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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NECA-IBEW PENSION TRUST FUND (The Decatur Plan), and ANN F. LYNCH, AS TRUSTEE FOR THE ANGELA LOHMANN REVOCABLE TRUST, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

PRECISION CASTPARTS CORP., MARK DONEGAN, DON R. GRABER, LESTER L. LYLES, DANIEL J. MURPHY, VERNON E. OECHSLE, ULRICH SCHMIDT, RICHARD L. WAMBOLD and TIMOTHY A. WICKS,

Defendants.

No. 3:16-cv-01756-YY

CLASS ACTION

LEAD PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

Telephonic Final Approval Hearing

Date: May 7, 2021
Time: 1:00 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

LR 7-1(a) CERTIFICATION

In compliance with Local Rule 7-1(a), the parties, through their respective counsel conferred via telephone and email. Defendants have confirmed that they do not oppose this motion.

MOTION

Lead Plaintiffs NECA-IBEW Pension Trust Fund (The Decatur Plan) and Ann F. Lynch, as Trustee for the Angela Lohmann Revocable Trust (together, "Lead Plaintiffs"), by and through their counsel ("Lead Counsel"), respectfully move the Court for an order (i) finding the proposed Settlement[1] to be fair, reasonable, and adequate to the Class and appropriate for final approval; and (ii) finding that the proposed Plan of Allocation should be approved.

This Motion is based on the Stipulation of Settlement; the accompanying Memorandum in Support of Motion; the Joint Declaration of Lawrence Deutsch and A. Rick Atwood, Jr. in Support of the Motion ("Joint Declaration" or "Joint Decl."); the pleadings and other papers on file in this action; any oral argument the Court may hear; and on any matters that may be considered by this Court.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

In the face of long odds and a vigorous defense, Lead Plaintiffs and Lead Counsel have achieved a proposed settlement of $21 million plus interest (the "Settlement Fund") for the benefit of the Class. The $21 million Settlement is a highly favorable result and is a credit to Lead Plaintiffs' and Lead Counsel's determined, creative, and detailed investigation and litigation

[1] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Stipulation of Settlement (ECF No. 154). Unless otherwise noted, citations are omitted and emphasis is added throughout.

efforts. For the reasons set forth herein, the Court should approve the proposed Settlement and Plan of Allocation as fair, reasonable and adequate, and in the best interests of the Class.[2]

Lead Plaintiffs' case, although strong and meritorious, was not without risk. While securities class actions pose numerous challenges in general, Lead Plaintiffs here faced particularly significant risks with respect to liability and damages. For example, Defendants argued in their motions for summary judgment that the alleged omissions in the Proxy were not material or actionable under the "safe harbor" protections of the PSLRA, that there was "no evidence of objective or subjective falsity," and that the alleged omissions "did not render any statements in the Proxy false or misleading." Defendants also argued that Precision Castparts stockholders suffered no harm through the Acquisition, but instead actually received a benefit in the form of a premium for their shares. Absent the Acquisition, according to Defendants, Precision Castparts' standalone value would have deteriorated given the actual post-Acquisition performance of the Company. This claim is supported by the fact that Berkshire had to take a nearly $10 billion write down in 2020 due to Precision's significant underperformance following the Acquisition. Further, in his February 27, 2021 annual letter to Berkshire shareholders, Warren E. Buffett, Chairman of Berkshire's Board, admitted that he "paid too much for" Precision Castparts, he "was simply too optimistic about PCC's normalized profit potential," and that it was a "big" error.[3]

Although Lead Plaintiffs strongly disputed Defendants' assertions, if Defendants' arguments were successful on just one of these positions, there would be no recovery for the Class.

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[2] To avoid repetition, the Court is respectfully referred to the accompanying Joint Declaration, along with Lead Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 152) for a more detailed history of the Litigation, the efforts undertaken by Lead Plaintiffs and Lead Counsel, and the factors bearing on the reasonableness of the Settlement and the Plan of Allocation.

[3] *See* Joint Decl. ¶ 64.

Lead Plaintiffs and Lead Counsel avoided these and other risks in this Litigation by achieving the Settlement. Additionally, the Plan of Allocation is also fair and reasonable – it is based on directly analogous distributions in other post-merger settlements of §14(a) claims.

The difficulty in obtaining this $21 million recovery, and the risk inherent in litigating this case, are both underscored by this fact: Lead Counsel are aware of no other case since at least 2016, in any jurisdiction, where plaintiffs obtained a greater monetary recovery on a pure §14(a) claim challenging a merger proxy (with no open market securities fraud component). In fact, recent studies have identified monetary recoveries on post-merger litigation like this case as "relatively rare." *See* Joint Decl., ¶ 61, Ex. 2 at 5. This case's standing against such few others highlights the favorable nature of this result, relative to the risk in litigating post-merger securities cases. Despite that risk and the rarity of the result eventually achieved, Lead Plaintiffs and Lead Counsel vigorously litigated the case and pursued a monetary recovery for the Class. And they succeeded.

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 should be finally approved by the Court.

II. THE SETTLEMENT SHOULD BE APPROVED BY THE COURT

A. The Settlement Class Should Be Finally Certified

Lead Plaintiffs respectfully request that the Court grant final certification of the Class as a settlement class, because: 1) the Class satisfies the requirements of Rule 23(a) and (b)(3); and 2)

the Court-approved notice program satisfies Rule 23 and due process requirements, and has been fully implemented pursuant to the Court's requirements.[4]

1. The Class Satisfies the Rules 23(a) and (b)(3) Requirements for Certification

The Court completed the first step in the settlement approval process when it granted preliminary approval of the Settlement and preliminarily certified the settlement Class. Order Preliminarily Approving Settlement and Providing for Notice, ECF No. 157 ("Preliminary Approval Order") ¶ 3. The Preliminary Approval Order made specific findings that the Class meets each of the four Rule 23(a) requirements of: numerosity, commonality, typicality, and adequacy. *Id.* ¶ 4.[5] Likewise, the Court found that the Class met each of the Rule 23(b)(3) requirements: that "questions of law and fact common to the Members of the Class predominate over any questions affecting only individual Class Members," and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* Lead Plaintiffs respectfully submit that nothing has changed since these findings were made and they remain accurate.

2. The Court-Approved Notice Program Satisfies Due Process and Has Been Fully Implemented

The notice provided to a class certified under Rule 23(b)(3) must satisfy Rule 23(c)(2), which requires "the best notice that is practicable under the circumstances." FED. R. CIV. P. 23(c)(2)(B). The Preliminary Approval Order approved the forms of Lead Plaintiffs' Notice and Summary Notice, finding that they complied with the requirements of Rule 23 and due process.

[4] *See generally* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl.").

[5] See Section II.B.1.c., *infra*, for further details regarding the adequacy of Lead Plaintiffs' and Lead Counsel's representation of the Class. FED. R. CIV. P. 23(e)(2)(A).

ECF No. 157 ¶¶ 7-8, 14. The Court also approved Lead Plaintiffs' proposed manner of distribution of the Notice and Summary Notice as compliant with the requirements of Rule 23 and due process, ordering the Claims Administrator to: a) establish a website for the Settlement at www.PrecisionShareholderLitigation.com (the "Website"); b) commence mailing the Notice and Proof of Claim and Release form to all Class Members who can be identified with reasonable effort by February 5, 2021; c) cause the Notice and Proof of Claim and Release Form to be posted on the Website by February 5, 2021; and d) cause the Summary Notice to be published once in the national edition of *The Wall Street Journal* and once over a national newswire service by February 5, 2021. *Id.* ¶¶ 9-11, 14. The Court further ordered Lead Counsel to file with this Court proof of compliance with these mailing and publishing requirements no later than April 30, 2021. *Id.* ¶ 12.

Because the Court's Preliminary Approval Order previously found that the form of the Notice and Summary Notice and the Administration of Notice plan each complied with Rule 23 and due process requirements, and because the Claims Administrator complied with the Preliminary Approval Order regarding Administration of Notice, notice to the Class complied with Rule 23 and due process requirements, fairly apprises Class Members of their rights with respect to the Settlement, and is the best notice practicable under the circumstances. *See* Joint Decl. Ex. 1, Murray Decl.

Accordingly, because the Class meets the requirements of 23(a) and (b)(3) and because notice to Class Members complied with Rule 23 and due process requirements, the Court should grant final certification of the Class as a settlement class.

B. The Settlement Is "Fair, Reasonable and Adequate" And Should Be Finally Approved

The Ninth Circuit recognizes a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Hyundai & Kia Fuel Econ. Litig.*, 926

F.3d 539, 556 (9th Cir. 2019) (en banc); *see also In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation…."). A settlement hearing "is not to be turned into a trial or rehearsal for trial on the merits." *Officers for Justice*, 688 F.2d at 625. The court need not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992). Nor should a proposed settlement be "judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625. The appropriate standard is "is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

Where a settlement is binding on class members (as this one is), the Court may approve it only "after a hearing and only on finding that it is fair, reasonable, and adequate." FED. R. CIV. P. 23(e); *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012). The "decision to approve or reject a settlement is committed to the sound discretion of the trial judge because [the judge] is exposed to the litigants, and their strategies, positions and proof." *Hanlon*, 150 F.3d at 1026.

Factors guiding the Court's review include: 1) the strength of the plaintiffs' case; 2) the risk, expense, complexity, and likely duration of further litigation; 3) the risk of maintaining class action status throughout the trial; 4) the amount offered in settlement; 5) the extent of discovery completed and the stage of the proceedings; 6) the experience and views of counsel; 7) the presence

of a governmental participant; and 8) the reaction of the class members to the proposed settlement. *Id.* (the "*Hanlon* factors"). District courts may consider some or all of these factors. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). The Ninth Circuit also "put[s] a good deal of stock in the product of an arms-length [sic], non-collusive, negotiated resolution." *Id.* at 965 (citing *Hanlon*, 150 F.3d at 1027; *Officers for Justice*, 688 F.2d at 625).

Finally, the Ninth Circuit has recognized that "[j]udicial review also takes place in the shadow of the reality that rejection of a settlement creates not only delay but also a state of uncertainty on all sides, with whatever gains were potentially achieved for the putative class put at risk." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). As detailed herein, the *Hanlon* factors weigh in favor of approval of the Settlement and there are no indicia of collusion in this arm's-length, negotiated Settlement.[6]

[6] Notwithstanding the December 1, 2018 amendments to Federal Rule of Civil Procedure 23(e), Courts in this District have continued to review settlements under the *Hanlon* factors, *see, e.g. Azar v. Blount International, Inc.*, No. 3:16-CV-0483-SI, 2019 WL 7372658 (D. Or. Dec. 31, 2019), and because the *Hanlon* factors are consistent with the Rule 23(e) requirements, Lead Plaintiffs focus on the *Hanlon* factors here. In addition to the *Hanlon* factors weighing in favor of approval of the Settlement, the Settlement meets each of the Rule 23(e) requirements, as noted herein.

The only Rule 23(e) requirement not otherwise discussed herein is that in reviewing the adequacy of relief provided for the Class, the Court should take into account any agreement between the parties "made in connection with the propos[ed]" Settlement. FED. R. CIV. P. 23(e)(2)(C)(iv).

As set forth in the Stipulation (ECF No. 154, ¶ 7.4) and discussed in Lead Plaintiff's preliminary approval brief, Defendants and Lead Plaintiffs have entered into a standard supplemental agreement which provides that, if the number of shares of Precision common stock that opt out of the Class equals or exceeds a certain amount, Defendants shall have the option to terminate the Settlement. *See* ECF No. 152 at 18. Such agreements are common and do not undermine the propriety of the Settlement. *See, e.g., In re Illumina, Inc. Sec. Litig.*, No. 3:16-CV-3044-L-MSB, 2019 WL 6894075, at *9 (S.D. Cal. Dec. 18, 2019) (finding "the content and confidentiality of the Supplemental Agreement adequate and reasonable under the circumstances"). While the Supplemental Agreement is identified in the Stipulation (Stipulation, ¶7.4), the terms are confidential, as this Circuit permits. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

1. The *Hanlon* Factors Support Approval of the Settlement

a. The Strength of Lead Plaintiffs' Case; The Risk, Expense, Complexity, and Likely Duration of Further Litigation; and The Risk of Maintaining Class Action Status Throughout the Trial

In considering whether to enter into the Settlement, Lead Plaintiffs, represented by counsel experienced in securities and class action litigation, weighed the risks in establishing the elements of their claims. "Courts experienced with securities fraud litigation routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear." *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx), 2013 WL 12303367, at *6 (C.D. Cal. July 9, 2013). Securities class actions "are often long, hard-fought, complicated, and extremely difficult to win." *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-CV-04883-BLF, 2019 WL 3290770, at *8 (N.D. Cal. July 22, 2019); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018) (securities litigation is "highly complex," "notably difficult and notoriously uncertain").

Lead Plaintiffs' claims under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 require them to prove that the allegedly misleading statements made in the Proxy were (1) objectively false, *i.e.*, they were false or misleading with respect to the underlying subject matter; and (2) subjectively false; *i.e.*, they misstated the actual opinions, beliefs, or motivation of the Defendants. ECF No. 72 at 13-14 (citing *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162

Furthermore, because the Released Claims in the Settlement likely include the claims asserted in *In re Precision Castparts Corp. Shareholder Litigation*, Case No. 15-cv-21455 (Or. Cir. Ct.), which challenged the Merger and was stayed pending resolution of this Litigation, Lead Plaintiffs and Defendants have agreed to seek dismissal of that action after final judgment is entered here, pursuant to the terms of the state court's stay order. Additionally, Lead Plaintiffs and Defendants have confirmed to plaintiffs' counsel in *Murphy, et al. v. Precision Castparts Corp., et al.*, Case No. 3:16-cv-00521-SB (D. Or.), that the Released Claims in this Settlement do not include any claims asserted in that action.

(9th Cir. 2009)); *see also, Azar*, 2019 WL 7372658, at *6 ("Plaintiffs would have to prove that Defendants made a material false statement or omission in the proxy statement, that the statement was objectively and subjectively false, that Defendants had the requisite state of mind, and that the proxy statement was the transactional cause of harm to Plaintiffs. Plaintiffs would then have to prove that the share price was too low.").

Defendants challenged virtually every aspect of Lead Plaintiffs' claims throughout the litigation and, following full fact and expert discovery, filed motions for summary judgment on the issues of both (i) liability, and (ii) damages and loss causation, along with motions to exclude Lead Plaintiffs' experts. If Defendants did not prevail on these motions, their fight surely would have continued at trial.

Although Lead Plaintiffs are confident in the strength of their claims, and were in the midst of preparing memoranda in opposition to the summary judgment and *Daubert* motions when the Settlement was reached, Lead Plaintiffs recognize that they faced significant legal and factual defenses at summary judgment and trial. It was far from certain that Lead Plaintiffs could prove that the statements made in the Proxy were both objectively and subjectively false, or that the Class was damaged thereby, especially given Precision's disappointing post-Acquisition results and Berkshire's subsequent write down. *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013) (plaintiffs proved liability in a merger trial, but the court found that the price was fair and damages were zero).

As both Lead Plaintiffs and Defendants had put forth experts on the issues of liability and damages (and several of those experts were being challenged in motions to exclude pursuant to *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)), the litigation was likely heading towards a "battle of experts" of multiple fronts. As courts have long recognized, such a "battle of

the experts" presents substantial litigation risk. *In re Extreme Networks, Inc. Sec. Litig.*, 2019 WL 3290770, at *8. Even if Lead Plaintiffs survived summary judgment with their experts unscathed and prevailed at trial, their victories would likely be subject to appeal.

Absent the Settlement, another risk to Lead Plaintiffs' case was the risk of achieving certification of the Class and maintaining that certification through trial and potential appeal. At the time that the Settlement was reached, Plaintiffs had moved for class certification, but Defendants had not yet filed their opposition brief. However, Defendants had expressed to Lead Plaintiffs their intention to mount a vigorous challenge to certification of the Class. *See Chambers v. Whirlpool Corp.*, No. CV 11-1733 FMO (JCGx), 2016 WL 5922456, at *6 (C.D. Cal. October 11, 2016) ("Because plaintiffs had not yet filed a motion for class certification, there was a risk that the class would not be certified."). Even assuming Lead Plaintiffs obtained certification of the Class, the Ninth Circuit recognizes the inherent risk that a district court "may decertify a class at any time." *Rodriguez*, 563 F.3d at 966; *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) ("Even if the Court were to certify the class, there is no guarantee the certification would survive through trial, as Defendants might have sought decertification or modification of the class.").

In addition to these risks, continued litigation would be costly. Before the Settlement was reached, Defendants spared no expense in contesting virtually every point, as demonstrated by the four experts they proffered and their motions for summary judgment and to exclude Lead Plaintiffs' experts. Continuing litigation through class certification, summary judgment, *Daubert* motions, trial and appeals would have delayed a potential recovery for Class Members for years. And during this period, significant expenses would continue to escalate.

Without the Settlement, there is no question that the resolution of this case would take many years and require significant litigation expenses, with the end result far from certain. *Hartless v. Clorox Co.*, 273 F.R.D. 630, 640 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012) ("Considering these risks, expenses and delays, an immediate and certain recovery for class members… favors settlement of this action."). The present value of a very significant settlement right now, as opposed to the possibility that a better result might be obtained after a trial and appeal many years in the future, *if at all*, supports approval of the Settlement. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1042.[7]

The difficulties faced by Lead Plaintiffs at summary judgment and in *Daubert* motions, plus potential difficulties at trial and even appeal, not to mention the possibility of nonexistent damages even if liability was established, along with the expense of such continuing litigation, supports a finding that the Settlement is fair, reasonable and adequate.

b. The Amount Offered in Settlement

The present Settlement provides an immediate and substantial cash benefit to the Class in the amount of $21,000,000, an outstanding result given the extensive legal, factual and practical risks of continued litigation identified in Section II.B.1.a., *supra*, and falling well within a range of what would be fair, reasonable and adequate given those risks. Indeed, this recovery is believed by Lead Counsel to be the largest monetary recovery in any case, in any jurisdiction since at least 2016, that alleged a pure §14(a) negligence claim challenging a merger proxy (with no open market securities fraud component). *See* Joint Decl. ¶ 70.

[7] *See also* FED. R. CIV. P. 23(e)(2)(C)(i) (in reviewing the adequacy of relief provided for a class in a proposed settlement, a court should take into account "the costs, risks, and delay of trial and appeal").

While a settlement should be judged in the context of how it compares to the amount that could be recovered at trial, adjusted for the risk, expense, and delay of actually going to trial, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not *per se* render the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Officers for Justice*, 688 F.2d at 628). Here, Lead Plaintiffs' damages expert opined that the Class was damaged by $12-$16/share. On the other hand, Defendants' expert determined that there was zero damage to the Class. Armed with this opinion, Defendants filed a *Daubert* motion to exclude the testimony of Lead Plaintiffs' damages expert.

Lead Plaintiffs and Lead Counsel were aware of the risks of continued litigation and the potential for their damages expert to be excluded. Hence, there was a real risk that potential damages could have been reduced, or eliminated entirely, as Lead Plaintiffs litigated the case to trial. *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17. Lead Plaintiffs and their counsel thus concluded that that the substantial and certain monetary recovery obtained for the benefit of the Class is an excellent result and is in the best interests of Members of the Class given these risks. So, while the cash recovery may be just "a 'mere fraction' of what [Lead] Plaintiffs generally argued they could recover at trial, that does not require a finding that the recovery is not fair, reasonable, or adequate." *In re Premera Blue Cross Customer Data Security Breach Litig.*, No. 3:15-MD-2633-SI, 2019 WL 3410382, at *24 (D. Or. July 29, 2019) (citing *In re Mego*, 213 F.3d at 459; *Linney v. Cellular Ala. P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (noting that "the very essence of a settlement is … a yielding of absolutes and an abandoning of highest hopes")). Furthermore, to date, no objections have been raised challenging the sufficiency of the amount offered in this Settlement. *See* Joint Decl. ¶ 73.

"Ultimately, the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625. Considering the total recovery of the Settlement and the risks of continued litigation, the amount of recovered is fair, reasonable and adequate. *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 241 (3d Cir. 2001) (noting that typical recoveries in securities class actions range from 1.6 percent to 14 percent of total losses).

c. The Extent of Discovery Completed and the Stage of the Proceeding

This *Hanlon* factor is concerned with whether "the parties have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp.*, 213 F.3d at 459. Specifically, a "settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

The discovery here was much more than "sufficient." This case was aggressively litigated for more than four years, during which time Plaintiffs' legal theories were challenged on and survived a motion to dismiss, extensive fact and expert discovery was taken by both sides, and motions for class certifications, summary judgment, and to exclude experts under *Daubert* were filed. During fact discovery, Lead Counsel reviewed nearly 400,000 pages of documents produced by Defendants and third parties, and took fourteen (14) depositions. Lead Plaintiffs then filed the Second Amended Complaint (ECF No. 122), which incorporated the evidence learned during fact discovery. Lead Plaintiffs further engaged in extensive expert discovery, including serving four expert reports, addressing eight rebuttal and sur-rebuttal expert reports from Defendants, and taking five depositions of Defendants' experts.

Lead Counsel's broadly developed knowledge of the facts and law relevant to this case supports approval of the Settlement. Typically, "[a] court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." *Lane v. Brown*, 166 F. Supp. 3d 1180, 1190 (D. Or. 2016); *see also DIRECTV, Inc.*, 221 F.R.D. at 528 ("[T]he proposed settlement was reached only after the parties had exhaustively examined the factual and legal bases of the disputed claims. This fact strongly militates in favor of the Court's approval of the settlement.").[8]

d. The Experience and Views of Counsel

Lead Counsel are experienced class action litigators, and recommend the Settlement as being fair, reasonable and adequate and in the best interests of the Class Members. Joint Decl. ¶¶ 61-72. "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Accordingly, "'[g]reat weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Bell v. Consumer Cellular, Inc.*, No. 3:15-CV-941-SI, 2017 WL 2672073, at *6 (D. Or. June 21, 2017) (quoting *DIRECTV, Inc.*, 221 F.R.D. at 528). "Absent fraud or collusion, courts can, and should, rely upon the judgment of experienced counsel for the parties, when assessing a settlement's fairness and reasonableness." *Azar*, 2019 WL 7372658, at *8. Thus, the

[8] This diligent prosecution of the Litigation likewise satisfies the requirement that "the class representatives and class counsel have adequately represented the class." FED. R. CIV. P. 23(e)(2)(A).

recommendations of experienced Lead Counsel in this action that the Settlement is fair, reasonable and adequate "strongly favor" approval. *Lane*, 166 F. Supp. 3d at 1191.

e. The Reaction of the Class Members to the Settlements

The number of class members who object to a proposed settlement "is a factor to be considered when approving a settlement" and the "absence of significant numbers of objectors weighs in favor of finding the settlement to be fair, reasonable and adequate." *Lane*, 166 F. Supp. 3d at 1191.

As of April 1, 2021, the Claims Administrator has mailed copies of the Notice to the transfer agent list of 760 records, the SEC list of 4,453 records, and the Claims Administrator's core broker list of 282 records. *See* Joint Decl. Ex. 1, Murray Decl. ¶¶ 5-6. In total, as of April 1, 2021, the Claims Administrator has mailed a total of 111,239 Notices to potential Class members and nominees. *Id.* ¶ 11. In addition, Summary Notice was published in *The Wall Street Journal* disseminated over the Business Wire on February 5, 2021. *Id.* ¶ 12. Through the date of this filing, not a single member of the Class has objected to the Settlement or requested to be excluded. The Claims Administrator has received one request for exclusion from the Settlement as to 14 shares of Precision stock, but those 14 shares were sold prior to the Class Period. *Id.* ¶ 16. Such overwhelming support is compelling evidence that the Settlement is fair and reasonable. *Arnett v. Bank of Am., N.A.*, No. 3:11-cv-1372-SI, 2014 WL 4672458, at *10 (D. Or. Sept. 18, 2014) (citing *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1343 (S.D. Fla. 2011) ("[N]ear unanimous approval of the proposed settlements by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement.")); *see also DIRECTV, Inc.*, 221 F.R.D. at 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class

settlement…are favorable to…class members."); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1043 ("By any standard, the lack of objection of the Class Members favors approval of the Settlement.").

It is clear that the *Hanlon* factors support final approval of the Settlement.[9]

2. The Settlement Has No Indicia of Collusion and is the Result of Arm's-Length Negotiations Before an Experienced Mediator

In considering the fairness and adequacy of the proposed Settlement, the Court "must examine whether the settlement was the 'result of good faith, arm's-length negotiations or the result of fraud and collusion.'" *Azar*, 2019 WL 7372658, at *9 (quoting *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 258 (N.D. Cal. 2015); *see also* FED. R. CIV. P. 23(e)(2)(B) (requiring that the Settlement "was negotiated at arm's length"). A district court may find there are no indicia of collusion in a settlement where, like here: (i) the parties reached the settlement via arm's-length negotiations before an experienced mediator; (ii) the settlement fund does not revert back to the defendant; and (iii) the parties did not agree to an amount or range of attorneys' fees, but left the matter to the court. *Chambers v. Whirlpool*, 980 F.3d 645, 669 (9th Cir. 2020).

There can be no question that the Settlement is the result of arm's-length negotiations, devoid of even a hint of collusion. The Settling Parties engaged experienced mediator Robert A. Meyer, Esq. of JAMS to assist them, and attended a full-day in person mediation. While those initial mediation efforts were unsuccessful, the Parties remained in regular contact with Mr. Meyer, keeping him updated about developments throughout the course of the Litigation, and with his assistance, ultimately reached an agreement-in-principle to resolve the Litigation, subject

[9] The "presence of a governmental participant" factor is not relevant here. That said, Defendants did comply with their requirement, under CAFA, of "serv[ing] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement." 28 U.S.C. § 1715(b). *See* ECF No. 158.

to Court approval. The fact that the Settlement was negotiated at arm's length – after over four years of contentious litigation – strongly supports preliminary approval. *See Pataky v. Brigantine, Inc.*, No. 17-cv-00352-GPC-AGS, 2018 WL 3020159, at *3 (S.D. Cal. June 18, 2018) ("[a] settlement is presumed to be fair if reached in arms-length negotiations after relevant discovery has taken place"). Indeed, the "presumption of reasonableness is warranted in this case based on [Lead] Counsel's expertise in complex litigation, familiarity with the relevant facts and law, and significant experience negotiating other class and collective action settlements." *Frieri v. Sysco Corp.*, No. 16-CV-1432 JLS (NLS), 2019 WL 6467599, at *7 (S.D. Cal. Dec. 2, 2019). *See also, e.g., In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) (Courts within the Ninth Circuit "have afforded a presumption of fairness and reasonableness of a settlement agreement where that agreement was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (a "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery").

Additionally, Defendants do not have any reversionary interest in the Settlement Fund. Following the initial distribution of the Net Settlement Fund, the balance is to be reallocated to Class Members until there is only a *de minimus* remainder which will be donated to an appropriate non-profit organization. ECF No. 154 at ¶ 5.7. Further, there is no agreement as to attorneys' fees in the Settlement, and the procedure for and the allowance or disallowance of attorneys' fees is

left to the Court. *Id.* at ¶ 6.4.[10] There are no indicia of collusion that would prevent the approval of the Settlement.

III. THE PLAN OF ALLOCATION SHOULD BE FINALLY APPROVED

In addition to seeking approval of the Settlement, Lead Plaintiffs also seek approval of the Plan of Allocation – the proposed plan for allocating the proceeds of the Settlement. A plan of allocation of class settlement funds is subject to the same "fair, reasonable and adequate" standard that applies to approval of class settlements. *Class Plaintiffs*, 955 F.2d at 1284-85; *In re Omnivision Techs.*, 559 F. Supp. 2d at 1045. A plan of allocation that compensates class members based on the type and extent of their injuries is generally considered reasonable. "When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.'" *Scott v. ZST Digital Networks, Inc.*, No. CV 11-3531 GAF (JCx), 2013 WL 12126744, at *7 (C.D. Cal. Aug. 5, 2013) (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004)).

[10] In reviewing the adequacy of relief provided for the Class, the Court should take into account "the terms of any proposed award of attorney's fees, including timing of payment." FED. R. CIV. P. 23(e)(2)(C)(iii).

Lead Plaintiffs direct the Court to the concurrently filed Lead Counsel's Motion for Award of Attorneys' Fees and Expenses, and Award of Lead Plaintiff's Costs and Expenses, and Memorandum in Support thereof ("Fee and Expense Motion"), which discusses Lead Counsel's request for an award of attorneys' fees of 33.33% of the Settlement Amount and expenses of $867,891.13, plus interest on both amounts. The fee and expense requests were fully disclosed in the Notice, and were approved by Lead Plaintiffs, and the fee request is in line with fees awarded in other settlements approved in the Ninth Circuit. *See* Joint Decl. Ex. 1, Murray Decl. Ex. A, Notice at 2; ¶ 79; Ex. 3 at ¶ 6-7; Ex. 4 at ¶ 9-10; *see also* Fee and Expense Motion, Section II.A.

In addition, Lead Counsel will request that any award of fees and expenses be paid at the time the Court approves such award. *See, e.g., In re Hewlett–Packard Co. Sec. Litig.*, No. SACV 11-1404-AG (RNBx), 2014 WL 12656737, at *2 (C.D. Cal. Sept. 15, 2014) (ordering that "attorneys' fees and litigation expenses shall be paid to [Lead Counsel] from the Settlement Fund immediately upon entry of this Order").

The Plan of Allocation is clearly described in the Court-approved Notice. It is fair, reasonable, and adequate because it distributes proceeds equitably among those Class Members who have legal standing to bring the §14(a) and §20(a) claims currently asserted in the Litigation. *See, e.g., In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 381 F. Supp. 2d 192, 241 (S.D.N.Y. 2004) ("only shareholders who owned Time Warner common stock on the record date of the Merger are permitted to bring Section 14(a) claims").

In order to ascertain the most sensible, equitable, and legally supported plan of allocation in this case, Lead Counsel conducted a survey of all recent cash recoveries on merger-related §14(a) claims. That research uncovered that the most recent and analogous post-merger settlements occurred in *In re Hot Topic, Inc. Sec. Litig.*, No. 2:13-cv-02939-SJO-JCx (C.D. Cal.), and *Duncan, et al. v. Joy Global Inc., et al.*, No. 2:16-cv-01229-PP (E.D. Wis.). *Hot Topic* and *Joy Global* (like the Litigation here) involved §14(a) and §20(a) claims regarding projection-related disclosures in a merger proxy. *See* ECF No. 153-1, 153-2. *Hot Topic* resulted in a $14.9 million post-merger settlement for the class. *See* ECF No. 153-1. The *Hot Topic* plan of allocation distributed settlement funds on a per-share basis to stockholders "on the record date, May 3, 2013," *i.e.*, those stockholders entitled to vote on the Hot Topic merger. *Id.* at 1. *Joy Global* resulted in a $20 million post-merger settlement for the class. *See* ECF No. 153-2. The *Joy Global* plan of allocation distributed settlement funds on a per-share basis to stockholders "as of the close of business on September 1, 2016," *i.e.*, those stockholders "considered record holders entitled to vote on the Acquisition." *Id.* at 11; *see also id.* ("Given that the currently pending claims in the litigation challenge statements made in the Proxy related to that vote, Plaintiffs' Counsel believe that this proposed Plan of Allocation aligns the recovery with those who have legal standing to bring the claims currently asserted in the Litigation."). The Plan of Allocation here employs the

same methodology. There have been no objections to the proposed Plan of Allocation filed by any Class Member. Joint Decl. ¶ 73. In sum, the Plan of Allocation here is fair, reasonable and adequate, and is supported by ample authority in post-merger §14(a) proxy claims.[11] Thus, it should be finally approved.

IV. CONCLUSION

The $21 million Settlement Fund for the Class is a highly favorable culmination to this complex Litigation. The Settlement's nearly unprecedented status amongst such few others in post-merger securities litigation underscores the favorability of this result, as well as its inherent risk. For all the reasons stated herein and in the Joint Declaration, Lead Plaintiffs submit that the Settlement, and Plan of Allocation are fair, reasonable and adequate, and should be approved by the Court.

DATED: April 2, 2021

Respectfully Submitted,

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[11] Likewise, the Court-approved notice program (*See* Section II.A.2., *supra*) and the Plan of Allocation support approval of the Settlement pursuant to FED. R. CIV. P. 23(e)(2)(C)(ii) (in reviewing the adequacy of relief provided for a class in a proposed settlement, a court should take into account "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims").

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 2, 2021, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ A. Rick Atwood, Jr.

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