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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

JOINT DECLARATION OF LAWRENCE DEUTSCH AND A. RICK ATWOOD, JR. IN SUPPORT OF (I) LEAD PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND (II) LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES, AND AWARD OF LEAD PLAINTIFF'S COSTS AND EXPENSES

Telephonic Final Approval Hearing

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

We, LAWRENCE DEUTSCH and A. RICK ATWOOD, JR., declare:

1. Lawrence Deutsch is a Shareholder of the law firm Berger Montague PC (“Berger Montague” or “BMPC”), which serves as Co-Lead Counsel on behalf of Co-Lead Plaintiffs NECA-IBEW Pension Trust Fund (The Decatur Plan) (the “Fund”) and Ann F. Lynch, as Trustee for the Angela Lohmann Revocable Trust (the “Trust,” and together with the Fund, “Lead Plaintiffs”). Lawrence Deutsch is an attorney duly licensed to practice *pro hac vice* before this Court.

2. A. Rick Atwood, Jr. is a partner at the law firm of Robbins Geller Rudman & Dowd LLP (“Robbins Geller” or “RGRD”), which serves as Co-Lead Counsel on behalf of Lead Plaintiffs. Rick Atwood Deutsch is an attorney duly licensed to practice *pro hac vice* before this Court.

3. We submit this declaration in support of: (1) final approval of the Settlement; (2) approval of the Plan of Allocation; (3) an award of attorneys’ fees and expenses; and (4) an award of reimbursement of costs and expenses for one of the Lead Plaintiffs, *i.e.*, the Trust. This declaration explains why the Settlement and Plan of Allocation are fair, reasonable, adequate and in the best interests of the Class, and why Lead Counsel believe that the requested attorneys’ fees and expenses, and the Trust’s costs and expenses, are reasonable, fair, and should be approved.<sup>1</sup>

4. We have personal knowledge of the matters stated herein and, if called upon, we could and would competently testify thereto.

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<sup>1</sup> This declaration incorporates by reference the definitions in the Stipulation of Settlement filed with the Court on January 8, 2021 (ECF No. 154, the “Stipulation”). Unless otherwise defined, all capitalized terms used herein shall have the same meanings as set forth in the Stipulation.

## **I. INTRODUCTION**

5. This Litigation is a stockholder class action by Lead Plaintiffs on behalf of the former shareholders of Precision Castparts Corp. (“Precision”) against Precision, its Chairman and Chief Executive Officer, and certain of its former directors concerning Defendants’ dissemination of proxy materials, which Lead Plaintiffs allege were false and misleading in violation of §§14(a) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 14a-9 promulgated thereunder.

6. Following over four years of litigation concerning the proxy materials and Lead Plaintiffs’ allegations, Lead Plaintiffs and Defendants reached the \$21 million Settlement, which is now before the Court for final approval.

## **II. HISTORY OF THE LITIGATION**

### **A. The Merger Announcement and Proxy Issuance**

7. On August 10, 2015, Precision issued a press release announcing the execution of an Agreement and Plan of Merger, pursuant to which Berkshire Hathaway Inc. (“Berkshire”) and certain of its subsidiaries would purchase all of Precision’s outstanding shares for \$235 per share (the “Merger” or the “Acquisition”).

8. On October 13, 2015, Precision filed the Definitive Proxy Statement (the “Proxy”), seeking shareholder approval of the Merger.

9. On January 29, 2016, Berkshire completed the Acquisition of Precision.

### **B. Commencement of the Action and Lead Plaintiff Proceedings**

10. On September 2, 2016, plaintiffs NECA-IBEW Pension Trust Fund (The Decatur Plan) and Angela Lohmann (“Lohmann”), the former trustee for the Angela Lohmann Revocable Trust (together, the “Original Plaintiffs”), filed the initial Class Action Allegation Complaint (the

“Initial Complaint”). ECF No. 1. The Initial Complaint alleged claims against Defendants for violations of §§14(a) and 20(a) of the 1934 Act and SEC Rule 14a-9 promulgated thereunder, in connection with the Proxy.

11. On November 1, 2016, the Original Plaintiffs filed a motion seeking their appointment as lead plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §§78u-4(a)(3)(B); and the appointment of their counsel Robbins Geller and Berger Montague (together, “Lead Counsel”) as Lead Counsel (“Motion to Appoint Lead Plaintiffs”). ECF No. 27.

12. On November 21, 2016, the Court granted the Motion to Appoint Lead Plaintiffs and appointed the Original Plaintiffs as Lead Plaintiffs and Lead Counsel as Lead Counsel. ECF No. 38.

**C. Motion to Dismiss**

13. On January 5, 2017, the Original Plaintiffs filed their Amended Class Action Allegation Complaint (“First Amended Complaint”). ECF No. 56.

14. On March 6, 2017, Defendants filed their Motion to Dismiss the Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Motion to Dismiss”). ECF No. 57. In their Motion to Dismiss, Defendants argued that, under Fed. R. Civ. P. 12(b)(6) and the PSLRA, the First Amended Complaint failed to state a claim upon which relief could be granted and should be dismissed with prejudice.

15. On May 5, 2017, the Original Plaintiffs filed their Opposition to Defendants’ Motion to Dismiss the Amended Complaint. ECF No. 59.

16. On June 5, 2017, Defendants filed their Reply in Support of Their Motion to Dismiss the Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 61.

17. On July 26, 2017, the Court held a hearing on Defendants' Motion to Dismiss, and took the motion under advisement. Lawrence Deutsch and Robin B. Switzenbaum of Berger Montague, A. Rick Atwood, Jr. of Robbins Geller, and Nadia H. Dahab of Stoll Berne appeared on behalf of the Original Plaintiffs. ECF No. 66.

18. On October 3, 2017, Magistrate Judge Youlee Yim You issued Findings and Recommendations recommending the denial of Defendants' Motion to Dismiss ("F&R"). ECF No. 72.

19. Defendants objected to the F&R on October 17, 2017. ECF No. 75.

20. Plaintiffs filed their response to Defendants' objection to the F&R on October 31, 2017. ECF No. 76.

21. On January 24, 2018, Judge Anna J. Brown adopted Judge You's F&R, rejecting Defendants' objection and denying the Motion to Dismiss. ECF No. 77.

22. On February 7, 2018, Defendants filed their Answer to the First Amended Complaint. ECF No. 79.

**D. Fact Discovery**

23. From January 2018 through November 2019, the parties conducted extensive fact discovery. Among other things, the parties conducted the following written and document discovery:

- a. the parties exchanged their Initial Disclosures Pursuant to Rule 26(a)(1) on March 7, 2018;

b. the Original Plaintiffs served their First Request for Production of Documents on March 9, 2018, and Defendants served their Responses and Objections on April 9, 2018;

c. the Original Plaintiffs served a subpoena to Precision's financial advisor Credit Suisse (USA) LLC ("Credit Suisse") on April 25, 2018, and Credit Suisse served their Responses and Objections on May 9, 2018;

d. the Original Plaintiffs served a subpoena to Berkshire on July 1, 2019, and subsequently negotiated the production of documents from Berkshire;

e. the parties filed their Motion for Stipulated Protective Order on August 15, 2018 (ECF No. 83), and the Court entered the Stipulated Protective Order on August 17, 2018 (ECF No. 84);

f. between November 2018 and February 2019, Defendants served ten (10) subpoenas to absent class members;

g. the Original Plaintiffs filed a Motion to Quash and/or for a Protective Order on February 28, 2019 (ECF No. 91), Defendants filed their response on March 6, 2019 (ECF No. 92), and the Court held oral argument and issued a ruling on March 22, 2019 (ECF Nos. 94-95);

h. Defendants served their First Set of Document Requests on August 14, 2018, and the Original Plaintiffs served their objections and responses on September 13, 2018;

i. the Original Plaintiffs served their First Set of Interrogatories to Defendants on July 19, 2019, and Defendants served their responses and objections on August 19, 2019;

j. the Original Plaintiffs filed a Motion to Compel on August 14, 2019 (ECF No. 99), Defendants filed their opposition on August 23, 2019 (ECF No. 105), the Court held oral argument on September 4, 2019 (ECF No. 106), and issued a ruling on September 27, 2019 (ECF No. 112);

k. the Original Plaintiffs served their Second Set of Interrogatories to Defendants on September 26, 2019, and Defendants served their responses and objections on November 8, 2019;

l. Defendants served their First Set of Interrogatories on September 27, 2019, and the Original Plaintiffs served their responses and objections on November 8, 2019;

m. Defendants served their Second Set of Requests for Production of Documents on September 27, 2019, and the Original Plaintiffs served their responses and objections on November 8, 2019;

n. the Original Plaintiffs gathered and produced over 300 documents, comprising over 4,500 pages;

o. Defendants produced, and Lead Counsel reviewed, over 66,000 documents, comprising approximately 383,000 pages;

p. Berkshire, Credit Suisse, and other third parties produced, and Lead Counsel reviewed, approximately 2,000 documents;

24. The Original Plaintiffs, through Lead Counsel, took fourteen (14) depositions of Defendants and other fact witnesses in nine (9) states, including:

a. Precision's Jay Khetani on April 26, 2019 in Boston, Massachusetts;

b. Defendant Don R. Graber on April 30, 2019 in Savannah, Georgia;

c. Defendant Richard W. Wambold on May 23, 2019 in Austin, Texas;

- d. Defendant Timothy A. Wicks on June 7, 2019 in Minneapolis, Minnesota;
- e. Credit Suisse's Gerald Lodge on June 19, 2019 in New York, New York;
- f. Credit Suisse's Andy Lipsky on June 20, 2019 in New York, New York;
- g. Precision's Shawn R. Hagel on July 12, 2019 in Portland, Oregon;
- h. Precision's Kirk G. Pulley on July 24, 2019 in Portland, Oregon;
- i. Defendant Ulrich R. Schmidt on August 1, 2019 in Amelia Island, Florida;
- j. Berkshire's Warren E. Buffett on August 28, 2019 in Omaha, Nebraska;
- k. Berkshire's Todd A. Combs on August 28, 2019 in Omaha, Nebraska;
- l. Precision's Mark Donegan on October 3, 2019 in Portland, Oregon;
- m. Steven Blackmore, Precision's former Vice President and Treasurer, on November 12, 2019 in Portland, Oregon; and
- n. Defendant Lester L. Lyles on November 19, 2019 in Tysons Corner, Virginia.

25. Defendants took, and Lead Counsel defended or participated in, five (5) depositions of the Original Plaintiffs and other fact witnesses in California, Illinois, New Jersey, New York and Pennsylvania.

**E. Second Amended Complaint and Lead Plaintiff Substitution**

26. On December 6, 2019, the Original Plaintiffs filed their motion for leave to amend the First Amended Complaint. ECF No. 117. On January 17, 2020, Defendants filed their response, indicating that while reserving all rights, they did not oppose the motion for leave to amend. ECF No. 118.

27. On January 27, 2020, the Original Plaintiffs filed their 334-paragraph, 112-page Second Amended Class Action Allegation Complaint (the "Second Amended Complaint"). ECF



No. 122. The Original Plaintiffs incorporated into the Second Amended Complaint a significant amount of the documentary evidence and testimony that the Original Plaintiffs discovered during the extensive fact discovery period.

28. On February 14, 2020, Defendants filed their Answer to the Second Amended Complaint. ECF No. 123.

29. On May 12, 2020, Lead Plaintiffs filed the notice of Ms. Lohmann's death, and an unopposed motion to substitute her daughter, Ms. Lynch, the successor trustee of the Angela Lohmann Revocable Trust, as Lead Plaintiff in this action. ECF Nos. 124-26.

30. The Court granted the motion and substituted Ms. Lynch as Lead Plaintiff on May 13, 2020. ECF No. 127.

31. Following the substitution of Ms. Lynch as Lead Plaintiff, Lead Plaintiffs produced additional documents related to the Angela Lohmann Revocable Trust.

32. On September 1, 2020, Defendants took the deposition of Ms. Lynch.

**F. Expert Discovery**

33. From March 2020 to September 2020, Lead Plaintiffs and Defendants conducted broad expert discovery.

34. On March 13, 2020, Lead Plaintiffs served their initial expert report: the Expert Report of Matthew R. Morris, CFA, CLP.

35. On May 15, 2020, Defendants served four expert reports: the Expert Report of Professor Richard S. Ruback, the Expert Report of David P. Stowell, the Expert Report of Professor Wayne Guay, and the Expert Report of Douglas Cameron Scott.

36. On June 26, 2020, Lead Plaintiffs served the Reply Report of Matthew R. Morris, CFA, CLP, the Brian T. Foley Expert Report, and the Expert Report of Bill Post.

37. Between August 4, 2020 and September 14, 2020, Defendants served four sur-rebuttal expert reports;

38. Lead Plaintiffs took five (5) depositions of Defendants' experts:

- a. Mr. Stowell on July 24, 2020;
- b. Mr. Scott on August 5, 2020;
- c. Professor Guay on August 21, 2020;
- d. Professor Ruback on September 15, 2020; and
- e. Mr. Scott on September 25, 2020.

39. Defendants took three (3) depositions of Lead Plaintiffs' experts on July 31, 2020, August 13, 2020, and September 10, 2020.

**G. Class Certification, Summary Judgment and *Daubert* Motions**

40. On October 6, 2020, Lead Plaintiffs filed their Motion for Class Certification and Memorandum in Support. ECF No. 131.

41. Also on October 6, 2020, Lead Plaintiffs filed three *Daubert* motions, their:

- a. Motion to Exclude Expert Opinion and Testimony of Richard S. Ruback (ECF No. 133);
- b. Motion to Exclude Expert Opinion and Testimony of Douglas C. Scott (ECF No. 134); and
- c. Motion to Exclude Expert Opinion and Testimony of David P. Stowell (ECF No. 135).

42. On October 6, 2020, Defendants filed two summary judgment motions: their Motion for Summary Judgment on Liability (ECF No. 136, the "Liability Summary Judgment

Motion”) and their Motion for Summary Judgment on Damages and Loss Causation (ECF No. 138, the “Damages Summary Judgment Motion”).

43. In the Liability Summary Judgment Motion, Defendants argued that Court should have entered summary judgment on the issue of liability for three reasons: (1) Lead Plaintiffs’ claims challenged inactionable forward-looking statements; (2) a trier of fact could not conclude that the challenged statements were objectively or subjectively false or misleading; and (3) there was no evidence from which a factfinder could conclude that the challenged statements were material.

44. In the Damages Summary Judgment Motion, Defendants argued that Lead Plaintiffs failed to bring forth any evidence of loss causation or damages and that Class members received more as a result of Berkshire’s acquisition of Precision than they would or could have received elsewhere. The Damages Summary Judgment Motion emphasized the post-Acquisition underperformance of Precision and Berkshire’s subsequent \$9.8 billion writedown of Precision’s business value.

45. Also on October 6, 2020, Defendants filed two *Daubert* motions, their:

- a. Motion to Exclude Expert Testimony of Brian T. Foley (ECF No. 139); and
- b. Motion to Exclude Expert Testimony of Matthew R. Morris (ECF No. 140).

#### **H. Arm’s-Length Mediation and Settlement**

46. Throughout the Litigation, the parties participated in formal and informal arm’s-length mediation efforts with a highly-experienced mediator, Robert A. Meyer, Esq., of JAMS.

47. In advance of their first formal mediation session, the parties submitted their respective mediation materials to Mr. Meyer on or around March 5, 2019.

48. On March 13, 2019, the parties attended a full-day in-person mediation session in Los Angeles, California. Lawrence Deutsch, Randall J. Baron and A. Rick Atwood, Jr. participated in the mediation session on behalf of Lead Plaintiffs and the Class.

49. While the March 13, 2019 initial mediation session was unsuccessful, the parties remained in regular contact with Mr. Meyer, keeping him updated about developments throughout the course of the Litigation while fact and expert discovery evolved.

50. During this time, the parties' counsel continued to discuss the potential for resolution of this matter with Mr. Meyer, ultimately reaching resolution with his assistance.

51. After a series of discussions, Mr. Meyer informed the parties on October 14, 2020, of a mutual agreement in principle on the essential economic elements of a settlement of the Litigation.

52. On October 14, 2020, the parties informed the Court of this agreement in principle to settle the Litigation.

53. The parties then worked to document the agreement, exchanging numerous drafts of a stipulation of settlement, finalizing and executing the Stipulation on January 8, 2021.

#### **I. Preliminary Approval and Notice**

54. On January 8, 2021, Lead Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement. ECF No. 152.

55. Also on January 8, 2021, Lead Plaintiffs filed with the Court the Stipulation with all of its exhibits, including the [Proposed] Order Preliminarily Approving Settlement and Providing for Notice, the proposed Notice of Pendency and Proposed Settlement of Class Action, the proposed Proof of Claim and Release form, the proposed Summary Notice, and the [Proposed] Final Judgment and Order of Dismissal with Prejudice. ECF Nos. 154 – 154-5.

56. On January 15, 2021, the Court issued its Order Preliminarily Approving Settlement and Providing for Notice (the “Preliminary Approval Order”). ECF No. 157.

57. The Preliminary Approval Order preliminarily certified the settlement Class. ECF No. 157, ¶ 3. It made specific findings that the Class meets each of the four Rule 23(a) requirements of: numerosity, commonality, typicality, and adequacy. *Id.*, ¶ 4. Likewise, the Preliminary Approval Order 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.*

58. The Preliminary Approval Order also approved the forms of Lead Plaintiffs’ proposed Notice and Summary Notice, finding that they complied with the requirements of Rule 23 and due process. *Id.*, ¶¶ 7-8, 14. The Preliminary Approval Order further 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](http://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.

59. As of April 1, 2021, the Claims Administrator has mailed a total of 111,239 Notice and Proof of Claim packages to potential Class members and nominees, and caused the Summary Notice to be published in the *The Wall Street Journal* and transmitted over *Business Wire*. *See*

Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date (“Murray Decl.”), attached hereto as Exhibit 1, ¶¶ 11-12.

60. In addition, the Stipulation and Notice, along with other information about the Action, the Settlement and the Court’s Settlement hearing, was posted to the Claims Administrator’s website, at [www.PrecisionShareholderLitigation.com](http://www.PrecisionShareholderLitigation.com). *Id.*, ¶ 14.

### **III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE UNDER THE CIRCUMSTANCES AND WARRANTS APPROVAL**

61. 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) (internal quotation marks omitted). 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”). Specifically regarding post-merger litigation like this case, studies found that monetary recoveries are “relatively rare.” *See* 2016 Cornerstone Research report titled “Shareholder Litigation Involving Acquisitions of Public Companies,” attached hereto as Exhibit 2, at 5.

#### **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**

62. 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 (9th Cir. 2009)).

63. 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.

64. Although Lead Counsel are confident in the strength of Lead Plaintiffs' claims, and were in the midst of preparing memoranda in opposition to the summary judgment and *Daubert* motions when the Settlement was reached, they 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 writedown. *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). On August 8, 2020, Berkshire announced that it was recording a \$9.8 billion writedown in connection with the Acquisition of Precision. *See* <https://www.berkshirehathaway.com/news/aug0820.pdf>. In his February 27, 2021 letter to Berkshire's shareholders, Berkshire's Chairman of the Board, Warren E. Buffett, admitted that he "paid too much for" Precision and "was simply too optimistic about PCC's normalized profit

potential,” and that the “error” was a “big one.” *See* <https://www.berkshirehathaway.com/2020ar/2020ar.pdf>, at 4.

65. 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.

66. 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, Lead 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 v. West Publ’g Corp.*, 563 F.3d 948, 963, 966 (9th Cir. 2009); *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.”).



67. 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.

68. 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.

69. 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. Possible Range of Recovery**

70. 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 the paragraphs above, 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).

71. 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 v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)). 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.

72. 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.

### **C. Reaction of the Class**

73. The Notice apprised the Class Members of their right to, and procedure for, objecting to the proposed Settlement, the proposed Plan of Allocation, Lead Counsel’s fee and expense application, and/or Lead Plaintiffs’ time and expense request. *See* Ex. 1, Murray Decl. Ex. A. All objections must be filed and mailed/delivered so that it is received by the Court and

counsel for the Parties by April 16, 2021. At the time of the filing of this declaration, we have not received any objections to any aspect of the Settlement, the Plan of Allocation, Lead Counsel's fee and expense application, and/or Lead Plaintiffs' time and expense request. To date, the Claims Administrator has not received any requests for exclusion from Class members, receiving one request for exclusion as to 14 shares of Precision stock that were sold prior to the Class Period. *See id.* ¶ 16.

#### **IV. THE PLAN OF ALLOCATION**

74. Upon approval by the Court, the Plan of Allocation governs the method by which the Net Settlement Fund will be distributed to Claimants. The Plan of Allocation was fully described in the Notice distributed to potential Class Members (*see* Ex. 1, Murray Decl. Ex. A, Notice at 11-12), and provides for a distribution to those Class Members who were holders of record of Precision common stock at close of business on October 9, 2015, and were thus holders of record entitled to vote on the Acquisition, and who submit a valid Proof of Claim to the Claims Administrator. No distributions will be made to Claimants who would otherwise receive a distribution of less than \$10.00.

75. The objective of the Plan of Allocation is to distribute the Settlement proceeds equitably among those Class Members who have legal standing to bring the §§14(a) and 20(a) claims currently asserted in the Litigation. Only those stockholders holding Precision common stock as of the close of business on October 9, 2015 were considered record holders entitled to vote on the Acquisition. Given that the currently pending claims in the litigation challenge statements made in the Proxy related to that vote, Lead 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.

76. The Net Settlement Fund will be distributed to Claimants on a pro rata basis. A Class Member's actual recovery will be a proportion of the Net Settlement Fund determined by its claim as compared to the total claims of all eligible Class Members who submit acceptable Proofs of Claim. Payments shall be conclusive against all Claimants. The Plan of Allocation is not a formal damage analysis, and the calculations made in accordance with the Plan of Allocation are not intended to be estimates of, or indicative of, the amounts that Class Members might have been able to recover after a trial.

77. 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. As described in greater detail in the accompanying memorandum, that research uncovered that similar distributions, *i.e.*, based on the voting record date for a merger, occurred in the following two most recent and analogous post-merger settlements:

- a. *In re Hot Topic, Inc. Sec. Litig.*, No. 2:13-cv-02939-SJO-JCx (C.D. Cal.), *see* ECF No. 153-1; and
- b. *Duncan v. Joy Global, Inc.*, No. 16-cv-1229-PP (E.D. Wisc.), *see* ECF No. 153-2.

## **V. THE FEE AND EXPENSE APPLICATION**

78. Lead and Local Counsel have not received any payment for their services in prosecuting the Litigation, nor have they been paid for their expenses incurred in representing the Class. Lead Counsel are now seeking approval for an award of 33.33% of the Settlement amount, plus expenses incurred in the prosecution of the Litigation in the amount of \$867,891.13. The attorneys' fees requested are appropriate and warranted by the extensive efforts of Lead Counsel and the significant recovery they obtained for the Class.

79. As set forth in the accompanying memoranda in support of final approval of the Settlement and in support of the fee and expense motion, the fee request is entirely reasonable as compensation for the work performed on behalf of members of the Class and the result obtained. Both Lead Plaintiffs have approved the fee request.<sup>2</sup>

80. While the attorneys' fees request is above the Ninth Circuit's 25% benchmark, for the reasons explained in the memorandum in support, Lead Counsel's request meets the factors considered for an upward departure from the benchmark and is in line with attorneys' fees in other settlements approved in the Ninth Circuit.<sup>3</sup>

81. As detailed above, Lead Counsel were unwavering in their dedication to the interests of the Class and in the investment of the necessary time and resources to bring this matter

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<sup>2</sup> See Declaration of Kevin Cope in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and (II) Lead Counsel's Motion for Award of Attorneys' Fees and Expenses, and Award of Lead Plaintiff's Costs and Expenses ("Cope Decl."), attached hereto as Exhibit 3, ¶¶ 6-7; Declaration of Ann F. Lynch in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and (II) Lead Counsel's Motion for Award of Attorneys' Fees and Expenses, and Award of Lead Plaintiff's Costs and Expenses ("Lynch Decl."), attached hereto as Exhibit 4, ¶¶ 9-10.

<sup>3</sup> "[A] fee award of one-third is within the range of awards in this Circuit." *In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2018 WL 4620695, at \*4 (N.D. Cal. Sept. 20, 2018); see also *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at \*19 (C.D. Cal. June 10, 2005) ("[C]ourts in this circuit, as well as other circuits, have awarded attorneys' fees of 30% or more in complex class actions."). Lead Counsel's fee request is in line with other settlements approved in the Ninth Circuit and this District. See, e.g., *In re Heritage Bond Litig.*, 2018 WL 4620695, at \*23 (awarding one-third of \$27.78 million settlement fund); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (no abuse of discretion where the "\$4 million award (thirty-three percent [of the class's \$12 million recovery]) for attorneys' fees is justified because of the complexity of the issues and the risks") for attorneys' fees is justified because of the complexity of the issues and the risks"); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at \*9 (S.D. Cal. June 1, 2010) (approving an attorneys' fee award of 33.33%); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, at \*3 (D. Or. Nov. 13, 2006) (awarding 30% of the class settlement fund); *Gustafson v. Valley Ins. Co.*, No. CV 01-1575-BR, 2004 WL 2260605 (D. Or. Oct. 6, 2004) (same).

to a successful conclusion. Lead and Local Counsel devoted over 13,800 hours of attorney, paralegal and litigation support time resulting in a lodestar of \$8,788,820.93. *See* Declaration of Lawrence Deutsch Filed on Behalf of Berger Montague PC in Support of Application for Award of Attorneys' Fees and Expenses ("Deutsch Decl."), attached hereto as Exhibit 5, ¶ 4; Declaration of A. Rick Atwood, Jr. Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Atwood Decl."), attached hereto as Exhibit 6, ¶ 4; Declaration of Jennifer Wagner Filed on Behalf of Stoll Berne in Support of Application for Award of Attorneys' Fees and Expenses ("Wagner Decl."), attached hereto as Exhibit 7, ¶ 4.

82. The expenses in the amount of \$867,891.13 were incurred in the prosecution of the Litigation. *See* Ex. 5, Deutsch Decl. ¶ 5; Ex. 6, Atwood Decl. ¶ 5; Ex. 7, Wagner Decl. ¶ 5. Lead Counsel believe that these expenses are reasonable in amount, were necessary for the successful prosecution of the Litigation, and therefore should be approved by the Court.

## **VI. REIMBURSEMENT OF LEAD PLAINTIFF'S COSTS AND EXPENSES**

83. Lead Counsel request the reimbursement of reasonable costs and expenses in the amount of \$349.80 incurred by Lead Plaintiff Ann F. Lynch, as Trustee for the Angela Lohmann Revocable Trust, and by Angela Lohmann, the former trustee for the Trust, attributable to the Trust's prosecution of the case on behalf of the Class. These costs and expenses include lost wages and mileage as set forth in Exhibit 4, the Lynch Declaration. *See* Ex. 4, Lynch Decl. ¶¶ 3-6, 11-13 (describing devotion to the representation of the Class throughout the Litigation). This request is only for such demonstrated costs and expenses and is not a requested incentive or service award.

**VII. CONCLUSION**

84. For the reasons set forth above and in the accompanying memorandum, we respectfully submit that: (1) the Settlement should be finally approved as fair, reasonable and adequate; (2) the Plan of Allocation represents a fair method for the distribution of the Settlement proceeds and should be approved; (3) the requested award of attorneys' fees and expenses should be granted; and (4) the requested award of reimbursement of the Trust's costs and expenses should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 2<sup>nd</sup> day of April 2021, at Wilmington, North Carolina.



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LAWRENCE DEUTSCH

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 2<sup>nd</sup> day of April 2021, at San Diego, California.



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A. RICK ATWOOD, JR.

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Pension Trust Fund*



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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**Manual Notice List**

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- (No manual recipients)