AlaFile E-Notice

01-CV-2003-006630.00

Judge: PAT BALLARD

To: SOMERVILLE JOHN QUINCEY
jqs@somervillellc.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JOHN LAURIELLO VS CAREMARK RX LLC
01-CV-2003-006630.00

The following matter was FILED on 7/29/2016 12:34:23 PM

C004 CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM

C002 FINNEY JAMES O. JR.

C003 JOHNSON SAM

BRIEF IN SUPPORT OF MOTION

[Filer: POWELL SCOTT ASHLEY]

Notice Date: 7/29/2016 12:34:23 PM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL 35203

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STATE OF ALABAMA
Unified Judicial System

Revised 3/5/08

01-JEFFERSON ☐ **District Court** ☑ **Circuit Court**

Case CV20

JOHN LAURIELLO VS CAREMARK RX LLC

CIVIL MOTION COVER SHEET

Name of Filing Party: C002 - FINNEY JAMES O. JR.
C003 - JOHNSON SAM
C004 - CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

SCOTT A. POWELL ESQ.

2025 3RD AVENUE NORTH, SUITE 800
BIRMINGHAM, AL 35203

Attorney Bar No.: POW005

☐ Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

- ☐ Default Judgment ($50.00)
- ☐ Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Judgment on the Pleadings ($50.00)
- ☐ Motion to Dismiss, or in the Alternative Summary Judgment($50.00)
- ☐ Renewed Dispositive Motion(Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Summary Judgment pursuant to Rule 56($50.00)
- ☐ Motion to Intervene ($297.00)
- ☑ Other _____

pursuant to Rule ($50.00)

_____

*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

☐ Local Court Costs $ 0.00

Motions Not Requiring Fee

- ☐ Add Party
- ☐ Amend
- ☐ Change of Venue/Transfer
- ☐ Compel
- ☐ Consolidation
- ☐ Continue
- ☐ Deposition
- ☐ Designate a Mediator
- ☐ Judgment as a Matter of Law (during Trial)
- ☐ Disburse Funds
- ☐ Extension of Time
- ☐ In Limine
- ☐ Joinder
- ☐ More Definite Statement
- ☐ Motion to Dismiss pursuant to Rule 12(b)
- ☐ New Trial
- ☐ Objection of Exemptions Claimed
- ☐ Pendente Lite
- ☐ Plaintiff's Motion to Dismiss
- ☐ Preliminary Injunction
- ☐ Protective Order
- ☐ Quash
- ☐ Release from Stay of Execution
- ☐ Sanctions
- ☐ Sever
- ☐ Special Practice in Alabama
- ☐ Stay
- ☐ Strike
- ☐ Supplement to Pending Motion
- ☐ Vacate or Modify
- ☐ Withdraw
- ☑ Other Brief in Support of Motion

pursuant to Rule . (Subject to Filing Fee)

Check here if you have filed or are filing contemoraneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees) ☐

Date: 7/29/2016 12:32:53 PM

Signature of Attorney or Party: /s/ SCOTT A. POWELL ESQ.

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

ELECTRONICALLY FILED
7/29/2016 12:33 PM
01-CV-2003-006630.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CASE NO. CV-2003-006630-PJB

SAM JOHNSON and CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM, for themselves, individually, and on behalf of a class of all others who are similarly situated,

Plaintiffs,

v.

CAREMARK Rx, L.L.C.; AMERICAN INTERNATIONAL GROUP, INC.; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; AIG TECHNICAL SERVICES, INC.; And AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Defendants.

THE PLAINTIFF CLASS'S MEMORANDUM BRIEF IN SUPPORT OF THE PLAINTIFFS CLASS'S MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

Comes now the Plaintiff Class, pursuant to Rule 23(e) of the Alabama Rules of Civil Procedure, and seeks final Court approval of the class action Settlement contained in the parties' Stipulation and Agreement of Settlement of May 27, 2016,[1] to include, *inter alia*, the specific approvals of: (i) the fairness of the proposed settlement amount of $310 million to all class members, including minors and incompetents, if any; (ii) the fairness of the proposed Plan of Allocation; (iii) the due process fairness of the forms of notice and methods of transmitting the notices; and (iv) the proposed choice of Computershare Trust Company, N.A., as Escrow Agent, and Gilardi & Co., LLC, as Claims Administrator, and the proposed plans for escrow and claims administration.

In support of its Motion, the Plaintiff Class states as follows:

I. LIST OF EXHIBITS REFERENCED HEREIN

The Plaintiff Class specifically incorporates all of the exhibits filed in the contemporaneously-filed "Evidentiary Submissions in Support of The Plaintiff Class's Motion for Final Approval of Proposed Class Action Settlement and Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs," which includes the following:

EXHIBIT 1: Declaration of Professor William B. Rubenstein

EXHIBIT 2: Declaration of Professor Arthur R. Miller

EXHIBIT 3: Declaration of Judge U. W. Clemon

EXHIBIT 4: Joint Affidavit of Class Counsel Scott A. Powell, J. Timothy Francis, and John Q. Somerville

EXHIBIT 5: Affidavit of Class Representative Sam Johnson

[1] The Stipulation is Exhibit 1 to the May 28, 2016, Plaintiff Class's Motion for Preliminary Approval of Proposed Class Action Settlement, Doc 3269.

EXHIBIT 6: Affidavit of James Love on behalf of Class Representative Birmingham Retirement and Relief Fund

EXHIBIT 7: Affidavit of former Named Plaintiff and Class Representative John Lauriello

EXHIBIT 8: Declaration of Ross Murray for Claims Administrator Gilardi & Co.

EXHIBIT 9: Transcript of May 31, 2016, Preliminary Approval Hearing

EXHIBIT 10: Lead Counsel Agreement of February 25, 2009

EXHIBIT 11: Objection from Steven M. Sobel

EXHIBIT 12: Objection from Georgia Urology

EXHIBIT 13: Objection from Clete Walker

EXHIBIT 14: Composite Exhibit of Items Relating to Clete Walker

II. SHORT SUMMARY OF RELEVANT PROCEDURAL HISTORY

By order dated August 15, 2012, this Court certified a Class consisting of:

> All persons who (i) purchased MedPartners, Inc. ("MedPartners"), common stock [including, but not limited to, through open market transactions, mergers or acquisitions in which MedPartners issued common stock, acquisition through the Company's Employee Stock Purchase Plan ("ESPP"), and any other type of transaction in which a person acquired one or more shares of MedPartners stock which a person acquired one or more shares of MedPartners stock in return for consideration] during the period from October 30, 1996, through January 7, 1998, inclusive (MedPartners employees who purchased shares through the ESPP in January 1998 being deemed to have purchased their shares on December 31, 1997); (ii) purchased call option contracts on MedPartners common stock during the period October 30, 1996, through January 7, 1998, inclusive; (iii) sold put option contracts on MedPartners common stock during the period October 30, 1996, through January 7, 1998, inclusive; or (iv) purchased MedPartners Threshold Appreciation Price Securities ("TAPS") in the September 15, 1997, offering or thereafter through January 7, 1998; or (v) tendered shares of Talbert Medical Management Holdings Corporation to MedPartners between August 20, 1997, and September 19, 1997 ("The Settlement Class"); excluding all those members who opted out of the 1999 Class Settlement [and also those who opted out of this Class in response to the May 2015 Notice].

By that same order, this Court appointed James O. Finney, Jr., Sam Johnson, and City of Birmingham Retirement and Relief System as representatives of the above certified class. James O. Finney, Jr., died on April 15, 2015. John Lauriello served as a putative class representative from the initial filing of the complaint in 2003 until June 12, 2009. Mr. Lauriello, however, remained a member of the Class thereafter and sat for deposition on October 12, 2011. The Court also appointed the following firms as class counsel: Hare, Wynn, Newell & Newton, LLP; James L. North & Associates; and Somerville, LLC. By Order dated May 7, 2015, the law firm of Francis Law, LLC, was substituted as co-class counsel in place of James L. North & Associates. Lanny S. Vines is the attorney for the former intervenor.

Pursuant to this Court's order of May 5, 2015, Notice of Class Action (the "2015 Notice") was mailed to 93,722 potential class members on or about May 14, 2015. (See the Declaration of Michael Joaquin, filed on October 9, 2015, Document 1731.) In addition, the 2015 Notice was sent to 251 brokerages, custodial banks, and other institutions which hold securities in street name for their customers who are beneficial owners of the securities. Upon notification by such institutions, 5,323 additional Notices were mailed directly to putative class members and 709 Notices were provided to institutions for forwarding to their beneficial owners. The 2015 Notice was also published in the Wall Street Journal on May 14, 2015. Only four class members submitted opt out forms. *Id*.

On May 27, 2016, the Plaintiff Class and the Defendants, Caremark Rx, L.L.C. ("Caremark"); American International Group, Inc.; National Union Fire Insurance Company of Pittsburgh, P A.; AIG Technical Services, Inc.; and American International Specialty Lines Insurance Company (hereinafter collectively referred to as "AIG") reached a settlement whereby,

among other things, Defendant AIG agreed to pay the amount of $230,000,000 and Defendant Caremark agreed to pay the amount of $80,000,000 in settlement of all claims raised in this litigation. See Stipulation and Agreement of Settlement (the "Stipulation," Exhibit 1 to the May 28, 2016, Plaintiff Class's Motion for Preliminary Approval of Proposed Class Action Settlement). In the Stipulation and in the notices to the class members, class counsel stated their intention to request attorneys' fees, reimbursement of expenses, and class representative service awards to each of Sam Johnson, the City of Birmingham Retirement and Relief System, and John Lauriello, all to be paid from the Settlement Fund. Expenses of notice and claims administration will also be paid from the Settlement Fund. After deduction of attorneys' fees, litigation expenses, class member service awards, and claims administration expenses, the remainder, i.e., "the Net Settlement Fund," will be paid to class members filing approved claims.

On June 1, 2016, this Court rendered and entered its Order Preliminarily Approving Settlement and Providing for Notices to the Class. Pursuant to that Order, Gilardi and Co. mailed the Court-approved settlement notices to over 94,000 addresses. The short-form notice was also published in the Wall Street Journal on June 17, 2016, at page C7. The website www.aig-caremarkclassaction.com was set up to provide additional information about the settlement to class members, and to provide the opportunity for filing claims online. The claims administrator, Gilardi & Co., has to date received approximately 1026 claims (approximately 529 of that total are "Form A" claims filed by class members who filed approved claims in the 1999 settlement). The deadline for objections expired on July 22, 2016. Gilardi & Co. received two written-only objections. One other objection and notice of intent to appear was filed with the Court, and Gilardi was copied.

III. STANDARDS FOR FINAL COURT APPROVAL

A class action may be settled, voluntarily dismissed, or compromised only with court approval. Ala. R. Civ. P. 23(e). Judicial policy favors voluntary settlement as the means of resolving class-action cases; however, the court has an independent duty to ensure that the settlement is fair, adequate, and reasonable. *Austin v. Hopper*, 28 F.Supp.2d 1231 (M.D. Ala. l998). Courts review a proposed class action settlement for fairness, reasonableness, and adequacy. Ala. R. Civ .P. 23; *Perdue v. Green*, 127 So. 3d 343, 356 (Ala. 2012). Factors for courts to consider in deciding whether a class action settlement is fair, reasonable, and adequate include: (1) likelihood of success at trial; (2) range of possible recovery; (3) range of possible recovery at which settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) opposition to settlement; and (6) stage of proceedings at which settlement was achieved. See *Faught v. American Home Shield Corp*., 668 F.3d 1233 (11th Cir. 2011). Othni Lathram and Anil A. Mujumdar, Alabama Civil Procedure § 5.83, pp. 5-160~61 (2015 ed.), points out that these and similar factors were adopted by the Alabama Supreme Court in *Adams v. Robertson*, 676 So. 2d 1265, 1273 (Ala. 1995). See also the similar list of factors at 4 William B. Rubenstein, Newberg on Class Actions § 13:15, p. 322 (5th ed. 2014) (electronic database updated Dec. 2015).

IV. SUMMARY OF THE ARGUMENT

The history of this case, with which the Court is entirely familiar, is set forth in the Stipulation and is incorporated herein by reference. See also the joint affidavit of class counsel (Powell, Francis, and Somerville) and Professor William B. Rubenstein's declaration, Exhibits 4 and 1, respectively, to the contemporaneously-filed "Evidentiary Submissions in Support of The Plaintiff Class's Motion for Final Approval of Proposed Class Action Settlement and Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs."

Prior to agreeing to the settlement, class counsel conducted a thorough investigation into the facts of this case and diligently pursued an investigation of the allegations of plaintiffs and the class members against defendants. Class counsel also thoroughly analyzed the parties' legal positions, the applicable law, the Court's various legal rulings (that Defendants vowed to appeal following the jury trial), and the benefits to class members in receiving settlement proceeds at this time, rather than facing further trial court proceedings and (even if winning at trial) protracted appellate proceedings that could have lasted for years. Based on their own investigation and evaluation, class counsel have determined that the settlement with defendants for the consideration and on the terms set forth in the Stipulation is fair, reasonable, and adequate, and is in the best interest of the Class in light of all known facts and circumstances, including the defenses asserted by defendants, risk of significant delay, and numerous potential appellate issues. The Stipulation was reached after arms-length negotiations among the parties. Accordingly, class counsel respectively submit that the settlement complies with, and exceeds, the standards for final Court approval of a proposed class action settlement.

V. DETAILED EXAMINATION OF THE EIGHT *ADAMS* FACTORS

See American Bar Association Survey of State Class Action Law, Alabama § 6.c. (database updated Dec. 2015):

> Pursuant to Rule 23(e), there can be no settlement of a class action without the trial court's approval, and the burden is on the proponents of the settlement to show that it is "fair, adequate, and reasonable." *Adams v. Robertson*, 676 So. 2d 1265, 1272–73 (Ala. 1995). In determining whether to approve a settlement, a trial court may consider the following factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which the settlement is fair, adequate, and reasonable; (4) the complexity, expense, and duration of the litigation; (5) the substance and amount of opposition to the settlement; (6) the stage of the proceedings at which the settlement was achieved; (7) the financial ability of the defendant(s) to withstand a greater judgment and the potential for a judgment or judgments in an amount or amounts likely to trigger due process considerations relating to punitive damages; and (8) whether proper notice was given. *Id*. at 1273; see also *Perdue v. Green*, 127 So. 3d 343, 356 (Ala. 2013).

As shown below, all of these factors support a finding of the reasonableness and fairness of the proposed $310M settlement (except that (7) is irrelevant in this case).

1. The Likelihood of Success at Trial

Probability of success and the range of possible recovery are the most important factors in determining whether a settlement is reasonable. *Campos v. I.N.S.*, 1999 WL 1044233 (S.D. Fla. 1999).[2] In weighing this factor, the trial court does not have "the right or duty to reach any

[2] "The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured." *In re Polyurethane Foam Antitrust Litig*., No. 1:10 MD 2196, 2016 WL 320182, *6 (N.D. Ohio Jan. 27, 2016). "The 'most important factor relevant to the fairness of a class action settlement' is the first one listed: the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *In re Capital One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015).

ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Cotton v. Hinton*, 559 F. 2d 1326, 1330 (5th Cir. 1977). "The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, 'It has been held proper to take the bird in the hand instead of a prospective bird in the bush.'"[3] "A generally accepted principle is that unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." William B. Rubenstein, Newberg on Class Actions, Appendix VIII-D (4th ed.) (electronic database updated June 2016).

In evaluating the likelihood of success at trial, the Court should take into account the merits of the class members' claims, the defenses raised by the defendants, and the manageability of the trial, but "should not reach any ultimate conclusions with respect to issues of fact or law involved in the case." *Knight v. Alabama*, 469 F.Supp.2d 1016, 1033 (N.D. Ala. 2006). Instead, the Court should determine whether the risks faced by the parties and the difficulty of trial weigh in favor of approving the settlement. *Id*. Here, as shown below, the likelihood of success at trial for either party was undercut by the risk, difficulty, and expense of further litigation.

The final outcome of continued litigation in this case was highly uncertain. Both sides faced the risk of loss at trial. Given that defendants would appeal any plaintiff verdict and raise,

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[3] *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974). Many courts have applied this quote, including: *Fontes v. Heritage Operating, L.P.*, No. 14CV1413, 2016 WL 1465158, *3 (S.D. Cal. April 14, 2016); *Diakos v. HSS Sys., LLC,* No. CV 14-61784-CIV, 2016 WL 3702698, *3 (S.D. Fla. Feb. 5, 2016); *Faught v. Am. Home Shield Corp*., No. 2:07-CV-1928 -RDP, 2010 WL 10959223, *23 (N.D. Ala. April 27, 2010), aff'd, 668 F.3d 1233 (11th Cir. 2011).

inter alia, the affirmative defense of statute of limitations, which, if proven, would negate all liability - going to trial with this defense unresolved by an appellate court would have been essentially an all-or-nothing gamble for both parties on liability. The fact that settlement prevents further litigation of such issues is a benefit that weighs in favor of approving the settlement. See *Diaz v. Hilsborough County Hospital Authority*, 2000 WL 1682918, *3 (M.D. Fla. 2000) (approving settlement where continued litigation posed risk of defendant's successful assertion of qualified immunity defense).

In contrast, the Settlement Agreement is a win for both parties, ending defendants' potential greater monetary liability, while also ensuring that the Settlement Class will finish over 12 years of expensive litigation with an exceptionally high recovery - rather than a diminished, or nonexistent, damage award that could have been subject to further uncertainties on appeal. Had a jury returned a plaintiffs' verdict, the defendants had available to them myriad potential appellate issues, including many close-call evidentiary rulings of unique or near-unique characteristics.

Not only is every jury verdict outcome an uncertainty; but, in addition, a plaintiffs' verdict in this case would have been subject to many very serious appellate issues. "[V]ictory - even at the trial stage - is not a guarantee of ultimate success," given the risks and expense of appeal. *In re Michael Miliken & Assoc*., 150 F.R.D. 46, 53 (S.D. N.Y. 1993); *In re Am. Int'l Grp., Inc. Sec. Litig*., 916 F. Supp. 2d 454, 469 (S.D. N.Y. 2013) (same). If the Plaintiff Class were successful at trial, it still faced the certainty of an appeal on any number of difficult issues. With their unlimited financial resources, these defendants could well afford to post a supersedeas bond and finance a lengthy and expensive appeals process that would, at the very least, postpone any payment of damages for years, and might result in them paying no damages at

all. The fact that settlement allows both parties to avoid the risk and expense of appeals litigation is a significant factor in support of settlement approval.

In addition, the Settlement Agreement spares the parties the difficulties and risks that they would have faced in litigating the issue of damages - assuming the jury found liability. Courts have emphasized that, "[i]n class actions, the 'complexities of calculating damages increase geometrically.'" *Chatelain v. Prudential-Bache Securities, Inc*., 805 F.Supp. 209, 214 (S.D. N.Y. 1992); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 858 (E.D. Mo. 2005) (same). And, the "risk of proving damages [can] not be eliminated until after a successful trial and exhaustion of all appeals." *In Re General Instrument Securities Litigation,* 209 F.Supp.2d 423, 430 (E.D. Pa. 2001). Accordingly, courts routinely find that avoiding the difficulties of proving damages - particularly where the damages litigation will likely become "an expensive battle of the experts" - is a benefit to the parties that weighs in favor of approving a class settlement. *Id*; *In re Warner Communications Securities Litigation,* 618 F.Supp. 735, 744 (S.D. N.Y. 1985) (settlement approved where litigation of damages would be "battle of the experts where it was virtually impossible to predict with any certainty which testimony would be credited."); *In re Rent-Way Sec. Litig*., 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003) (same). Some of the damages issues are discussed in the following subsection.

This first factor, likelihood of success, is the major factor. In fact, this factor, by itself, fully supports the decision to approve this $310M settlement. See *Pinto v. Princess Cruise Lines*, 2007 WL 853431, *4 (S.D. Fla. 2007) (approving settlement where plaintiff's case had merit but "the risk of going forward was substantial"). The Court should, therefore, grant final approval of this proposed $310M settlement.

2. The Range of Possible Recovery

Settlements, by definition, are compromises which "need not satisfy every concern of [the] plaintiff class, but may fall anywhere within a broad range of upper and lower limits." *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982), quoted at *Adams v. Robertson*, 676 So. 2d 1265, 1291 (Ala. 1995). "In weighing the likelihood of success and the amount of potential recovery if the case continued against the amount offered in settlement, the court need only determine that the settlement falls within the reasonable range of fairness to the class." 6A Federal Procedure, Lawyers Edition § 12:380 (database updated June 2016).

Courts have recognized that "[a] recoupment of at least a material portion of the class's damages fits well within the range of reasonableness" that will justify approval of a proposed class action settlement. *Strougo v. Bassini*, 258 F.Supp.2d 254 (S.D. N.Y. 2003). Class action settlements which provide the class with just 20% or less of its claimed damages are commonly found to be a reasonable rate of recovery that will justify the settlement of litigation. See *City of Detroit v. Grinnell Corp*., 356 F.Supp. 1380, 1386 (S.D. N.Y. 1972). See also *In Re Medical X-Ray Film Antitrust Litigation*, 1998 WL 661515, *7 (E.D. N.Y. 2000) (settlement representing a 17% rate of recovery on claimed damages for the class was excellent result); *In re Crazy Eddie Sec. Litig*., 824 F.Supp. 320, 326 (E.D. N.Y. 1993) (settlement representing 10% of claimed damages was favorable outcome); *In re General Instr. Sec. Litig*., 209 F.Supp.2d 423, 431, 434 (E.D. Pa. 2001) (approving cash settlement representing 11% of the plaintiffs' estimated damages); *Cullen v. Whitman Medical Corp*., 197 F.R.D. 136, 147 (E.D. Pa. 2000) (same); and *In re Corel Corp., Inc. Sec. Litig*., 293 F.Supp.2d 484, 489-90, 498 (E.D. Pa. 2003) (settlement

fund that comprised about 15% of damages found to be reasonable). See *In re APA Assessment Fee Litig*., 311 F.R.D. 8, 19 (D. D.C. 2015):

> ... the settlement represents closer to 13% of plaintiffs' best possible recovery. But 13% is hardly a damning figure. Settlements representing a similar percentage of best case recovery have been approved. See, e.g., *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig*., 4 F.Supp.3d 94, 103 (D. D.C. 2013) ("4–8%"); T*rombley*, 826 F.Supp.2d at 198 ("approximately 12% to 30%"); *In re Baan Co. Sec. Litig*., 284 F.Supp.2d 62, 65 (D. D.C. 2003) ("over 16%").

As discussed below, the wide ranges of potential recoveries afforded by the different expert analyses would clearly have turned the damages phase of this trial into a "battle of the experts where it was virtually impossible to predict with any certainty which testimony would be credited." *In Re Warner Communications*, 618 F.Supp. 735, 744 (S.D. N.Y. 1985). The fact that the Settlement Agreement provides a rate of recovery that is far greater than average for class settlements - without the cost of battle - is a compelling reason to approve this settlement.

In evaluating the adequacy of the rate of recovery for the class, the Court compares the amount of the total settlement ($310M) to the amount that the class as a whole would likely have recovered at trial. *Knight*, 469 F.Supp.2d at 1033. Thus, the Court should evaluate the recovery rate in this case based upon the total amount of the Settlement Fund ($310M), compared with the possible overall damages that might have been awarded at trial. *Allapatah Services, Inc. v. Exxon Corporation*, 2006 WL 1132371, *11 (S.D. Fla. 2006) (total settlement amount in common fund found to be reasonable recovery for class).

The measure of damages in this fraud-in-the-settlement case is the difference between the $56M received and the amount that the 1999 case would probably have settled for had everyone known the truth about the unlimited-limits LMU. Plaintiffs' experts would have testified that the

market loss of the class as a whole was about $1.1B, and that a reasonable settlement value would have been at least 75% (given the degree of "bad" facts against MedPartners and an unlimited ability to pay). Given that $56M was already recovered, a best-case scenario for the Class was a compensatory verdict in the range of $775M.[4]

Defense experts would have ridiculed the notion that any defendant would ever pay 75% of damages in a voluntarily settlement. They would have put the percentage far lower. Thus, a rational jury could have found liability, but found that a 50% settlement percentage was more likely, meaning their verdict would have been in the range of $500M. Had this case tried, a verdict of $500M would have been viewed as a major victory for the Plaintiff Class.

Of course, with such wildly-differing expert testimonies, a jury could have found liability but returned a verdict far less than $500M. The defense experts would have testified that the maximum loss of the 1999 class was - if any - only a maximum of $400M. Even if the jury found that a 75% settlement rate was probable, that verdict would have been only $300M - had the jury believed the defense estimates of $400M in market losses. In a Plaintiffs' worse-case scenario, the jury could have believed the defense experts that no market loss could have been shown to be attributable to any securities fraud or accounting fraud - meaning that a jury could have found

[4] The Class did have a claim for punitive damages. For purposes of settlement, an amount of potential punitive damages is rarely, if every, negotiated. That is, almost no defendant ever voluntarily pays any amount attributable to punitive damages in a settlement. In this case, had the jury added an amount of punitive damages to a compensatory verdict of $600M or more, the appellate courts might have taken away all of the punitive damages on that basis that, in this literally unique case, $600M of compensatory damages was "punishment" enough. "[C]ompensatory damages may provide sufficient punishment and deterrence." *McMillan v. Massachusetts Soc. for Prevention of Cruelty To Animals*, 140 F.3d 288, 306 (1st Cir. 1998). "[C]ompensatory damages often provide sufficient punishment and deterrence." *Bandera v. City of Quincy*, 220 F. Supp. 2d 26, 42 (D. Mass. 2002).

liability for fraud, but set the damages at zero.

Because a jury could have found no liability, found zero damages, or found the damages to be far lower than argued by plaintiffs, the predicted verdict range would have to factor in these possibilities of a zero or low-ball verdict. However, for purposes of this exercise in hypotheticals, put aside the potential for a defense or low-amount verdict. If a near best-case recovery would have been $775M, then $310M represents a recovery of 40% of potential maximum damages. That is an excellent recovery rate that would easily pass muster with any reviewing court. But, consider something less than "best-case." If a $500M verdict would be considered a sterling result, though less than what counsel asked for in closing, the $310M settlement represents a recovery of 62% of a very good verdict. So, comparing the settlement offer of $310M to the potential range of verdicts also is a strong factor weighing on the side of approving this proposed settlement.

3. The Point on or below the Range of Possible Recovery at Which the Settlement Is Fair, Adequate, and Reasonable

This factor substantially overlaps with factor # 2, above. The adequacy of the amount offered in settlement is judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig*., 597 F. Supp. 740, 762 (E.D. N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987); *Hart v. RCI Hosp. Holdings, Inc*., No. 09 CIV. 3043 PAE, 2015 WL 5577713, *11 (S.D. N.Y. Sept. 22, 2015) (same); *Woodward v. NOR-AM Chem. Co.*, No. CIV. 94-0780-CB-C, 1996 WL 1063670, *17 (S.D. Ala. May 23, 1996) (Butler, J.) (same); *Denver*

Area Meat Cutters & Employers Pension Plan v. Clayton, 209 S.W.3d 584, 591 (Tenn. Ct. App. 2006) (same). "[T]he Court is not to compare the terms of the Settlement with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion." *In re Veeco Instruments, Inc. Sec. Litig*., No. 05 MDL 01695, 2007 U.S. Dist. LEXIS 85629, at *33 (S.D. N.Y. Nov. 7, 2007); *Karic v. Major Auto. Companies, Inc*., No. 09 CV 5708 (CLP), 2016 WL 1745037, *6 (E.D. N.Y. April 27, 2016) (same). Rather, a court need only determine whether the settlement falls within a "range of reasonableness" - i.e., a range which "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), repeated at *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005). See also *In re Global Crossing Sec. and ERISA Litig*., 225 F.R.D. 436, 461 (S.D. N.Y. 2004) (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"); and *In re Indep. Energy Holdings PLC Sec. Litig*., No. 00-6689, 2003 U.S. Dist. LEXIS 17090, at *12-13 (S.D. N.Y. Sept. 29, 2003) (noting few cases tried before a jury result in full amount of damages claimed). As noted in subsections 1 and 2, above, the range of possible recoveries has to take into account potential defense victories on appeal, as well as the possibility of a defense or low-ball verdict at trial. The $310M settlement offer is not just measured against the amount of a best-case scenario plaintiffs' verdict. Instead, the reviewing court has to weigh the odds of plaintiffs receiving something less, something much less, or nothing at all. Taking all reasonable possibilities into account, the amount of $310M represents an excellent settlement (even if measured solely against the best-case plaintiffs' scenario).

4. The Complexity, Expense, and Duration of the Litigation

The Plaintiff Class asserts that this "unique" case must rank within the top 1% of all class actions ever filed in regard to complexity and duration, and probably in the top 5-10% as to expense. There has never before been a reported case or other legal publication dealing with a fraud on a certified class. Accordingly, by its very nature, this case has involved complex, unique issues of both law and fact. This litigation was also complicated by the appellate decertification of the first certification, the vigorous and lengthy appeal from the second certification, and tooth-and-nail fighting over every the admissibility of every significant piece of propounded evidence.

This Court is already well-aware of most all of these details, even though Judge Tom King presided over this case for its first decade. Much more about the complexities of this case are discussed in Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs, and in the affidavits of class counsel and plaintiffs' experts - e.g., the declaration of Professor William B. Rubenstein. This litigation has required: the testimony, analysis, and/or assistance of many separate expert witnesses; the taking of over 50 depositions; extensive briefing; the production of thousands of pages of electronic and paper discovery; etc.; etc. The trial of this case would have incurred even more costs, time, and judicial resources, with no certain outcome for either party. In view of this, the Settlement Agreement is a fair and reasonable alternative to continued litigation, particularly in view of its high percentage of recovery and the high risks of continued litigation. The Class urges final approval of the proposed $310M settlement.

Complex litigation - like the instant case - can occupy a court's docket for years, depleting the resources of the parties. *Cotton v. Hinton*, 559 F. 2d 1326, 1331 (5th Cir. 1977).

For this reason, "public policy strongly favors the pretrial settlement of class action lawsuits." *In re Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992), quoted in *In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 862 (11th Cir. 2009), and *Adams v. Robertson*, 676 So. 2d 1265, 1292 (Ala. 1995); *Braynen v. Nationstar Mortgage, LLC,* No. 14-CV-20726, 2015 WL 6872519, *6 (S.D. Fla. Nov. 9, 2015) (same). This settlement is the result of over 12 years of litigation. The length of time necessary to reach a final result would have occupied more years of judicial resources and vast amounts of additional attorney time and case expenses. The pleadings and briefs already filed in this Court demonstrate that this case has been, and would have continued to be, very difficult and expensive to resolve. Settlement of this action is in the best interests of judicial economy and the Class. See 4 William B. Rubenstein, Newberg on Class Actions § 13:52, pp. 475-76 (5th ed. 2014) (electronic database updated June 2016):

> One of the factors most courts consider is whether the settlement will save significant time and money because of the complexity and expense of continued litigation. Class action litigation is inherently complex, and complexity makes litigation especially costly in terms of both time and money. Thus, while the judicial system always favors settlement, it especially welcomes settlement in complex cases such as class suits, and even more so, the more complex the class action. Legal complexity, factual complexity, even complexity in one portion of the case (such as determining damages), all weigh in favor of settlement. This is true even if the plaintiffs have a strong case and good chance of winning at trial.

There can be no doubt that the defendants would have appealed a plaintiffs' verdict. This settlement will spare the delay and expense of continued litigation. This litigation has already been pending for over 12 years. Even if the Class could recover a larger judgment after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class any recovery for years to come, further reducing its value. See *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-5173, 2008 U.S. Dist. LEXIS 36093, at *16 (S.D. N.Y.

May 1, 2008); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D. N.Y. 2003) ("even 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"); *Hicks v. Morgan Stanley & Co.*, No. 01-10071, 2005 U.S Dist. LEXIS 24890, at *16 (S.D. N.Y. Oct. 19, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action"). Trial would be very complicated for jurors, and would be expensive for the parties. The proposed settlement eliminates those complexities and expenses, and the probable additional years of continued appellate litigation.

5. The Substance and Amount of Opposition to the Settlement

The reaction of the class to the settlement is a significant factor in assessing its fairness and adequacy, and "'the absence of objectants may itself be taken as evidencing the fairness of a settlement.'" *In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D. N.Y.), aff'd, 117 F.3d 721 (2d Cir. 1997); *Kiefer v. Moran Foods, LLC*, No. 12-CV-756 WGY, 2014 WL 3882504, *5 (D. Conn. Aug. 5, 2014) (same); *In re High Pressure Laminate Antitrust Litig*., No. M2005-01747-COA-R3CV, 2006 WL 3681147, *5 (Tenn. Ct. App. Dec. 13, 2006) (same); *In re Luxottica Grp. S.p.A. Sec. Litig*., 233 F.R.D. 306, 311-12 (E.D. N.Y. 2006) (same). One court has noted that the reaction of the class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *In re Veeco Instruments, Inc. Sec. Litig*., No. 05 MDL 01695, 2007 U.S. Dist. LEXIS 85629, at *21-22 (S.D. N.Y. Nov. 7, 2007) (quoting

Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 362 (S.D. N.Y. 2002)).

Here, the lack of any *substantive* objections weighs heavily toward approving the proposed settlement. The deadline for objections expired on July 22, 2016. Gilardi & Co. received two written-only objections. One objection and notice of intent to appear was filed with the Court. For details responses to the objections, please see the closing subsection of the contemporaneously-filed "Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs."

As courts have repeatedly explained, a positive reaction (or lack of a negative reaction) from a class further supports settlement approval. See *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1998) ("the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness."); *In re Prudential Ins. Co. of Am. Sales Practices Litig*., 962 F. Supp. 450, 537-38 (D. N.J. 1997), aff'd, 148 F.3d 283 (3d Cir. 1998) (although a numerical assessment is not dispositive, lack of significant negative feedback from the class supports approval of the settlement). See *New York State Teachers' Retirement System v. General Motors Company*, --- F.R.D. ----, 2016 WL 2907968, *10 (E.D. Mich. May 19, 2016)

> "A certain number of....objections are to be expected in a class action." *In re Cardizem*, 218 F.R.D. at 527. "Although the Court should consider objections to the settlement, the existence of objections does not mean that the settlement is unfair." *In re Telectronics*, 137 F.Supp.2d at 1018. "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *In re Cardizem*, 218 F.R.D. at 527.

See also 4 William B. Rubenstein, Newberg on Class Actions § 13:54, pp. 479-83 (5th ed. 2014) (electronic database updated June 2016) (emphasis added):

> One of the factors most courts consider is the reaction of the absent class members, specifically the quality and quantity of any objections and the quantity of class members who opt out.
>
> In some sense, the class's reaction should be the central factor courts look to, as the judicial function at settlement is precisely to safeguard the absent class members' interest. It would seem that there would be no better indicator of those interests than the feedback the court gets from class members themselves....
>
> Regarding objectors, the court will take note of both the nature and merits of objections and the proportion of class members who object. The substance of objections will be evaluated on their merits. Evaluating the quantity of objectors is a little trickier. Courts have often held that if only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.... [O]n average about 1% of the class objects....
>
> If the class contains particularly significant class members - e.g., institutional investors with large stakes in securities cases - who do not object, those class members' acquiescence may be more meaningful.

Our class contains many large institutional investors and many sophisticated individual investors with claims of multi-millions of dollars. None of them have objected. See also 2 McLaughlin on Class Actions § 6:10 (12th ed.) (database updated Dec. 2015) ("The significance of the objection rate properly may take into account the composition of the class, including its sophistication and the size of class member claims."); *In Re: Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 536 (3rd Cir. 2004) ("we agree with the District Court that the small number of TPP objectors is particularly telling as they are sophisticated businesses with very large potential claims"); and *Lachance v. Harrington*, 965 F. Supp. 630, 645 (E.D. Pa. 1997) ("Even if some of the class members had small stakes which undermined their incentive to object to the settlement in this case, large quantities of National Media stock were in the hands of institutional investors who certainly had sufficient incentive to object to the settlement if they found it to be unfair or unreasonable.").

6. The Stage of the Proceedings at Which the Settlement Was Achieved

This factor weighs just as heavily as all the others in support of approving the proposed settlement. Everyone involved in this case agrees that this case represents the longest-fought and hardest-fought class action litigation within anyone's memory. This factor is designed to "assure the Court that counsel for the plaintiffs have weighed their position based on a full consideration of the possibilities facing them." *In re Global Crossing Sec. and ERISA Litig*., 225 F.R.D. 436, 458 (S.D. N.Y. 2004); *Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 JG VVP, 2013 WL 4525323, *8 (E.D. N.Y. Aug. 27, 2013) (same).

This case was ready for trial. No stone had been left unturned by any party. From the series of summary judgment motions and evidentiary disputes, this Court understands the depths of factual and legal knowledge possessed by the parties and their attorneys. Everything knowable (legally and factually) about this case was known. In order to reach a fair settlement, the "parties must have an adequate appreciation of the merits of the case before negotiating." *In re Prudential Insurance Company*, 148 F.3d 283, 319 (3d Cir. 1998); *Gevaerts v. TD Bank*, No. 1:14-CV-20744-RLR, 2015 WL 6751061, *7 (S.D. Fla. Nov. 5, 2015) (same). When discovery is complete and the case is ready for trial, this "ordinarily assures sufficient development of the facts to permit a reasonable judgment of the possible merits of the case." *Knight v. Alabama*, 469 F.Supp.2d 1016, 1033 (N.D. Ala. 2006). See 4 William B. Rubenstein, Newberg on Class Actions § 13:50, p. 467 (5th ed. 2014) (electronic database updated June 2016):

> One of the factors most courts consider is the how much formal discovery the parties have undertaken prior to settlement. This inquiry is undertaken for two reasons. First, if extensive discovery has been done, a court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement's value is based upon such adequate

> information. Second, full discovery demonstrates that the parties have litigated the case in an adversarial manner and is, therefore, an indirect indicator that a settlement is not collusive but arms-length. In short, the more formal discovery that occurred prior to settlement, the more likely the court is to find the settlement is substantively adequate and procedurally fair.

If a Court finds that a proposed settlement is free from collusion, then "[a] proposed class action settlement enjoys a strong presumption that it is fair, reasonable, and adequate…." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-11814, 2004 U.S. Dist. LEXIS 8608, at *5 (S.D. N.Y. May 14, 2004). See also *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (a class action settlement is entitled to a presumption of fairness, adequacy and reasonableness when there were "arm's length negotiations between experienced, capable counsel after meaningful discovery."). It is well settled that such "negotiated result of an adversarial proceeding is an indication of its fairness." *Domingue v. Sun Elec. & Instrumentation*, No. 09-682, 2010 WL 1688793, *1 (M.D. La. Apr. 26, 2010); see also *In re Train Derailment Near Amite La.*, No.1531, 2006 WL 1561470, *19 (E.D. La. May 24, 2006) ("The fact that a class action settlement is reached after arms' length negotiations by experienced counsel generally gives rise to a presumption that the settlement is fair, reasonable, and adequate…."); *In re Mills Corp. Sec. Litig*., 265 F.R.D. 246, 255 (E.D. Va. 2009) ("Negotiations were sufficiently thorough, contentious, and at arm's length to ensure the propriety of Class Counsel's decision to enter into the settlement and the proceedings leading thereto"). Further, there were no negotiations that created a conflict between the Class and the payment of attorneys' fees because, here, fees will be paid from the common fund, not by the defendants.

There has been no fraud or collusion between the parties. In approving a settlement agreement, the Court must first examine whether the agreement has resulted from fraud or

collusion; i.e., "whether the settlement was achieved in good faith after arms-length negotiations." *Knight v. Alabama*, 469 F.Supp.2d 1016, 1033 (N.D. Ala. 2006). This requirement is easily met here, where the settlement agreement resulted from arms-length negotiations after multiple formal and informal mediation processes.

Here, counsel for all parties have continuously investigated and analyzed the facts and the law of this case for over 12 years, through numerous separate phases of litigation and discovery. By the time of settlement, the first-set trial date had passed and all parties were ready and expecting to commence trial. Given the maturity of this case, and the enormous amount of time and work invested in it for so many years, it is clear that the parties had not only an adequate, but a comprehensive, appreciation of the merits of the case before agreeing to a settlement. This factor weighs heavily in favor of the final approval of the proposed settlement.

7. The Financial Ability of the Defendant(s) to Withstand a Greater Judgment

The Class asserts that this is a non-factor or an irrelevant factor. These defendants could withstand even a multi-billion-dollar judgment. In the current Fortune 500 standings, CVS Health stands at # 7, with annual revenues of $153B. "Poor" AIG manages only a ranking of # 49, with revenues of "only" $58B. See beta.fortune.com/fortune500.

The fact that the defendants could have paid more than $310M does not render a settlement unreasonable, however, when the other factors favor the settlement. See, e.g., *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). "[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.

N.Y.), aff'd, 117 F.3d 721 (2d Cir. 1997). "[A] defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig*., No. 06-5173, 2008 U.S. Dist. LEXIS 36093, at *23 (S.D. N.Y. May 1, 2008); *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, *9 (S.D. N.Y. Sept. 9, 2015) (same). "Where, as here, the other ... factors weigh in favor of approval, this factor alone does not suggest the settlement is unfair." *In re Sony* at *23-24.

8. Whether Proper Notice Was Given

Certification and opt-out notice was given in 2015. Settlement notice was given in June 2016, and the deadline for objections was July 22, 2016. The 2015 and 2016 notice procedures were approved by this Court and found to comport with due process. Nothing has changed in this regard, and the Class urges the Court to give final approval to the notice processes utilized in this case. The Class contends that the notice regime in this case has met, and actually greatly exceeded, the requirements of due process.

Ala. R. Civ. P. 23(c)(2) requires notice "that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." The notices in this case have done all that. Federal due process requires that notice of a class action settlement "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." *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1983). "It is widely recognized that for the due

process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected." *In re Prudential Sec. Inc. Ltd. P'Ships Litig*., 164 F.R.D. 362, 368 (S.D. N.Y.), aff'd, 107 F.3d 3 (2d Cir. 1996); *Lopez v. Hayes Robertson Grp., Inc*., No. 1310004CIVMARTINEZGO, 2015 WL 5726940, *7 (S.D. Fla. Sept. 29, 2015) (same); *Juris v. Inamed Corp*., 685 F.3d 1294, 1321 (11th Cir. 2012) ("due process does not require that class members actually receive notice"). Here, the form and method of notice to the class members satisfy both the requirements of Rule 23 and due process.

The claims administrator, Gilardi & Co., administered the settlement notice process in June 2016. See Exhibit 8 to the Evidentiary Submissions, the declaration of Ross Murray for claims administrator Gilardi & Co. As this Court approved for the May 2015 certification and opt-out notices,[5] the plan of settlement notice herein utilized the mailing of two versions of Short-Form Notices (Exhibits B-2 and B-3 to the Stipulation) to the best addresses available for all known potential class members (a number probably exceeding 90,000). The Short-Form Notices refer class members to the settlement website where claims can be filed online. Alternatively, class members can call a toll-free number and request a mailing of the Long-Form Notice and paper claim forms, and file claims via mail. As done in 2015, the Short-Form Notice was also be published (in substantially the same form as B-2 and B-3, combining the two into one publication notice) in the Wall Street Journal on June 17, 2016, at page C7. Differently-worded notices and claims forms are provided to: (i) the approximately 18,000 class members

[5] See "Joint Motion for Approval of Class Notice" of April 24, 2015, and "Order Approving Class Notice" of May 5, 2015.

who filed approved claims in 1999 (B-2); and (ii) potential class members who did not file approved claims in 1999 (B-3). See 1 McLaughlin on Class Actions § 5:80 (11th ed.) (database updated Nov. 2014):

> First-class mail directed to last-known addresses of class members is generally considered to be the 'best notice practicable' to ensure that proper notice is received by potential class members. A notice program may pass constitutional muster even when it is known in advance that first class mailings may not reach a substantial portion of the class, as long as there is no reasonable way to reach more class members. The better practice is to include a provision that the Settlement Administrator will use its best efforts to locate updated addresses for class members in the event that any class notice is returned as undeliverable. . . . Further, courts have refused to order identification efforts that would require 'impractical and extended searches' or would be unduly time-consuming or expensive. The 'reasonable effort' required by Rule 23(c)(2)(B) 'is a function of anticipated results, costs, and amount involved.' . . . Notice procedures that use brokerage house and nominees' records to compile lists for class action mailings meet the requirements of due process and Rule 23(c)(2)....
>
> Courts have repeatedly held that neither due process nor Rule 23(c)(2)(B) mandates that class members receive actual notice in order to be bound by class action proceedings. Actual receipt of notice is not required. The provision of notice reasonably calculated to apprise class members of the proceedings is sufficient.

The Manual for Complex Litigation, Fourth, § 21.311, p. 288 (Federal Judicial Center 2004). notes that, "referring class members to an Internet site for further information can provide complete access to a wide range of information about a class settlement. Many courts include the Internet as a component of class certification and class settlement notice programs." See *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, 254 F.R.D. 294, 299 (W.D. Tex. 2008) (same).

The Claims Administrator is responsible for the Settlement Administration processes. The Claims Administrator shall: receive and update contact information for Class Members; proof, edit, and distribute the Notice of Settlement; receive and review the Claims Forms

submitted by Class Members; re-mail Notices to any Class Members with Notices returned with a forwarding addresses; research, update, and re-mail Notices to Class Members with Notices that have been returned marked undeliverable; determine eligibility for payment as an Authorized Claimant and the amount of any such payments; advise the parties with regard to the amounts payable to Authorized Claimants; and draft and mail the Settlement Payment checks to Class Members, after final Court approval.

OBJECTORS. The objectors complain that the 35 days between notice on June 17, 2016, and the deadline to object on July 22, 2016, is too short. No one complains that the September 30, 2016, deadline for filing claims is too short. The objectors fail to detail what they have done, prior to July 22, to locate their 1997 trading information, and what actions they want to take in the future that could not have been taken prior to July 22. The claims administrator says: "In Gilardi's experience, the inability to obtain documentation is a common complaint in securities litigation cases where several years have passed." Exhibit 8, Declaration of Ross Murray for Claims Administrator Gilardi & Co., ¶ 11.a.1.

Further, if Walker truly is a class member, his best opportunity was to have filed a claim in 1999, which he did not - and his objection offers no reason for why he did not file in 1999. He was an officer at MedPartners at the time, so he had to know about the 1998 lawsuits and the 1999 settlement. And, if he got a settlement notice in 2016, he would have received the certification notice in 2015. He could have started looking for his records in 2015 - and his objection offers no reason for why he did not start looking in 2015. A high-ranking officer at MedPartners during the class period (1996-98) should be able to show whether he purchased stock in his own company during the class period.

This Court has an obligation to define the class and set rules for the proving of class membership. The requirements and the time frames set by this Court in this case were eminently fair and reasonably. See generally this discussion in *In re Deepwater Horizon*, 739 F.3d 790, 809 (5th Cir.), cert. denied sub nom. *BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc*., 135 S. Ct. 754 (2014):

> The district court's instruction to provide proof of class membership was a legitimate exercise of its discretion under Rule 23(d)(1)(A) and Rule 23(d)(1)(C) to "issue orders that[ ] ... determine the course of proceedings" and "impose conditions ... on intervenors" in a class action. As the Supreme Court recognized in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), a district court presiding over a class action "has both the duty and the broad authority" to enter such orders to minimize "the potential for abuse" during such proceedings. Although a district court's discretion under Rule 23(d) is "not unlimited," the district court plainly acted within its discretion in finding that the BCA Objectors forfeited and waived their objections by disobeying the reasonable requirements of the Preliminary Approval Order. Moreover, in an unpublished case with equivalent facts, *Feder v. Electronic Data Systems Corp*., 248 Fed.Appx. 579, 580 (5th Cir. 2007), we dismissed an appeal from a district court's order on class certification and settlement approval based on the objector's failure to "prove his membership in the class" in accordance with the district court's reasonable documentation requirements. We see no meaningful difference between the present case and the facts of *Feder*. As we explained in *Feder*, "the right to object to settlement in a ... class action must rest on something more than the sort of bare assertions" now offered by the BCA Objectors.

Feder was a securities class action. Urbanik appealed the district court's decision to disregard his objections to a settlement. *Feder*, 248 F. App'x 579. "Urbanik submitted a written objection to the settlement which included, among his objections, a statement that he purchased or otherwise acquired securities of EDS during the class period." *Id*. at 580. "Urbanik included no further information regarding EDS securities. The district court then held its fairness hearing to determine whether to approve the settlement. During the hearing, Urbanik's counsel stated that his client bought and sold shares of EDS stock in the requisite time frame." *Id*. at 581. Urbanik

did not produce any other proof demonstrating that he was a member of the class. *Id.*

On appeal, the 5th Circuit found that Urbanik did not provide enough information providing that he was a member of the class. The court stated, "[a]side from Urbanik's unsupported claim of ownership in his objection letter, and the statements made by his attorney at the settlement hearing, Urbanik produced no evidence substantiating his membership in the class." *Id*.

> In this case, where the proof of claims period has closed and the settlement has been finally approved by the district court, the burden of proving class membership cannot be satisfied by the appellant's unsupported assertions of class membership. Urbanik did not submit a proof of claim form. Nor did he provide the documentary evidence required by the claim form to support his contention that he bought or sold EDS stocks during the class period. His objection did not include the required information as to the number or type of EDS securities that Urbanik alleges to have dealt in during the period. Allowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process.

Feder, 248 F. App'x at 581 (emphasis added). Note that the district court had provided 38 days between the date of mailing notices and the deadline for filing objections. E.D. Tex., Case No. 6:03-cv-00126-LED, Document 310, pp. 12-13 (July 21, 2008).

A 30-day period is commonly held to comply with due process. (Note that the time between notice and the objection deadline in the 1999 MedPartners settlement was 30 days.[6]) See 2 McLaughlin on Class Actions § 6:18 (12th ed.) (database updated Dec. 2015) (emphasis added):

> Courts have consistently held that **30 to 60 days** between the mailing (or other dissemination) of class notice and the last date to object or opt out, coupled

[6] See Joint Affidavit of Neil L. Selinger and Steven E. Cauley in Support of the Proposed Settlement and Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses of June 30, 1999.

with a few more weeks between the close of objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement. [FN 1].

FN 1. See *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 940, 946–47 (10th Cir. 2005) (approving a **32-day** opt-out period); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice mailed **31 days** before the deadline for written objections and 45 days before the fairness hearing); *Miller v. Republic Nat. Life Ins.* Co., 559 F.2d 426, 430 (5th Cir. 1977) (in securities fraud class action case, a period of "almost **four weeks** between the mailing of the notices and the settlement hearing" was adequate time, particularly when only one class member objected to the timing and where such class member was a part of the case since its inception); *Marshall v. Holiday Magic, Inc*., 550 F.2d 1173, 1178 (9th Cir. 1977) (approving notice mailed **26 days** before the deadline for opting out of a settlement); *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975) (**19 days** notice was enough time to object, particularly when case had been ongoing for two years); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647, 652 (7th Cir. 1971) (in securities class action, adequate time was provided when notice was mailed on May 28 and fairness hearing was held on June 22 [25 days]); Air Lines Stewards & Stewardesses Ass'n Local 550 v. American Airlines, Inc., 455 F.2d 101, 108 (7th Cir. 1972) (in gender discrimination class action, class members were afforded a "reasonable time" of days [**12 days**] between sending of the notice and the hearing); ... *Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co.,* 2014 WL 631031, *5 (E.D. Pa. 2014) (approving **30-day** period to object or opt out from date on notice); *Woodard v. Andrus*, 272 F.R.D. 185, 204 (W.D. La. 2010) ("courts addressing opt-out periods in the class settlement context have typically held that between **30 and 60 days** from the time of mailing is appropriate"); *In re Sprint Corp. Securities Litigation*, 2004 WL 955859, *3 (D. Kan. 2004), aff'd, 429 F.3d 935 (10th Cir. 2005) (approving **32-day** interval "between the time the Notices were initially sent [to record holders and known beneficial holders] and the objection deadline); *In re BankAmerica Corp. Securities Litigation*, 210 F.R.D. 694, 708 (E.D. Mo. 2002) (in securities class action, "**three to four weeks** between the mailing of class notice and the last date to object, with an additional three weeks to prepare for the settlement hearing" sufficed); *Grice v. PNC Mortg. Corp. of America*, 1998 WL 350581, *8 (D. Md. 1998) (in consumer class action, approving **30-day** notice period prior to final settlement approval hearing).

See also *Etter v. Hibernia Corp*., 952 So. 2d 782, 791 (La. App. 4 Cir.), writ denied, 956 So. 2d 615 (La. 2007) (**30 days**), and *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195

(N.D. Ill. 1981) (**30 days**).

If 30 to 60 days is standard, the lower end of scale is appropriate under the specific circumstances of this case. The class already got a claims notice in 1999. Those who were interested enough could have gathered their then-fresh records in 1999 and filed a claim in 1999. Those who did, only have to file a name-and-address form today – they do not have to submit stock-trade records. Approximately 18,000 class members filed nearly $700M of claims in 1999. Only those who elected to ignore the 1999 notices are the ones having trouble now in finding old records. Most class action settlements are done in one step, with certification and settlement done in one process, with just one class notice. Here, in May 2015, the class was noticed about certification and their opt out rights. So, the June 2016 settlement notice did not just come out of the blue. Even though the objection deadline was July 22, the claims period runs through September 30, so the people complaining about lack of time have through September to locate records and file a claim (and, all these complainants are people who elected not to opt out in 2015 and to be bound by any judgment or settlement). Further, this is a class where the vast percentage of class members are known by name and address and were given individual mailed notice – that is, this is not a class where the primary methods of notice are publications, Internet, and word of mouth. So, in a case like this one, the minimal due process time frame of about 30 days fits perfectly – though a longer time period might be desirable in a different kind of class action case. The objectors' due process claims have no merit.[7]

[7] The Walker and Georgia Urology objectors also complain that the class definition might permit recoveries by individuals who actually committed the securities frauds at pre-1998 MedPartners. That is not the case. For a detailed response to the "wrongdoer" objections, please see the closing subsection of the contemporaneously-filed "Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs."

Judge Clemon, see Exhibit 3, refutes the objection regarding the 35-day notice period:

51. Assuming but not admitting or conceding that Mr. Walker has standing in this case (i.e., that he is a member of the certified class), it is my view that there is no factual or legal basis for his due process claim. The "notice" required by the due process clause of the Fourteenth Amendment to the Constitution, must be "reasonable under the circumstances." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950). The amount of time between the publication of class notice of a proposed settlement and the deadline for objections is subject to the trial court's discretion, so long as the due process clause is not offended. *United States v. Alabama*, 271 F.App'x 896, 900, 901 (11th Cir. 2008). The period between the notice and the deadline for objections is a factual determination to be made by a court on a case-by-case analysis. *Woodward v. Andrus*, No. CIV.A.03-2098, 2010 WL 1936154, at *5 (W.D. La. May 12, 2012). As Mr. Justice Frankfurter framed it: "due process cannot be imprisoned within the treacherous limits of any formula." *Joint Anti-Facist Refugee Commove. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

52. The factual circumstances surrounding Plaintiffs' counsel June 17th notice to members establish that Mr. Walker's due process rights have not been violated. Mr. Walker obviously received the most recent notice to the class in sufficient time for his filing of objections. The June 17th notice was the second class notice he has received in the last two years; and between the two notices, he chose not to opt-out of the class. From the time that Mr. Walker was notified that the case had been certified, he knew that either at trial or following a settlement, he would be required to come forward with proof of his membership in the class. Finally, Mr. Walker still has more than two months within which to file his claim.

53. My opinion that Mr. Walker has not been denied due process is based on my own experience and training, my participation in legal conferences and seminars, and the published decisions of other trial judges and appellate courts. [FN 19]

> FN 19. For example, in *AAL High Yield Bond Fund, et al. v. Ruttenberg, et al*, (N.D. Ala. No. 2:00-cv-1404-UWC) (Doc. 24), I approved the publication of class notice 34 days before the deadline for objections. In *Miller v. Republic Nat'l Life Ins. Co.,* 559 F.2d 436, 429, 430 (11th Cir. 1977), the Eleventh Circuit noted that "[t]here were almost four weeks between the mailing of the notice and the settlement hearing." A 19-day period was found to be sufficient notice in *Griffin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.1975); a 26-days' period was approved in *Marshall v. Holiday Magic, Inc*., 550 F.2d 1173, 1178 (9th Cir. 1977). A thirty days' period was approved in *Manguin v. Florida E. Coast Ry. Co.,*

318 F.Supp. 720, 733-34 (M.D. Fla. 1970), *aff'd*, 441 F.2d. 728 (5th Cir. 1971). *See also New England Health Care Employees Pension Fund*, 429 F.3d 935, 940, 946-947 (10th Cir. 2005) (approving a 32-day opt–out period).

VI. ADDITIONAL MATTERS

A. Plan of Allocation

Payments from the Net Settlement Fund to Class Members with approved claims will be distributed according to the "Plan of Allocation of Settlement Proceeds" contained within the "Notice of Pendency of Class Action, Proposed Settlement Thereof, Settlement Hearing and Right to Share in Settlement Fund," dated May 3, 1999, in *Griffin v. MedPartners, Inc*., CV-98- 00297, Jefferson County, Alabama, Circuit Court. This Plan of Allocation is set forth in its entirety in the Long-Form Notice of June 2016. If the Court gives final approval to the proposed settlement, upon completion of the claims-filing process and pursuant to a motion for distribution, the Net Settlement Fund will be distributed to Authorized Claimants according to the Plan of Allocation as set forth in the Notice.

First, the Class asserts that the Plan of Allocation is res judicata. The transcript of the May 31, 2016, Preliminary Approval Hearing is Exhibit 9 to the Evidentiary Submissions. At pp. 33-34, class counsel said:

> Issue number three is the Plan of Allocation. This formula is set out in full in B-1, which is the Long-Form Notice. It's Section 7 of B-1. That's pages five through eight. This wording is verbatim from the 1999 plan. In 1999, all the elements of the class and all the parties agreed that this plan was fair. No class member objected. Judge Wynn approved it and adopted it. In our view, even if we wanted to change the plan, which we do not, we believe that it's res judicata.

> The Alabama Supreme Court opinion held that the 1999 judgment conclusively resolved all of the conflicts between the sub-classes and that this fraud in the settlement class was just one class, one unified class wherein everybody was equally defrauded. The Supreme Court also quoted Judge King's certification order where this Court, through Judge King, held that the 1999
> settlement had resolved and finally adjudicated the conflicting claims of the three sub-classes.
>
> So the vast majority of this class are members who bought common stock between the dates of October 1996 and January 1998. There's a mathematical formula for calculating their losses depending on the date they made the purchase and whether they sold the stock or were still holding the stock in January of 1998. Then the other two sub-classes are those who purchased options and those who purchased TAPS, Threshold Appreciation Price Securities. So there's a formula as to how the overall settlement is divided among those three sub-classes, and there's a formula as to how the common stockholders' losses are calculated.

In response, this Court commented, at p. 55, as follows:

> I think ... the plan for allocation, particularly in light of the res judicata effect that's already been announced, both by this Court through my predecessor and by the Alabama Supreme Court, kind of leaves me saying I would have to have some awfully compelling reasons to buck that trend at this point in time. I don't have a problem with that.

And, even if this Court were to look at the Plan of Allocation on a blank slate, it is rational and reasonable enough to warrant approval. This is especially true because no class member has objected to the Plan, either in 1999, or in 2016. The adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims and whether the proposed allocation is fair and reasonable in light of that information. See *In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 133 (S.D. N.Y.), aff'd, 117 F.3d 721 (2d Cir. 1997), and *In re Luxottica Grp. S.p.A. Sec. Litig*., 233 F.R.D. 306, 316-17 (E.D. N.Y. 2006). As with other aspects of the settlement, the opinion of experienced and informed counsel carries considerable weight. *In re Indep. Energy Holdings PLC Sec. Litig*., No. 00-6689, 2003 U.S. Dist. LEXIS 17090, at *15 (S.D. N.Y. Sept. 29, 2003 ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by

'experienced and competent' class counsel.") (citation omitted). Class counsel in this case have studied the Plan of Allocation for years. It seems to us to be fair and reasonable, and we have discerned no better formula for calculating allowable losses. "Significant weight should be given to the judgment of experienced counsel that the settlement and any proposed plan of allocation are fair and in the best interests of the class." 2 McLaughlin on Class Actions § 6:4 (12th ed.) (database updated Dec. 2015).

B. Escrow

As noted in the Stipulation, the defendants will deposit with the Escrow Agent the sum of $310 million within 30 days of this Court's final approval of the proposed settlement. The Plaintiff Class seeks the Court's final approval of the parties' selection of Computershare Trust Company, N.A., as Escrow Agent, pursuant to the Escrow Agreement, which is attached to the Stipulation as Exhibit F. For the Court's information, the insurance referenced in the Escrow Agreement has been arranged for and approved by all parties and Computershare. The Escrow Agreement was executed by all parties and Computershare on July 26, 2016.

C. Claims Administration

The Plaintiff Class seeks the Court's final approval of the selection of Gilardi & Co., LLC, as Claims Administrator. Class counsel represents to the Court that, in their opinion, Gilardi & Co. has been doing an excellent job in its role as administrator. There is absolutely no reason to now try to "change horses in mid-stream."

D. Pro Ami

Paragraph 3 of the June 1, 2016, Order says: "Simultaneously with the Fairness Hearing, the Court will hold a hearing (the 'Pro Ami Hearing') at which the Court will receive evidence and examine whether the settlement is fair and reasonable to and in the best interest of Minors and Incompetents, if any, who are Class Members." Class counsel believes that, by definition, no class member can be a minor. But, this Court is not being asked to decide that question. Instead, this Court is being asked to decide the hypothetical question of: If some class members might be minors, is this proposed settlement fair to minors? Similarly, this Court is being asked to decide the fairness question in regard to hypothetical incompetent class members. Class counsel understands the law to be that everyone is legally competent unless and until a court declares otherwise[8] - and, in such an order, the court would appoint a guardian or conservator. Thus, class members with legally-declared incapacities necessarily have court-appointed agents who would have received the notices directed to the incapacitated class member.

For the Court's information, here are the passages in the Stipulation that relate to pro ami approval:

> 1.30 "Incompetent" means a Person who is not of sufficient mental capacity to appreciate the effect of what he or she is doing in making a contract, who is not

[8] "[T]he law presumes every person to be sane." *Willis v. James*, 284 Ala. 673, 676, 227 So. 2d 573, 576 (1969); *Hester v. Hester*, 474 So. 2d 734, 736 (Ala. Civ. App. 1985). "There is a presumption of sanity under Alabama law." *Duncan v. Am. Home Assur. Co*., 747 F. Supp. 1418, 1420 (M.D. Ala. 1990). As to the legal processes for having someone declared to be incapacitated, or for having an incapacity terminated, see generally: Ala. Code §§ 26-2A-105 and 110; 1 Judith S. Crittenden and Charles P. Kindregan, Jr., Crittenden and Kindregan, Alabama Family Law § 14:3 (database updated Nov. 2015) (entitled, "Representation of incompetent adult party"); Hugh M. Lee, Alabama Elder Law § 8:50 (database updated Nov. 2015) (entitled, "Establishing the need for guardianship or conservatorship") ("all persons are presumed to have capacity").

> able to exercise his or her will with reference thereto, who has no reasonable perception or understanding of the nature and terms of the contract, and who is a Class Member (a) in such Person's own name or (b) in the name of a Representative....
>
> 1.35 "Minor" means a Person who was born after the date that is 19 years prior to the Final Order Date and who is a Class Member (a) in such Person's own name or (b) in the name of a Representative....
>
> 1.46 "Pro Ami Hearing" means an evidentiary hearing, to be held simultaneously with the Fairness Hearing, to determine whether the Settlement is fair and reasonable to and in the best interest of Minors and Incompetents, if any, either in their own names or in the names of Representatives.
>
> 1.47 'Pro Ami Order" means an order of the Court approving in all material respects the Settlement and determining that the Settlement is fair and reasonable to and in the best interests of Minors and Incompetents, if any....
>
> 5.5 At the Fairness Hearing/Pro Ami Hearing, Class Counsel shall request that the Court: (a) Determine, based on an examination by the Court of the facts, whether the Settlement is fair and reasonable to and in the best interest of Minors and Incompetents, if any; and (b) Enter the Pro Ami Order....
>
> 5.6(e) Approve separately and expressly each of the following as fair and reasonable to and in the best interests of the Plaintiff Class (including Minors and Incompetents, if any) in the context of the overall Settlement: (i) The release of the portion of the Released Claims identified in Paragraph 1.49(d) hereof; (ii) Paragraph 2.4 hereof; (iii) The release of Unknown Claims and the operation of Paragraph 2.5 hereof; [and] (iv) Paragraph 2.6 hereof.

Generally, the law is: "If a suit involving a minor or incompetent is settled prior to litigation, during litigation or on appeal, the minor or incompetent will not be bound to the settlement unless it is found to be fair and reasonable and is approved by the Court. *Abernathy v. Colbert County Hospital Board,* 388 So. 2d 1207 (Ala. 1980)." Sidney C. Summey, Pro Ami Settlements, Conservatorships and Guardianships in Alabama, Alabama Association for Justice (2012), available at www.whitearnolddowd.com/wp-content/uploads/2014/03/SSProbate-for-Litigators-2012-AAJ-as-posted.pdf. The pro ami process includes "testimony from which the court can infer that liability was disputed, testimony concerning the nature and extent of injury to the ward, and a written order in which the court finds that the settlement is fair, reasonable and in the best

interest of the child." Sidney C. Summey, Handling Lawsuits for Minors, Decedents and the Disabled, Alabama Association of Trial Lawyers Journal (Winter 2000), available at www.whitearnolddowd.com/wp-content/uploads/2014/03/SSHANDLING-LAWSUITS-FOR-MINORS.pdf. *Abernathy v. Colbert County Hospital Board*, 388 So. 2d 1207, 1209 (Ala. 1980), and *Large v. Hayes*, 534 So. 2d 1101, 1105 (Ala. 1988), quote *Tennessee Coal, Iron & R.R. Co. v. Hayes*, 97 Ala. 201, 12 So. 98 (1892), for the proposition that: "The Court may, upon being advised of the facts, upon hearing the evidence, enter up a valid and binding judgment for the amount so attempted to be agreed upon, but this is not because of the agreement at all - that should exert no influence - but because it appears from the evidence that the amount is just and fair, and a judgment therefor will be conservative of the minor's interests."

A guardian ad litem is not necessary in this case because, e.g., the court sits as a fiduciary for ***all*** absent class members, adults, minors, incompetents, etc. In an individual tort case, the court is not a fiduciary with duties running to the plaintiff. "Rule 23 requires judicial approval of any settlement of a class action lawsuit. That requirement distinguishes settlement of a class suit from settlement of a nonclass suit: the latter requires no judicial approval in most circumstances." William B. Rubenstein, Newberg on Class Actions § 13:40, p. 427 (5th ed. 2014) (electronic database updated June 2016). Prof. Rubenstein explains further that, "so central is the protection of absent class members' rights that the court is said to have a 'fiduciary duty' toward absent class members during the settlement of a class suit. This is a peculiar judicial function, as the normal job of a court is to act as a neutral arbiter between two competing parties, not as the fiduciary for a group of people." *Id*. at pp. 427, 430. "Under Rule 23(e) the district court acts as a ***fiduciary*** who must serve as a ***guardian*** of the rights of absent class members." *In re General Motors Corp. Pick-Up Truck*

Fuel Tank Products Liability Litigation, 55 F.3d 768, 785 (3d Cir. 1995) (emphases added). "In the context of reviewing a proposed class action settlement, the district court has a special duty to act as ***guardian*** for the interests of absent class members...." 2 McLaughlin on Class Actions § 6:4 (12th ed.) (database updated Dec. 2015) (emphasis added).

"Neither Rule 17(c) nor any other provision of Alabama law requires appointment of a guardian ad litem for a minor plaintiff in order to effect a pro-ami settlement." William E. Shreve, Jr., Settling the Claims of a Minor, 72 Ala. Law. 308, 310 (2011). "There is authority that a court cannot appoint a guardian ad litem ... where the guardian will provide services already being performed...." *Id*. at 311. Because the law requires the Court to sit as a fiduciary and to decide if the proposed settlement is fair to the entire class, then the Court is necessarily performing exactly the same guardian-ad-litem types of tasks and functions.

In deciding whether the proposed settlement is fair to minor and incompetent class members, if any, all the same factors discussed above are applicable. Assume that class member "X" is a minor and class member "Y" is an adult. If the settlement is fair to the class as a whole, then, by definition, it is just as fair to X as it is to Y. In this case, there are no factual or legal distinctions that would separate the interests of X from those of Y. In other words, all class members are in the same boat in regard to fairness of the $310M settlement. The terms of this settlement do not discriminate for or against class members who may be underage or incapacitated in some manner. Identically-situated class members (i.e., two class members who bought exactly the same amount of stock at the same time for the same price) are treated identically in the Plan of Allocation, whether they are adults, minors, incapacitated, or whatever. Therefore, once the Court determines that, for the class (as a whole), the proposed $310M settlement is fair, adequate, and reasonable, then the settlement is also,

by logical necessity, just as fair, adequate, and reasonable to minor or incompetent class members, if any.

VII. CONCLUSION

WHEREFORE, Plaintiffs and the Plaintiff Class respectfully request that the Court finally approve: (i) the fairness of the proposed settlement amount of $310 million to all class members, including minors and incompetents, if any; (ii) the fairness of the proposed Plan of Allocation; (iii) the due process fairness of the forms of notice and methods of transmitting the notices; and (iv) the proposed choice of Computershare Trust Company, N.A., as Escrow Agent, and Gilardi & Co., LLC, as Claims Administrator, and the proposed plans for escrow and claims administration.

Note that defendants and defendants' counsel disclaim: (a) any duty or obligation to the Plaintiffs or the Plaintiff Class, including any duty or obligation to act as proponents of whether the settlement is fair, reasonable, or adequate to and in the best interests of Plaintiffs and the Plaintiff Class (including Minors or Incompetents, if any); or (b) any duty to review, supplement, clarify, or correct any submissions, presentations, or statements to the Court by Plaintiffs or Class Counsel relating to whether the settlement is fair, reasonable, or adequate to and in the best interests of Plaintiffs and the Plaintiff Class (including Minors or Incompetents, if any). Defendants, nevertheless, do not object to this motion.

Class counsel conclude and assert that the proposed $310M settlement is fair, reasonable, adequate, and in the best interest of the Class. See *In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 125 (S.D. N.Y.), aff'd, 117 F.3d 721 (2d Cir. 1997) ("great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying

litigation.") (internal citation and quotations omitted); *Chatelain v. Prudential-Bache Sec., Inc*., 805 F. Supp. 209, 212 (S.D. N.Y. 1992) ("[a] substantial factor in determining the fairness of the settlement is the opinion of counsel involved in the settlement."). A close examination of the pertinent eight *Adams* factors supports the final approval of the present settlement.

The court may rely on the opinions of class counsel about the agreement's fairness and adequacy. *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977).[9] Class counsel fully supports the settlement reached herein. Please note, also, that both class representatives, Sam Johnson and the Birmingham Retirement and Relief Fund, fully endorse the proposed settlement as being fair, reasonable, and adequate to the Class. See Exhibits 5 and 6 to the Evidentiary Submissions. John Lauriello, the original named plaintiff and former class representative, agrees, too. See Exhibit 7. Judge U. W. Clemon opines that "the amount of $310 million is, without question, fair and reasonable to the class." Exhibit 3, at ¶ 26.

Respectfully submitted this the 29th day of July, 2016.

s/ Scott A. Powell
One of the Attorneys for Plaintiffs

[9] "Courts often accord great weight to the opinions of counsel for the class in approving class action settlements." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1149 (11th Cir. 1983). "The judgment of class counsel is also important in addressing the fairness, adequacy, and reasonableness of a consent decree." *Shuford v. Alabama State Bd. of Educ*., 897 F. Supp. 1535, 1549 (M.D. Ala. 1995) (Thompson, J.). "In deciding whether to approve a settlement or not, the court also may take into account class counsel's recommendation regarding the proposed settlement." 7B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, A. Benjamin Spencer, and Adam N. Steinman, Federal Practice & Procedure § 1797.1 (3d ed.) (April 2016 update). "In assessing a settlement of a class action, the courts will consider the opinion of a competent counsel as to the propriety of the settlement." 32B Am. Jur. 2d Federal Courts § 1872 (database updated July 2016).

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of July, 2016, served a copy of the foregoing on counsel of record by notice of electronic mail on those who are registered participants in the electronic-filing system and upon counsel of record who are not participants in the electronic-filing system by placing a copy of same in the United States Mail, first class postage prepaid, and addressed, as follows:

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