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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

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|---|---|
| In re CASTLIGHT HEALTH, INC. SHAREHOLDER LITIGATION | Lead Case No. CIV533203 |
| | CLASS ACTION |
| This Document Relates To: ALL ACTIONS. | PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS |
| | Assigned for All Purposes to the Honorable Marie S. Weiner |
| | DATE: October 28, 2016<br>TIME: 9:00 a.m.<br>DEPT: 2<br>DATE ACTION FILED: 04/02/15 |

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## I. INTRODUCTION

Plaintiffs Firerock Global Opportunity Fund LP, Oklahoma Firefighters Pension and Retirement System, Robert Spencer Wright, and Robert Kromphold (collectively, "Plaintiffs") respectfully submit this memorandum in support of the motion for final approval of the settlement of this certified class action (the "Litigation") on the terms set forth in the Stipulation of Settlement dated June 2, 2016 ("Stipulation" or "Settlement") and approval of the Plan of Allocation of Settlement proceeds.[1] The $9.5 million Settlement is the result of hard-fought litigation and extensive arm's-length settlement negotiations between the Settling Parties with the substantial assistance of the Honorable Layn R. Phillips (Ret.), one of the nation's most well-respected and effective mediators of securities class actions.[2] Plaintiffs believe the Settlement represents a highly favorable result that will benefit all persons who purchased Castlight Class B common stock pursuant or traceable to the Registration Statement issued in connection with the IPO on or before September 10, 2014.

Prior to reaching the Settlement in this Litigation, Plaintiffs' Counsel thoroughly investigated and vigorously prosecuted this case. Plaintiffs' Counsel, among other things: (i) reviewed and analyzed stock trading data; (ii) consulted with an expert regarding causation and damages; (iii) reviewed and analyzed Castlight's Class Period and post-Class Period public filings, annual reports, press releases, conference call transcripts, and other public statements; (iv) collected and reviewed a comprehensive compilation of analyst reports and major financial news service reports on Castlight; (v) interviewed approximately 25 potential witnesses, including former employees with the assistance of in-house and private investigators; (vi) drafted initial and amended complaints; (vii) opposed Defendants' two demurrers; (viii) researched the applicable law with respect to the claims asserted in the Litigation and the potential defenses thereto; (ix) attended Court hearings and conferences; (x) prepared and entered into a protective order; (xi) prepared and served numerous detailed document

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation.

[2] *See, e.g.*, *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 498, n.14 (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").

requests on the Defendants; (xii) conferred with counsel for Defendants regarding the scope and manner of production of documents; (xiii) reviewed over 55,000 pages of documents produced by Defendants; (xiv) responded to Defendants' discovery requests; (xv) drafted a comprehensive mediation statement; (xvi) reviewed and analyzed Defendants' detailed mediation statement; (xvii) engaged in rigorous settlement negotiations; (xviii) participated in an all-day mediation session with Judge Phillips; and (xix) drafted and negotiated the Stipulation and other settlement documents with Defendants.

The Class' reaction to the Settlement and the Plan of Allocation to date has been entirely favorable. More than 29,400 Notices and Proofs of Claim and Release (collectively, "Notice Packets") were sent to potential Class Members and their nominees explaining, *inter alia*, the terms of the proposed Settlement and the Plan of Allocation.[3] While the deadline for Class Members to object – October 7, 2016 – has not passed, to date, Plaintiffs' Counsel are not aware of a single objection to the Settlement, the Plan of Allocation, or to counsel's request for an award of attorneys' fees and expenses, and no one has requested exclusion from the Class. Sylvester Decl., ¶15; Joint Decl., ¶¶4-6. For these and the other reasons set forth below, as well as those set forth in the Joint Declaration, Plaintiffs respectfully request that the Court grant final approval of the Settlement and the Plan of Allocation as fair, reasonable, and adequate to Class Members.[4]

## II. THE PROPOSED SETTLEMENT SHOULD BE GRANTED FINAL APPROVAL

When considering a motion for final approval of a class action settlement, a court's inquiry is whether the settlement is "fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996).[5] A settlement is fair, adequate, and reasonable when "the interests of the class as a

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[3] *See* Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Sylvester Decl."), ¶¶4-11, which is attached as Exhibit 12 to the Joint Declaration of James I. Jaconette and Jonathan Gardner in Support of Motion for: (1) Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds; and (2) an Award of Attorneys' Fees and Expenses ("Joint Decl."), filed concurrently herewith.

[4] This memorandum focuses primarily upon the legal standards for approving the Settlement, and evaluating the Plan of Allocation. A separate memorandum is being submitted herewith in support of the motion for an award of attorneys' fees and expenses. For a complete factual recitation, Plaintiffs' Counsel respectfully refer the Court to the Joint Declaration.

[5] Unless otherwise noted, citations are omitted throughout.

whole are better served if the litigation is resolved by the settlement rather than pursued." *Manual for Complex Litigation* §30.42, at 238 (3d ed. 1995); *see also Natural Gas Anti-Trust Cases*, No. 4221, 2006 WL 5377849, at *1 (San Diego Cnty. Super. Ct. Dec. 11, 2006). In making this determination, there is a "presumption of fairness . . . where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk*, 48 Cal. App. 4th at 1802; *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010) (same).

The Settlement is presumptively fair. The parties extensively negotiated the Settlement at arm's length, under the guidance of a highly experienced and effective mediator, Judge Phillips. These negotiations included an all-day mediation with Judge Phillips where the parties' positions were extensively debated. Prior to the mediation, the parties exchanged detailed mediation briefs explaining their respective positions and submitted them to Judge Phillips. In addition to the extensive settlement negotiations, Plaintiffs' Counsel's investigation and litigation efforts have allowed them to assess the strengths and weaknesses of the Class' claims. Class Counsel also have extensive experience and expertise in the prosecution of securities class actions in state and federal courts throughout the country. *See* www.rgrdlaw.com and www.labaton.com. Finally, although the date for filing objections has not passed, Class Counsel are not aware of a single objection to the Settlement.[6] *See* Joint Decl., ¶4. The presumption of fairness therefore applies.

The Settlement also satisfies the standards for approval of a class action settlement set forth in *Dunk*. There, the court set forth several factors to be considered by a court when granting final approval of a settlement, including: (1) the settlement amount; (2) the risks of continued litigation; (3) the stage of proceedings; (4) the complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel; and (6) the reaction of class members. 48 Cal. App. 4th

[6] If any objections are received, Class Counsel will address them in a reply memorandum to be filed on or before October 21, 2016, in accordance with this Court's Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order").

at 1801; *see also Cellphone Termination*, 186 Cal. App. 4th at 1389. As discussed below and in the Joint Declaration, each of these criteria supports final approval of the Settlement in this case.

**A. The Amount of the Settlement Favors Approval**

Under the Settlement, Defendants have made a cash payment of $9,500,000 for the benefit of the Class, with no right of reversion. This Settlement is unquestionably better than another distinct possibility – little or no recovery for the Class. Indeed, even if Plaintiffs were able to successfully prosecute this Litigation through trial and all appeals, there was no guarantee that a jury's verdict would have been more than the Settlement Amount, and it would have taken years before all appeals were settled and the Class received any payment. *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001) ("Compromise is inherent and necessary in the settlement process . . . even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'"). Furthermore, it is important to recognize that the Settlement was only achieved after substantial litigation and that it is the product of each party's evaluation of the strengths and weaknesses of their respective case and the costs of taking the litigation through the completion of merits and expert discovery, trial, and appeals. *See* Joint Decl., ¶¶39, 51. Class Counsel believe that at the time the Settlement was reached, it was one of the largest recoveries for a Securities Act claim prosecuted in California State Court. Based on all factors involved, an all-cash settlement of $9,500,000 is a highly favorable result for the Class. Accordingly, this factor militates in favor of the Court granting final approval. *See Wershba*, 91 Cal. App. 4th at 250 ("A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable.").

**B. The Substantial Risks of Continued Litigation**

Plaintiffs' case against the Defendants presented substantial risks in terms of establishing liability and damages.

**1. Risks in Establishing Liability**

Section 11 of the Securities Act of 1933 creates a private remedy for any purchaser of a security if "any part of the registration statement . . . contain[s] an untrue statement of a material fact or omit[s]

to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(a). Plaintiffs believe that they stood a good chance of establishing that the Registration Statement issued in connection with the IPO violated the federal securities laws because there were multiple undisclosed uncertainties and trends that were affecting Castlight that were reasonably likely to have a negative impact on Castlight's revenue and profitability that pursuant to SEC Regulation S-K 17 C.F.R. §229.303 were required to be, but were not, disclosed to investors. Specifically, Plaintiffs allege that Defendants failed to disclose implementation delays, increased expenses, and an inability to maintain pricing consistent with the expected revenue growth on the Company's principal product, and that those alleged omissions rendered the Registration Statement misleading. Joint Decl., ¶14. Defendants, however, consistently took the position that Plaintiffs could not prove Defendants made any materially false or misleading statements in the Registration Statement or that there was a duty to disclose any of the alleged omitted information. Defendants would also argue that all of the allegedly omitted information was the subject of detailed and ample disclosures and warnings in Defendants' offering documents. While Plaintiffs would vigorously dispute Defendants' contentions, the uncertainty of continued litigation must be considered. As one court has observed:

> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

*W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971). Thus, careful consideration of the numerous uncertainties and risks of proving liability and prevailing on likely appeals supports approval of the Settlement.

**2. Risks Relating to Loss Causation and Damages**

Plaintiffs are mindful that if they were able to establish liability at trial, there was no guarantee they would prevail on the issues of loss causation and damages. During the mediation, Defendants argued that the alleged materially misleading statements and omissions in the Registration Statement did not in fact cause a substantial portion of the damages Plaintiffs claimed, and they pressed a negative

causation defense asserting the lack of any corrective disclosures and any statistically significant drop in the Company's stock price following the IPO. Joint Decl., ¶50.

As a result, at summary judgment and trial, Defendants' experts would no doubt argue that all or a substantial portion of the losses experienced by the Class were due to factors completely unrelated to any conduct of Defendants, thereby eliminating any potential recovery. There was a substantial risk that the finder of fact would agree with Defendants' contention that no damages could be linked to the Defendants' conduct, or that damages were substantially less than the amount Plaintiffs have asserted. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Although Plaintiffs were confident they could prove damages and rebut Defendants' negative causation defense, Defendants' argument constituted a risk that Plaintiffs might not be able to prove damages caused by the alleged material misrepresentations and omissions in the Registration Statement. Thus, the amount of damages that Class Members would actually recover at trial even if they prevailed on liability issues was uncertain. *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) ("even if a jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages").

Moreover, even if Plaintiffs were to prevail at trial, the risks would not end there. *See In re Mfrs. Life Ins. Co. Premium Litig.*, MDL No. 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 21, 1998) ("even if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent – there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings"). There are many cases in which a successful verdict has been overturned either by motion after trial or an appeal. For example, in *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an extended trial. Based upon the jury's findings, recoverable damages would have exceeded $100 million. The court, however, overturned the verdict, entered judgment notwithstanding the verdict

for the individual defendants, and ordered a new trial with respect to the corporate defendant. *See also Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction under *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011)); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011) (after plaintiffs' jury verdict, court granted defendants' motion for judgment as a matter of law and entered judgment for defendants), *aff'd*, 688 F.3d 713 (11th Cir. 2012) (finding trial court erred, but defendants nevertheless entitled to judgment as a matter of law based on lack of loss causation).[7] In sum, the risks posed by continued litigation were substantial, and they would be present at every step of the litigation if it were to continue.

### C. The Stage of Proceedings and Available Evidence Gave the Parties Sufficient Information to Negotiate an Adequate and Reasonable Settlement

This factor focuses on whether the parties had sufficient information to conduct an informed negotiation for a settlement that adequately reflects the merits of the case. When applying this factor, "[t]he question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it." *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 U.S. Dist. LEXIS 19210, at *39-*40 (E.D. La. Mar. 2, 2009). "'In the context of class action settlements, "formal discovery is not a necessary ticket to the bargaining table" where the parties have sufficient information to make an informed decision about settlement.'" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Moreover, the trial court "may legitimately presume that counsel's judgment [that it has the information necessary to evaluate a settlement] is reliable." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981).

[7] Other examples of verdicts for the plaintiff being overturned include: *Robbins v. Koger Props.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing on appeal $81 million jury verdict and dismissing securities action with prejudice); *AUSA Life Ins. Co. v. Ernst & Young*, 39 F. App'x. 667 (2d Cir. 2002) (affirming district court's dismissal after a full bench trial and earlier appeal and remand); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y.) (granting defendants' motion for judgment as a matter of law after jury verdict for plaintiffs), *aff'd sub nom. Winkler v. Wigley*, 242 F.3d 369 (2d Cir. 2000).

As detailed above and in the Joint Declaration, by the time the parties reached the Settlement, Plaintiffs and their counsel had sufficiently investigated and researched the merits of their claims and Defendants' potential defenses to determine that the terms of the Settlement are fair, reasonable, and adequate and in the best interest of the Class. Counsel's reasoned judgment was obtained after a thorough investigation and vigorous prosecution, including analysis of more than 55,000 pages of documents produced in discovery, and consulted with a loss causation and damages expert. Joint Decl., ¶¶31-32. Prior to and during the Litigation, some 25 potential witnesses were interviewed, thousands of pages of SEC filings were reviewed, and detailed complaints were drafted. *Id.*, ¶¶25-26. Class Counsel also prepared a successful demurrer opposition (in the main) and a detailed mediation statement. Furthermore, the merits of the parties' respective positions were extensively debated during settlement discussions, including mediation with Judge Phillips which further highlighted the legal and factual issues in dispute. *Id*., ¶¶33-35. The knowledge and insight gained through these activities provided Class Counsel with sufficient information to evaluate the strengths and weaknesses of the Class' claims and Defendants' defenses, as well as the likelihood of obtaining a larger recovery from Defendants had the Litigation continued. *Id.*, ¶¶48-54.

### D. Balancing the Certainty of an Immediate Recovery Against the Expense and Likely Duration of Protracted Litigation and Trial Favors Settlement

The immediacy and certainty of a recovery is another factor for the Court to balance in determining whether the Settlement is fair, adequate, and reasonable. *See, e.g.*, *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Courts have held that "[t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 626 (9th Cir. 1982). Thus, the benefit of the present settlement must be balanced against the expense of achieving a more favorable result at a trial in the future. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

Approval of the Settlement will mean a significant, prompt recovery for Class Members. If not for this Settlement, the case would have continued through the completion of document and deposition discovery, expert discovery, summary judgment, trial, and likely appeal. A trial would have occupied a

number of attorneys for many weeks and would have required substantial and costly expert testimony on both sides. Furthermore, a judgment favorable to the Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and further appeals, which could prolong the case for several more years. *See, e.g.*, *Warner Commc'ns*, 618 F. Supp. at 745 (delay from appeals is a factor to be considered). Therefore, delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Class Members to wait many more years for any recovery, further reducing its value. Settlement of this Litigation ensures an immediate recovery and eliminates the risk of no recovery at all. *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 373-74 (S.D. Ohio 2006) (explaining "the difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses, and a possible delay in recovery due to the appellate process, provide justifications for this Court's approval of the proposed Settlement").

As the Ninth Circuit has made clear, the very essence of a settlement agreement is compromise, "'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624. "'Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.'" *Id.*; *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 19 (N.D. Cal. 1980) ("[a]s a quid pro quo for not having to undergo the uncertainties and expenses of litigation, the plaintiffs must be willing to moderate the measure of their demands"), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Accordingly, the fact that the Class potentially could have achieved a greater recovery after trial does not preclude the Court from finding that the Settlement is within a "range of reasonableness" for approval. *E.g.*, *Warner Commc'ns*, 618 F. Supp. at 745.

### E. The Recommendations of Experienced Counsel Heavily Favor Approval of the Settlement

The views of the attorneys actively conducting the litigation, while not conclusive, are "entitled to significant weight" when evaluating a settlement. *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ellis*, 87 F.R.D. at 18 ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight"); *Dunk*, 48 Cal. App. 4th at 1802. Indeed, as one court recognized, "'[t]he recommendations of plaintiffs'

counsel should be given a presumption of reasonableness.'" *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007).

Class Counsel are well-known for their experience and success in complex and class action litigation and fully support the Settlement as in the best interest of the Class. This factor heavily favors this Court's approval of the Settlement.

**F. The Reaction of the Class Supports Approval of the Settlement**

A court may also consider the reaction of the class in determining whether to approve a settlement. *Dunk*, 48 Cal. App. 4th at 1801; *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). A "relatively small number" of objections is "an indication of a settlement's fairness." *Brotherton*, 141 F. Supp. 2d at 906 (citing Herbert Newberg & Alba Conte, 2 *Newberg on Class Actions* §11.48 (3d ed. 1992)); *see also Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 U.S. Dist. LEXIS 97057, at *18 (S.D. Ill. June 6, 2006) (nine objections is a "minuscule" amount). However, "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton*, 141 F. Supp. 2d at 906.

In this case, the Class was notified of the Settlement by First-Class Mail, publication, and the Internet. Over 29,400 copies of the Notice Packet were sent to potential Class Members and nominees (Sylvester Decl., ¶11) and the Summary Notice was transmitted over the *PR Newswire* and published in *The Wall Street Journal* on August 11, 2016. *Id*., ¶14. In addition, a dedicated website, www.castlightshareholderlitigation.com, was created and all relevant documents and dates were (and are) posted thereon. *Id.*, ¶13.

While the time for objections has not yet expired, to date, no Class Member has objected (*see* Joint Decl., ¶4), and no Class Member has requested exclusion from the Class. Sylvester Decl., ¶15. Thus, the reaction of the Class weighs heavily in favor of approving the Settlement. *See Nat'l Rural Telecommc'ns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (absence of large number of objections raises a strong presumption settlement is fair to the class); *Dunk*, 48 Cal. App. 4th at 1802 (one of the factors leading to a presumption that the settlement is fair, reasonable and adequate is that "the percentage of objectors is small").

Each of the above factors fully supports a finding that the Settlement is fair, reasonable, and adequate. Accordingly, Plaintiffs respectfully request that the Court approve the Settlement.

## III. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

The objective of a plan of allocation is to provide an equitable basis upon which to distribute the settlement fund among eligible class members. *See Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably"); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). Assessment of the plan of allocation is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable, and adequate. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). An allocation formula must only have a reasonable, rational basis, particularly if recommended by "experienced and competent" plaintiffs' counsel. *White v. NFL*, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993); *In re Am. Bank Note Holographics Sec. Litig.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001). Because they tend to mirror the complaints' allegations, "plans that allocate money depending on the timing of purchases and sales of the securities at issue are common." *In re Datatec Sys. Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 U.S. Dist. LEXIS 87428, at *15 (D.N.J. Nov. 28, 2007).

Here, the Plan of Allocation was developed with the assistance of Class Counsel's damages consultant, and it reflects an assessment of the damages that could have been recovered under the theories asserted by Plaintiffs in this case. *See* Joint Decl., ¶¶42-44. The Plan of Allocation will, therefore, result in an equitable distribution of the proceeds among Class Members who submit valid claims. As a result, Plaintiffs respectfully submit that the Plan of Allocation is a fair and reasonable method for allocating the Net Settlement Fund among the Members of the Class. *See id.*

## IV. CONCLUSION

For reasons set forth above and in the declarations submitted in conjunction herewith, Plaintiffs respectfully request that the Court grant final approval of the Settlement and the Plan of Allocation.

DATED: September 23, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
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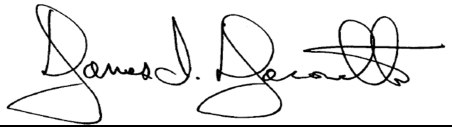

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Additional Counsel for Robert Kromphold

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on September 23, 2016, declarant served the PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed below:

**COUNSEL FOR PLAINTIFFS**

| Attorney | Email Address | Party Name |
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3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 23, 2016, at San Diego, California.

JACLYN STARK