ROBBINS GELLER RUDMAN
& DOWD LLP
JAMES I. JACONETTE (179565)
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619-231-1058
Facsimile: 619-231-7423
jamesj@rgrdlaw.com

COTCHETT, PITRE & MCCARTHY, LLP
MARK C. MOLUMPHY (168009)
TYSON REDENBARGER (294424)
ELLE LEWIS (238329)
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
Facsimile: 650-697-0577
mmolumphy@cpmlegal.com
tredenbarger@cpmlegal.com
elewis@cpmlegal.com

SCOTT+SCOTT ATTORNEYS AT LAW LLP
JOHN T. JASNOCH (281605)
JOSEPH A. PETTIGREW (236933)
600 West Broadway, Suite 3300
San Diego, CA 92101
Telephone: 619-233-4565
Facsimile: 619-233-0508
jjasnoch@scott-scott.com
jpettigrew@scott-scott.com

Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

In re MICRO FOCUS INTERNATIONAL PLC SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Lead Case No. 18CIV01549 CLASS ACTION CLASS REPRESENTATIVES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION Assigned for All Purposes to: Hon. Marie S. Weiner, Dept. 2 DATE: July 25, 2023 TIME: 2:00 pm Date Action Filed: 03/28/18

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Regulations

I. INTRODUCTION

Plaintiffs and Court-appointed Class Representatives Ian Green ("Green") and the Cardella Family Irrevoc Trust U/A 06/17/15 ("Cardella Family Trust," and together with Green, "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 Stipulation of Settlement dated January 24, 2023 (the "Stipulation"), and for approval of the Plan of Allocation.[1] This motion is unopposed by Defendants.[2]

The Settlement provides for payment by or on behalf of Defendants of $107,500,000 for the benefit of the Settlement Class.[3] This substantial Settlement is the culmination of vigorous litigation by the Class Representatives and Defendants (the "Parties") for almost five years, and is the product of extensive arm's-length negotiations between the Parties with the assistance of the Hon. Layn Phillips (U.S.D.J., ret.) of Phillips ADR ("the Mediator"), one of the nation's most well-respected and effective mediators of securities class actions. The Settlement resolves all claims against Defendants asserted, or which could have been asserted, in this Action and the Federal Action. Class Counsel believe that the Settlement represents a highly favorable result for the Settlement Class and warrants this Court's approval.

---

[1] Unless otherwise defined herein, capitalized terms have the meanings ascribed to them as in the Stipulation or in the Joint Declaration of Amanda F. Lawrence, Mark C. Molumphy, and James I. Jaconette in Support of Motions for (1) Final Approval of Class Action Settlement and Plan of Allocation and (2) Award of Attorneys' Fees, Payment of Litigation Expenses, and Service Awards ("Joint Declaration"), filed concurrently herewith.

[2] However, consistent with the Stipulation, ¶7.2, Defendants take no position on the portion of this motion pertaining to approval of the Plan of Allocation.

[3] The preliminarily approved Settlement Class includes all persons and entities who purchased or acquired ADSs or ADRs of Micro Focus International plc, or rights to receive such ADSs or ADRs (i) during the period from September 1, 2017 through August 28, 2019 inclusive, or (ii) pursuant or traceable to the Registration Statements on Forms F-4 and F-6 and Prospectus issued in connection with the merger of Micro Focus and the software business unit of HPE (or their subsidiaries), and who were damaged thereby. Excluded from the Settlement Class are Defendants, officers and directors of Micro Focus, officers and directors of HPE, members of their immediate families, legal representatives, heirs, successor or assigns, and any entity in which they have or had a controlling interest.

The proposed Settlement is presumptively fair because it was reached through arm's-length bargaining and Class Counsel's investigation and prosecution of this case assured that Class Representatives entered into the Settlement on a fully informed basis. Further, Class Counsel are experienced in securities class action litigation and there has been just one objection to the proposed Settlement to date.

Moreover, there is nothing to rebut the presumption of fairness. While Class Representatives and Class Counsel believe that the litigation has substantial merit and they would have prevailed at summary judgment and trial, they considered the numerous risks raised by the arguments Defendants made during the case and in settlement negotiations, as well as the risks in establishing liability and damages at trial. All Defendants have denied, and continue to deny, any wrongdoing or violation of any law. At trial, the jury could have sided with Defendants on some or all of the determinative issues, leaving the Settlement Class with little or no recovery. Further, should Class Representatives succeed at trial, in light of the history of the Action – including Defendants' multiple appeals to the California Supreme Court – it was highly likely that Defendants would pursue yet another appeal, only further delaying, and possibly imperiling, payment to the Settlement Class.

Class Counsel, who are experienced in prosecuting shareholder class actions, have concluded that the Settlement is highly favorable to and in the best interest of the Settlement Class. This conclusion is based on, among other things, weighing the substantial recovery obtained against the risks, expense, and delay presented in continued litigation through trial and appeal; an evaluation of the evidence developed through extensive discovery; experience in litigating complex actions similar to this Action; and the nature of the 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 accompanying Joint Declaration,[4] Class Representatives respectfully request that the Court grant final approval to

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

the proposed Settlement and approve the Plan of Allocation as fair, reasonable, and adequate to Settlement Class Members.[5]

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

A. The Standards Governing Final Approval of Class Action Settlements

When considering a motion for final approval of a class action settlement, a court's inquiry is typically limited to determining whether the settlement is "fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) ("[t]he 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'").[6] A settlement satisfies that criteria when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *See* MANUEL FOR COMPLEX LITIGATION (THIRD) §30.42 (1995); *see also Nat. Gas Anti-Trust Cases I, II, III & IV*, 2006 WL 5377849, at *1 (San Diego Super. Ct. Dec. 11, 2006). This standard focuses on a comparison of the benefits of settlement versus the risks and costs of continued litigation. *See N. Cnty. Contractor's Ass'n v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1091 (1994). Longstanding public policy also heavily favors settlements, particularly of class actions. *See, e.g., Hamilton v. Oakland Sch. Dist. of Alameda Cnty.*, 219 Cal. 322, 329 (1933); *Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1608 (1991).

Based on these considerations, a "presumption of fairness exists 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; *see also Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1389 (2010) (same). Also relevant to establishing

---

[5] This memorandum focuses primarily on the legal standards for approving the proposed Settlement and the Plan of Allocation. A separate memorandum is submitted herewith in support of the motion for an award of attorneys' fees and expenses and service awards to the Class Representatives and the Federal Plaintiff. For a complete factual recitation, Settlement Class Counsel respectfully refer the Court to the Joint Declaration, incorporated by reference herein.

[6] Unless otherwise indicated, citations are omitted and emphasis is added.

fairness are: (1) the settlement amount; (2) the risks, complexity, expense, and likely duration of continued litigation; (3) the stage of proceedings; and (4) the views of class counsel and class members. *Dunk*, 48 Cal. App. 4th at 1801 (citing *Officers for Just. v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982)); *see also Cellphone*, 186 Cal. App. 4th at 1389.[7]

B. The Settlement Is Presumptively Fair

As further detailed herein and in the Joint Declaration, the Settlement is presumptively fair for several distinct reasons.

First, the Settlement resulted from arm's-length negotiations under the guidance of a mediator highly experienced in securities class actions, the Hon. Layn Phillips. The Mediator assisted the Parties in reaching the Settlement following the exchange of detailed mediation briefs (and exhibits), two all-day mediation sessions, and extensive follow-up discussions over six months. Joint Declaration, ¶¶66-69. Based on the Mediator's assessment of the Parties' positions and evidence, the Mediator extended a settlement proposal to the Parties; after extensive deliberations, the Parties ultimately accepted that proposal and worked to prepare the Stipulation and Plan of Allocation.

Second, the Settlement was informed by Class Counsel's extensive pre-trial investigation, fact discovery, and litigation efforts, which ensured that Class Representatives and Class Counsel had a thorough understanding of the strengths and weaknesses of the claims at the time of Settlement. This included, among other things:

(a) working with in-house and external investigations to investigate the events underlying the Merger, develop an understanding of the issues, identify potential witnesses and additional sources of information, and cultivate further support for the allegations and claims outside of formal discovery;

(b) reviewing and analyzing the registration statements and prospectus (the "Offering Documents") issued in connection with the Merger, as well as other materials issued by Micro Focus and HPE;

[7] California courts also look to the standards articulated in federal courts for assessing class action settlements. *See La Sala v. Am. Sav. & Loan Ass'n*, 5 Cal. 3d 864, 872 (1971).

(c) reviewing and analyzing industry reports, securities analyst reports, news reports, press releases, and other public and non-public materials concerning the Merger;

(d) researching and formulating the allegations and claims in order to draft well-supported and detailed complaints capable of withstanding dismissal;

(e) briefing, arguing, and eventually prevailing on multiple attempts to dismiss or stay this Action, including two appeals to the California Supreme Court;

(f) evaluating, researching, and briefing issues related to the initial proposed settlement of the Federal Action that threatened to impact the prosecution of the claims asserted in this Action;

(g) engaging and consulting experts on damages and the IT industry, as well as unique aspects of multi-jurisdictional class-action litigation, to navigate discovery and other proceedings;

(h) responding to discovery requests, reviewing and producing documents, and defending then-proposed Class Representatives Green and August Cardella, Trustee of the Cardella Family Trust, at their respective depositions;

(i) briefing, arguing, and achieving class certification and overseeing the process associated with providing notice to the Certified Class;

(j) issuing several rounds of discovery requests, including document requests, form and special interrogatories, requests for admission, and third-party subpoenas, conducting numerous meet-and-confer calls with Defendants and non-parties, preparing search terms and identifying custodians, reviewing and analyzing Defendants' privilege log and conferring on supplemental productions, and briefing and presenting discovery-related motions where necessary;

(k) obtaining, organizing, and reviewing over 3.1 million pages of documents produced by Defendants and non-parties;

(l) preparing for and conducting 21 depositions of fact witnesses, including certain of the Defendants and non-party witnesses, in-person and remotely;

(m) preparing for expert discovery and reviewing and analyzing significant amounts of testimonial and documentary evidence in anticipation of then-forthcoming summary judgment proceedings and, ultimately, trial; and

(n) preparing for and participating in two full-day mediation sessions, consulting with an expert on damages and causation, drafting two mediation statements, identifying and selecting supporting exhibits culled from discovery to support Class Representatives' position, and participating in discussions with the Mediator.

Joint Declaration, ¶98.

Third, as set forth in the accompanying Class Counsel Declarations[8] (Robbins Geller Declaration, Ex. G; Cotchett Pitre Declaration, Ex. G; Scott+Scott Declaration, Ex. G), Class Counsel have recognized expertise in securities class-action litigation and have achieved many successful recoveries on behalf of investors and other claimants. Based on their experience, Class Counsel believe that the recovery here is highly favorable to the Settlement Class – particularly in light of the recoverable damages, the substantial risks of continued litigation, and the strengths and weaknesses of the case. That judgment is entitled to great weight. *Dunk*, 48 Cal. App. 4th at 1801; *see also O'Brien v. Brain Rsch. Labs, LLC*, 2012 WL 3242365, at *12 (D.N.J. Aug. 9, 2012).

Finally, the reaction of the Settlement Class supports the presumption of fairness. Pursuant to the February 7, 2023 Order Preliminarily Approving Settlement and Providing for Notice, the Court authorized Epiq Class Action & Claims Solutions, Inc. to serve as claims administrator and ordered notice to the Settlement Class. More than 311,000 copies of the Notice of Proposed Settlement of Class Action ("Settlement Notice") and Proof of Claim and Release form (collectively, the "Claim Package") were sent to potential Settlement Class Members and their nominees. *See* Declaration of

[8] The "Class Counsel Declarations" are comprised of (i) Declaration of James I. Jaconette Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Declaration"), attached as Ex. 4 to the Joint Declaration, (ii) Declaration of Mark C. Molumphy on Filed Behalf of Cotchett, Pitre & McCarthy, LLP, in Support of Application for Award of Attorneys' Fees and Expenses ("Cotchett Pitre Declaration"), attached as Ex. 5 to the Joint Declaration, and (iii) Declaration of Amanda F. Lawrence on Filed Behalf of Scott+Scott Attorneys at Law LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Scott+Scott Declaration"), attached as Ex. 6 to the Joint Declaration.

Alexander P. Villanova Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, ¶11, submitted herewith as Exhibit 1 to the Joint Declaration. The Settlement 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 Settlement Class Members. The Settlement Notice also advised Settlement Class Members of their right to object and the procedures and deadline for objecting to the proposed Settlement, the Plan of Allocation, and Class Counsel's request for an award of attorneys' fees and expenses and Class Representatives' request for service awards. In addition, the Summary Notice was published in national edition of *The Wall Street Journal* and transmitted over *Business Wire* on March 10 and May 18, 2023, respectively. *Id.*, ¶12. The Settlement Notice, Stipulation, and other relevant documents and information, including all deadlines, have been made publicly available on a case-dedicated website for the Settlement, www.MicroFocusClassAction.com. *Id.*, ¶13.

Although Settlement Class Members have until June 30, 2023 to object or exclude themselves from the Settlement Class, Class Counsel are aware of just one objection. Joint Declaration, ¶123. The near total lack of objections by the Class to date supports a presumption of fairness. *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); *see also Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (small number of objections raises strong presumption that settlement is fair). Additionally, that just 52 requests for exclusion from the Settlement Class (out of the 311,967 Settlement Notices mailed to potential Settlement Class Members) have been received further supports a presumption of fairness. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 53 (2008) (presumption of fairness not overcome where "1,234 members (0.2 percent of the class) opted out" of settlement class of "[n]early 700,000 class members"); *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 828, 834 (N.D. Cal. 2017) (presumption of fairness not overcome where "[o]f the nearly 2 million member class, 452 opted out of the settlement," which "amount[ed] to less than .03 percent of the class").

C. The Settlement Readily Satisfies the Additional *Dunk* Factors

1. The Amount of the Settlement Favors Approval

The proposed Settlement provides for a cash payment of $107.5 million for the benefit of the Settlement Class, and there is no right of reversion should the proposed Settlement become final. This recovery is well above the range of court-approved settlements in recent years in securities class actions. *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements 2022 Review and Analysis*, CORNERSTONE RSCH., at 1, https://www.cornerstone.com/wp-content/uploads/2023/03/Securities-Class-Action-Settlements-2022-Review-and-Analysis.pdf (listing $13 million and $36.2 million as the median and average securities settlement in 2022, respectively). That Defendants asserted that recoverable damages, if any, were dramatically lower, further supports a presumption of fairness here. Joint Declaration, ¶¶82-86.

The proposed Settlement is also unquestionably better than another distinct possibility – little or no recovery for the Settlement Class. Indeed, the risk of no recovery for the class in complex cases of this type is very real. In numerous hard-fought lawsuits, plaintiffs and the class ultimately received no recovery − despite years of work and interim success − due to the discovery of facts unknown when the case started, changes in the law while the case was pending, or a decision of a judge, jury, or court of appeals after a full trial. *See, e.g., In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment to defendants after eight years of litigation); *In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict by jury); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1235 (10th Cir. 1996) (overturning securities-fraud class-action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 following a 1994 Supreme Court opinion).

Accordingly, this factor militates in favor of the Court granting final approval.

2. The Substantial Risks of Continued Litigation

While Class Representatives believe their claims are strong on the merits, the case involves substantial risks in establishing liability and negative causation, as well as procedural risks.

a. Risks in Establishing Liability

Class Representatives alleged that the Offering Documents materially misrepresented and obscured problems that were undermining Micro Focus' and HPE's business prospects at the time of the Merger, including compatibility issues, sales force hurdles including massive employee attrition, and a loss of customers. In addition, Class Representatives alleged HPE's products were falling behind competitors and customers were failing to upgrade or to buy new products. *See* Joint Declaration, ¶¶17-22.

Defendants, however, denied that Class Representatives could prove that any of the challenged statements were materially untrue or misleading – or even actionable – or that there were any material omissions. Moreover, Defendants contended that all alleged risks were well known to the market or adequately described in risk warnings. *Id.*, ¶¶39, 45, 80. Nor does this case involve an internal investigation by Micro Focus or an investigation by the SEC or enforcement action by any other governmental agency. *Id.*, ¶80. Though these factors are not required for a successful securities action, their absence would have certainly been used by Defendants to bolster their claim that they did not fail to disclose material information.

While Class Representatives and Class Counsel have substantial responses to Defendants' arguments, victory was by no means assured, and the uncertainty of establishing liability weighs strongly in favor of approving the Settlement. *See Bellows v. NCO Fin. Sys., Inc.*, 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.*, 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.").

b. Risks Related to Loss Causation and Damages

Although Class Representatives were confident that they could establish damages assuming a finding of liability, they faced a risk that the Court or jury would substantially reduce or even eliminate damages. Under §11(e) of the Securities Act of 1933, 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.

Defendants would doubtless contend, for example, that the losses sustained by the Settlement Class were attributable not to any misrepresentation but rather to unforeseen market-wide events affecting Micro Focus ADSs and that the ADSs' trading price decline was in line with overall market conditions and the disclosure of adverse yet unforeseen business developments. Joint Declaration, ¶¶82-86. Thus, even if Class Representatives proved that Micro Focus made misstatements and/or omissions, Defendants would have argued that no portion of the drop was attributable to those statements or omissions. *Id.*

As a result, the Parties' respective experts would have offered sharply divergent testimony concerning damages at summary judgment and trial, reducing the determination of this element to a "'battle of the experts.'" *See In re Tyco Int'l, Ltd. Multidistrict Litig.*, 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). There was a substantial risk that the finder of fact would credit Defendants' contentions that damages were not linked to any misstatements or that damages were a fraction of the amount sought. *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 Class Representatives were to obtain all of their damages, the risks would not end there. *See In re Mfrs. Life Ins. Co. Premium Litig.*, 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."). There are numerous cases in which a successful verdict has been overturned either by motion after trial or an appeal. In *In re Apple Comput. Sec. Litig.*, 1991 WL 238298, at *1 (N.D. Cal. Sept. 6, 1991), for example, 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, e.g., Glickenhaus & Co. v. Household Int'1, 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 in jury instruction); *In re BankAtlantic Bancorp, Inc.*, 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*, 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). Therefore, litigation risks on liability and damages support approval of the Settlement.

c. Risks Related to Summary Judgment and Trial

At the time the Parties informed the Court that they had reached a settlement in principle, key deadlines in the Action were fast approaching, including summary judgment motions (December 19, 2022), initial expert disclosures (December 20, 2022), and supplementary expert witness disclosures (December 27, 2022), as well as trial, which was scheduled to begin on April 13, 2023. Joint Declaration, ¶87. Each of these phases presented risks, including that the finder of fact would agree with Defendants and that recoverable damages would be substantially lower than the Settlement Amount – or even zero.

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

The third *Dunk* 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:

> The 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., 2009 WL 512081, at *12 (E.D. La. Mar. 2, 2009). 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).

As detailed above, when the Parties reached the proposed 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 were fair, reasonable, and adequate and in the best interests of the Settlement Class. Class Counsel developed this understanding after almost five years of litigation, during which time they examined the discovery developed, consulted with experts, and worked with the Mediator. These efforts allowed Class Counsel to thoroughly appreciate the strengths and weaknesses of the Parties' positions, which were fully explored and debated. Joint Decl., ¶¶26-69.

4. Balancing the Certainty of an Immediate Recovery Against the Expense and Duration of Further Litigation, Trial, and Appeal Favors Settlement

"[T]he complexity, expense and likely duration of the litigation absent settlement" is another factor to consider in determining whether the proposed Settlement is fair, adequate, and reasonable. *Nat. Gas*, 2006 WL 5377849, at *2; *see also Officers for Just.*, 688 F.2d at 626. "'[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court.'" *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013).

"'[S]ecurities actions are highly complex,'" and "'securities class litigation is notably difficult and notoriously uncertain.'" *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *13 (N.D. Cal. Dec. 18, 2018), *aff'd sub. nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020); *accord La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 2009 WL 4730185, at *8 (D.N.J. Dec. 4, 2009) ("securities class actions are inherently complex"); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006) (same). Such actions are also "expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). This case was no exception. Prosecution required a thorough understanding of the information technology and software industries, as well as securities and class action law. Had the case continued, extensive and costly expert reports and testimony would have been necessary at the summary judgment and trial

stages – notwithstanding that continued litigation would not have guaranteed a greater degree of success.

In contrast to the risks posed by further litigation and potential appeals, approval of the Settlement will mean a significant and prompt recovery for Settlement Class Members. *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 373-74 (S.D. Ohio 2006) (explaining "the difficulty Plaintiff[] would encounter in proving [its] 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 Just.*, 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). The Settlement provides an immediate and substantial recovery for Settlement Class Members, whereas continued litigation would entail considerable delay and cost without any certainty of a better result.

5. The Recommendations of Experienced Counsel Heavily Favor Approval of the Settlement

The opinion of experienced counsel is entitled to considerable weight. *See Dunk*, 48 Cal. App. 4th at 1801 (among the factors to be considered is "the experience and views of counsel"); *see also O'Brien*, 2012 WL 3242365, at *12 ("The opinion of experienced counsel, based upon their familiarity with the facts and law and understanding of the strengths and weaknesses of their positions, is entitled to considerable weight and favors finding that the settlement is fair."). Here, Class Counsel, who are experienced class action securities litigators, believe that for all of the reasons discussed above, the Settlement represents an excellent result for the Class. Joint Declaration, ¶103. That strongly supports the fairness and reasonableness of the Settlement.

6. The Reaction of the Settlement Class

The reaction of the Settlement Class also supports final approval of Settlement. To date, out of the over 311,000 Settlement Notices mailed to potential Settlement Class Members, Class Counsel are aware of just a single objection to any aspect of the proposed Settlement and just 52 requests for exclusion from the Settlement Class.[9] Joint Declaration, ¶123. Thus, the Settlement Class resoundingly supports the proposed Settlement, which weighs heavily in favor of establishing its fairness.

In sum, each of the above factors fully supports a finding that the proposed Settlement is fair, reasonable, and adequate. Accordingly, Class Representatives respectfully request that the Court approve the proposed Settlement.[10]

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

Assessment of a plan of allocation is governed by the same standards of review applicable to a settlement as a whole: the plan must be fair, reasonable, and adequate. *Class Plaintiffs v. City of 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" plaintiffs' counsel. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001). Courts have approved plans of allocation in other securities cases similar to the one here. *See, e.g.*, Judgment, *In re LendingClub Sec. Litig.*, No. 3:16-cv-02627 (N.D. Cal. Sept. 24, 2018), ECF No. 401 (granting final approval in action with plan of allocation encompassing authorized claimants with Securities Act and Exchange Act losses); *see also In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL

---

[9] Class Counsel will respond to all objections in the reply papers and will produce a full tally of objections and exclusions received.

[10] Additionally, as noted in the Joint Declaration (¶12), Federal Plaintiff Iron Workers' Local No. 25 Pension Fund also fully supports approval of the proposed Settlement. *See also* Declaration of Richard Sawhill, Chairman of Iron Workers' Local No. 25 Pension Fund, in Support of Class Representatives' Motion for Final Approval of Settlement, Plan of Allocation, Class Counsel's Fees, Payment of Litigation Expenses, and Class Representatives Service Awards, ¶6.

4225828, at *5 (D.N.J. Nov. 28, 2007) ("plans that allocate money depending on the timing of purchases and sales of the securities at issue are common").

Here, the proposed Plan of Allocation was developed by Class Representatives' damages expert, Bjorn I. Steinholt, and is similar to the plans approved in other securities cases. The Plan of Allocation allocates $100 million and $7.5 million for Securities Act and Exchange Act Authorized Claimants, respectively. Authorized Claimants eligible for a *pro rata* distribution under the Securities Act will receive a share calculated utilizing the Securities Act's statutory damages formula. Authorized Claimants eligible for a *pro rata* distribution under the Exchange Act will receive a share calculated utilizing a recognized loss formula, which deducts any Securities Act losses an Authorized Claimant may also have. All *pro rata* allocations will be based on the theories of the case, Settlement Class Members' recognized losses, and will be applied in the same manner to all Settlement Class Members and will result in equitable distribution of the proceeds among Settlement Class Members who submit valid claims. Joint Declaration, ¶92. As a result, Class Representatives respectfully submit that the Plan of Allocation is a fair and reasonable method for allocating the Net Settlement Fund among the Members of the Settlement Class.

IV. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE SETTLEMENT CLASS

As, set forth in the Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement at 8, and as the Court determined in preliminarily approving the Settlement, the requirements of California Code of Civil Procedure §382 are readily satisfied here.[11] Nothing has occurred that would alter the Court's conclusion since then. Therefore, for the same reasons that the Court preliminarily certified the Class, it should finally certify the Class for settlement purposes.

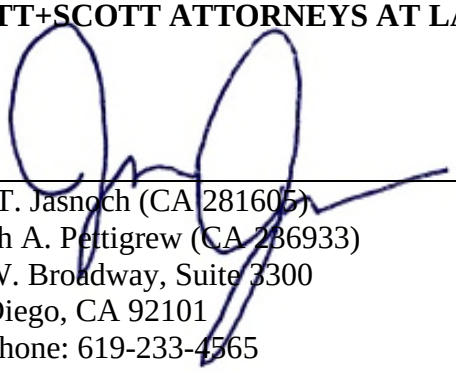
[11] As noted above (§II.B) and in the Joint Declaration (¶57), the Court previously granted class certification. *See also* Order Granting Class Certification, dated November 19, 2021, at 2-3. Solely for the purposes of this Settlement, the Parties stipulated (Stipulation, ¶2.1) to a Settlement Class encompassing Members of the previously Certified Class and investors with Exchange Act claims.

V. CONCLUSION

The Settlement is an excellent result, and for the foregoing reasons, Class Representatives respectfully request that the Court grant final approval to the proposed Settlement, approve the Plan of Allocation, and enter the proposed Order and Final Judgment.

DATED: May 22, 2023

SCOTT+SCOTT ATTORNEYS AT LAW LLP



John T. Jasnoch (CA 281605)
Joseph A. Pettigrew (CA 236933)
600 W. Broadway, Suite 3300
San Diego, CA 92101
Telephone: 619-233-4565
Facsimile: 619-233-0508
jjasnoch@scott-scott.com
jpettigrew@scott-scott.com

SCOTT+SCOTT ATTORNEYS AT LAW LLP
Amanda F. Lawrence (*pro hac vice*)
156 S. Main Street
P.O. Box 192
Colchester, CT 06415
Telephone: 860-537-5537
alawrence@scott-scott.com

SCOTT+SCOTT ATTORNEYS AT LAW LLP
Jeffrey P. Jacobson (*pro hac vice*)
Marc J. Greco (*pro hac vice*)
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212-223-6444
Facsimile: 212-223-6334
dweintraub@scott-scott.com
tlaughlin@scott-scott.com

ROBBINS GELLER RUDMAN & DOWD LLP
James I. Jaconette (CA 179565)
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619-231-1058
Facsimile: 619-231-7423
jamesj@rgrdlaw.com
bcochran@rgrdlaw.com

ROBBINS GELLER RUDMAN & DOWD LLP
Joseph Russello (*pro hac vice*)
Philip T. Merenda (*pro hac vice*)
William A. Massa (*pro hac vice*)
Brent E. Mitchell (*pro hac vice*)
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631-367-7100
jrussello@rgrdlaw.com
pmerenda@rgrdlaw.com
wmassa@rgrdlaw.com
bmitchell@rgrdlaw.com

COTCHETT, PITRE & MCCARTHY, LLP
Mark C. Molumphy (CA 168009)
Tyson Redenbarger (CA 294424)
Elle Lewis (CA 238329)
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
Facsimile: 650-697-0577
mmolumphy@cpmlegal.com
tredenbarger@cpmlegal.com
elewis@cpmlegal.com