UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GRADY SCOTT WESTON, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. RCS CAPITAL CORPORATION, RCAP HOLDINGS, LLC, RCAP EQUITY, LLC, NICHOLAS S. SCHORSCH, BRIAN S. BLOCK, EDWARD MICHAEL WEIL, WILLIAM M. KAHANE, BRIAN D. JONES, PETER M. BUDKO, MARK AUERBACH, JEFFREY BROWN, C. THOMAS MCMILLEN, and HOWELL WOOD, Defendants.	Civ. No. 1:14-CV-10136-GBD

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

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PRELIMINARY STATEMENT

Lead Plaintiffs, Oklahoma Police Pension Fund and Retirement System and City of Providence, Rhode Island respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement reached in the above-captioned litigation (the "Settlement") and approval of the proposed Plan of Allocation for the proceeds of the Settlement. The Settlement provides a recovery of $31,000,000.00 in cash to resolve this securities class action against RCS Capital Corporation ("RCAP" or the "Company"), RCAP Holdings, LLC ("RCAP Holdings"), RCAP Equity, LLC ("RCAP Equity"), Nicholas S. Schorsch, Brian S. Block, Edward M. Weil, Jr., William M. Kahane, Brian D. Jones, Peter M. Budko, Mark Auerbach, Jeffrey Brown, C. Thomas McMillen and Howell Wood (collectively, "Defendants"). The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement, dated June 2, 2017 (the "Stipulation"), which was previously filed with the Court. ECF No. 134-1.[1]

The Settlement recovers a significant amount of the Settlement Class's estimated damages – approximately 10% of Lead Plaintiffs' consulting damages expert's maximum estimate – and represents an excellent result for the Settlement Class, particularly when compared to the risks that continued litigation might result in a vastly smaller recovery, or no recovery at all, due to the Company's bankruptcy. Importantly, Lead Plaintiffs, sophisticated institutional investors who were actively involved in the Action, support the Settlement. *See* Declaration of Jeffrey Dana, City Solicitor for the City of Providence (Ex. 1) and Declaration of Steven K. Snyder, Executive Director, Chief Investment Officer and In-House Counsel for the

[1] Capitalized terms not defined herein have the same meanings as in the Stipulation.

Oklahoma Police Pension Fund and Retirement System (Ex. 2).[2]

The Settlement is the result of hard-fought litigation and arm's-length negotiations between counsel, facilitated by a well-respected and experienced mediator, Mr. Robert A. Meyer. Defendants, who are represented by experienced and formidable securities litigators, have asserted strong defenses, adamantly denied liability, and were firm in their belief that the Settlement Class could not prevail on the claims asserted given that the alleged accounting fraud at issue took place at an entirely *different company*.

As set forth below and in the accompanying Joint Declaration,[3] the Settlement is the result of Lead Plaintiffs' and Lead Counsel's comprehensive litigation efforts over the past two years. Lead Counsel vigorously opposed Defendants' motions to dismiss and participated in an all-day oral argument with respect to the myriad issues presented in the motions; navigated the bankruptcy proceedings to protect the Settlement Class's interests; and engaged in lengthy settlement negotiations with the assistance of a nationally-recognized mediator. The Settlement was reached at a time when the Parties fully understood the strengths and weaknesses of their respective positions.

For all the reasons discussed herein and in the Joint Declaration, it is respectfully submitted that the Settlement is not only fair, reasonable and adequate, but is an excellent result that should be approved by the Court. Likewise, the Plan of Allocation, which was developed

[2] All exhibits herein are annexed to the Joint Declaration of Deborah Clark-Weintraub and Ira A. Schochet ("Joint Decl." or "Joint Declaration"), submitted herewith. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference refers to the designation of the entire exhibit attached to the Joint Declaration and the second reference refers to the exhibit designation within the exhibit itself.

[3] The Court is respectfully referred to the Joint Declaration for a full discussion of the factual background and procedural history of the Action, the litigation efforts, the risks and obstacles faced if litigation continued, a discussion of the negotiations leading to the Settlement, and the reasons why the Settlement and Plan of Allocation should be approved by the Court.

with the assistance of Lead Plaintiffs' consulting damages expert, is fair and equitable and should be approved by the Court.

THE NOTICE PROGRAM SATISFIED RULE 23 AND DUE PROCESS

In accordance with the Preliminary Approval Order, to date 15,114 copies of the Notice have been mailed to potential class members and their nominees. *See* Declaration of Adam D. Walter Regarding: (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; (C) Report on Requests for Exclusion and Objections; and (D) Volume of Claims Received to Date ("Mailing Decl."), ¶¶ 2-9, Ex. 4. The Summary Notice was published in *The Wall Street Journal* and disseminated over the *PR Newswire* on July 19, 2017. *Id.* ¶ 10. The Notice, Claim Form, the Stipulation and its Exhibits, and the Preliminary Approval Order were also posted on a case-specific website identified in the Notice. *Id.* ¶ 12.

The Notice contains, *inter alia*: (i) a detailed description of the Action; (ii) the material terms of the Settlement, including a description of the claims that will be released; (ii) the manner in which the Net Settlement Fund will be allocated among eligible Settlement Class Members; (iii) the process for seeking exclusion; (iv) the process for objecting; and (v) information about the attorneys' fee and expense request. *See generally* Ex. 4 - A.

Accordingly, the Notice program fully satisfied Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," and the specific requirements of the Private Securities Litigation Reform Act of 1995 and Rule 23(e)(1). *See Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Standards for Evaluating Class Action Settlements

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, this Court may approve a class action settlement where it finds the settlement to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Wal-Mart Stores,* 396 F.3d at 116. The evaluation of a proposed settlement requires an assessment of both the procedural and substantive fairness of the settlement. *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009).

While the decision to grant or deny approval of a settlement lies within the discretion of the court, a number of courts have observed a general policy in favor of settling class actions. *See Aponte v. Comprehensive Health Mgmt. Inc*., No. 10 Civ. 4825 (JLC), 2013 WL 1364147, at *2 (S.D.N.Y. Apr. 2, 2013) (noting that "[c]ourts examine procedural and substantive fairness in light of the 'strong judicial policy in favor of settlement[]' of class action suits").[4] Recognizing that a settlement represents an exercise of judgment by negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

The Second Circuit has identified nine factors that courts should consider in deciding the substantive fairness of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best

[4] All citations are omitted and emphasis is added, unless otherwise noted.

> possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463; *see also In re Wachovia Equity Sec. Litig.*, No. 08 Civ. 6171 (RJS), 2012 WL 2774969, at *3-5 (S.D.N.Y. June 12, 2012). "A court need not find that every factor militates in favor of a finding of fairness, rather a court 'considers the totality of these factors in light of the particular circumstances.'" *Chin v. RCN Corp.*, No. 08 Civ. 7349 (RJS) (KNF), 2010 WL 3958794, at *3 (S.D.N.Y. Sept. 8, 2010). As demonstrated below and in the Joint Declaration, the Settlement meets each of the applicable *Grinnell* factors.

B. The Settlement Is Procedurally Fair

A presumption of fairness attaches to the proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See Shapiro v. JP Morgan Chase & Co.*, No. Civ. 11-8331 (MHD), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014). A court may find the negotiating process is fair where, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *see also Wachovia Equity Sec. Litig.*, 2012 WL 2774969, at *3.

Here, the Settlement was reached only after extensive arm's-length settlement negotiations by highly experienced, fully-informed counsel with the assistance of Mr. Robert A. Meyer, a premier mediator with experience in mediating numerous securities claims involving Fortune 500 companies and major financial institutions. *See In re Priceline.com, Inc. Sec. Litig.*, No. 3:00CV1884(AVC), 2007 WL 2115592, at *3 (D. Conn. July 20, 2007) (noting the procedural fairness of settlement mediated by one of two mediators, including Mr. Meyer). As

set forth in the Joint Declaration, prior to the mediation session on November 14, 2016, the Parties exchanged damages analyses and mediation statements. Joint Decl. ¶ 33. Although the mediation session did not result in an agreement to settle, it moved the Parties closer in their respective negotiating positions and the Parties continued to speak with Mr. Meyer in separate discussions. The Parties ultimately agreed to settle on March 20, 2017, after further arm's-length negotiations under the auspices of Mr. Meyer. *Id*.

Moreover, the recommendation of Lead Plaintiffs, each a sophisticated institutional investor that manages millions in retirement fund assets, also supports the fairness of the Settlement. *See generally* Exs. 1 and 2. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). "'Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.'" *Id*.

C. The Settlement Satisfies the Second Circuit's Test of Substantive Fairness

1. The Complexity, Expense, and Likely Duration of the Action Supports Approval of the Settlement

"This factor captures the probable costs, in both time and money, of continued litigation." *Shapiro*, 2014 WL 1224666, at *8. Securities class actions like this one are by their nature complicated, and district courts in this Circuit have long recognized that "[a]s a general rule, securities class actions are 'notably difficult and notoriously uncertain' to litigate." *In re Facebook Inc. IPO Sec. Litig. and Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. 2016); *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.,* 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012). This case is no

exception.

The Settlement Class' claims here raise numerous factual issues concerning a tangled web of corporate structures and complex business practices involving publicly-traded and non-traded real estate investment trusts ("REITs"), retail broker-dealers, wholesale broker-dealers, and investment banking and advisory businesses. Three companies stood at the center of this web of Schorsch-managed and controlled entities: (1) AR Capital, LLC ("AR Capital"), a sponsor of non-traded REITs created and managed by Schorsch insiders; (2) RCAP, whose main businesses were selling ownership interests in AR Capital's non-traded REITs and "advising" them, usually in connection with transactions with other Schorsch-related entities; and (3) ARCP, a publicly traded REIT that provided liquidity events for – or purchased – AR Capital's non-traded REITs and had at certain times retained RCAP to advise it in connection with such transactions. The crux of the alleged fraud involved the actual strength and prospects of RCAP's business, which depended on the other Schorsch-controlled entities for its revenue, and all of which were closely identified as belonging to the same complex of entities, at a time when RCAP's leading executives were perpetrating an accounting fraud at one of those closely related entities. Joint Decl. ¶¶ 14-16, 39-40.

In addition, this case involves complicated legal issues detailed below concerning falsity, scienter, and loss causation, among other things, each of which would require extensive percipient and expert testimony at trial. Furthermore, absent this Settlement, Lead Counsel would have expended sizeable amounts of time and money conducting factual and expert discovery; engaging in extensive motion practice, including moving for class certification and responding to motions for summary judgment; litigating *Daubert* motions; and proving Lead Plaintiffs' claims at trial. Even if Lead Plaintiffs could recover an equally large judgment after a

trial – which was far from certain given the Company's bankruptcy and the risks described below – the additional delay through post-trial motions and the appellate process could deny the Settlement Class any recovery for years. *See In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 117 (S.D.N.Y. 2009) (additional "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable"). An appeal of any verdict would also carry the risk of reversal, in which case the Settlement Class would receive no recovery at all, even after having prevailed on the claims at trial. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery.").[5]

2. The Reaction of the Settlement Class to the Settlement

The reaction of a class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *Veeco Instruments,* 2007 WL 4115809, at *7. While the deadline of August 29, 2017 for Settlement Class Members to object or seek exclusion has not passed, here, in response to a thorough notice program in which more than 15,000 Notices have been mailed, to date not a single Settlement Class Member has objected and no requests for exclusion from the Settlement Class have been received. *See* Ex. 4 ¶¶ 13-14.[6]

[5] *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *cf. In re Apollo Grp., Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 WL 5927988 (9th Cir. June 23, 2010) (trial court overturned unanimous verdict for plaintiffs, later reinstated by the Ninth Circuit Court of Appeals, and judgment re-entered after denial of *certiorari* by the U.S. Supreme Court).

[6] If any objections or requests for exclusion are received, Lead Plaintiffs will respond in their reply papers due with the Court by September 21, 2017.

3. The Stage of the Proceedings

In considering this factor, "'the question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.'" *Facebook,* 2015 WL 6971424, at *3; *Bear Stearns,* 909 F. Supp. 2d at 267. To satisfy this factor, parties need not have engaged in formal or extensive discovery. *See Maley v. Del Global Techs*. Corp., 186 F. Supp. 2d 358, 363 (S.D.N.Y. 2002).

At the time the Parties agreed to settle, Lead Counsel had a thorough understanding of the strengths and weaknesses of the claims and defenses asserted. Lead Counsel's robust investigation of the conduct at issue included the review and analysis of: (i) SEC filings by RCAP, ARCP, and their affiliates; (ii) the sworn/verified allegations in *McAlister v. American Realty Capital Properties, Inc., et al*., Index No. 162499/2014 (Sup. Ct. N.Y. Cnty.); (iii) other court filings related to RCAP and ARCP and the issues and events in question, including (a) the amended pleadings and other filings in *In re American Realty Capital Properties, Inc. Litigation*, Civil Action No. 1:15-mc-00040-AKH (S.D.N.Y); (b) the complaint filed in *RCS Creditor Trust v. Schorsch, et al*., Case No. 2017-0178 (Del. Ch.); (c) filings in the Bankruptcy Action; and (d) filings in actions and other proceedings brought by the DOJ and SEC; (iv) securities analysts' reports and advisories about the Company and ARCP; (v) press releases, investor presentations, and other public statements issued by the Company, ARCP, and their affiliates; (vi) transcripts of RCAP and ARCP conference calls; and (vii) media reports about RCAP, ARCP, and their affiliates. *See generally* Joint Decl. Additionally, the investigation included interviews with 13 persons who were either former employees of the Company or otherwise had relevant knowledge. Joint Decl. ¶ 12.

As of the time of settlement, Lead Counsel had also opposed three complex motions to

dismiss filed by the various Defendants and participated in a full-day oral argument with respect to the myriad issues raised in the motions. Lead Counsel's investigation and briefing with respect to both liability and damages issues and legal analyses enabled Lead Plaintiffs and Lead Counsel to thoroughly understand and evaluate the strengths and weaknesses of the claims asserted, and accordingly to allow them to engage in effective settlement discussions with Defendants. Therefore, this Court should find that this factor also supports approval of the Settlement.

4. The Risk of Establishing Liability

In assessing the Settlement, the Court should balance the benefits afforded to the class, including the certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. As this case amply demonstrates, securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See In re AOL Time Warner Inc. Sec. and ERISA Litig.*, No. 02-5575, 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation").

The principal claims in the Action are based on Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder and Sections 11 and 12(a)(2) of the Securities Act of 1933 ("Securities Act"). "To establish a claim under the Exchange Act, a plaintiff must prove: (1) the defendant made a material misrepresentation or omission; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp. PLC*, 783 F.3d 383, 389 (2d Cir. 2015). To establish a claim under Section 11 of the Securities Act, a complaint must show that a "relevant communication either misstated or omitted a material fact." *Iowa Pub. Emps.' Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 141 (2d Cir. 2010). The elements of a Section 12(a)(2) claim are

roughly parallel with the elements of a Section 11 claim. *See New Jersey Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 120 (2d Cir. 2013).

While Lead Plaintiffs believe that Defendants' motions to dismiss would be denied and that the allegations of the Complaint would ultimately be borne out by the evidence, they also recognize that they faced significant hurdles to proving liability. Defendants' principal factual argument was that there was an insufficient and tenuous nexus between the allegedly criminal accounting manipulations at ARCP that were disclosed in October 2014, which resulted in several criminal investigations and criminal proceedings, including the recent conviction of Defendant Block, and the allegedly materially false and misleading misstatements and omissions that Defendants made concerning the business prospects of RCAP. Defendants argued that ARCP and RCAP are separate businesses with different management teams and distinct financial results. They also argued that while ARCP had accounted for a significant portion of RCAP's investment banking revenues in 2013 and the first six months of 2014, RCAP and ARCP had publicly announced, months before the ARCP accounting fraud was revealed, that they were terminating their investment banking relationship as of July 2014. Similarly, while the vast majority of the non-traded REITs for which RCAP acted as a wholesale distributor originated from AR Capital, Defendants argued that this entity was distinct from ARCP and RCAP as well, and had not experienced any accounting improprieties. Joint Decl. ¶ 36. In short, Defendants' primary defense was that Lead Plaintiffs were impermissibly imputing an alleged fraud at one company (ARCP) to an entirely separate company with different investors (RCAP) – when the latter company had not restated its financial results and was not the subject of any investigations related to the ARCP fraud.[7] *Id*. ¶ 37.

[7] Massachusetts' Secretary of the Commonwealth, William Galvin, commenced an investigation of RCAP's wholesale distribution business, which was reported on November 10, 2014. However, Defendants argued that nothing in the limited media coverage surrounding this

a. Risks Concerning Falsity

Consistent with the foregoing, Defendants argued that only one of the alleged misstatements mentions ARCP, and that statement, which is contained in the 2014 Second Quarter Form 10-Q, discloses that RCAP and ARCP have "mutually terminated our investment banking relationship in July of 2014" – which they argued was a true statement of historical fact. As to all the remaining misstatements, Defendants argued that they are, *inter alia*: (i) general statements of corporate optimism regarding RCAP's outlook; (ii) inactionable puffery or forward-looking statements with "cautionary language" that warned of the risk of negative consequences for RCAP based on unforeseen developments impacting AR Capital; and/or (iii) statements of historical fact/financial data that were not themselves challenged to be false. *Id*. ¶ 38.

In response, Lead Plaintiffs contended that Defendants' statements as to RCAP's present financial strength and future prospects did not have to mention ARCP to render them misleading. Given both the close association of all Schorsch-related entities – a particularly important fact to the essential network of retail brokers who purchased REITs from RCAPs wholesale channel that were managed by AR Capital – and the significant business RCAP conducted with the other Schorsch-related entities, there was a substantial undisclosed risk that RCAP's business could be destroyed upon disclosure of the fraud, a risk distinctly at odds with Defendants' glowing and optimistic statements. Indeed, when investors learned of the accounting fraud at ARCP, it was RCAP, not ARCP, which was driven into bankruptcy. Accordingly, Lead Plaintiffs contended that Defendants' statements, including that RCAP's business was "a freight train that isn't going to slow for probably a decade" and that touted RCAP's "pipeline of activity" from other

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investigation suggested that it had anything to do with alleged false statements by RCAP. Indeed the subsequent complaint related to proxy practices. Joint Decl. ¶ 37.

Schorsch-controlled entities, were materially false and misleading and actionable under the federal securities laws. *Id*. ¶¶ 39-40. However, Lead Plaintiffs well understood that these arguments were not guaranteed to succeed.

Defendants further asserted that Schorsch and Block were only alleged to have directly made certain of the misstatements—*i.e*. misstatements appearing in the Company's 2013 Form 10-K (Complaint ¶¶ 85-93) that they each signed (Complaint ¶ 86), and oral misstatements during the February 12 and May 1, 2014 earnings conference calls that Schorsch made (Complaint ¶¶ 78, 95, 98-100, 102-03).[8] Thus, with respect to the other alleged misstatements, which were press releases, conference call statements, or SEC filings that the individuals did not sign, Defendants argued that Lead Counsel would need to overcome *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), in which the Supreme Court held that Section 10(b) liability runs only as to the "maker" of a statement, throughout the course of the litigation. To do so, Lead Counsel would need to prove that Schorsch and Block were directly involved in creating the alleged misstatements, such that they should be found to be speakers, which Defendants would strenuously contest. For example, Block asserted at the motion to dismiss stage, and likely would continue to argue at summary judgment and trial, that he "had no management role at the Company during the class period" (ECF No. 68 at 3). *See* Joint Decl. ¶ 41. Thus, *Janus* presented a significant hurdle to establishing liability for certain of the statements.

b. Risks in Proving Scienter

Lead Plaintiffs also faced a significant challenge in proving that Defendants acted with

[8] Neither RCAP nor RCAP Holdings disputed at the motion to dismiss stage that they were the makers of each of the alleged misstatements (*e.g*., Complaint ¶¶ 76-83, 85-90, 94-103, 104-07, 122-34, 137-42, 163-66, 174, 176-77, 179- 80, 264-70).

scienter. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008) ("Proving a defendant's state of mind is hard in any circumstances."). Here, Defendants argued that Lead Plaintiffs' allegations are based on an accounting fraud at ARCP, and therefore Lead Plaintiffs could not prove an intent to deceive RCAP investors. In support, Defendants relied on the Second Circuit's holding in *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co*., 553 F.3d 187, 198 (2d Cir. 2009), which held that "the facts alleged must support an inference of an intent to defraud the plaintiffs rather than some other group." In response, Lead Counsel disputed the relevance of the *ECA* precedent, given that the false and misleading statements were indisputably made to RCAP investors. Although Lead Counsel were confident that they would be able to gather sufficient evidence to establish scienter, they also knew that their work would involve unique challenges, given, among other things, the interplay between the fraud at ARCP and its alleged carryover impact at RCAP. Joint Decl. ¶ 42.

5. The Risks of Establishing Loss Causation and Damages

Even if Defendants' liability were established, Lead Plaintiffs would have to prove the existence and the amount of damages. Loss causation requires proof of a "causal connection between the material misrepresentation and the [economic] loss" suffered. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 338 (2005). Once causation is established, damages estimation remains "a complicated and uncertain process, typically involving conflicting expert opinion about the difference between the purchase price and [share]s 'true' value absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

Here, Lead Plaintiffs' consulting damages expert has estimated maximum class-wide aggregate damages of approximately $313 million, if all six allegedly corrective disclosures were established at trial. This includes maximum recoverable damages of approximately $311.5 million in connection with the Exchange Act claims and approximately $1.5 million in incremental

Securities Act damages. *See* Declaration of Chad Coffman, CFA, Ex. 3 ¶¶ 7, 33; Joint Decl. ¶ 43. However, as explained below, Defendants would likely make several arguments that, if accepted, would have substantially reduced the damages recoverable by Settlement Class Members. *Id*.

As an initial matter, there was a significant risk that Defendants would continue to advance their argument that all of the disclosures after the October 29, 2014 disclosure of the accounting fraud at ARCP were not "corrective" because, at that point, the truth about the alleged fraud had been fully disclosed. In other words, that the truth was fully revealed on the first corrective disclosure, which would eliminate the five subsequent alleged corrective disclosures. Joint Decl. ¶ 44. As explained in the Coffman Declaration, in the event that Defendants were successful in arguing that all of the alleged corrective disclosures after October 29, 2014 should be excluded – based on their claim that the truth was fully disclosed as of that date – class-wide aggregate damages would be just approximately $85.3 million. *See* Ex. 3 ¶ 8, 33; Joint Decl. ¶ 48.

Defendants would also likely argue that some or all of the alleged corrective disclosures were unrelated to Defendants' alleged misstatements. Defendants would argue that of the six events alleged to be corrective disclosures, three do not even mention RCAP and the other alleged corrective disclosures did not correct any of the alleged misstatements. Lead Plaintiffs believed that they had compelling responses to such arguments. Among those were that: (1) the disclosures concerning Schorsch and Block's accounting manipulations at ARCP revealed a serious threat to the prospects for RCAP's wholesale broker-dealer and investment banking business that was known to Defendants but concealed by their earlier positive statements about these business segments and (2) the remaining disclosures of adverse events were as a result of the public revelation of that accounting scandal. Joint Decl. ¶¶ 45-46.

Given these competing views of the claims, there are a number of possible intermediate damages outcomes between $85.3 million and maximum damages of $313 million, if, in addition to the first corrective disclosure, one or more, but not all, of the remaining five corrective disclosures are ultimately included. For example, if, in addition to the first corrective disclosure, the only other corrective disclosure included in the case is the smallest corrective disclosure of November 10, 2014, then class-wide aggregate damages would be approximately $106.3 million. *See* Ex. 3 ¶ 9, 33; Joint Decl. ¶ 49. There are many other potential outcomes in which the class-wide aggregate damages would be below the maximum $313 million. *Id*.

Although Lead Plaintiffs believed that they had compelling responses to Defendants' loss causation arguments, the amount of damages incurred would be hotly-contested at trial using highly qualified competing experts -- who strongly disagreed with each other's assumptions and respective methodologies. That risk is amplified because the reaction of a jury to battling expert testimony is highly unpredictable. *See, e.g.*, *Veeco Instruments,* 2007 WL 4115809, at *10.

Accordingly, the substantial and certain payment of $31,000,000.00, particularly when viewed in the context of these risks and uncertainties, weighs heavily in favor of approval.

6. The Risks of Maintaining the Class Action Through Trial

Had the Settlement not been reached, there is no assurance that class status would be maintained. At the time of settlement, Lead Plaintiffs had not yet moved for class certification of a litigation class. Although Lead Plaintiffs do not rely heavily upon this factor, there remains a risk that, absent the Settlement, Lead Plaintiffs may not have been able to maintain class certification through trial, and the Settlement avoids any uncertainty with regard to this issue.

7. Ability to Withstand a Greater Judgment

The ability of a defendant to pay a judgment greater than the amount offered in settlement is relevant to whether the settlement is fair. *Grinnell*, 495 F.2d at 463. Here, even if a

favorable judgment was obtained following trial and upheld on appeal, there were serious limitations relating to RCAP's ability to pay, given the Company's bankruptcy. The order confirming the Company's chapter 11 plan granted Lead Plaintiffs limited relief from the discharge provisions:

> *solely to the extent of available insurance coverage and any proceeds thereof*, it being understood that the plan discharge and injunction provisions set forth in any confirmed Chapter 11 plan for the RCS Debtors shall not apply to the prosecution or settlement of such Securities Litigation Claims as set forth in the RCS Plan. . . . For the avoidance of doubt, any recoveries on account of such Securities Litigation Claims against the RCS Debtors shall be limited to, and any payments or settlements shall only be provided by available insurance coverage, if any, and no action shall be taken to collect any portion of any settlement, judgment, or other costs from the assets or properties of the RCS Debtors or the Reorganized Debtors.

See In re RCS Capital Corp., No. 16-10223, ECF No. 769 (Bankr. D. Del. 2016). The wasting insurance coverage, which had already been used for defense costs and other related litigation, would have continued to be depleted if the Action continued. Joint Decl. ¶¶ 51-52. Courts have found similar circumstances strongly support approval of a settlement. *See, e.g., Teachers Ret. Sys. of La. v. A.C.L.N. Ltd.*, No. 01 Civ. 1181 (MP), 2004 WL 1087261, at *4 (S.D.N.Y. May 14, 2004). Settlement, therefore, eliminates the risk of collection.

8. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The last two substantive factors courts within the Second Circuit consider are the range of reasonableness of a settlement in light of (i) the best possible recovery and (ii) litigation risks. *Grinnell*, 495 F.2d at 463. In analyzing these last two factors, the issue for the Court is not whether the Settlement represents the best possible recovery, but how the Settlement relates to the strengths and weaknesses of the case. The court "'consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.'" *Id.* at 462. Courts agree that the

determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum[.]" *In re PaineWebber Ltd. P'Ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997). Instead, "in any case there is a range of reasonableness with respect to a settlement[.]" *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, according to analyses prepared by Lead Plaintiffs' consulting damages expert, the Settlement represents a recovery of approximately 10% of estimated maximum damages of approximately $311.5 million in Section 10(b) damages, or 24% of the estimated $127.6 million in Section 11 damages, under a best case scenario where a jury credited ***all*** of Lead Plaintiffs' loss causation evidence. The Settlement recovers significantly more if, for instance, Defendants' loss causation and damages arguments, discussed above, were credited by a jury. If the class were only able to recover based on the October 29, 2014 alleged disclosure, the Settlement recovers 36% of the estimated $85.3 million in damages. If the class were only able to recover based on the October 29, 2014 and November 10, 2014 disclosures, the Settlement recovers 29% of the estimated $106.3 million in damages. *See* Joint Decl. ¶¶ 6, 43, 48-49; Ex. 3 ¶¶ 8-9, 33. Thus, the recovery falls well within the range of reasonableness that courts regularly approve in similar circumstances. *See, e.g.*, *In re Merrill Lynch & Co. Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving $40.3 million settlement representing approximately 6.25% of estimated damages and noting was at the "higher end of the range of reasonableness of recovery in class actions securities litigation"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (approving $125 million settlement that was "between approximately 3% and 7% of estimated damages [and] within the range of reasonableness for recovery in the settlement of large securities class actions"); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal.

2008) ($13.75 million settlement yielding 6% of potential damages was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *Int'l Bhd of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving $12.5 million settlement recovering 3.5% of maximum damages and noting that the amount is within the median recovery in securities class actions settled in the last few years). Moreover, the Settlement also presents a superior recovery when compared to the median reported settlement amounts in securities class actions, which was $8.6 million in 2016 and $8.3 million from 1996 to 2015. *See* Laarni T. Bulan, Ellen M. Ryan, and Laura E. Simmons, Securities Class Action Settlements - 2016 Review and Analysis at 1 (Cornerstone Research 2017), Ex. 10.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

If the Court approves the Settlement, upon completion of the claims process, the Net Settlement Fund will be distributed according to the Plan of Allocation set forth in the Notice. "[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133. As with the Settlement, the opinion of experienced and informed counsel carries considerable weight. "When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.'" *Global Crossing*, 225 F.R.D. at 462.

The Plan of Allocation was prepared with the assistance of Lead Plaintiffs' damages expert, Mr. Coffman, and provides for the distribution of the Net Settlement Fund based upon each Settlement Class Member's "Recognized Loss," as calculated by the formulas described in the Notice. In developing the Plan of Allocation, Mr. Coffman considered the amount of artificial inflation present in RCAP's common stock throughout the Class Period that was

purportedly caused by the alleged fraud, and the statutory damages provisions of the Securities Act. *See* Joint Decl. ¶¶ 60-64.

A.B. Data, as the Court-approved Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's total Recognized Loss compared to the aggregate Recognized Losses of all Authorized Claimants, as calculated according to the Plan. The calculation will depend upon several factors, including whether the Claimant has a larger loss under the Exchange Act formulas or the Securities Act formulas (the larger loss will be used), when the Claimant's common stock was purchased, whether the stock was sold during the Class Period, and, if so, when. *Id*.

Accordingly, the proposed Plan of Allocation is designed to fairly and rationally allocate the proceeds of this Settlement among the Settlement Class. Notably, no Member of the Settlement Class has objected to the Plan of Allocation to date and it should be approved.

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

For purposes of the Settlement only, Lead Plaintiffs seek certification of the Settlement Class. Certification of settlement classes "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). The Court preliminarily certified the Settlement Class for settlement purposes via the Preliminary Approval Order, and nothing has changed to alter the appropriateness of that determination.

A. The Members of the Settlement Class Are Too Numerous to Be Joined

Rule 23(a)(1) requires that members of a class be so numerous that joinder of all of class members would be "impracticable." Fed. R. Civ. P. 23(a)(1). The numerosity requirement is satisfied by "showing that a large number of shares were outstanding and traded during the relevant period." *In re Vivendi Universal, S.A., Sec. Litig.*, 242 F.R.D. 76, 84 (S.D.N.Y. 2007). RCAP's

common stock was actively traded on the New York Stock Exchange throughout the Class Period and near the end of the Class Period, as of November 2014, there were approximately 66 million shares of common stock outstanding. *See* RCAP Form 10-Q for the quarterly period ending September 30, 2014. Based on this information, the Court can reasonably conclude that the Settlement Class likely includes thousands of members, and joinder of all of these individuals would be impracticable. Rule 23(a)(1) is satisfied.

B. Common Questions of Law and Fact Exist

To establish commonality, members of the class must have "suffered the same injury," and "[t]heir claims must depend upon a common contention." *WalMart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011). Here, the Complaint alleges a litany of questions of fact and law common to all members of the Settlement Class including, *inter alia,* whether: (i) Defendants' alleged acts and omissions violated the federal securities laws; (ii) statements disseminated by Defendants to the investing public during the Class Period misrepresented or omitted material facts about the business, operations, and management of RCAP; (iii) Defendants acted knowingly, or with recklessness, in allegedly misrepresenting or omitting those material facts; (iv) whether the prices of RCAP's common stock were artificially inflated during the Class Period due to the alleged false and misleading statements or omissions; and (v) Lead Plaintiffs and other Members of the Settlement Class suffered damages, as well as the appropriate measure thereof. Complaint ¶ 238. Courts in this District have routinely found that the above types of common questions satisfy Rule 23(a)(2). The commonality requirement is thus met.

C. Lead Plaintiffs' Claims are Typical of those in the Settlement Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Here, Lead Plaintiffs meet Rule 23(a)(3)'s typicality requirement because "each class member's claim arises from the same

course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 571 (S.D.N.Y. 2008). Lead Plaintiffs alleged that Defendants made material misstatements and omissions, artificially inflating the value of RCAP's common stock.

D. Lead Plaintiffs and Lead Counsel Will Fairly and Adequately Protect the Interests of the Settlement Class

Rules 23(a)(4) and 23(g) are satisfied because: (i) Lead Plaintiffs' interests are not antagonistic to those of other Members of the Settlement Class, and (ii) Lead Counsel is qualified, experienced, and more than able to conduct this Action. *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). Lead Plaintiffs purchased RCAP common stock during the Class Period and allegedly suffered significant losses as a result of the same course of conduct that allegedly injured other members of the Settlement Class. Complaint ¶¶ 16-17. Their interests in demonstrating Defendants' liability and maximizing possible recovery are aligned with the interests of absent class members. *See, e.g., In re WorldCom Inc. Sec. Litig.*, 219 F.R.D. 267, 282 (S.D.N.Y. 2003). Further, there is no evidence that Lead Plaintiffs have interests antagonistic to the interests of other members of the Settlement Class.

As for the adequacy of Lead Counsel, here, Court-appointed Lead Counsel are qualified and experienced and have conducted the Action vigorously and effectively on behalf of Lead Plaintiffs and the Settlement Class. Labaton Sucharow LLP and Scott+Scott are among the leading law firms representing plaintiffs in securities class actions in courts throughout the nation. *See* Joint Decl. Exs. 5 - C, 6 - C. In view of these facts, the adequacy requirement is met, and Lead Plaintiffs and Lead Counsel should be appointed.

E. Common Questions of Law and Fact Predominate

Under Rule 23(b)(3), questions of law or fact common to the members of a class must

"predominate" over any questions affecting individual members. The predominance test is "readily met in certain cases alleging . . . securities fraud." *See SCOR*, 537 F. Supp. 2d at 572. In securities fraud class actions "in which the fraud is alleged to have been carried out through public communications to a wide variety of market participants, common issues of law and fact will generally predominate over individual issues." *In re Arakis Energy Corp. Sec. Litig*., No. 95 Civ. 3431 (ARR), 1999 WL 1021819, at *10 (E.D.N.Y. Apr. 27, 1999). The critical issues of fact and law that predominate in this matter, such as whether material misstatements were made, are common to all Settlement Class Members. There are no significant, let alone predominant, individual issues that could preclude class certification.

F. A Class Action Is Superior

Rule 23(b)(3) further requires that "a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). It is desirable to consolidate the litigation of claims here because the individual adjudication of the claims would be extremely burdensome and risk inconsistency. *See WorldCom*, 219 F.R.D. at 304.

For all the foregoing reasons, it is respectfully submitted that the proposed Settlement Class should be certified.

CONCLUSION

The Settlement reached in this Action is an excellent result that provides a substantial and certain benefit for the Settlement Class. For the reasons set forth herein and in the Joint Declaration, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement and Plan of Allocation are fair, reasonable, and adequate, and request the Court grant final approval of the Settlement and Plan of Allocation.[9]

Dated: August 14, 2017

Respectfully submitted,

LABATON SUCHAROW LLP

By: */s/ Ira A. Schochet*
Joel H. Bernstein
Ira A. Schochet
Eric D. Gottlieb
140 Broadway
New York, NY 10005
Telephone: (212) 907-0700

-and-

SCOTT+SCOTT, ATTORNEYS AT LAW, LLP

Deborah Clark-Weintraub
Max R. Schwartz
The Helmsley Building
230 Park Avenue, 17th Floor
New York, New York 10169
Telephone: (212) 223-6444

Lead Counsel for Lead Plaintiffs

[9] A proposed form of Judgment, negotiated by the Parties, and a proposed order approving the Plan of Allocation will be submitted to the Court with Lead Plaintiffs' reply papers, after the deadlines for seeking exclusion and objecting have passed.

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2017, I caused the foregoing Memorandum of Law in Support of Lead Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation to be served electronically on all ECF participants.

/s/ Ira A. Schochet
Ira A. Schochet