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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JOHN R. SWITZER, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. W.R. HAMBRECHT & CO., LLC, et al., Defendants.	Lead Case No. CGC-18-564904 (Consolidated with No. CGC-18-565324) CLASS ACTION PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION DATE: March 13, 2020 TIME: 10:30 a.m. DEPT: 613 Assigned for all purposes to Judge Teri L. Jackson, Dept. 613 Date Action Filed: 03/09/18

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I. INTRODUCTION

Plaintiffs John R. Switzer and Jay Mendelson ("Plaintiffs" or "Class Representatives") respectfully submit this memorandum in support of their motion for final approval of the settlement of this class action on the terms set forth in the Amended Stipulation of Settlement dated August 2, 2019 ("Stipulation" or "Settlement"), and for approval of the Plan of Allocation.[1]

The Settlement provides for the payment by or on behalf of Defendants of the sum of $2,450,000 for the benefit of the Class.[2] This Settlement is the culmination of vigorous litigation among the Parties[3] for more than a year and a half, and is the product of arm's-length negotiations between the Parties under the guidance of Michelle Yoshida, Esq., of Phillips ADR, a well-respected and effective mediator of securities class actions. The Settlement resolves all claims against Defendants. Plaintiffs and Class Counsel[4] believe that the Settlement represents a very favorable result for the Class and militates in favor of Court approval.

As further discussed below, the Settlement should be presumed fair because it was reached in good faith through arm's-length bargaining, and Class Counsel's investigation and prosecution of the case assured that Plaintiffs entered into the Settlement on a fully informed basis. Class Counsel are

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[1] Unless otherwise defined herein, all capitalized terms shall have the same meanings ascribed to them in the Stipulation. Citations to the Stipulation are in the form "Stip., ¶__.

[2] "Class" or "Class Members" means all Persons who purchased Arcimoto common stock in Arcimoto's IPO between June 22, 2017 and September 21, 2017. Excluded from the Class are Defendants and their families, the officers, directors and affiliates of Defendants at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling ownership interest during the Class Period; and any Person who timely and validly requests exclusion from the Class.

[3] "Parties" shall mean Plaintiffs, on the one hand, Arcimoto, Inc. ("Arcimoto" or the "Company"), Mark Frohnmayer, Douglas M. Campoli, Thomas Thurston, Terry Becker, and Jefferson Curl (the "Individual Defendants," and collectively with Arcimoto, the "Arcimoto Defendants"), and W.R. Hambrecht + Co., LLC (the "Underwriter Defendant" or "Hambrecht," and together with the Arcimoto Defendants, "Defendants"), on the other hand.

[4] Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and Johnson Fistel, LLP ("Johnson Fistel") were appointed by the Court as Class Counsel in the Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, dated August 9, 2019 (the "Preliminary Approval Order").

experienced in securities class action litigation, and following a thorough Court-approved notice program, to date, there have been no objections to the Settlement or Plan of Allocation.[5]

There is nothing to rebut that presumption. While Plaintiffs and Class Counsel believe that the litigation has substantial merit and they would have ultimately prevailed at trial, they considered the numerous arguments made by Defendants during the case and in settlement negotiations, as well as the risk of being unable to establish liability and damages at trial. Indeed, at trial, the jury could have sided with Defendants on some or all of the determinative issues, leaving the Class with little or no recovery whatsoever.

Class Counsel, who are both well-respected firms that have substantial experience in prosecuting shareholder class actions, have concluded that the Settlement is an excellent result that is in the best interest of the Class. This conclusion is based on, among other things, the substantial recovery obtained through the Settlement when weighed against the significant risk, expense, and delay presented in continuing this litigation through trial and probable appeal; a complete analysis of the evidence obtained; Class Counsel's considerable experience in litigating complex actions similar to the present action; and the serious disputes among the Parties on both merits and damages issues.

For these and other reasons set forth below, as well as those set forth in the previously-filed Joint Declaration of James I. Jaconette and Phong L. Tran in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (the "Joint Declaration," or "Joint Decl."),[6] Plaintiffs respectfully request that the Court grant final approval to the Settlement and approve the Plan of Allocation as fair, reasonable, and adequate to Class Members.[7]

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[5] The objection deadline is January 6, 2020. *See* Preliminary Approval Order, ¶22. Should any objections be received by that date, Class Counsel will address them in a supplemental memorandum, which is due no later than February 20, 2020. *Id.*

[6] The Joint Declaration details Plaintiffs' claims, the procedural history of the litigation, the efforts of Class Counsel in prosecuting the case, the risks of continued litigation, and why the Settlement is in the best interests of the Class.

[7] 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, Class Counsel respectfully refer the Court to the Joint Declaration, incorporated by reference herein.

II. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE AND WARRANTS FINAL APPROVAL

A. Standards Governing Final Approval of Class Action Settlements

"A class action shall not be dismissed, settled, or compromised without the approval of the court." Cal. Civ. Code §1781(f). When assessing a proposed class action settlement, the court's inquiry centers on whether the settlement is "fair, adequate, and reasonable." *Dunk v. Ford Motor Co*., 48 Cal. App. 4th 1794, 1801 (1996).[8] The inquiry "'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id*.; *see also In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006) (same).

Accordingly, the Court need not inquire into the possible result that might have been obtained at trial. *See Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 246 (2001) ("The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial."). A review of the likely rewards of settlement and the risks and costs of continued litigation suffices. *See North Cnty. Contractor's Ass'n v. Touchstone Ins. Servs*., 27 Cal. App. 4th 1085, 1091 (1994) (court must determine if settlement is in the "ballpark"). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 526 (C.D. Cal. 2004).[9] Further, longstanding public policy strongly favors settlements. *See, e.g., Hamilton v. Oakland Sch. Dist*., 219 Cal. 322, 329 (1933) ("[I]t is the policy of the law to discourage litigation and to favor compromises."). This policy becomes an "overriding public interest" in class actions. *Bell v. Am. Title Ins. Co*., 226 Cal. App. 3d 1589, 1608 (1991).

In determining whether a settlement is fair, adequate, and reasonable, there is a "presumption of fairness" where, as here: "(1) the settlement is reached through arm's-length bargaining; (2)

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

[9] California courts often look to the standards developed by federal courts in reviewing and approving class action settlements. *See, e.g., La Sala v. Am. Sav. & Loan Ass'n*, 5 Cal. 3d 864, 872 (1971).

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; *see also Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1110, 1118 (2009) (same).

The court in *Dunk* also set forth additional factors that may be considered along with this presumption, 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. *See Dunk*, 48 Cal. App. 4th at 1801; *see also In re Microsoft I-V Cases*, 135 Cal. App. 4th at 723 (same).

As discussed below, the Settlement is entitled to a presumption of fairness, and the application of the additional *Dunk* factors further confirms that final approval should be granted.

B. The Settlement Should be Accorded a Presumption of Fairness

The Settlement is presumptively fair under the standard articulated in *Dunk*.

First, the Parties negotiated the Settlement in good-faith and at arm's-length under the supervision of Michelle Yoshida, Esq., of Phillips ADR, a well-regarded and experienced mediator in cases like this. *See Sudunagunta v. NantKwest, Inc.*, No. CV 16-1947-MWF (JEMx), 2019 WL 2183451, at *3 (C.D. Cal. May 13, 2019) (in granting final approval of a securities class action settlement, court found that "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive"). These negotiations included a day-long, in-person mediation session during which the Parties' positions on merits and damages issues were discussed, as well as extensive follow-up negotiations, all of which were informed by detailed mediation briefs and supporting materials exchanged in advance of the negotiations. *See* Joint Decl., ¶¶6(q)-(r), 36-39. During these settlement negotiations, the strengths and weaknesses of the Parties' respective claims and defenses were fully explored as Ms. Yoshida challenged both sides' positions. *Id.*, ¶37.

Second, the Parties engaged in extensive pretrial investigation and discovery and other proceedings to evaluate the strengths and weaknesses of the claims and defenses, and therefore entered into the Settlement on an informed basis. Class Counsel, among other things:

(i) conducted an extensive factual investigation of the events underlying Arcimoto's September 21, 2017 Offering;

(ii) reviewed and analyzed the representations made by the Company in the Prospectus, as well as in subsequent U.S. Securities and Exchange Commission ("SEC") filings;

(iii) reviewed and analyzed the representations made by Defendants in the IPO roadshow videos;

(iv) reviewed and analyzed industry and securities analyst reports, comprehensive news reports, press releases, and other media files concerning Arcimoto;

(v) reviewed and analyzed witness accounts of Arcimoto's operations provided by former Arcimoto employees, which were developed through counsel's investigation;

(vi) researched and filed multiple complaints, including the operative Complaint;

(vii) briefed, argued, and successfully opposed, in part, the demurrers brought by Defendants to the Consolidated Complaint;

(viii) briefed, argued and successfully opposed Defendants' motion to stay further discovery pending ruling on demurrer;

(ix) negotiated, prepared and filed the stipulation consolidating and coordinating the related actions;

(x) prepared and filed initial and updated joint case management conference statements addressing the status of discovery and the scheduling of pre-trial matters;

(xi) prepared and propounded written discovery on Defendants, including special interrogatories and document requests;

(xii) met and conferred with Defendants over the discovery requests;

(xiii) reviewed and drafted responses and objections to the discovery requests propounded on Plaintiffs;

(xiv) obtained and reviewed over 107,000 pages of document discovery produced by Arcimoto and Hambrecht;

(xv) reviewed and produced documents on behalf of Plaintiffs in response to Defendants' discovery requests;

(xvi) retained and consulted with a damages consultant regarding the calculation of damages under the 1933 Act;

(xvii) prepared and submitted detailed mediation statements prior to the mediation with Ms. Yoshida; and

(xviii) prepared for and participated in a day-long mediation session with Michelle Yoshida, Esq. of Phillips ADR on January 25, 2019, which culminated in a cash Settlement Amount of $2,450,000 and other favorable settlement terms for the Class.

See Joint Decl., ¶¶6(a)-(s), 31-39. Given these substantial efforts, Class Counsel were in an optimal position to negotiate the Settlement based on an informed evaluation of the strengths and weaknesses of the claims asserted, the defenses raised, and the risks of continued litigation. *Id.*, ¶¶31, 37, 42.

Third, although the Court has an obligation to independently review the Settlement, the judgment of experienced counsel regarding the Settlement is entitled to great weight and supports a presumption of fairness. *See Nat'l Rural*, 221 F.R.D. at 528 ("'Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation"); *Dunk*, 48 Cal. App. 4th at 1802. Class Counsel here – the firms of Robbins Geller and Johnson Fistel – have extensive experience and expertise in the prosecution of securities class actions in federal and state courts throughout the country. *See* Exhibit G to the accompanying Declaration of James I. Jaconette Filed on Behalf of Robbins Geller Rudman & Dowd LLP and Exhibit F to the accompanying Declaration of Frank J. Johnson Filed on Behalf of Johnson Fistel, LLP in Support of Application for Award of Attorneys' Fees and Expenses (Firm Resumes of Robbins Geller and Johnson Fistel). Likewise, counsel for plaintiff Jay Mendelson, Robbins LLP,[10] also has considerable experience in prosecuting securities class actions such as this. *See* Exhibit F to the accompanying Declaration of Stephen J. Oddo Filed on Behalf of Robbins LLP in Support of Application for Award of Attorneys' Fees and Expenses (Firm Resume of Robbins LLP). Class Counsel, along with Robbins LLP, fully support the Settlement, and believe that the substantial and certain recovery of $2,450,000 is a highly favorable result for the Class when weighed against the uncertainty and substantial risk and expense of continuing this litigation through trial and appeals. Joint Decl., ¶¶8-12, 42-45. The fact that qualified and well-informed counsel endorse the Settlement as being fair, adequate, and reasonable favors this Court's approval of the Settlement.

Fourth, the reaction of the Class to the Settlement supports a presumption of fairness. Pursuant to the Preliminary Approval Order, more than 6,900 copies of the Notice of Proposed Class Action Settlement ("Notice") were sent to potential Class Members and their nominees. *See* Declaration of Mishka Ferguson Regarding Notice Dissemination, Publication, and Requests for Exclusion Received

[10] Robbins LLP was previously known as Robbins Arroyo LLP.

to Date ("Mailing Decl."), ¶¶4-12, submitted herewith. The Notice described the nature of the litigation, the terms of the Settlement, and the manner in which the Net Settlement Fund will be allocated among Class Members. The Notice also advised Class Members of their right to object and the procedures and deadline for objecting to the Settlement, the Plan of Allocation, or counsel's request for an award of attorneys' fees and expenses. In addition, the Summary Notice was transmitted over *Business Wire* and published in *The Wall Street Journal* on September 12, 2019. *Id*., ¶13. The Notice, Stipulation, and other relevant documents and information, including all deadlines, were also made publicly available on a case-dedicated website for the Settlement, www.arcimotosecuritieslitigation.com. *Id*., ¶15.

Although Class Members have until January 6, 2020 to object or exclude themselves from the Class, Class Counsel are not aware of any objections to the Settlement or the Plan of Allocation as of the date hereof. Only two requests for exclusion have been submitted. *See id*., ¶16 (two requests for exclusions to date). The lack of objections and minimal requests for exclusion by the Class to date supports a presumption of fairness.[11] *See 7-Eleven Owners for Fair Franchising v. Southland Corp*, 85 Cal. App. 4th 1135, 1153 (2000) (one factor that "lead[s] to a presumption the settlement was fair" is that only "a small percentage of objectors" came forward); *Nat'l Rural*, 221 F.R.D. at 529 (small number of objections raises strong presumption that settlement is fair).

Based on the foregoing, the Settlement is entitled to a presumption of fairness under *Dunk*.

C. The Settlement Satisfies the Additional *Dunk* Factors

In addition, each of the *Dunk* factors supports a finding that the Settlement is fair, reasonable and adequate, and deserving of final approval.

1. The Amount of the Settlement Balanced Against the Strength of Plaintiffs' Case Favors Approval

Under the Settlement, Defendants have paid or caused to be paid $2,450,000 in cash for the benefit of the Class. This $2,450,000 Settlement, if approved, would be significantly above the range of

[11] If any objections are received, Plaintiffs will address them in a supplemental memorandum to be filed on February 20, 2020. *See* Preliminary Approval Order, ¶22.

settlements in recent years in class actions asserting federal statutory claims under the Securities Act for alleged material misstatements in the offering documents for a public stock offering.

Based on the assumption that Plaintiffs would meet their burden of proof and persuade the jury at trial as to each element of their prima facie claims, and that Plaintiffs would successfully rebut every affirmative defense Defendants intended to establish, maximum estimated damages could reach as high as $7.75 million. *See* Declaration of Bjorn I. Steinholt, dated June 24, 2019, ¶12, attached as Exhibit 1 to the accompanying Declaration of Ellen Gusikoff Stewart in Support of Motion for: (1) Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) an Award of Attorneys' Fees and Expenses. Accordingly, the percentage of recovery of Plaintiffs' maximum estimated damages is approximately 31.6% – well above the median settlement as a percentage of estimated damages that courts have approved in cases only involving Securities Act claims. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements – 2018 Review and Analysis* at 7, Fig. 6 (Cornerstone Research 2019) (analyzing 76 class action settlements asserting §§11 and/or 12(a)(2) claims from between 2009 and 2018, and finding the median settlement as a percentage of "simplified statutory damages" was 8%).[12] *See also* Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* at 35, Fig. 27 (NERA 2019) (median settlement value as a percentage of investor losses in cases where damages are less than $20 million is 19.4%). Not surprisingly, Defendants estimated damages at a fraction of the amount estimated by Plaintiffs' expert.

This Settlement is unquestionably better than another possibility – little or no recovery at all in view of the risks of continued litigation, discussed below. *See Wershba*, 91 Cal. App. 4th at 250 ("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

[12] The Cornerstone Research report is available online at: https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2018-Review-and-Analysis.

voluntary settlement in which each side gives ground in the interest of avoiding litigation."'). This factor supports final approval of the Settlement.

2. The Substantial Risks of Continued Litigation

While Plaintiffs believe their claims are strong on the merits, the ultimate success of Plaintiffs' case, through trial and any appeal, was hardly assured. Plaintiffs alleged that Arcimoto's Registration Statement, Prospectus and certain videos used in connection with the IPO roadshow (collectively, the "Offering Materials") contained materially false and misleading statements and omitted material adverse information about the Company's business operations and financial prospects. Joint Decl., ¶¶5, 20-21. In particular, Plaintiffs alleged that the Offering Materials misrepresented and omitted material facts concerning Arcimoto's then-existing production capabilities at the time of the IPO, its ability to deliver properly-functioning "SRK" electric vehicles to customers, and the purported "street legal" status of the SRKs. *Id*. Defendants have and would continue to maintain that Plaintiffs cannot demonstrate the materiality or falsity of any of the challenged statements in the Offering Materials, and that all appropriate risk warnings were made. *Id*., ¶¶8, 25, 44. Moreover, it is likely that Defendants would have asserted a "negative causation" defense at summary judgment and trial, by which they would argue that the decline in Arcimoto common stock price after its IPO was not attributable to any omission or misrepresentation in the Offering Materials, but was simply consistent with overall market conditions or other reasons unrelated to the alleged misstatements and omissions. *Id*., ¶45. While Plaintiffs have substantial responses to these arguments, the uncertainty of continued litigation weighs strongly in favor of approval of the Settlement. 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, 743-744 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *see also Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413-W-AJB, 2008 WL 5458986,

at *7 (S.D. Cal. Dec. 10, 2008) ("[W]hile Class Counsel believe strongly in the merit of the class claims, they also recognize that any case encompasses risks and that settlement of contested cases is preferred in this circuit. Indeed, even if Plaintiff were to prevail at trial, risks to the class remain."); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *7 (C.D. Cal. June 10, 2005) ("Also favoring approval of the Settlement is the knowledge that, while Plaintiffs are confident of the strength of their case, it is imprudent to presume ultimate success at trial and thereafter.") (both citing *Chas. Pfizer*, 314 F. Supp. at 743-744). The numerous uncertainties and risks of proving liability at and after trial support approval of the Settlement.

3. Risks Relating to Establishing Damages

Although Plaintiffs were confident that they could establish damages assuming a finding of liability, Plaintiffs faced a risk that the Court or jury would substantially reduce or even eliminate damages altogether. *See* Joint Decl., ¶45. Under §11(e) of the Securities Act, 15 U.S.C. §77k(e), a defendant can reduce or eliminate damages through a showing that the false or misleading statements or omissions alleged were not the cause, in whole or in part, of the loss sustained by the class. As noted above, Defendants would likely argue "negative causation" at both summary judgment and trial. The Parties' respective experts therefore would offer sharply divergent testimony concerning damages at both summary judgment and trial, reducing the determination of this element to a highly-contested "battle of the experts." *See In re Tyco Int'l, Ltd*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) (fact that "trial would likely involve a confusing 'battle of the experts' over damages" supported approval of settlement); *see also* Joint Decl., ¶¶41, 45. Plaintiffs faced a substantial risk that the factfinder would credit Defendants' defense that damages were not linked to the misstatements in the offering documents or that damages were a fraction of the amount Plaintiffs proffered. *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).

Even if Plaintiffs were to obtain 100% of their damages, the risks would not end there. *See In re Mfrs. Life Ins. Co. Premium Litig.*, MDL No. 1109, 1998 WL 1993385, at *5 (S.D. Cal. Dec. 21, 1998) ("[E]ven 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."). Indeed, there are numerous 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 WL 238298, at *1 (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 for the individual defendants, and ordered a new trial with respect to the corporate defendant. *See also e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 433 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error injury instruction under *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011)); *In re BankAtlantic Bancorp, Sec. Litig.*, No. 07-61542-CIV, 2011 WL 1585605, at *20 (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 sub nom. Hubbard v. BankAtlantic Bancorp, Inc.*, 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); *see also* Joint Decl., ¶46. The substantial litigation risks on the issues of liability and damages support approval of the Settlement.

4. Plaintiffs Had Sufficient Information to Negotiate and Obtain a Fair 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.

As detailed above, when the Parties reached the Settlement, Class 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 interests of the Class. Class Counsel's reasoned judgment was obtained after more than a year and a half of hard-fought

litigation, during which they briefed demurrers and a motion to stay the proceedings; propounded multiple sets of written discovery requests on each Defendant group; reviewed over 107,000 pages of documents; consulted with a damages expert; and participated in mediated settlement negotiations during which the strengths and weaknesses of the Parties' positions were fully explored and debated. *See* Joint Decl., ¶¶6, 31-35. The knowledge and insight gained through these activities provided Class Counsel with sufficient information to evaluate the strengths and weaknesses of the Class's claims and Defendants' defenses, as well as the likelihood of obtaining a potentially larger recovery from Defendants had the litigation continued.

It bears noting that class action settlements are regularly approved after having completed similar or less discovery than that completed here. *See, e.g., Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 403 (2010) (final approval of class action affirmed when no depositions had been taken, just written discovery completed). This factor weighs significantly in favor of approval.

5. Balancing the Certainty of an Immediate Recovery Against the Complexity, Expense, and Likely Duration of Continued Litigation and Trial Favors Settlement

The immediacy and certainty of a recovery balanced against the complexity, expense, and duration of continued litigation is another factor for the Court to balance in determining whether the Settlement is fair, adequate, and reasonable. *See Wershba*, 91 Cal. App. 4th at 244-245; *Dunk*, 48 Cal. App. 4th at 1801. The benefit of the present settlement must be balanced against the expense of achieving a more favorable result at a trial in the future. Approval of the Settlement assures a prompt and significant recovery for Class Members. If not for the Settlement, this litigation would continue to proceed through the completion of document and deposition discovery, expert discovery, summary judgment, trial, and likely appeal. A trial would occupy teams of attorneys for weeks and would require substantial and costly expert testimony on both sides. Further, 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 appeals, which would prolong the case for several more years. *See Warner Commc'ns.*, 618 F. Supp. at 745 (delay from appeals is factor to be considered). 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. The essence of a settlement is compromise, "'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v. Civil Serv. Comm'n.*, 688 F.2d 615, 624 (9th Cir. 1982). "'[T]he 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*. The certainty of recovery balanced against the complexity, expense, and duration of continued litigation weighs in favor of approval of the Settlement. *See* Joint Decl., ¶¶8, 46-47.

6. The Recommendation of Experienced Counsel Favor Approval of the Settlement

The views of the attorneys actively conducting the litigation, while not conclusive, are entitled to great weight in the fairness analysis. *See Dunk*, 48 Cal. App. 4th at 1802; *see also In re Omnivision Techs*., 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007) ("'The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'"). "This is because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *See Nat'l Rural*, 221 F.R.D. at 528. Class Counsel here have a strong track record of successfully prosecuting securities class actions like this one, and their endorsement of the Settlement as being in the best interests of the Class therefore weighs strongly in favor of approval.[13] *See* Joint Decl., ¶¶12, 47.

In sum, because each of the *Dunk* factors supports a finding that the Settlement is fair, reasonable, and adequate, the Court should approve the Settlement.

[13] The reaction of the Class is also relevant to the fairness of the Settlement. *See Dunk*, 48 Cal. App. 4th at 1801. As noted above, there have been no objections and only two opt-outs to date. If any timely objections are submitted, Plaintiffs will address them in a supplemental memorandum. *See* note 11, *supra*.

III. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

Plaintiffs also seek approval of the Plan of Allocation. The Plan of Allocation is set forth in full in the Notice mailed to potential Class Members. *See* Mailing Decl., Ex. A, Notice at 3-5. Assessment of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). An allocation formula "'need only have a reasonable, rational basis, particularly if recommended by experienced and competent'" class counsel. *See, e.g., In re Zynga Sec. Litig.*, No. 12-cv-04007-JSC, 2015 WL 6471171, at *12 (N.D. Cal. Oct. 27, 2015).

The Plan of Allocation provides an equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Proof of Claim. The Plan of Allocation was developed by Class Counsel with the assistance of their damages consultant, reflects an assessment of the damages that could have been recovered at trial and follows the statutory framework for calculating damages under §11(e) of the Securities Act. Accordingly, 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. Notably, no objections to the Plan of Allocation have been filed to date.

IV. CONCLUSION

The Settlement reached by Class Counsel is a very good one, and for the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval to the Settlement, approve the Plan of Allocation, and enter the proposed Judgment and Order Granting Final Approval of Class Action Settlement and Approving the Plan of Allocation.

DATED: December 23, 2019

ROBBINS GELLER RUDMAN
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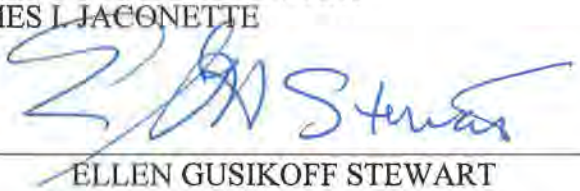

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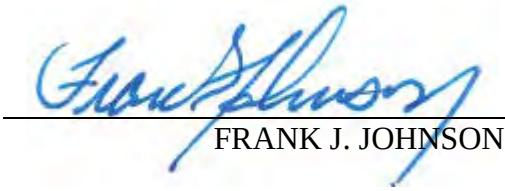

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DECLARATION OF SERVICE BY MAIL AND EMAIL

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 December 23, 2019, declarant served the PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION 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 on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

4. This document was also served via email on all parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 23, 2019, at San Diego, California.

Jaclyn Williams

JACLYN WILLIAMS

SERVICE LIST

Switzer v. W.R. Hambrecht & Co., LLC, Lead Case No. CGC-18-564904 (Super. Ct., S.F. Cty.)
(Consolidated with No. CGC-18-565324)

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