement Class. (Docket No. 114).

[3] The "Settling Defendants," collectively refers to Carter's, Inc. ("Carter's" or the "Company"), Frederick J. Rowan, II ("Rowan"), Joseph Pacifico ("Pacifico"), Michael D. Casey ("Casey"), Andrew North ("North"), Charles E. Whetzel, Jr. ("Whetzel"), and Joseph M. Elles ("Elles").

Judgment (the "Judgment"), which was negotiated by the Settling Parties as an Exhibit to the Stipulation; (ii) a finding that notice to the Settlement Class satisfied due process and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"); (iii) final certification of the Settlement Class; (iv) appointment of Lead Plaintiff as Class Representative and Labaton Sucharow LLP as Class Counsel; and (v) approval of the Plan of Allocation for distributing the Net Settlement Fund.

This motion is supported by the Declaration of Jonathan Gardner in Support of Lead Plaintiff's Motion for Final Approval of Proposed Partial Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses (the "Gardner Decl."), which is incorporated by reference, as well as the Declaration of William R. Farmer, Executive Director of Plymouth County Retirement System, in Support of Lead Plaintiff's Motion for Final Approval of Partial Class Action Settlement and Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses.[4]

[4] All exhibits referenced herein are annexed to the Gardner Decl. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference refers to the designation of the

PRELIMINARY STATEMENT

Lead Plaintiff and Lead Counsel have succeeded in obtaining an excellent recovery for the Settlement Class of $20 million in cash. The Settlement provides an immediate and substantial recovery to the Settlement Class, which faced the significant risk of a much smaller recovery or possibly no recovery at all if the Consolidated Action continued against the Settling Defendants. In consideration for this payment, the Settlement will finally resolve all Released Claims against the Settling Defendants and Released Defendant Parties.

The Settlement was reached only after extensive investigative efforts and motion practice and is the result of arm's-length negotiations by well-informed counsel with the active assistance of former United States District Court Judge Layn R. Phillips ("Judge Phillips"), a highly experienced mediator. Lead Counsel has significant experience in securities class action litigation, and has negotiated numerous substantial class action settlements throughout the country. It is Lead Counsel's informed opinion that the Settlement is an excellent result in light of the uncertainty and further substantial expense of pursuing these claims through trial and the appeals that may have followed. Moreover, Lead Plaintiff, a sophisticated institutional investor, has closely monitored this litigation from the outset, was

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entire exhibit attached to the Gardner Decl. and the second reference refers to the exhibit designation within the exhibit itself.

involved in negotiating the Settlement, and recommends that the Settlement be approved. It is respectfully submitted that the Settlement is fair, reasonable, and adequate, and is in the best interests of the Settlement Class.

OVERVIEW OF THE CONSOLIDATED ACTION

Lead Plaintiff is simultaneously submitting herewith the Gardner Decl., which is an integral part of this submission. For the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*, the history of the Consolidated Action; Judge Forrester's order granting the Settling Defendants' motions to dismiss the FAC; the claims asserted against the Settling Defendants in the FAC and SAC; the investigation undertaken; the negotiations leading to the Settlement; the value of the Settlement compared to the risks and uncertainties of continued litigation; and a description of the services provided by Lead Counsel.

The Settlement was reached at a time when Lead Plaintiff and Lead Counsel had a thorough understanding of the facts and challenges posed by the claims and defenses, and the factors that would impact a future recovery from the Settling Defendants. Briefly, the proceedings to date have included:

- Extensive investigation, including review and analysis of: (1) filings with the Securities and Exchange Commission ("SEC"); (2) publicly available information concerning the Defendants (including newspaper articles, online publications, stock price movement data, statements at analyst conferences and Bloomberg reports); (3)

securities analyst reports and advisories about Carter's; (4) Defendants' press releases and other public statements; (5) pleadings, disclosures and motion practice in the SEC's action against Elles; (6) charging instruments in the criminal proceeding against Elles filed by the Department of Justice ("DOJ"); and (7) the applicable law and accounting rules governing the claims. (Gardner Decl. ¶¶56-58.)

- Contentious motion practice including: (1) investigating and drafting the Complaint, FAC and SAC; (2) researching and responding to three separate briefs filed by Defendants in support of their motion to dismiss the FAC; and (3) researching and drafting Lead Plaintiff's mediation statement. (*Id*. ¶¶44-49.)

- Identifying more than 160 potential witnesses, contacting 114, and interviewing approximately 68 individuals with knowledge of the relevant issues to the Consolidated Action. (*Id*. ¶57.)

- Consulting with experienced experts including a damages expert to analyze issues of loss causation and class-wide damages, and an accounting expert to analyze the Company's restatement and GAAP and GAAS issues. (*Id*. ¶58.)

- Extended negotiations including several discussions between counsel and an in-person, full-day mediation session before former United States District Court Judge Phillips, a highly regarded and experienced mediator. (*Id*. ¶¶12, 60-62.)

In light of the opportunity for an excellent recovery despite the risks of continuing litigation, and the positive reaction by the Settlement Class to date, Lead Plaintiff respectfully asks this Court to grant final approval of the Settlement, approve the Plan of Allocation, and finally certify the proposed Settlement Class.

ARGUMENT

I. THE SETTLEMENT MERITS APPROVAL BY THE COURT

Public and judicial policy both strongly favor pretrial settlement of litigation; this policy is particularly compelling in class actions and other complex litigation. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits."); *Hillis v. Equifax Consumer Services, Inc.,* No. 104-CV-3400-TCB, 2007 WL 1953464, at *9 (N.D.Ga. June 12, 2007) ("When exercising its discretion, the court is mindful of the public and judicial policies that strongly favor the settlement of class action lawsuits"). Public policy recognizes that class actions alleging securities violations are particularly well-suited for settlement. *See, e.g., Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) (due to "the notable unpredictability of result" and the length of such litigation, "securities fraud class actions readily lend themselves to settlement").

The criteria for granting final approval to a class action settlement, under Fed. R. Civ. P. 23(e), are that the settlement must be "fair, adequate and reasonable [and] . . . not the product of collusion between the parties and/or their attorneys." *Bennett v. Behring Corp.*, 737 F.2d 982, 986-87 (11th Cir. 1984).

In *Bennett*, the Court of Appeals held that the following factors should be considered in evaluating a class action settlement:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

737 F.2d at 986; *see also In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1318 (11th Cir. 2009). Approval of a class action settlement, including application of the foregoing factors, "is committed to the sound discretion of the district court." *In re U. S. Oil & Gas Litig.*, 967 F.2d at 493; *accord In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 859 (11th Cir. 2009). Additionally, "a trial court is 'entitled to rely on the judgment of experienced counsel for the parties' in evaluating settlement." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 689 (N.D. Ga. 2001), *quoting Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).[5] Indeed, in reviewing a class action settlement under Rule 23(e), "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330.

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[5] Opinions of the Fifth Circuit issued prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (*en banc*).

A. The Settlement Satisfies the Threshold Consideration of Being the Product of Good Faith, Arm's-Length Negotiations

A threshold consideration is whether a proposed settlement is the product of fraud or collusion between the parties. "In determining whether there was fraud or collusion, the Court examines whether the settlement was achieved in good faith through arm's-length negotiations, whether it was the product of collusion between the parties and/or their attorneys, and whether there was any evidence of unethical behavior or want of skill or lack of zeal on the part of class counsel." *Canupp*, 2009 WL 4042928, at *9 (citing *Bennett*, 737 F.2d at 987 n.9). Courts "presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered." William B. Rubenstein, Alba Conte and Herbert B. Newberg, 4 *Newberg on Class Actions* § 11:51 (4th ed. 2010).

Here, no claim of fraud or collusion in the negotiation of the Settlement could be credibly asserted. The record demonstrates that the Settlement was the product of extensive, arm's-length negotiations – including several discussions between counsel that culminated in an in-person, full-day mediation session before Judge Phillips, an experienced mediator. (Gardner Decl. ¶¶12, 60-62.)

The settlement negotiation process here demonstrates beyond question that there is no issue of collusion. *Ingram*, 200 F.R.D. at 693 (parties' use of an experienced and well-respected mediator supported the court's finding that the

settlement was fair and not the product of collusion); *see also In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008) (speaking of Judge Phillips, "the Court and the parties have had the added benefit of the insight and considerable talents of a former federal judge who is one of the most prominent and highly skilled mediators of complex actions, who acted as Special Master in the settlement negotiations.")

B. Application of the *Bennett* Factors Supports Approval

1. The Significant Obstacles to Success at Trial Support Approval of the Settlement

The first *Bennett* factor is "the likelihood of success at trial," *Bennett*, 737 F.2d at 986. In assessing plaintiffs' likelihood of success at trial for purposes of reviewing a settlement, the Court should not try the merits of the case but should only make a limited inquiry as to "whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of settlement." *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697-98 (M.D. Fla. 2005).

Although Lead Plaintiff strongly believes that its claims against the Settling Defendants are meritorious, there were significant obstacles to success at trial in this Consolidated Action. For example, Lead Plaintiff faced risks that: (i) upon a second round of motions to dismiss or motions for summary judgment, the Court would find that certain of the Settling Defendants' alleged misstatements were

legitimate economic projections protected by the PSLRA's provisions governing forward-looking statements; (ii) that they would be unable to establish the scienter of the Settling Defendants (particularly relating to the Accommodations Fraud claims), which is well-recognized as a difficult and uncertain element in any securities case; and (iii) that even if Lead Plaintiff prevailed on liability, the Settling Defendants would challenge loss causation and the calculation of damages.

Forward Looking Statements. The Settling Defendants argued, and would have likely continued to argue both in dispositive motions and to a jury, that the alleged OshKosh-related misstatements were legitimate economic projections protected by the PSLRA and that the defendants' purported knowledge of the underlying facts (even if it could be established) was irrelevant. 15 U.S.C. §78-5(c)(1); *see also Harris v. Ivax Corp*. 182 F.3d 799, 803, 806-807 (11th Cir. 1999) (defendants "may avoid liability for forward-looking statements that prove false if the statement is 'accompanied by meaningful cautionary statements….'"). For example, the Settling Defendants would argue that statements in which they professed their belief that the OshKosh brand had "great potential" (*e.g.*, SAC ¶314), as well as statements in which they "projected" increases in OshKosh sales figures (*e.g.*, SAC ¶274), all concerned future economic performance, and that the

accuracy of future projections can only be determined after those projections are made. Indeed, in Judge Forrester's Dismissal Order, the Court accepted the Settling Defendants' *Harris*-based arguments, but granted leave to replead. (Gardner Decl. ¶¶65, 83.)

Lead Plaintiff would have continued to maintain, and work to gather evidence, in response, that: (1) the alleged misstatements related to historical or current facts, did not comprise "mixed" statements of present fact and future projection under *Harris*, and therefore were not protected as forward-looking, *see, e.g., In re Premiere Techs., Inc., Sec. Litig*., No. 98 cv 1804, 2000 WL 33231639, *17 (N.D. Ga. December 8, 2000) ("the statutory safe harbor does not preclude liability" for "statements or omissions of historical or 'hard' facts about current or past conditions"); and (2) because information provided by confidential witnesses demonstrates the Settling Defendants' knowledge that the alleged misstatements were false, any cautionary language accompanying the alleged misstatements could not have been "meaningful." *See, e.g., In re SeeBeyond Techs. Corp. Sec. Litig*., 266 F.Supp.2d 1150, 1165-66 n.8 (C.D. Cal. 2003) (the "cautionary statement cannot be evaluated without reference to the defendant's knowledge"). There is, however, a real risk that the Court could find the alleged misstatements were immaterial and not actionable, either in response to a future motion to dismiss

or summary judgment motion. (Gardner Decl. ¶84.)

Scienter. Lead Plaintiff would have faced challenges by the Settling Defendants regarding Lead Plaintiff's claim that the Settling Defendants had the requisite scienter with respect to both the OshKosh Fraud and the Accommodations Fraud. Regarding the latter, the Settling Defendants maintained that: (1) the SAC fails to plead a strong inference of scienter (and that Lead Plaintiff could not prove scienter) on the part of Casey, Rowan, and North, the only individuals who "made" any alleged misstatements; (2) under the Supreme Court's recent decision in *Janus Capital Group, Inc. v. First Deriv. Traders*, 131 S. Ct. 2296 (2011), Elles, Pacifico, and Whetzel did not "make" any alleged misstatements because none possessed "ultimate authority" over the alleged statements – thus any scienter attributable to them is irrelevant; and (3) because the SAC fails to plead a strong inference of scienter as to any Individual Defendant that "made" an alleged misstatement, and Lead Plaintiff could not prove such scienter, scienter cannot be imputed to Carter's under Eleventh Circuit agency principles, *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008). For example, the Settling Defendants would argue that the scienter allegations attributed to confidential witnesses were insufficiently particularized, because the allegations did not specify particular dates of meetings or the amount improperly

booked or customers that were affected. The Settling Defendants would also likely argue that the confidential witnesses had no accounting expertise, and thus had no basis for their allegations that accommodations payments were improperly booked. Accordingly, the Settling Defendants would argue that the scienter allegations attributed to confidential witnesses should be discounted, such that scienter could not be sufficiently pled against Casey, Rowan, or North. (Gardner Decl. ¶¶66, 81.)

In response, based on its extensive and ongoing investigation, Lead Plaintiff would have argued that: (1) under the doctrine of corporate scienter, the individual possessing scienter need not be the same person who "made" the misstatements; (2) Elles possessed the requisite scienter (as demonstrated by the pleadings in the SEC and DOJ action against him and as would be developed during discovery),[6] which is imputable to Carter's under established agency principles; and (3) Casey, Rowan, and North were all signatories to the allegedly false financials and possessed ultimate authority over the statements therein. However, these arguments presented novel legal issues and it is not clear how the law would develop or the Court would rule if the litigation continued. There is a not-insignificant risk the Court would agree with the Settling Defendants' application

[6] Pacifico was indicted after the Settlement was reached.

of *Janus* and interpretation of Eleventh Circuit agency principles. (Gardner Decl. ¶¶69, 82.)

Proof of Damages. Lead Plaintiff faced risks not only in establishing the liability of the Settling Defendants, but also with respect to the calculation and proof of damages. The Settling Defendants would likely argue in dispositive motions and at trial that: (1) there was no loss causation because Lead Plaintiff cannot establish that the Company's stock drops were causally related to the alleged misconduct, rather than the result of other unrelated Company-specific information or market and industry factors; (2) the alleged disclosures were not "corrective"; and (3) any damages are curtailed by the PSLRA's 90-day "bounce-back" cap on damages, 15 U.S.C. § 78u-4(e). For example, the Settling Defendants would likely argue that the two alleged partial disclosures of the truth relating to the OshKosh Fraud were not corrective because they disclosed only revised economic forecasts, and thus did not relate to any alleged falsity regarding OshKosh's growth prospects. The Settling Defendants would also argue that because Carter's stock price was higher at the time of the first Accommodations Fraud partial disclosure than it had been for the majority of the Class Period, and "bounced back" after each subsequent disclosure, damages would be severely curtailed. The Settling Defendants would also likely contest the proper economic

model for determining the amounts by which Carter's stock was allegedly artificially inflated to determine the amount of damages, even were causation to be established. These loss causation and damages issues would no doubt be vigorously contested were the litigation to continue; involve a battle of the experts presenting complicated issues; and be decided by a jury, with the attendant risks of a lesser or no recovery. (Gardner Decl. ¶88.)

Although Lead Plaintiff believes its claims could survive a future motion to dismiss and that it could rebut these arguments with expert testimony, survive summary judgment, and prevail at trial, proof of damages would have been a heavily disputed matter subject to conflicting expert testimony and it was not possible to predict with any confidence precisely how a jury would resolve such a dispute. *See, e.g., Zuckerman v. Smart Choice Auto. Group, Inc.*, No. 99-237, 2001 WL 686879, at *10 (M.D. Fla. May 3, 2001) ("The determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions."); *Ingram*, 200 F.R.D. at 689 (one of the "significant risks" of bringing a class action suit to trial is that it would involve a "battle of experts"). In light of all these potential obstacles to recovery at trial, the certain recovery of $20 million represents an excellent result for the Settlement Class.

2. The Range of Reasonableness

"The second and third factors in the Eleventh Circuit's *Bennett* analysis call for the Court to determine 'the possible range of recovery' and then ascertain where within that range 'fair, adequate, and reasonable settlements lie.'" *Garst v. Franklin Life Ins. Co.*, No. 97-C-0074, 1999 U.S. Dist. LEXIS 22666, at *64 (N.D. Ala. June 25, 1999) (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 541 (S.D. Fla. 1988) (same), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1331 (S.D. Fla. 2001) ("the second and third considerations of the *Bennett* test are easily combined").

When compared to the risks of continued litigation the proposed $20 million Settlement is a very favorable recovery and clearly falls within the range of reasonableness. This substantial recovery compares favorably against other securities class action settlements in recent years. A recent study of such settlements by NERA Economic Consulting, a firm that frequently provides damages expertise to defendants in securities cases, reported that in 2011 the median settlement amount for securities class actions was $8.7 million and that between 1996 and 2010, since the passage of the PSLRA, median settlement amounts in securities class actions ranged from $3.7 - $11 million. (*See* Dr. Jordan Milev, Robert Patton, Svetlana Starykh, and Dr. John Montgomery, *Recent Trends*

in Securities Class Litigation: 2011 Year-End Review, at 18 (NERA December 14, 2011), Ex. 12.) A recent study by Cornerstone Research further notes that the median settlement amount for all post-PSLRA securities class action settlements is $7 million. (*See* Ellen M. Ryan & Lauren E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2011 Review and Analysis*, at 11 (2012), Ex. 13.) In light of these facts, and compared with settlement amounts in similar post-PSLRA cases, the recovery here of $20 million is an excellent result.

3. The Complexity, Expense and Likely Duration of Continued Litigation Support Approval of the Settlement

This Consolidated Action has been challenging and complex, given the facts and law at issue in the litigation. It involves not only the complex issues associated with securities class actions generally, but the underlying allegations and defenses are intertwined with complicated facts concerning the growth prospects of an apparel manufacturer and alleged manipulation of financial results relating to accommodation payments. For example, a jury would have to be educated on industry terms such as net sales, same store sales, SKUs, and the differences between wholesale customers and retail customers. Similarly, accounting for accommodations is complex, requiring that accommodations, budgeted on the strength of advance wholesale orders months before a seasonal line of clothing ships, be booked in the quarter that the clothing ships, not the

quarter in which accommodations are budgeted. (Gardner Decl. ¶87.) Based on the evidence adduced so far and the complexity of the issues involved, Lead Plaintiff reasonably expected that continued litigation of the Consolidated Action would involve a great amount of time and additional work with multiple experts.

Lead Plaintiff would first face a second round of motions to dismiss by the Settling Defendants. Then it would need to complete fact and expert discovery, brief additional motions before the Court, including class certification, summary judgment and *Daubert* motions, and convince a jury that the Settling Defendants had violated the securities laws and that this conduct caused their losses. Furthermore, there was the possibility that the Consolidated Action would have been stayed due to the DOJ criminal proceeding against certain of the Settling Defendants, thereby further lengthening the litigation. Trial would involve the significant challenge of proving the required elements of the Exchange Act. These efforts would require additional large expenditures over an extended period, after which the Settlement Class might obtain a result far less beneficial than the one provided by the Settlement. Moreover, even if successful at trial, Lead Plaintiff would face the post-judgment appeals which were sure to follow and could have taken years to resolve.

In contrast to the substantial expense and risk of litigating the claims through trial, the risk of a stay due to the DOJ proceeding, and the extended duration that would result from the trial itself, post-trial motions, and appeals, the Settlement provides a certain immediate payment of $20 million.

4. The Reaction of Settlement Class Members to Date Supports Approval of the Settlement

The reaction of class members to a proposed settlement is a significant factor to be considered and the absence of substantial objections "is excellent evidence of the settlement's fairness and adequacy." *Ressler*, 822 F. Supp. at 1556; *see also In re Motorsports Merch. Antitrust Litig.*, 112 F.Supp.2d 1329, 1338 (N.D.Ga. 2000) ("the lack of objections is a further factor weighing in favor of approval of the settlements"); *Garst*, 1999 U.S. Dist. LEXIS 22666, at *71-72 ("small amount of opposition strongly supports approving the Settlement").

Thus far, the reaction of the Settlement Class to the Settlement has been very positive and supports approval of the proposed Settlement. The Court-approved Claims Administrator began mailing copies of the Notice of Pendency of Class Action and Proposed Partial Settlement and Motion for Attorneys' Fees and Expenses ("Notice") to potential Settlement Class Members or their nominees on February 2, 2012. (*See* Declaration of Claims Administrator ("Epiq Decl."), attached to the Gardner Decl. as Ex. 3 at ¶7) To date, the Notice has been mailed

to more than 90,000 potential members of the Settlement Class. (*Id.* ¶13.) Summary Notice of Pendency of Class Action and Proposed Partial Settlement and Motion for Attorneys' Fees and Expenses ("Summary Notice") was also published once in *Investor's Business Daily* and over *PR Newswire* on February 14 2012, and the Notice and other related documents were published on a dedicated settlement website, www.carterssecuritieslitigation.com, and on the website of Lead Counsel, www.labaton.com. (Epiq Decl. ¶¶16-17, 31-33, Gardner Decl. ¶15.)

The Notice informed Settlement Class Members of their right to exclude themselves from the Settlement Class or their right to object to any aspect of the Settlement, the Plan of Allocation and/or Lead Counsel's application for an award of attorneys' fees and expenses. (*See* Ex. A to the Epiq Decl.) The deadline for submitting objections and exclusion requests is May 10, 2012. As of the date of this Memorandum, ***no*** objection to the Settlement has been received. (Gardner Decl. ¶91.) Moreover, ***no*** exclusion requests have been received. (Epiq Decl. ¶ 46.) Should any objections and/or exclusion requests be received, they will be addressed by Lead Plaintiff in their reply papers that will be filed on or before May 24, 2012.

5. The Stage of the Proceedings

The Settlement was reached only after Lead Plaintiff filed a detailed SAC based on its comprehensive investigation and identification of more than 160 potential witnesses, contact with 114, and interviews with approximately 68 individuals with knowledge of the issues in this case. The Consolidated Action involved briefing contentious motions to dismiss, and participating in an in-person full-day mediation before an experienced mediator after an exchange of mediation material. Lead Plaintiff also had the benefit of a full opportunity to analyze Carter's restatement, which was reviewed with a well-respected and experienced accounting expert. (*See generally* Gardner Decl.) At the time the Settlement was reached, the PSLRA discovery stay was in effect.

In weighing this *Bennett* factor, a Court should focus on whether "Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation," and not the extent to which formal discovery was conducted. *Francisco v. Numismatic Guar. Corp.*, No. 06-61677, 2008 WL 649124, at *11 (S.D. Fla., Jan. 31, 2008). "[F]ormal discovery [is not] a necessary ticket to the bargaining table," *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981), and courts have rejected the notion that such discovery must take place. *See, e.g., Cotton*, 559 F.2d at 1332

(The fact that "very little formal discovery was conducted and that there is no voluminous record in this case . . . does not compel the conclusion that insufficient discovery was conducted.").

After the litigation efforts here, there can be little question that the Settling Parties had sufficient information to assess the strengths and weaknesses of their claims and that each side "was well aware of the other side's position and the merits thereof." *Sunbeam*, 176 F. Supp. 2d at 1332.

C. The Recommendations of Experienced Counsel and Court-Appointed Institutional Lead Plaintiff Heavily Favor Approval of the Settlement

In determining whether the proposed Settlement is fair, adequate, and reasonable, the Court may rely on the judgment of counsel and, indeed, "should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330; *accord Perez*, 501 F. Supp. 2d at 1380; *Strube*, 226 F.R.D. at 703. Lead Counsel, which is highly experienced in class action litigation of this type and is very well informed about the strengths and weaknesses of the case strongly endorses the Settlement and believes that it represents an excellent recovery on behalf of the Settlement Class. (Ex. 5-C.)

Moreover, Lead Plaintiff, which is a sophisticated institutional investor, closely supervised this litigation and has endorsed the Settlement as fair,

reasonable, and adequate to the Settlement Class. (*See* Lead Plaintiff's Declaration, attached to Gardner Decl. as Ex. 1.) The endorsement of a settlement by a PSLRA lead plaintiff that has played an active role in the litigation provides additional support for the fairness of the settlement. *See, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004).

II. FINAL CERTIFICATION OF THE SETTLEMENT CLASS

In presenting the Settlement to the Court for preliminary approval, Lead Plaintiff requested that the Court preliminarily certify the Settlement Class so that notice of the proposed Settlement could be issued. In its Preliminary Approval Order, entered on January 18, 2012, this Court did so. Nothing has changed to alter the propriety of the Court's certification and, for all the reasons stated in Lead Plaintiff's Memorandum of Law in Support of Its Unopposed Motion for Preliminary Approval of Proposed Partial Class Settlement (Docket No. 111) incorporated herein by reference, Lead Plaintiff now requests that the Court grant final certification of the Settlement Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and (b)(3), appoint Lead Plaintiff as Class Representative, and appoint Lead Counsel as Class Counsel.

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The standard for approval of a plan of allocation is the same as the standard for approving a settlement: whether it is "fair, adequate and reasonable and is not the product of collusion between the parties." *In re Chicken Antitrust Litig. Am. Poultry,* 669 F.2d 228, 238 (5th Cir. 1982). Here, the Plan of Allocation, fully described in the Notice, should be approved, as it provides a fair and equitable method of dividing the Net Settlement Fund among Settlement Class Members who submit timely and valid Proofs of Claim ("Authorized Claimants"), consistent with governing law. Settlement Class Members were informed that they had an opportunity to object to the Plan of Allocation no later than May 10, 2012, and to date, no objections have been filed. (Gardner Decl. ¶99.)

The objective of a plan of allocation is to provide an equitable basis upon which to distribute a settlement fund among eligible class members. Here, the Plan of Allocation was formulated with the assistance of Lead Plaintiff's consulting damages expert, and was developed with a focus on providing a fair and reasonable allocation based upon the type of security purchased, information that was in the market at the time of a claimant's purchase, statutory methods for calculating damages, and the strengths and weaknesses of the various claims. This analysis also included studying the market reaction to the alleged disclosures by

the Company and calculating the amount of artificial inflation present in Carter's securities throughout the Class Period that was allegedly attributable to the wrongdoing. Calculation of a Recognized Loss will depend upon several factors, including what type of securities were purchased and when they were purchased or sold. (Ex. 3-A at 11-15; Gardner Decl. ¶¶94-99.)

As explained in the Notice, if the total Recognized Losses exceed the Net Settlement Fund, as is typical, Authorized Claimants will be entitled to receive a *pro rata* share of the Net Settlement Fund, *i.e.* the percentage of their Recognized Loss determined by the ratio of the total Recognized Losses of all Authorized Claimants to the value of the Net Settlement Fund. Accordingly, Lead Plaintiff and Lead Counsel submit that the Plan of Allocation is fair, adequate and reasonable and should be approved by the Court.

CONCLUSION

For all the foregoing reasons, Lead Plaintiff respectfully requests that the Court, *inter alia*: (i) finally approve the proposed Settlement as fair, reasonable, and adequate and enter the proposed Judgment; (ii) grant final certification of the Settlement Class, and (iii) enter the proposed Order Approving the Plan of Allocation. Proposed orders will be submitted with Lead Plaintiff's reply papers, after the deadlines for seeking exclusion and objecting have passed.

Dated: April 23, 2012

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