UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CELESTICA INC. SEC. LITIG.	:	Civil Action No.: 07-CV-00312-GBD (ECF CASE) Hon. George B. Daniels

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

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PRELIMINARY STATEMENT

Class Representatives, New Orleans Employees' Retirement System ("New Orleans") and Drywall Acoustic Lathing and Insulation Local 675 Pension Fund ("DALI"), respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement reached in the above-captioned litigation (the "Settlement") and approval of the proposed Plan of Allocation. The Settlement provides a recovery of $30,000,000.00 in cash to resolve this securities class action against Celestica Inc. ("Celestica" or the "Company"), Stephen W. Delaney ("Delaney"), and Anthony P. Puppi ("Puppi") (collectively, "Defendants"). The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement, dated April 17, 2015 (the "Stipulation"), which was previously filed with the Court. ECF No. 250-1.[1]

The Settlement is the result of almost eight years of extensive and hard-fought litigation, including significant motion practice, proceedings before the United States Court of Appeals for the Second Circuit ("Second Circuit"), the completion of extensive fact and expert discovery, summary judgment rulings, and arm's-length negotiations between counsel, facilitated by a well-respected and experienced mediator, the Honorable Layn R. Phillips (Ret.), with a trial date looming. Defendants, who are represented by experienced and formidable securities litigators, have asserted strong defenses, adamantly denied liability, and were firm in their belief that the Class could not prevail on the claims asserted. As discussed below and in the accompanying Declaration of James W. Johnson in Support of Class Representatives Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation and Class Counsel's Motion for

[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation.

Award of Attorneys' Fees and Payment of Litigation Expenses ("Johnson Decl." or "Johnson Declaration"),[2] the Settlement is an excellent result for the Class.

The Settlement is the result of Class Representatives' and Class Counsel's vigorous and comprehensive litigation efforts over the past almost eight years in which they, *inter alia,* (i) conducted a thorough investigation into the claims of the Class, including interviewing 52 former Celestica employees and other persons with relevant knowledge; (ii) researched and filed a detailed Consolidated Class Action Complaint ("Complaint"); (iii) vigorously opposed Defendants' motions to dismiss; (iv) successfully appealed the Court's order granting Defendants' motions to dismiss to the Second Circuit; (v) completed extensive fact and expert discovery; (vi) successfully obtained an order directing the deposition of, and document production from, the Company's controlling shareholder; (vii) secured a permissive adverse-inference regarding deletion of emails; (viii) successfully certified a Class over Defendants' determined opposition; (ix) successfully opposed Defendants' motion for summary judgment on all elements; (x) filed a motion for summary judgment which was partially granted by the Court; (xi) engaged in lengthy settlement negotiations with the assistance of a former federal district court judge and nationally-recognized mediator; and (xii) began trial preparation, including the filing of a motion *in limine* and a *Daubert* motion with the Court and work on a Joint Pretrial

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[2] The Court is respectfully referred to the accompanying Johnson Declaration for a full discussion of the factual background and procedural history of the Action, the extensive litigation efforts of Class Counsel, the risks and obstacles faced if litigation continued, a discussion of the negotiations leading to the Settlement, and the reasons why the Settlement and Plan of Allocation are fair, reasonable, and adequate and should be approved by the Court.

All exhibits referenced herein are annexed to the Johnson Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference refers to the designation of the entire exhibit attached to the Johnson Declaration and the second reference refers to the exhibit designation within the exhibit itself.

Order. As a result of Class Counsel's extensive efforts in the prosecution of this Action, the Settlement was reached at a time when the Parties fully understood the strengths and weaknesses of their respective positions.

Class Counsel, who is well-respected and experienced in prosecuting securities class actions, believe that the Settlement - which recovers a significant portion of the Class's estimated damages - represents an excellent result for the Class, particularly when compared to the risks that continued litigation might result in a vastly smaller recovery, or no recovery at all. This conclusion is based on, among other things, the substantial and certain recovery obtained for the Class when weighed against the significant risk, expense, and delay presented in continuing the litigation through trial, probable post-trial motions and appeals; a detailed analysis of the evidence obtained to date and the strengths and weaknesses of the factual and legal issues presented; the serious disputes between the Parties concerning the merits and damages; and Class Counsel's vast experience in litigating complex securities class actions. Importantly, Class Representatives, sophisticated institutional investors who were actively involved in the Action, fully support the Settlement. *See* Declaration of Jesse Evans, Jr. in Support of Final Approval of Settlement and Other Relief (Ex. 8) and Declaration of Hugh Laird in Support of Final Approval of Settlement and Other Relief (Ex. 9).

For all the reasons discussed herein and in the Johnson Declaration, it is respectfully submitted that the Settlement is not only fair, reasonable and adequate, but is an excellent result for the Class that should be approved by the Court. Likewise, the Plan of Allocation, which was developed with the assistance of Class Representatives' damages expert, provides a fair and equitable method for distribution among eligible Class Members and should also be approved by the Court.

THE NOTICE PROGRAM SATISFIED RULE 23 AND DUE PROCESS

In accordance with the Preliminary Approval Order, to date 60,047 copies of the Notice of Pendency of Class Action, Proposed Settlement, and Motion for Attorneys' Fees and Expenses (the "Notice") have been mailed to potential Class Members and their nominees. *See* Affidavit Regarding (A) Mailing of the Notice and Proof of Claim form; (B) Publication of Summary Notice; (C) Website and Telephone Helpline; and (D) Report on Requests for Exclusions Received to Date, ¶¶ 2-6, Ex. 4. The Summary Notice was also published in *The Wall Street Journal* and disseminated over the *PR Newswire* on June 1, 2015. *Id.* ¶ 7. The Notice, the Proof of Claim form, the Stipulation and its Exhibits, and the Preliminary Approval Order were also posted on a case-specific website identified in the Notice, and Class Counsel has made relevant documents concerning the Settlement available on its firm website. *Id.* ¶ 8; Johnson Decl. ¶ 119.

The Notice contains a detailed description of the nature and procedural history of the Action, as well as the material terms of the Settlement, including, *inter alia*: (i) the recovery under the Settlement; (ii) the manner in which the Net Settlement Fund will be allocated among eligible Class Members; (iii) a description of the claims that will be released in the Settlement; (iv) the right and mechanism for Class Members to exclude themselves; and (v) the right and mechanism for Class Members to object to the Settlement, the Plan of Allocation, and/or the Fee and Expense Application.

Accordingly, the Notice program fully satisfied Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Notice also satisfied the specific requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and Rule 23(e)(1), which requires that notice must be provided in a "reasonable

manner"—*i.e.*, it must "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

Although the deadlines to object or seek exclusion are not until July 7, 2015, to date no objections to the Settlement have been received, there have been no objections to the proposed Plan of Allocation, and the Claims Administrator has received only one invalid request for exclusion from the Class.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Standards for Evaluating Class Action Settlements

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

While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a number of courts have observed a general policy in favor of settling class actions. *See Aponte v. Comprehensive Health Mgmt.*, No. 10 Civ. 4825 (JLC), 2013 WL 1364147, at *2 (S.D.N.Y. Apr. 2, 2013) (noting that "[c]ourts examine procedural and substantive fairness in light of the 'strong judicial policy in favor of settlement[]' of class action suits" and collecting cases) (citation omitted); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("[T]here is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.") (citation omitted).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974); *see also In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) (in evaluating a settlement, "a court neither substitutes its judgment for that of the parties who negotiated the settlement nor conducts a mini-trial of the merits of the action") (citation omitted).

In addition to the presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors that courts should consider in deciding the substantive fairness of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

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

B. The Settlement Is Procedurally Fair

A presumption of fairness attaches to the proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See Shapiro v. JP Morgan Chase & Co*., No. Civ. 11-8831 (MHD), 2014 WL 2224666, at *7 (S.D.N.Y. Mar. 24, 2014). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted); *see also Wachovia Equity Sec. Litig.*, 2012 WL 2774969, at *3.

This presumption of fairness applies in this case because the Settlement was reached only after extensive arm's-length settlement negotiations by a highly experienced, fully-informed counsel with the assistance of an experienced mediator, the Honorable Layn R. Phillips (Ret.), one of the premier mediators in complex, multi-party, high-stakes litigation. *See In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) (noting the procedural fairness of settlement mediated by Judge Phillips); *In re Am. Int'l Grp., Inc. Sec. Litig*., 293 F.R.D. 459, 465 (S.D.N.Y. 2013) (noting the procedural fairness of settlement reached through a mediation session before Judge Phillips); *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig*., 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding procedural fairness of settlement that was mediated by Judge Phillips and describing Judge Phillips as "an experienced and well-regarded mediator of complex securities cases"); *see also In re Delphi Corp. Sec. Derivative & "ERISA" Litig*., 248 F.R.D. 483, 498 (E.D. Mich. 2008) (speaking of Judge Phillips, "the Court and the parties have had the added benefit of the insight and considerable talents of a former federal judge who is one of the most prominent and highly skilled mediators of complex actions").

Moreover, the recommendation of Class Representatives, each a sophisticated institutional investor that manages millions in retirement fund assets, also supports the fairness of the Settlement. Class Representatives took an active role in all aspects of this Action, as envisioned by the PSLRA, including extensive efforts in discovery and participation in settlement negotiations. *See generally* Exs. 8 and 9. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165(CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (citation omitted). "'Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.'" *Id*. (citation omitted).

Class Counsel, who has extensive experience prosecuting complex securities class actions and is intimately familiar with the facts of this case, believes that the Settlement is not only fair, reasonable, and adequate, but is an excellent result for Class Representatives and the Class. This opinion is entitled to "great weight." *City of Providence v. Aeropostale Inc. et al.,* No. 11 Civ. 7132, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014), *aff'd*, *Arbuthnot v. Pierson*, No. 14-2135, slip op. (2d Cir. June 10, 2015).

Each of these considerations confirm the reasonableness of the Settlement and that the Settlement is entitled to the presumption of procedural fairness.

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

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

"This factor captures the probable costs, in both time and money, of continued litigation." *Shapiro*, 2014 WL 1224666, at *8. Securities class actions like this one are by their nature complicated, and district courts in this Circuit have long recognized that "[a]s a general rule,

securities class actions are 'notably difficult and notoriously uncertain' to litigate." *Bear Stearns,* 909 F. Supp. 2d at 266; *see also In re Alloy, Inc., Sec. Litig.*, No. 03 Civ. 1597 (WHP), 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (approving settlement, noting action involved complex securities fraud issues "that were likely to be litigated aggressively, at substantial expense to all parties"); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02 Civ. 5575, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006) (due to their "notorious complexity," securities class actions often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials"). This case is no exception.

Class Representatives' claims raise numerous technical factual issues concerning complex inventory accounting rules, restructuring practices, and internal controls as well as complicated legal issues concerning falsity, scienter, and loss causation, among other things, each of which would require extensive percipient and expert testimony at trial.

Absent this Settlement, the Action would have proceeded to trial at considerable additional expense and investment of time, with no guarantee of success. While the Parties have completed class, fact, and expert discovery, and a trial date was just two months away, additional "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable." *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 117 (S.D.N.Y. 2009) (citation omitted). The expense and time of continued litigation would have been substantial. Trial preparation, on which Class Representatives were working on at the time of settlement, would have been extensive and the trial would likely last at least several weeks, if not months, and even if successful, post-trial motions and appeals would certainly follow. The post-trial motions and appeals process would have likely spanned years, during which time the Class would have received no distribution of any damage award. In addition, an appeal of any verdict

would carry the risk of reversal, in which case the Class would receive no recovery at all, even after having prevailed on the claims at trial. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery."). Furthermore, even winning at trial does not guarantee a recovery to the Class, because there is always a risk that the verdict could be reversed by the trial court or on appeal. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *cf. In re Apollo Grp., Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 WL 5927988 (9th Cir. June 23, 2010) (trial court overturned unanimous verdict for plaintiffs, later reinstated by the Ninth Circuit Court of Appeals, and judgment re-entered after denial of *certiorari* by the U.S. Supreme Court).

Thus, this factor weighs heavily in favor of approval of the Settlement.

2. The Reaction of the Class to the Settlement

One court has noted that the reaction of a class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *Veeco Instruments,* 2007 WL 4115809, at *7. "[T]he absence of objectants may itself be taken as evidencing the fairness of a settlement." *In re PaineWebber Ltd. P'ship Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (citation omitted); *see also In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 311-12 (E.D.N.Y. 2006). As discussed above, while the deadline of July 7, 2015 for Class Members to object or seek exclusion has not passed, here, in response to an

extensive Court-approved notice program, in which more than 60,000 Notices have been mailed to potential Class Members and their nominees, to date, not a single Class Member has objected to the Settlement and only one invalid request for exclusion from the Class has been received. *See* Ex. 4 ¶ 11.[3]

3. The Stage of the Proceedings and the Amount of Discovery Completed

In considering this factor, "'the question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.'" *Bear Stearns,* 909 F. Supp. 2d at 267 (quoting *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012)); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013) ("The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'") (citations omitted).

Given that the Parties agreed to settle the Action just two months before trial, there can be no dispute about whether Class Representatives and Class Counsel had an adequate appreciation of the merits of the claims and defenses before settling. This Action has been hotly contested from its inception, eight years ago, combing its way through most of the litigation process stopping short of the April 20, 2015 trial date. As a result, Class Representatives' and Class Counsel's knowledge of the strengths and weaknesses of the claims alleged and the stage of the proceedings are unquestionably adequate to support the Settlement. As discussed above and in more detail in the Johnson Declaration, this knowledge is based on, among other things,

[3] If any objections or additional requests for exclusion are received, Class Representatives will respond in their reply papers due on July 21, 2015.

the Parties' completion of extensive class, fact, and expert discovery as well as the briefing and orders on class certification and the Parties' summary judgment motions.

Class Counsel's investigation and discovery with respect to both liability and damages issues and legal analyses all enabled Class Representatives and Class Counsel to thoroughly understand and evaluate the strengths and weaknesses of the claims asserted, and accordingly to allow them to engage in effective settlement discussions with Defendants. Therefore, this Court should find that this factor also supports approval of the Settlement.

4. The Risk of Establishing Liability

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. As this case amply demonstrates, securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See AOL Time Warner*, 2006 WL 903236, at *11 (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *Alloy, Inc. Sec. Litig.*, 2004 WL 2750089, at *1 (finding that issues present in securities action presented significant hurdles to proving liability).

Class Representatives' case centered on allegations that Defendants made false and misleading statements concerning the success of Celestica's operational restructuring; the adequacy of Celestica's internal financial and reporting controls; and the accuracy of Celestica's inventory levels. The principle claims in the Action are based on §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. "To establish a §10(b) claim, a plaintiff must prove: (1) the defendant made a material misrepresentation or omission; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp. PLC*, 783 F.3d 383, 389 (2d Cir. 2015) (citing *Stoneridge Inv. Partners,*

LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 157 (2008)). Further litigation to establish both liability and damages posed a significant threat to any recovery for the Class.

While Class Representatives believe that they would be successful at trial and that the allegations of the Complaint would ultimately be borne out by the evidence, they also recognize that they faced significant hurdles to proving liability. There is no question that Class Representatives would have confronted a number of challenges in establishing liability at trial, considering the highly fact-intensive nature of the alleged fraud at issue and the vigorous opposition by Defendants to all elements of liability. Indeed, Defendants' arguments in motions and settlement negotiations made it clear that the Parties held, in many cases, polar opposite views of the factual and legal issues presented, many of which would have been the subject of expert testimony.

For example, Defendants would argue at trial that the majority of the alleged false statements are inactionable puffery or forward-looking statements and would point the jury to "cautionary language" in Celestica's public statements that warned of, *inter alia,* additional restructuring charges, that a failure to execute the restructuring could impact financial results, and that large customers might terminate or reduce their business. *See* Johnson Decl. ¶ 90. The Court's comments in its summary judgment opinion that "some of Defendant's statements were arguably forward-looking or mere puffery" indicated that a jury could agree with Defendants and find no liability with respect to those statements. ECF No. 222 at 18 n. 2; Johnson Decl. ¶ 91.

Defendants would also continue to assert that liability was unwarranted because Class Representatives' claims of an accounting fraud were not supported by any accounting irregularities and the Company did not restate its financials or otherwise admit to any accounting errors. *See* Johnson Decl. ¶ 95. The accounting manipulations alleged are complex and Class

Representatives would have to prove that Defendants recklessly violated GAAP. Because GAAP is not '"a canonical set of rules that will ensure identical accounting treatment of identical transactions by all accountants,'" the determinations of many of the accounting issues would be subject to expert testimony. *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 396 F. Supp. 2d 1178, 1186 (D. Colo. 2004) (citation omitted). "Indeed, GAAP generally tolerates a range of reasonable treatments, leaving the choice among reasonable treatments to management." *Id.*

Class Representatives also faced a significant challenge in proving that Defendants acted with scienter as proving a defendant's state of mind is difficult in any circumstances. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008) ("Proving a defendant's state of mind is hard in any circumstances."). Here, Defendants would argue, among other things, that the evidence shows that the Individual Defendants worked hard to manage and correct the operational problems and believed that they would be overcome and therefore the statements being made to the public were true. Defendants would also likely argue at trial that the lack of insider trading and the fact that none of the Individual Defendants stood to personally profit from the alleged fraud would negate any inference of fraud. *See* Johnson Decl. ¶ 101. Moreover, although the Court found in its August 20, 2014 Memorandum Decision and Order that there was a genuine issue of material fact as to Defendant's scienter, the Court also noted that the fact intensive nature to prove scienter is inappropriate for disposition on a motion for summary judgment. *See* ECF No. 222 at 16-17; Johnson Decl. ¶ 104.

Here, there was a real risk that the jury might find that Defendants ***at most*** acted negligently, but their conduct did not rise to the level needed to prove the requisite state of mind. Establishing a defendant's state of mind is a fact intensive inquiry and it is therefore impossible to predict how a jury would have found on this issue.

Although Class Representatives were confident that they would have been able to support their claims with persuasive testimony and documentary evidence, jury reactions to such testimony are inherently difficult to predict. Defendants would have presented counter-evidence, including expert testimony as well as different interpretations of the evidence offered by Class Representatives to support their various defenses to liability. Continued litigation involved substantial risks in proving Defendants' liability and a finding in favor of the Class by the jury was never assured. Defendants had potentially valid defenses to Class Representatives' claims that posed significant risks to the Class' recovery.[4] Therefore, this Court should find that this factor also supports approval of the Settlement.

5. The Risks of Establishing Loss Causation and Damages

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

Relying on their expert, Defendants would have argued to the jury that the disclosures made on January 27, 2006, October 27, 2006, and January 31, 2007, that Class Representatives alleged caused at least part of the Class' losses, were wholly unrelated to the alleged fraud and that the unrelated information caused the alleged price declines. *See* Johnson Decl. ¶ 107. The

[4] The Court is respectfully referred to paragraphs 89 to 105 of the Johnson Declaration for a more detailed discussion of the risks faced by Class Representatives in establishing liability.

United States Supreme Court's decision in *Dura*, and subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than in the past.[5]

The amount of damages incurred by Class Members would also be hotly-contested at trial. Expert testimony rests on many subjective assumptions that a jury could reject as speculative or unreliable. Here, the Parties' respective damages experts strongly disagreed with each other's assumptions and their respective methodologies, including the method of disaggregating potentially confounding news from the alleged fraud-related cause of the stock drops. *See* Johnson Decl. ¶¶ 107-09. Therefore, the risk that the jury would credit Defendants' damages position over that of Class Representatives had considerable consequences in terms of the amount of recovery for the Class, even assuming liability was proven. The reaction of a jury to battling expert testimony is highly unpredictable. Class Counsel recognize the possibility that a jury could be swayed by convincing testimony from Defendants' expert, and find little or no damages. *See, e.g.*, *Veeco Instruments,* 2007 WL 4115809, at *10 ("The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.").[6]

[5] *See, e.g., In re Apollo Grp., Inc. Sec. Litig.,* 2008 WL 3072731 (on a motion for judgment as a matter of law, overturned a jury verdict in favor of shareholders based on insufficient evidence presented at trial to establish loss causation); *Phillips v. Scientific-Atlanta, Inc.*, 489 Fed. App'x. 339 (11th Cir. 2012) (upholding summary judgment in favor of defendants on loss causation grounds in a case litigated since 2001); *In re BankAtlantic Bancorp, Sec. Litig.*, No. 07-61542-CIV-UNGARD, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (court granted defendants' judgment as a matter of law on the basis of loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd*, 688 F.3d 713 (11th Cir. 2012); *Robbins,* 116 F.3d at 1441 (finding no loss causation and overturning $81 million jury verdict).

[6] The Court is respectfully referred to paragraphs 106 to 109 of the Johnson Declaration for a more detailed discussion of the risks faced by Class Representatives in establishing loss causation and damages.

Accordingly, in the absence of a settlement, there was a very real risk that the Class would have recovered an amount significantly less than the total Settlement Amount – or even nothing at all. Thus, the substantial and certain payment of $30,000,000.00 by Defendants, particularly when viewed in the context of the risks and the uncertainties involved in this Action, clearly weighs heavily in favor of approving the Settlement.

6. The Risks of Maintaining the Class Action Through Trial

Although the Court certified the Class on August 20, 2014, certification can be reviewed and modified at any time by the Court before final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies certification may be altered or amended before final judgment."); *see also Annunziato v. Collecto, Inc*., 293 F.R.D. 329, 341 (E.D.N.Y. 2013) ("[u]nder rule 23, district courts have the power to amend class definitions or decertify classes as necessary") (citation omitted). There was also a risk that the jury could be persuaded by Defendants' arguments that the Class Period should be shorter, which could have drastically decreased damages. *See* Johnson Decl. ¶ 110. The Settlement avoids any uncertainty with respect to these issues.

7. Ability to Withstand a Greater Judgment

The ability of a defendant to pay a judgment greater than the amount offered in settlement is relevant to whether the settlement is fair. *Grinnell*, 495 F.2d at 463. However, even if defendants could withstand a greater judgment, "this factor, standing alone, does not suggest the settlement is unfair," especially where, as here, the "other Grinnell factors weigh heavily in favor of settlement." *D'Amato*, 236 F.3d at 86; *see also Cavalieri v. General Elec. Co*., No. 06-315, 2009 WL 2426001, at *2 (N.D.N.Y. Aug. 6, 2009) ("The court also notes that although neither party contends that defendants are incapable of withstanding greater judgment, that does not 'indicate that the settlement is unreasonable or inadequate.'"); *In re Sony SXRD*

Rear Projection TV Class Action Litig., No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008) ("a defendant is not required to 'empty its coffers' before a settlement can be found adequate").

While it is unclear whether Defendants are capable of withstanding a greater judgment, as a practical matter the prospects of recovering a substantially greater sum would have been offset by the inevitable post-trial motions and appeals Defendants would likely pursue following any judgment. Additionally, settlement eliminates the risk of collection. Defendants have paid the $30,000,000 into an escrow account pursuant to the Stipulation, which is already earning interest for the Class. *See Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811(MGC), 2010 WL 476009, at *5 (S.D.N.Y. Jan. 6, 2010) (approving settlement and noting that "[t]he settlement eliminated the risk of collection by requiring Defendants to pay the Fund into escrow").

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

The last two substantive factors courts within the Second Circuit consider are the range of reasonableness of a settlement in light of (i) the best possible recovery and (ii) litigation risks. *Grinnell*, 495 F.2d at 463. In analyzing these last two factors, the issue for the Court is not whether the Settlement represents the best possible recovery, but how the Settlement relates to the strengths and weaknesses of the case. The court "'consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.'" *Id*. at 462 (citations omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum[.]" *PaineWebber*, 171 F.R.D. at 130 (quotation marks and citations omitted). Instead, "in any case there is a range of reasonableness with respect to a settlement[.]" *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also*

Global Crossing, 225 F.R.D. at 461 (noting that "the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery"); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689 (SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) (noting few cases tried before a jury result in full amount of damages claimed).

Here, according to analyses prepared by Class Representatives' damages expert, the Settlement represents a recovery of approximately 11% to 24% of the estimated damages of between approximately $125 million to $272 million, under a best case scenario where a jury credited all of Class Representatives' loss causation evidence. *See* Johnson Decl. ¶ 5. This recovery falls well within the range of reasonableness. *See, e.g.*, *In re Merrill Lynch & Co. Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (court approved $40.3 million settlement representing approximately 6.25% of estimated damages and noting that this is at the "higher end of the range of reasonableness of recovery in class actions securities litigation"); *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2004 WL 2397190, at *8 (S.D.N.Y. Oct. 26, 2004) ($96 million settlement fund reflecting "ten to twenty percent" of estimated damages "sits comfortably within the range of reasonableness"); *In re Gilat Satellite Networks, Ltd.*, No. CV 02-1510 (CPS), 2007 WL 2743675, at *12 (E.D.N.Y. Sept. 18, 2007) (approving $20 million settlement representing 10% of maximum damages).

Considering the risk that the Class might not have been able to prove liability at trial, and the possibility that damages awarded by a jury could have been significantly lower than those demanded by the Class (or none at all), the Settlement is an excellent recovery. *See Indep. Energy*, 2003 WL 22244676, at *4 (noting few cases tried before a jury result in full amount of

damages claimed); *In re Citigroup Inc. Sec., Litig.*, 07 Civ. 9901, 2013 WL 3942951, at *11 (S.D.N.Y. Aug. 1, 2013) (noting that "the risk that the class would recover nothing or would recover a fraction of the maximum possible recovery must factor into the decision-making calculus").

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

If the Court approves the proposed Settlement, upon completion of the claims filing process, the Net Settlement Fund will be distributed to Class Members according to the Plan of Allocation set forth in the Notice. "[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133; *Luxottica Grp.*, 233 F.R.D. at 316-17. As with the Settlement, the opinion of experienced and informed counsel carries considerable weight. *Indep. Energy*, 2003 WL 22244676, at *5. "When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.'" *Global Crossing*, 225 F.R.D. at 462; *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001).

The Plan of Allocation, which was fully described in the Notice, was prepared with the assistance of one Class Representatives' damages expert, Mr. Coffman, and provides for the distribution of the Net Settlement Fund among Authorized Claimants based upon each Class Member's "Recognized Loss," as calculated by the formulas described in the Notice. In developing the Plan of Allocation, Mr. Coffman considered the amount of artificial inflation present in Celestica's common stock throughout the Class Period that was purportedly caused by the alleged fraud. This analysis entailed studying the price declines associated with Celestica's allegedly corrective disclosures, adjusted to eliminate the effects attributable to general market or industry conditions. In this respect, an inflation table was created as part of the Plan. The table

will be utilized in calculating Recognized Loss Amounts for Authorized Claimants. *See* Johnson Decl. ¶¶ 122-23.

GCG, as the Court-approved Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's total Recognized Loss compared to the aggregate Recognized Losses of all Authorized Claimants, as calculated in accordance with the Plan of Allocation. The calculation will depend upon several factors, including when the Authorized Claimant's common stock was purchased, whether the stock was sold during the Class Period, and, if so, when. *Id*. ¶ 124.[7]

Accordingly, the proposed Plan of Allocation is designed to fairly and rationally allocate the proceeds of this Settlement among the Class. Notably, no Member of the Settlement Classes has objected to the Plan of Allocation to date. Accordingly, Class Counsel respectfully requests that this Court approve the Plan of Allocation.

[7] Class Representatives' reply papers will address the questions raised by the Court at the preliminary approval hearing concerning the type of claimants to the Settlement and their potential recoveries, to the extent possible based on the claims data received at that point in time.

CONCLUSION

The Settlement reached in this Action is an excellent result that provides an immediate substantial and certain benefit for the Class. For the reasons set forth herein and in the Johnson Declaration, Class Representatives and Class Counsel respectfully submit that the Settlement and Plan of Allocation are fair, reasonable, and adequate, and request the Court grant final approval of the Settlement and Plan of Allocation.[8]

DATED: June 23, 2015

Respectfully submitted,

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Of Counsel for the Class

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

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2015, I caused the foregoing Memorandum of Law in Support of Class Representatives' for Final Approval of Proposed Class Action Settlement and Plan of Allocation to be served electronically on all ECF participants.

s/ James W. Johnson
James W. Johnson