SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In re Virgin Media Inc. Shareholders Litigation	Index No. 650537/2013 (Consolidated) The Honorable Jeffrey K. Oing, J.S.C.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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STATUTES, RULES AND REGULATIONS

Pursuant to CPLR §908, Plaintiffs City of Westland Police and Fire Retirement System ("City of Westland"), Jeff Grimsley ("Grimsley"), and Girvan Watts ("Watts") (collectively, "Plaintiffs") respectfully submit this memorandum in support of: (1) certification of the proposed Settlement Class; (2) final approval of the proposed Settlement of this Action;[1] and (3) an award of attorneys' fees and expenses in the amount of $2,700,000 for the services that Court-appointed Plaintiffs' Counsel[2] rendered in achieving the substantial benefits of the Settlement. A hearing is scheduled for October 3, 2013 at 10:00 a.m. for the Court to consider these matters.

PRELIMINARY STATEMENT

Plaintiffs filed this Action on behalf of shareholders of Virgin Media Inc. ("Virgin Media" or the "Company"), alleging that Virgin Media's board of directors (the "Board") breached its fiduciary duties by conducting a deficient sales process and agreeing to improper deal lockups in connection with the sale of the Company to Liberty Global, Inc. ("Liberty"). The core allegation in this Action was that the process resulting in the proposed sale to Liberty was run by senior executives, board members, and financial advisors with financial interests in conflict with the public shareholders' interests, who then improperly agreed to contractual terms impairing any company besides Liberty from submitting a competing bid. *See* Joint Affirmation of Mark Lebovitch and Mark S. Reich, dated September 3, 2013 ("Joint Aff.") at ¶5. The deal lockups at issue included onerous restrictions on the Company's ability to share due diligence information with anyone other than Liberty, Liberty's unlimited right to "match" any competing offer, and Liberty's right to receive a $470 million termination fee if the Company was sold to a

[1] This Action includes the following three consolidated actions: (1) *City of Westland Police & Fire Retirement Sys. v. Virgin Media Inc., et al.*, Index No. 651093/2013; (2) *Grimsley v. Berkett, et al.*, Index No. 650469/2013; and (3) *Watts v. Virgin Media Inc., et al.*, Index No. 650537/2013.

[2] The law firms of Bernstein Litowitz Berger & Grossmann LLP and Robbins Geller Rudman & Dowd LLP are Court-appointed Co-Lead Counsel for Plaintiffs ("Co-Lead Counsel"), while Levi & Korsinsky LLP is Court-appointed Executive Committee (together with Co-Lead Counsel, "Plaintiffs' Counsel").

competing bidder. *See id.* The lack of a sales process before the deal was announced and the collective anti-competitive effect of these deal protections undermined shareholder confidence that the price Liberty agreed to pay was the highest achievable. *See id.*

Through this hard-fought litigation, including review of more than 100,000 pages of discovery documents and depositions in London, England, Englewood, Colorado and New York City of Virgin Media's and Liberty's CEOs, Virgin Media Board members, and a Goldman Sachs banker, Plaintiffs developed an extensive record in support of their contentions. On May 8, 2013, Plaintiffs presented this record to the Court in a motion seeking a preliminary injunction of the special meeting of shareholders to vote on the Liberty transaction (Motion Seq. No. 002).

After Plaintiffs presented their record to the Court and to Defendants, the parties' ongoing informal settlement negotiations intensified. *See* Joint Aff. at ¶¶42-43. Following intense and contentious settlement discussions, Defendants ultimately agreed to significantly reduce the deal protections that impaired competing bids, including by making it much easier for Virgin Media to share due diligence information with other potential bidders, limiting Liberty's matching rights from unlimited to only one round, and reducing the termination fee by $100 million. *See id.* at ¶47. Defendants also agreed to make supplemental disclosures regarding the existence of other potential bidders and regarding the value of the Liberty transaction for Virgin Media shareholders. *See id.*

The Settlement is an outstanding result for the Class. By significantly reducing the deal protections and providing meaningful supplemental disclosures, the Settlement allowed a market-check to take place before Virgin Media shareholders voted on the proposed Liberty transaction. Potential alternative bidders for Virgin Media could more easily obtain confidential due diligence information and had a much more realistic possibility of submitting a successful

competitive bid due to the curtailment of Liberty's matching rights and the $100 million reduction of the termination fee. Thus, Plaintiffs and the other members of the Class could be much more confident that, in the absence of a competing bid, the price that Liberty offered to pay was the highest achievable and maximized shareholder value. *See In re Del Monte Foods Co. S'holders Litig.*, No. 6027-VCL, 2011 Del. Ch. LEXIS 94, at *44-*45 (Del. Ch. June 27, 2011) (reduction of deal protections "provided the opportunity for a topping bid, and this benefit existed whether or not a competing bidder materialized").

The Settlement is particularly exceptional when considered in light of the risks and challenges that Plaintiffs faced in this Action. Plaintiffs faced substantial hurdles in obtaining a preliminary injunction and, if the Court had denied injunctive relief, in establishing Defendants' liability for money damages with respect to their breach of fiduciary duty claims. For example, even if Plaintiffs were successful in convincing the Court that their claims had a reasonable likelihood of success, the Court could still have denied injunctive relief based on a balancing of the equities. *See, e.g.*, *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 434 (Del. Ch. 2012) (denying injunction because the "balance of harms counsel[ed] against a preliminary injunction"). There was also a substantial risk that, following trial, the Court would have found that Defendants were not liable for any money damages because their actions breached the duty of care – not the duty of loyalty – and were exculpated by Virgin Media's charter. These risks were particularly acute due to the Action's expedited discovery and briefing schedule.

Plaintiffs' Counsel request a fee award of $2,700,000, inclusive of $74,295.39 in expenses as compensation for their efforts on behalf of the Class. The parties reached the fee agreement following extensive negotiations that only commenced after the parties had agreed on the material terms of the Settlement and that continued through the first half of August 2013.

The requested attorneys' fees are fully supported by the substantial benefits of the Settlement and well within the range of fees commonly awarded in comparable settlements by this Court. Moreover, the requested attorneys' fees are agreed to by Defendants, subject only to this Court's approval. If approved by the Court, Defendants' payment of the requested fee will not affect or reduce the benefits of the Settlement to the Class. Finally, the requested attorneys' fees are also supported by Plaintiffs' Counsel's lodestar and a 2.06 multiplier, which is well below the range often awarded in complex class actions with substantial risks such as this one.

On July 25, 2013, the Court granted preliminary approval of the Settlement and entered the Preliminary Approval and Scheduling Order. Defendants' Counsel have informed Plaintiffs' Counsel that, in accordance with the Preliminary Approval and Scheduling Order, Defendants sent copies of the Notice of Pendency of Class Action, Proposed Settlement and Settlement Hearing (the "Notice") to all record stockholders of Virgin Media. As stated in the Notice, any objections are due no later than September 23, 2013. To date, Plaintiffs' Counsel have received no objections to the Settlement or to the request for attorneys' fees. *See* Joint Aff. at ¶14.

Plaintiffs respectfully request that the Court approve the Settlement and award Plaintiffs' Counsel $2,700,000 in attorneys' fees and expenses.[3]

FACTUAL BACKGROUND

A. Background of the Litigation

Virgin Media is a major provider of broadband, television, mobile phone, and home phone services in the United Kingdom. Liberty is a leading international cable television, broadband Internet and telephone services provider, with operations in 13 countries and has long

[3] A proposed Final Order and Judgment certifying the Settlement Class, approving the Settlement and awarding fees (leaving the amount of the fee award blank) is attached as Exhibit 1 to the accompanying affirmation of Mark Lebovitch dated September 3, 2013 (the "Lebovitch Affirmation").

had an interest in acquiring Virgin Media. Indeed, Liberty made an unsolicited bid to buy Virgin Media as early as 2007. At that time, the Board conducted a public auction process that ultimately did not result in the sale of the Company.

In August 2012, Liberty renewed its efforts and again approached the Company about a possible transaction. The Board relied on Virgin Media's CEO, Neil A. Berkett ("Berkett"), Chairman of the Board, James F. Mooney ("Mooney"), non-executive director Charles L. Allen, Goldman Sachs, and JPMorgan for responding to Liberty's overture and in deciding to sell the Company to Liberty. The Board appointed Goldman and JPMorgan as its financial advisors and Virgin Media's CEO Berkett as the "single point of contact" for all interactions with Liberty.

Each of the Board's advisors had significant financial interests in selling the Company without maximizing shareholder value. Berkett had announced his intent to retire and would receive significantly higher severance payments if the Company was sold before his departure. Mooney was sitting on the board of directors of another company with the same controlling shareholder as the controlling shareholder of Liberty. Allen was one of only two candidates to take a seat on the new parent company's board following the acquisition by Liberty and had a significant financial interest in promoting the interests of Goldman Sachs. Goldman Sachs, in turn, would receive a $40 million contingency fee if the Company was sold. JPMorgan would receive a $25 million contingency fee for helping to sell the Company.

Plaintiffs alleged that these significant conflicts undermined the process that the Board implemented to respond to Liberty's various offers in the fall of 2012 and early 2013. The Board did not conduct a market check while exploring a possible sale of Virgin Media to Liberty. Moreover, the Board agreed to lock up the Liberty deal with extreme deal protections that precluded any market check after the proposed transaction was announced. For example, the

Board agreed to provisions that made it virtually impossible for alternative bidders to obtain due diligence information that was necessary to prepare a competing bid. The Board also agreed to unlimited matching rights for Liberty if a competing bid nevertheless emerged and to a $470 million termination fee if such competing bid proved successful. Plaintiffs alleged that the Board breached its fiduciary duties to the Company's shareholders in approving the sale of Virgin Media to Liberty under these conditions.

B. Overview of the Litigation

Plaintiffs' Counsel began investigating the proposed Liberty transaction following the announcement of the transaction on February 5, 2013. Between February 12 and March 26, Plaintiffs filed three separate complaints. Shortly thereafter, with due consideration to the costs to the putative class members and with an eye towards efficiently litigating the Action, Plaintiffs moved to consolidate their cases and appoint a leadership structure among Plaintiffs' Counsel. Additionally, beginning on March 4, 2013, Plaintiffs served Defendants with discovery requests, as well as document and deposition subpoenas on JP Morgan and Goldman. Plaintiffs' Counsel met and conferred with counsel for Defendants and counsel for JP Morgan and Goldman regarding expedited discovery numerous times in the weeks leading up to the scheduled preliminary conference before the Court on April 10, 2013, but could not agree on an appropriate scope of discovery. As a result, Plaintiffs prepared papers in support of an expedited discovery motion.

On April 10, the Court consolidated the three actions under the caption *In re Virgin Media Inc. Shareholders Litigation*, Index No. 6506537/2013 and appointed Bernstein Litowitz Berger & Grossmann LLP and Robbins Geller Rudman & Dowd LLP as Co-Lead Counsel and Levi & Korsinsky LLP as Executive Committee. That day, the Court also entered a scheduling order providing for expedited discovery, a briefing schedule for Plaintiffs' forthcoming motion

for a preliminary injunction, and a tentative hearing date before the scheduled shareholder vote on the proposed Liberty transaction. Plaintiffs designated the City of Westland complaint as the operative class action complaint (the "Complaint") and proceeded with expedited discovery.

Plaintiffs' Counsel conducted extensive discovery in a highly compressed time period to develop a record upon which the Court could consider Plaintiffs' motion for a preliminary injunction. Between the filing of the Complaint and the filing of the opening brief in support of their motion for a preliminary injunction on May 8, 2013, Plaintiffs' Counsel obtained and reviewed over 100,000 pages of documents produced by Defendants and Goldman Sachs relating to the Board's reliance on Berkett, Mooney, Allen, Goldman Sachs and JPMorgan during the negotiations that led to the proposed Liberty transaction, the conflicts of interests plaguing these advisors to the Board, and the value of the consideration to be received by Virgin Media shareholders in connection with the proposed Liberty transaction. *See* Joint Aff. at ¶36.

During this time, Plaintiffs' Counsel also took the depositions of Virgin Media's CEO Berkett and non-executive director Allen in London, Liberty's CEO Michael T. Fries in Colorado, and Virgin Media Board member George R. Zoffinger and a Goldman Sachs banker in New York. *See* Joint Aff. at ¶37. In addition, Plaintiffs' Counsel worked with compensation expert Brian T. Foley, who submitted an affidavit identifying Berkett's severance benefits if Virgin Media was sold prior to his announced departure, and a valuation expert who assisted Plaintiffs' Counsel with evaluating Defendants' arguments concerning the value of Virgin Media. *See id.* at ¶38.

On May 8, 2013, three business days after the completion of fact discovery, Plaintiffs' Counsel filed their motion for a preliminary injunction, accompanied and supported by a factually developed memorandum of law, a substantive attorney affirmation, and an expert

affidavit. According to the schedule, Defendants' opposition to Plaintiffs' preliminary injunction motion was due on May 22, 2013 at noon, Plaintiffs' reply was due on May 28, 2013 at noon, and the Court would hold a hearing on May 30, 2013 at 10:00 a.m. – well in advance of the shareholder vote scheduled for June 4, 2013.

C. Negotiations and Settlement

From time to time during discovery, the parties' counsel engaged in discussions concerning a potential resolution of this Action. Prior to the filing of Plaintiffs' motion for a preliminary injunction, Defendants declined to make an offer containing even the minimum components that Plaintiffs insisted on as a framework for a settlement. *See* Joint Aff. at ¶44.

On May 8, 2013, Plaintiffs filed their preliminary injunction papers with numerous and detailed citations to the record that Plaintiffs' Counsel had developed during discovery. With Plaintiffs' record before the Court, and a preliminary injunction hearing looming, the parties engaged in intense and contentious settlement discussions. Because the parties were making meaningful progress, Defendants requested a short extension of the May 22, 2013 noon deadline for submitting their opposition papers to Plaintiffs' motion for a preliminary injunction. Plaintiffs agreed. Later that evening, the parties entered into the term sheet with the principal terms of the proposed Settlement. *See id.* The next day, the parties informed the Court of the Settlement and requested adjournment of the briefing schedule and the injunction hearing, and a stay of the Action. Plaintiffs' Counsel confirmed this to the Court in a May 24, 2013 letter.

Throughout the settlement negotiations, Plaintiffs insisted that Defendants agree to meaningful reductions in the deal protections that prevented potential competitive bids for Virgin Media. *See id.* at ¶42. Before accepting the Settlement, Plaintiffs' Counsel carefully evaluated the merits of the reduced deal protections and the supplemental disclosures, mindful of their duties to Virgin Media's shareholders. *See id.* at ¶43.

On June 4, 2013 – after the parties reached agreement on the principal settlement terms – Virgin Media held the vote on the Liberty transaction during a special meeting of shareholders. The shareholders approved the transaction and it was completed on June 7, 2013.

Meanwhile, the parties' counsel documented the terms of the Settlement in a detailed Stipulation of Settlement that was executed on July 22, 2013 and submitted to the Court on July 23, 2013. On July 25, 2013, the Court granted preliminary approval of the Settlement and entered the Preliminary Approval and Scheduling Order. Defendants' Counsel have represented that, in accordance with this Order, the Court-approved Notice was sent via first class mail to all Virgin Media's stockholders of record during the proposed Class Period. The Notice was also published on Virgin Media's website. Although the deadline has not yet passed, to date Plaintiffs' Counsel have received no objections to the Settlement or the fee request.

TERMS OF THE SETTLEMENT

Virgin Media filed two Form 8-K's with the SEC in connection with the Settlement. Virgin Media's May 23, 2013 Form 8-K[4] contained the Term Sheet and detailed the significantly reduced deal protections (the "Modified Deal Terms") achieved by the Settlement, including:

Modified Deal Term	Materiality of the Modification
• $100 million reduction of Termination Fee (from $470 million to $370 million).	Facilitated competitive bids by lowering the cost to acquire Virgin Media by $100 million.
• Modification of definition of superior proposal in the Merger Agreement for purposes of the Board's evaluation of any competing proposals by: (a) removing the requirement that the party submitting a competing bid must demonstrate committed financing; (b) allowing consideration of a competing bid even if acceptance of the bid would still be subject to consents, approvals	Facilitated competitive bids by making it easier for Virgin Media to share confidential due diligence information with potential alternative bidders and for the Board to engage in substantive settlement negotiations.

[4] Attached as Exhibit 2 to the Lebovitch Affirmation

Modified Deal Term	Materiality of the Modification
or waivers from governmental entities; and (c) removing the requirement that Virgin Media receive advice from financial or legal counsel in considering a competing bid.	
• Limiting Liberty to only one round of matching rights as opposed to the unlimited matching rights originally granted to Liberty in the Merger Agreement.	Facilitated competitive bids by removing the threat of unlimited matching.

Virgin Media's May 24, 2013 Form 8-K[5] contained the Supplemental Disclosures achieved by the Settlement, including:

Supplemental Disclosure	Materiality of the Disclosure
• Disclosure that on December 7, 2012, Goldman and JP Morgan reviewed a list of thirteen potential bidders for Virgin Media with the Board.	Facilitated shareholder understanding of the existence of potential competitive bidders for Virgin Media.
• Disclosure of: o Goldman's implied operating cash flow ("OCF") multiples in the illustrative discounted cash flow analysis; and o Goldman's estimate of the present value of expected synergies resulting from the Liberty transaction in its discounted cash flow analysis.	Facilitated shareholder understanding of the value of Virgin Media and the proposed Liberty transaction.
• Disclosure that the Board did not expressly discuss the differences between Delaware and United Kingdom law with respect to shareholders' rights in considering whether to enter into the Merger Agreement.	Facilitated shareholder understanding of the need to conduct an independent analysis of the differences between Delaware and United Kingdom law with respect to shareholders' rights.

Defendants have acknowledged that the significantly reduced deal protections in the Modified Deal Terms and the Supplemental Disclosures were the direct and sole result of the efforts of Plaintiffs' Counsel in this Action.

[5] Attached as Exhibit 3 to the Lebovitch Affirmation

ARGUMENT

I. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

The Court must make a class certification decision in connection with the proposed Settlement. As part of the Settlement, the parties agreed to resolve this Action on behalf of a mandatory non-opt out class consisting of all record and beneficial owners of Virgin Media common stock during the period beginning on February 5, 2013 through and including June 7, 2013 (the "Settlement Class").[6] Non-New York resident members of the Settlement Class may opt out solely to pursue potential claims for monetary damages but will otherwise be bound by the Settlement's terms. To date, no member of the Settlement Class has opted out.

This Court has preliminarily certified the Settlement Class in the July 25, 2013 Preliminary Approval and Scheduling Order. Because the elements of CPLR §901 and §902 are readily satisfied, the Court should grant final certification of the Settlement Class.

A. The Settlement Class Satisfies the Requirements of CPLR §901

Pursuant to CPLR §901, the Court may certify a class if: "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CPLR §901. Article 9 of the CPLR is to

[6] Excluded from the Class are Defendants, the officers, directors, affiliates, and family members of any of the Defendants, and any entity in which any Defendant has or had a controlling interest, and their respective successors-in-interest, successors, predecessors-in-interest, predecessors, representatives, trustees, executors, administrators, estates, heirs, assigns, or transferees, immediate and remote, and any person or entity acting for or on behalf of, or claiming under, any of them, and each of them, only in their capacity as such.

be "liberally construed in favor of granting class certification if all of the prerequisites of CPLR 901(a)(1)-(5) are met." *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 135 (2d Dept. 2008) (citations omitted). All five prerequisites are met here.

(1) ***Numerosity*** is easily established because Virgin Media had over 269,000,000 common shares issued and outstanding as of January 31, 2013. Complaint, ¶32. It is reasonable to assume that these Virgin Media shareholders are geographically dispersed throughout the United States and, therefore, that it would be impracticable, if not logistically impossible, to join all Settlement Class members. *See Globe Surgical*, 59 A.D.3d at 138 (numerosity satisfied where the proposed class included between 10 and 100 members) (collecting authorities).

(2) ***Commonality*** also is readily satisfied because Plaintiffs' and the Class' claims all arise out of the same operative facts giving rise to the same breach a fiduciary duty claims against the same Defendants. *See Brandon v. Chefetz*, 106 A.D.2d 162, 165-66 (1st Dept. 1985) (granting class certification where "existence of sufficient common questions of law and fact was based upon a finding that [defendants'] breaches of fiduciary duty were the prevalent issued in the case"). There can be no doubt that "the use of a class action would achieve economies of time, effort and expense, and promote uniformity of decisions as to persons similarly situated" to determine these common issues of fact and law. *Globe Surgical*, 59 A.D.3d at 140.

(3) ***Typicality*** is met because Plaintiffs' claims in this Action are exactly the same as those of the other members of the Settlement Class. Indeed, all Class members have the exact same breach of fiduciary claims regarding the same underlying transaction against the same Defendants. *See Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14, 22 (1st Dept. 1991) ("the typicality requirement relates to the nature of the claims and the underlying transaction"); *Klurfield v. Equity Enterprises, Inc.* 79 A.D.2d 124 (2d Dept. 1981) (affirming class certification where plaintiffs' claims affected "all shares of the stock to the same degree and for the same reason").

(4) ***Adequacy*** is satisfied because: (1) Plaintiffs are members of the Class they seek to represent and have the same interest and the same injury as the other Class members; (2) Plaintiffs have maintained an interest in prosecuting the Action; and (3) Plaintiffs have retained experienced counsel with a proven track record in class actions like this one who have zealously represented the interests of the Class.[7] *See Pruitt*, 167 A.D.2d at 24 (zealous representation by experienced class counsel supports a finding of adequate representation).

[7] Co-lead Counsel are leading practitioners in shareholder class action litigation and have successfully prosecuted numerous securities and breach of fiduciary duty actions on behalf of injured investors in this Court and across the country. The firm resume for Bernstein Litowitz Berger & Grossmann LLP is attached as Exhibit 4 to the Lebovitch Affirmation. The firm resume for Robbins Geller Rudman & Dowd LLP is attached as Exhibit 1 to the September 3, 2013 affirmation of Mark S. Reich (the "Reich Affirmation").

(5) ***Superiority*** is satisfied because Defendants' alleged breaches of duty affected all Class members in the exact same way, presenting numerous factual and legal questions that are identical for all Class members. *See Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 99 (2d Dept. 1980) ("Any device which would allow one action to do a job, or a good part of it, that would otherwise have to be done by many, must be considered 'superior'. . ."); *Globe Surgical*, 59 A.D.3d at 146 (finding superiority because class action, "through the aggregation of many similar claims, provides an incentive to the legal profession to expend the resources necessary to fully litigate often complex cases such as the instant matter").

Accordingly, the requirements of CPLR §901(1)-(5) are satisfied.

B. The Settlement Class Satisfies the Requirements of CPLR §902

The Court should also consider the five factors listed in CPLR §902, all of which support class certification. *First*, there is no "interest of members of the class in individually controlling the prosecution or defense of separate actions" because this Action arises out of a single course of conduct that affected all Class members. In addition, to date no Class member has objected to the Settlement or expressed any interest in separately litigating the issues presented in this Action. *See Conolly v. Universal Am. Fin. Corp.*, 21 Misc 3d 1109(A), at *5 (N.Y. Sup. Ct. Westchester Cnty. 2008) (finding that "the vast majority of the class members, by their silence, have indicated their disinterest in individually controlling the prosecution of any separate action").

Second, "the impracticability or inefficiency of prosecuting or defending separate actions" is shown by the number of Class members and the burden that individual adjudication of each of their claims would place on the judicial system. *See id.*, at *5. If separate actions were commenced by each Class member, Defendants would also be subject to the risk of inconsistent judgments and incompatible standards of conduct. *See In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154 (1st Dep't 1990), *modified on other grounds*, 77 N.Y.2d 185 (1991).

Third, "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class" does not militate against maintaining this

Action as a class action, because all actions asserting breach of fiduciary duty claims against Defendants in connection with the Liberty transaction were consolidated into this Action.

Fourth, "the desirability or undesirability of concentrating the litigation of the claim[s] in the particular forum" also supports class certification. Due to Virgin Media's significant ties to New York, including Virgin Media's executive office in New York City, this Court is a particularly desirable forum for resolving this controversy.

Fifth, "the difficulties likely to be encountered in the management of a class action" are minimal (if any) given the efficient consolidation of this Action. Indeed, any difficulties that could conceivably exist pale in comparison to the difficulties of prosecuting separate actions.

In sum, all factors of CPLR §901 and §902 support certification of the Settlement Class.

II. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Class Action Settlement Approval Standard

New York courts have long favored the voluntary settlement of lawsuits. *See Hallock v. State*, 64 N.Y.2d 224, 230 (1984) ("Stipulations of settlement are favored by the courts and not lightly cast aside"). Thus, as numerous courts have held, the proposed settlement of a class action should be approved where, as here, the compromise is fair, adequate, and in the best interest of the Settlement Class. *See Rosenfeld v. Bear Stearns & Co.*, 237 A.D.2d 199 (1st Dep't 1997); *Michels v. Phoenix Home Life Mut. Ins. Co.*, No. 5318-95, 1997 N.Y. Misc. LEXIS 171, at *77 (N.Y. Sup. Ct. Albany Cnty. Jan. 3, 1997).

In determining whether the Settlement is fair, reasonable, and adequate, the Court should consider: (1) the likelihood that Plaintiffs would succeed on the merits; (2) the extent of support from the parties and the judgment of counsel; (3) the presence of bargaining in good faith; and (4) the nature of the issues of law and fact. *See Colt Indus.*, 155 A.D.2d at 160. In this regard, "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of

success on the merits against the amount and form of the relief offered in the settlement." *Id.*

In applying these factors, courts do not substitute their judgments for that of the parties who negotiated the settlement, and do not conduct mini-trials of the merits of the action. *See, e.g.*, *In re Milken and Associs. Sec. Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993). As one court noted:

> [T]he determination of what . . . constitutes a fair settlement is not a matter of mathematical science . . . The court is in no position to substitute its judgment for that of honest and competent attorneys, who, after exhaustive discovery, have made a determination that the settlement represents a fair and realistic appraisal of their clients' chances of ultimate success.

Siegel v. Realty Equities Corp., No. 70 Civ. 4338, 1973 U.S. Dist. LEXIS 12499, at *8 (S.D.N.Y. July 30, 1973).

A review of these factors supports approval of the Settlement.

B. The Strengths of Plaintiffs' Claims and the Risks of Continued Litigation Balanced Against the Benefits Secured for the Class

The claims asserted in this Action were extensively briefed in Plaintiffs' motion for a preliminary injunction. While Plaintiffs were prepared to litigate this case to trial, victory at the preliminary injunction stage or later was a risky proposition. Throughout the litigation, Defendants have adamantly denied (and they continue to deny) any wrongdoing. The parties agreed, however, that this case presented complex issues requiring extensive factual and legal analysis regarding, among other things, application of the Delaware courts' case law under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

In pursuing this Action, Plaintiffs faced at least three difficult issues. First, even if Plaintiffs persuaded the Court that they had a reasonable likelihood of success in proving Defendants' breach of fiduciary duties, the Court could still have denied a preliminary injunction based on a balancing of the equities or a determination that Defendants' breaches could be

remedied through money damages. *See In re El Paso*, 41 A.3d at 434 (finding "balance of harms counsel[ed] against a preliminary injunction").

Second, Plaintiffs would have encountered significant hurdles in obtaining money damages from the Director Defendants due to the exculpation clause in Virgin Media's charter. Pursuant to this charter, the Director Defendants were not liable for breaches of the duty of care – only for breaches of the duty of loyalty. Moreover, it is unlikely that the Director Defendants would have been able to pay a substantial judgment in connection with any successful claims involving this $23 billion transaction.

Finally, Plaintiffs may have had difficulty proving damages in a case where no one could know what would have happened if Defendants had conducted a proper sales process. Indeed, there is a strong suggestion in the record that, in that case, the Board may have decided not to sell the Company in the first place.

Thus, Plaintiffs faced significant risks that, if they continued to litigate, there would be no change in the extreme deal protections before the Company's shareholders would vote on the proposed Liberty transaction and that shareholders would receive little or no monetary compensation at a subsequent trial. Through the Settlement, Plaintiffs secured significant reductions to the deal protections – including a $100 million reduction of the termination fee and limiting Liberty's matching rights, effectively enabling a market check before the Company's shareholders voted on the proposed transaction, plus meaningful supplemental disclosures about potential alternative bidders and the value of Virgin Media in the proposed transaction. *See In re Del Monte*, 2011 Del. Ch. LEXIS 94, at *14 ("[revised deal protection provisions] provide[] the opportunity for a topping bid, and this benefit exist[s] whether or not a competing bidder

materialized.").[8] Weighing these substantial benefits against the obstacles and risks Plaintiffs would have faced through continued litigation supports approval of the Settlement.

C. The Parties' Support and Plaintiffs' Counsel's Judgment

Following intense litigation and contentious settlement negotiations, both Plaintiffs and Defendants support approval of the Settlement as fair, reasonable and adequate. In addition, although the Court-ordered deadline to object to any aspect of the Settlement – September 23, 2013 – has not yet passed, to date Plaintiffs' Counsel have received no objection to any aspect of the Settlement. A lack of objections is generally indicative of the shareholder approval of a proposed class or derivative settlement. *See Pressner v. MortgageIT Holdings, Inc.*, 16 Misc. 3d 1103(A), at *6 (N.Y. Sup. Ct. 2007) (approving settlement "[i]n view of the fact that the proposed settlement was arrived at by the parties who are represented by able counsel, and since there has been no objection to the proposed settlement").[9]

Plaintiffs' Counsel has also concluded that the Settlement is fair, reasonable and adequate. *See* Joint Aff. at ¶3. Based on their investigation, discovery efforts, and analyses of the applicable legal principles, Plaintiffs' Counsel concluded that the significant reductions in the deal protections through the Modified Deal Terms and the supplemental disclosures provided substantial benefits to Virgin Media's shareholders who were asked to vote on the proposed

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[8] *See also In re Compellent Techs., Inc.*, No. 6084-VCL, 2011 Del. Ch. LEXIS 190, at *56-*57 (Del. Ch. Dec. 9, 2011) ("Loosening a no-shop clause, weakening information rights or matching rights, and ameliorating restrictions on a board changing its recommendation should, all else equal, increase the chance of a topping bid."); *In re Celera Corp. S'holder Litig.*, No. 6304-VCP, 2012 Del. Ch. LEXIS 66, at *77 (Del. Ch. Mar. 23, 2011), *rev'd in part on other grounds*, 59 A.3d 418 (2012) ("Lowering a termination fee thus reduces the barrier to making a superior offer in the first place and increases the amount of the superior offer's consideration that would go directly to shareholders.").

[9] *See also Wilson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *80-*81 (N.Y. Sup. Ct. N.Y. Cnty. 1995) (noting that "[t]he small number of opt-outs and objections from Class Members relative to the size of the Class and the lack of merit of the objections that were made support approval of the settlement"); *Shlensky v. Dorsey*, 574 F.2d 131, 148 (3d Cir. 1978) (approving settlement because "overwhelming majority of [the] shareholders have not objected to the settlement")

transaction and ample consideration to settle and release the claims in this Action, especially given the substantial risks, costs and uncertainties of continued litigation. *See Pressner*, 16 Misc. 3d 1103(A), at *6 (crediting judgment of counsel); *Michels*, 1997 N.Y. Misc. LEXIS 171, at *85 (same), *citing Smith v. Vista Org., Ltd.*, No. 89 Civ. 0048, 1991 WL 152612, at *5 (S.D.N.Y. July 30, 1991) (view of experienced counsel favoring settlement entitled to "considerable weight").

D. The Settlement Is the Result of Good Faith, Arms' Length Negotiations

The Settlement was the product of hard fought, arms' length negotiations between highly experienced counsel following extensive discovery. These circumstances support approval of the Settlement. *See Michels*, 1997 N.Y. Misc. LEXIS 171, at *86 ("Evidence of good faith bargaining . . . supports approval of the settlement."); *Ryan ex rel. v. Gifford*, No. 2213-CC, 2009 Del. Ch. LEXIS 1, at *5 (Del. Ch. Jan. 2, 2009) (approving settlement that was reached "after vigorous arms' length negotiations following meaningful discovery"); *In re Crocker S'holders Litig.*, No. 7405, 1985 Del. Ch. LEXIS 417, at *5 (Del. Ch. May 21, 1985) (approving settlement that was "the result of continued arms' length negotiations between the parties").

E. The Complex Nature of the Issues of Law and Fact in this Action

The nature of the issues of law and fact also support approval. Litigating this case to conclusion would undoubtedly be complex, lengthy and expensive. Defendants were prepared to defend vigorously and, even if successful, the anticipated motions to dismiss, motions for summary judgment, pretrial motions and likely appeal of any adverse verdict would have resulted in an extensive period of time before the issues would have been resolved. *See Michels*, 1997 N.Y. Misc. LEXIS 171, at *87 (approving settlement where otherwise "it would undoubtedly be years before the issues were resolved"), citing, *inter alia*, *Lowenschuss v. Bluhdom*, 612 F.2d 18, 19 (2d Cir. 1980) (approving settlement where further litigation would

have been "extensive and protracted" with no guarantee for any relief to the class).

In sum, all factors support approval of the Settlement.

III. PLAINTIFFS' REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES SHOULD BE GRANTED

Court-appointed Co-Lead Counsel respectfully request an award of $2,700,000 in attorneys' fees, inclusive of $74,295.39 in expenses, to be allocated by Co-Lead Counsel among themselves and the Executive Committee. An award of attorneys' fees is warranted where, as here, counsel's efforts have conferred a substantial benefit on the class. *See In re Cablevision Sys. Corp. S'holders Litig*., 868 N.Y.S.2d 456, 468 (N.Y. Sup. Ct. 2008) ("[In] a shareholder litigation, the plaintiff shareholders are entitled to an award of attorneys' fees if they confer a substantial benefit on the corporation or the other shareholders"). In addition, Defendants have agreed that Plaintiffs' Counsel are entitled to an award of attorneys' fees and expenses and, following arms' length negotiations *after* the parties reached agreement on the material terms of the Settlement, have agreed to pay $2,700,000. *See* Joint Aff. at ¶¶52-54. If approved by the Court, Defendants' payment of the agreed fee will not reduce the benefits of the Settlement to the Class.

As discussed below, Plaintiffs' Counsel's requested fees are reasonable and should be awarded. To date, no Settlement Class member has objected to the fee and expense application.

A. The Litigation Conferred Substantial Benefits on the Class

Under New York law, an award of attorneys' fees is appropriate when a party, proceeding in a representative capacity, obtains a result that creates a "substantial benefit" of a pecuniary or non-pecuniary nature on other shareholders. *See In re Cablevision*, 868 N.Y.S.2d at 468. The benefit need not have a readily ascertainable monetary value. *See id.* (citing *Seinfeld v.*

Robinson, 246 A.D.2d 291, 295 (1st Dep't 1998)).[10]

Here, the benefits conferred on Virgin Media's shareholders are significant. Plaintiffs' Counsel's efforts and litigation acumen led to radically reduced deal protections for Liberty, including a $100 million reduction of the termination fee and elimination of Liberty's unlimited matching rights, and significant Supplemental Disclosures that were critical to a full and accurate understanding of the terms of the proposed Liberty transaction. Given the substantial benefits achieved, Plaintiffs' requested fee is well within the range of awards in similar cases.[11] *See In re Goodrich Shareholders Litig.*, Index No. 13699/2011 (N.Y. Sup. Ct. Nassau Cnty. May 15, 2013) (awarding $4 million in fees and expenses in connection with approval of settlement involving reduced deal protections and supplemental disclosures); *Phillips v. Reckson Assocs. Realty Corp.*, No. 06-12871 (N.Y. Sup. Ct. Nassau Cnty. Jan, 20, 2009) (Final Order and Judgment Approving Settlement and Fees and Expenses awarding $5 million in fees and expenses); *In re New York Stock Exch./Archipelago Merger Litig.*, No. 601646/05 (N.Y. Sup. Ct. N.Y. Cnty. Feb. 21, 2006) (awarding $8.5 million in fees and $595,511 in expenses).[12]

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[10] In addition, in Delaware, where many of these types of cases are heard, courts also recognize that plaintiffs' counsel are entitled to attorneys' fees for providing substantial benefits on other shareholders. *See, e.g., In re Talley Indus.*, No. 15961, 1998 Del. Ch. LEXIS 53, at *46 (Del. Ch. Apr. 13, 1998) ("Considering all the circumstances presented, I have no difficulty concluding that the disclosures made here constitute adequate consideration for the settlement of the claims asserted and adequately supported the fee requested."); *Gilmartin v. Adobe Res. Corp.*, C.A. No. 12467 (Del. Ch. June 29, 1992) (ordering defendant corporation to pay plaintiff's counsel attorneys' fees and expenses over its objection based on the fact that plaintiff's counsel had caused defendants to make an additional disclosure to shareholders, citing the resulting benefit).

[11] All unreported authorities cited herein are included as a compendium that is attached as Exhibit 5 to the Lebovitch Affirmation.

[12] Delaware cases are in accord. *See In re Yahoo! S'holders Litig.*, C.A. No. 3561-CC (Del. Ch. Mar. 6, 2009) (Order) (awarding fees of $8.4 million for creating a substantial benefit to Yahoo's shareholders because the key terms of the settlement made the company "a more attractive target to potential suitors"); *In re Alberto-Culver Co. S'holders Litig.*, C.A. No. 5873-VCS (Del. Ch. Feb. 21, 2011) (Order) (approving $3.25 million fee award for a settlement that eliminated matching rights, reduced the termination fee, provided supplemental disclosures and temporarily postponed the shareholder vote); *In re The Limited, Inc., S'holders Litig.*, C.A. No. 17148-VCN (Del. Ch. Aug. 10, 2004) (Order) (approving $7

The requested fee award is also consistent with the policy of rewarding counsel who take risk and put forth intense effort in a compressed period of time to achieve a positive outcome for all stockholders. *See Seinfeld v. Coker*, 847 A.2d at 330, 338 (Del. Ch. 2000) (noting that awards of attorneys' fees should reflect the goal of "maximiz[ing] future plaintiffs' incentives to bring meritorious cases and to litigate them efficiently"); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 962 (Del. Ch. 2007) ("Nor can stockholder-plaintiffs believe that their lawyers will not receive appropriate remuneration in this Court for achieving an important benefit for the corporation or a class of stockholders").

B. Counsel Expended Substantial Effort Litigating This Action on a Fully Contingent Basis

Plaintiffs' Counsel's fee request is further supported by their efforts in litigating multiple complex legal issues – on a fully contingent basis – in a compressed timeframe. *See* Joint Aff. at ¶¶15-45. As shown in the accompanying September 3, 2013 individual affirmations of Mark Lebovitch, Mark S. Reich and Shane T. Rowley and summarized in the chart below, Plaintiffs' Counsel devoted significant resources prosecuting this Action – over 2,807 hours representing an aggregate lodestar amount in excess of $1,312,068. [13] This included extensive discovery efforts, including review of more than 100,000 pages of discovery materials and depositions in London, Colorado and New York, and briefing complex legal issues on an expedited schedule. In addition, as reported by each of the firms, Plaintiffs' Counsel incurred expenses of $74,295.39, which include the substantial expense of an expert who consulted on technical valuation aspects and an expert who consulted on execution compensation issues.

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million fee award for settlement in which primary defendants agreed not to tender and not to sell shares in the market for six months after tender offer).

[13] If the Court desires any additional information with respect to Plaintiffs' Counsel's time and expenses, Plaintiffs' Counsel will provide it at the request of the Court.

	Hours	Rates	Lodestar
Bernstein Litowitz			
Partner	115.00	$775	$89,125.00
Senior Counsel and Associate	389.50	$450 - $625	$219,356.25
Staff Attorney	854.25	$340 - $395	$315,797.00
Professional Support Staff	115.00	$275 - $310	$35,282.50
Robbins Geller			
Partner	274.50	$635	$174,307.50
Senior Counsel and Associate	677.25	$330 - $700	$259,755.00
Professional Support Staff	37.75	$295	$11,136.25
Levi & Korsinsky			
Partner	124.75	$815	$101,671.25
Associate	207.25	$375 - $575	$102,391.25
Professional Support Staff	12.25	$265	$3,246.25
TOTAL:	**2,807.50**		**$1,312,068.25**

Plaintiffs' Counsel's collective lodestar confirms the reasonableness of the requested fees. As noted above, Plaintiffs' Counsel expended 2,807.50 hours in litigating this Action, representing a total lodestar of $1,312,068.25 at their current, standard hourly rates. *See* individual affirmations of Mark Lebovitch, Mark S. Reich and Shane Rowley. The fee request is roughly 2.06 times the total lodestar and is well below the range routinely approved by New York courts in settlements of complex litigation. *See New York Life*, 1995 N.Y. Misc. LEXIS 652, at *94-*95 (awarding 4.6 multiplier, noting that "other courts have awarded fees that resulted in significantly higher multiples of the lodestar"); *Maley v. Dei Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) ("multiplier of 4.65 [is] well within the range awarded by courts in this Circuit and courts throughout the country"); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding 3.97 multiplier, noting that "[i]n recent years multipliers of between 3 and 4.5 have become common").

Indeed, each of the factors that New York courts review in determining an appropriate multiplier of the lodestar supports the reasonableness of Plaintiffs' Counsel's requested fee

award here. As noted above, the substantial benefits of the Settlement and awards in similar cases support Plaintiffs' fee request. *See Rahmey v. Blum*, 95 A.D.2d 294, 303-04 (2d Dep't 1983). In addition, Plaintiffs' Counsel's fee request is also supported by: (1) the novelty and difficulty of the questions presented; (2) the skill requisite to perform the legal services properly; (3) the preclusion of other employment by the attorney due to acceptance of the case; (4) the contingent nature of the fee; and (5) time limitations imposed by the circumstances of the case. *See id.*

1. The Novelty and Difficulty of the Questions Involved and the Required Skill of Counsel Support the Requested Fee Award

It is well-settled that shareholder litigation challenging corporate transactions is difficult and complex. *See United Vanguard Fund, Inc. v. Takecare, Inc.*, 727 A.2d 844, 855 (Del. Ch. 1998). Thus, Plaintiffs' Counsel's efforts to obtain the benefits achieved in this case required a high level of experience in complex shareholder litigation against Defendants who were represented by multiple highly experienced law firms with ample personnel and resources.

Moreover, this complex Action proceeded on an expedited basis. Thus, Plaintiffs' Counsel needed to convince highly motivated Defendants that they faced a significant risk of a preliminary injunction of the transaction – already a difficult task – in a highly compressed time period. Plaintiffs' Counsel took five depositions in London, Colorado and New York, and then filed Plaintiffs' motion for preliminary injunction – with extensive citations to the factual record – three business days later. For Plaintiffs' Counsel to marshal the resources and skills needed to put together a compelling injunction motion under these conditions was a significant challenge that resulted in a significant achievement – it was only through the skill of Plaintiffs' Counsel that the Modified Deal Terms and Supplemental Disclosures were achieved. The novelty, difficulty, and required skill of Plaintiffs' Counsel support the requested fee award.

2. The Contingent Nature of the Fee and Preclusion of Other Work Support the Requested Fee Award

Plaintiffs' Counsel undertook this representation on a fully contingent basis. State and Federal courts have recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis. *See Ryan ex rel.*, 2009 Del Ch. LEXIS, at *42 (recognizing that "an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis"); *Paris v. Metro. Life Ins. Co.*, 94 F. Supp. 356, 358 (S.D.N.Y. 1950) ("The fact that petitioners' compensation was contingent upon recovery must be taken into account"); *Wash. Fed. Sav. Loan Ass'n v. Village Mall Townhouses, Inc*., 90 Misc. 2d 227, 231 (N.Y. Sup. Ct. Queens Cnty. 1977); *Diamond v. Davis*, 62 N.Y.S.2d 175, 179 (N.Y. Sup. Ct. N.Y. Cnty. 1945). As a federal appellate court explained:

> The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services.

McKittrick v, Gardner, 378 F.2d 872, 875 (4th Cir. 1967). The risk of no recovery in cases such as this one is real, as the outcome is uncertain and success at trial is far from guaranteed.[14]

Further, the prosecution of this Action required Plaintiffs' Counsel to promptly analyze the terms of a complex transaction and gain access to all relevant information concerning Virgin Media's business and future prospects, determine what course of action was in the best interests of the Class, and negotiate the most favorable Settlement terms possible. *See* Joint Aff. at ¶9. Plaintiffs' Counsel's representation required substantial resources, including funds to compensate staff and pay for experts and out-of-pocket expenses. As a result, Plaintiffs' Counsel

[14] *See, e.g., Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (plaintiffs' counsel received no recovery for time and expenses after judgment for defendants following two trials).

devoted substantial resources that could have been devoted elsewhere through the acceptance of other employment. *See id.* at ¶¶50-51.

In sum, Plaintiffs' Counsel undertook this high-risk representation on a fully contingent basis and faced the possibility of receiving nothing for their efforts. Accordingly, the contingent nature of this case and preclusion of other employment support the requested fee award. *See Michels*, 1997 N.Y. Misc. LEXIS 171; *New York Life*, 1995 N.Y. Misc. LEXIS 652.

3. The Time Limitations Imposed by the Circumstances of the Case Support the Requested Fee Award

Plaintiffs' Counsel was working under significant time constraints in prosecuting this Action. Over the course of a few months, Plaintiffs' Counsel prepared complaints, moved for expedited discovery, obtained and reviewed more than 100,000 pages of document discovery, took key depositions of the most senior executives, two board members and a Goldman Sachs banker, worked with their valuation expert and an executive compensation expert in order to discern whether Defendants provided Virgin Media's shareholders with an adequate price and adequate information regarding the Acquisition, and prepared detailed preliminary injunction papers. After filing the preliminary injunction motion, Plaintiffs' Counsel was immediately engaged in contentious settlement negotiations to obtain the significant benefits of the Settlement. The time pressures inherent in this case made it necessary for members of Plaintiffs' Counsel, at critical junctures in the case, to work exclusively on this Action to ensure that Virgin Media shareholders were adequately represented.

In sum, given the significantly reduced deal protections and the meaningful supplemental disclosures achieved, the complexity of the Action, and the risks undertaken, Plaintiffs' Counsel respectfully submit that the requested fee award is reasonable and should be approved.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) certify the Settlement Class; (2) approve the Settlement; and (3) approve an award of $2,700,000, inclusive of litigation expenses, to Plaintiffs' Counsel, to be allocated by Co-Lead Counsel.

Dated: September 3, 2013

ROBBINS GELLER RUDMAN
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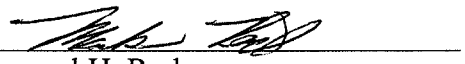

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