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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re AXA ROSENBERG INVESTOR LITIGATION This Document Relates To: All Actions	Master File No. CV 11-00536 JSW CLASS ACTION **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: March 30, 2012 Time: 9:00 a.m. Courtroom: 11, 19th Floor Judge: Jeffrey S. White

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, pursuant to the Court's Order Preliminarily Approving Settlement, Providing For Notice And Scheduling Settlement Hearing [ECF No. 64] ("Preliminary Approval Order"), on March 30, 2012, at 9:00 a.m., before the Honorable Jeffrey S. White of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Named Plaintiffs Government of Guam Retirement Fund, Sacramento County Employees' Retirement System, Board of Trustees of the National Elevator Industry Health Benefit Fund, and Board of Trustees of the Pipefitters Local 636 Defined Benefit Pension Fund (collectively, "Named Plaintiffs" or "Class Representatives") will and hereby do move the Court for an order, pursuant to Fed. R. Civ. P. 23(e) granting final approval of the Settlement dated as of November 1, 2011 [ECF No. 59] (the "Stipulation"),[1] including approving the proposed Plan of Allocation for distribution of the net settlement proceeds, and granting final certification of the Class as certified in the Court's Preliminary Approval Order.[2]

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[1] All capitalized terms that are not defined herein are defined in the Stipulation, which was filed with the Court on November 1, 2011 [ECF No. 59].

[2] The "Class," as certified in the Court's Preliminary Approval Order, is defined as follows: All persons or entities (whether consisting of a pooled investment fund or individually managed account) for which AXA Rosenberg Investment Management LLC or an Affiliated Adviser provided investment management or advisory services during the Class Period; and (i) for which a separate account (including sub-accounts) holding cash and/or securities was maintained with a custodian (or administrator or trustee) under that person's or entity's name (other than the pooled investment funds whose investors meet the definition of clause (ii)), or (ii) that signed subscription agreements (or similar documentation) to invest (and were invested) during the Class Period in a pooled investment fund that was sponsored by AXA Rosenberg Investment Management LLC, which fund did not have a board or other non-directed independent trustee(s) with independent fiduciary management responsibility ("Non-Independent Funds"). Excluded from the Class are Defendants and their subsidiaries, parents, affiliates, successors, predecessors, officers and directors, any entity in which any excluded person has a controlling interest, and the legal representatives, spouses, heirs, successors and assigns of any such excluded person, except that funds managed or advised by AXA Rosenberg or affiliates, any portion of which are for the benefit of non-affiliated third parties, are not excluded. Also excluded from the Class are any persons or entities who exclude themselves by filing a request for exclusion in accordance with the requirements set forth in the Notice.

This Motion is based on this Notice of Motion; the Memorandum of Points and Authorities in Support Thereof; the Joint Declaration of Lead Counsel in Support of Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation, and Motion for Attorneys' Fees and Reimbursement of Expenses, and Service Awards ("Joint Declaration" or "Joint Decl."); Motion for Approval of Attorneys' Fees and Reimbursement of Expenses, and Service Awards; all pleadings and papers filed herein; arguments of counsel; and any other matters properly before the Court.

STATEMENT OF ISSUES TO BE DECIDED (Civil L.R. 7-4(a)(3))

1. Whether the $65 million Settlement is fair, reasonable and adequate.
2. Whether the proposed Plan of Allocation is fair and reasonable.
3. Whether the Court should grant final certification of the Class as certified in the Court's Preliminary Approval Order.
4. Whether the Court should enter the [Proposed] Final Judgment and Order of Dismissal with Prejudice, attached as Exhibit B to the Stipulation of Settlement.

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SUMMARY OF THE ARGUMENT

The Named Plaintiffs respectfully move this Court for final approval of the Settlement, the Plan of Allocation, and certification of the Settlement Class, and entry of the [Proposed] Final Judgment and Order of Dismissal with Prejudice, attached as Exhibit B to the Stipulation of Settlement. This Action concerns a coding error that negatively affected the performance of Defendants' highly-complex computer-driven investment system for over two years, causing investment losses for the Class. During the period of the error and its aftermath, including the period after Defendants detected the error, Defendants allegedly received substantial investment management fees. This Settlement provides an immediate benefit for the Class, recovering $65 million – a 30% incremental recovery over payments AXA Rosenberg already made to certain Class Members pursuant to its settlement with the SEC, and an amount that includes the recovery of tens of millions of dollars in investment management fees that the SEC settlement did not address, to resolve Plaintiffs' common law and ERISA claims. The Settlement was achieved after hard-fought litigation, with Defendants' motions to dismiss *sub judice*, and with the benefit of extensive data and information obtained from the Defendants, as well as expert analyses, which fully informed the Plaintiffs and Lead Counsel regarding the strengths and weaknesses of the parties' claims and defenses and the potential recoverable damages.

The terms of the Settlement were negotiated at arm's-length with the assistance of a former federal judge and experienced mediator who supports the Settlement. Similarly, the Named Plaintiffs – each an experienced institutional investor – support the Settlement. In accordance with the Court's Preliminary Approval Order, Notice has been provided to the Class and there have been no objections. In light of these facts and as explained within, the Settlement is "fair, reasonable and adequate" and final approval should be granted under Rule 23(e), particularly where, as here, the Class's interests will be better served by resolution of the ligation than by continuation of it, given the risks and complexity of the case, the stage of the litigation now when all parties are thoroughly informed about the strengths of the claims and defenses, and the quality and zealousness of representation by the Named Plaintiffs and Lead Counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

Named Plaintiffs and Lead Counsel have succeeded in reaching a Settlement for $65 million to resolve the claims in this complex litigation after conducting a searching settlement discovery process, including an analysis of the potential provable recovery, and following arm's-length settlement negotiations overseen by an experienced and highly-respected mediator, the Honorable Layn R. Phillips (Fmr.).[3] The $65 million was deposited into an escrow account on or about December 16, 2011, for the benefit of the Class.

This case concerns a computer coding error in Defendants' highly-sophisticated computerized quantitative investment system that effectively eliminated the system's ability to incorporate dozens of risk factors into client investment management decisions.[4] After Named Plaintiffs had been investigating the error and its aftermath, but before this litigation and settlement, the United States Securities and Exchange Commission ("SEC") announced a settlement with Defendants that purported to compensate investors for full losses resulting from the error. Despite that settlement, Named Plaintiffs here have obtained tens of millions of dollars for recovery of additional losses and additional tens of millions of dollars for the return of investment management fees, which the SEC settlement did not address.

The Named Plaintiffs, along with Lead Counsel – based upon their evaluation of the facts and applicable law and their recognition of the risks and expense of continued litigation – submit that the proposed Settlement is fair, reasonable and adequate, and is in the best interests of the Class, providing for a meaningful recovery for the Class now. The Settlement was reached at a

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[3] "Named Plaintiffs" or "Plaintiffs" refers collectively to the Government of Guam Retirement Fund, Sacramento County Employees' Retirement System, Board of Trustees of the National Elevator Industry Health Benefit Fund, and Board of Trustees of the Pipefitters Local 636 Defined Benefit Pension Fund.

[4] The Defendants in this action are AXA Rosenberg and certain of its subsidiaries and affiliates: AXA Rosenberg Investment Management LLC ("ARIM"), Barr Rosenberg Research Center LLC ("BRRC"), AXA Rosenberg Group LLC ("ARG"), and AXA Rosenberg-Affiliated Investment Advisers ("Affiliated Advisers") ARG, ARIM, and BRRC (together, "AXA Rosenberg") operate out of shared offices in Orinda, California. *See* Consolidated Class Action Complaint ("Compl.") ¶¶14-19. For general factual background, *see* Compl. ¶¶26-42. Defendants do not admit to the factual allegations in this Motion, and have expressly denied some of the assertions alleged herein.

time when the parties understood the strengths and weaknesses of their claims and defenses based on the pre-filing investigation, the extensive motion to dismiss briefing, and discovery of data and other information from Defendants related to mediation. As set forth in the Declaration of Layn R. Phillips (former U.S. District Court Judge) in Support of Final Approval of Class Action Settlement (the "Phillips Decl."), attached to the Joint Declaration as Exhibit ("Ex.") A, the settlement negotiations included careful consideration of complex factual and legal issues.

Pursuant to the Court's Preliminary Approval Order, beginning on December 28, 2011, the Court-approved Notice and Proof of Claim and Release Form (the "Notice and Claim Form") were mailed to Class Members.[5] The Court-appointed Claims Administrator obtained the available identities of Class Members from counsel for AXA Rosenberg and the Notice and Claim Form was mailed to 749 Class Members. *Id*. Additionally, information regarding the Settlement, including downloadable copies of the Notice and Claim Form, was posted on the websites of Lead Counsel, www.blbglaw.com and www.lchb.com. *See* Joint Decl. ¶33. Pursuant to the Preliminary Approval Order, the deadline for Class Members to file objections to the Settlement, or to seek exclusion from the Class, will expire on March 9, 2012.[6] To date, no objections have been filed.

Plaintiffs have achieved an outstanding and remarkable recovery for the Class. The Settlement provides for the payment of $65 million in cash, a very substantial recovery. Plaintiffs entered into the Settlement with a thorough understanding of the strengths and weaknesses of the claims and defenses asserted in the Action, and the Settlement was reached only after hard-fought negotiations with the assistance of an experienced mediator and former federal judge. As demonstrated below, the Settlement is fair, reasonable, and adequate, and should be approved by the Court. In light of the benefits to the Class of this Settlement when weighed against the risks of ongoing litigation of this extremely complex case, and given the

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[5] *See* Declaration of Jenny Penning on Implementation of Court-Ordered Notice Plan ("Penning Decl., Ex. B to Joint Decl.), ¶¶4-6.

[6] A list of those seeking exclusion will be included in Ex. 1 attached to the proposed Final Judgment and Order of Dismissal with Prejudice that will be submitted to the Court following expiration of the deadline for seeking exclusion.

Class's response so far to the Settlement, Named Plaintiffs and Lead Counsel respectfully request the Court approve of the Settlement and Plan of Allocation, grant final certification of the Class as certified in the Court's Preliminary Approval Order, and enter the [Proposed] Final Judgment and Order of Dismissal with Prejudice, attached as Exhibit B to the Stipulation of Settlement.

I. FACTUAL AND PROCEDURAL BACKGROUND, AND CLAIMS ASSERTED

Plaintiffs respectfully refer the Court to the Complaint, the preliminary approval briefing, the motion to dismiss briefing, and the Joint Declaration for a complete description of the factual and procedural background, and the claims and defenses asserted by the parties. ECF Nos. 1, 20, 26, 30, 44, 49, 50.

II. ARGUMENT

A. The Standards For Judicial Approval Of Class Action Settlements

It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution," especially in class action lawsuits.[7] Indeed, class actions readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. It is beyond question that "there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits."[8] "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." 4 A. Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 (4th ed. West 2008).

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class action may be settled upon notice of the proposed settlement to class members, and a court finding, after a hearing,

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[7] *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2007) ("[T]he court must also be mindful of the Ninth Circuit's policy favoring settlement, particularly in class action law suits.").

[8] *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). The law always favors the compromise of disputed claims, including those asserted in stockholder class actions. *See Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

that it is fair, reasonable and adequate. *See also Woo v. Home Loan Grp., L.P.*, 2008 WL 3925854, at *3 (S.D. Cal. Aug. 25, 2008). On a motion for approval of a class action settlement, "the Court must determine whether the interests of the [class] will be better served by resolution of the litigation than by continuation of it." *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989).

A court's role in settlement approval is essentially twofold, requiring the determination of whether the settlement: (i) is tainted by fraud or collusion; and (ii) is fair, reasonable and adequate. *See Officers for Justice*, 688 F.2d at 625. To determine whether a settlement is "fundamentally fair, adequate and reasonable" pursuant to Rule 23(e), a court considers: "(1) the strength of the case; (2) the risk, expense, complexity and likely duration of further litigation and the risk of maintaining class action status throughout the trial; (3) the stage of the proceedings (investigation, discovery and research completed); (4) the settlement amount; (5) whether the class has been fairly and adequately represented during the settlement negotiations; and (6) the reaction of the class members to the proposed settlement." *Hartless v. Clorox Co.*, 273 F.R.D. 630, 639 (S.D. Cal. 2011) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003)); *see also In re Rambus Inc. Derivative Litig.*, 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (same)).

"The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625. In exercising its sound discretion, a district court should not adjudicate the merits of the case. As the Ninth Circuit has noted:

> [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Officers for Justice, 688 F.2d at 625 (bold emphasis added); *see also Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) ("in order to avoid a trial, the judge must [not] in effect conduct

one"). Ultimately, "[t]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.*

The presumption of reasonableness in this action is fully warranted because the Settlement is the product of arm's-length negotiations presided over by an experienced former federal judge mediator. *See* Joint Decl. ¶¶24-29. It is the considered judgment of the Mediator, Lead Counsel and the Named Plaintiffs that this Settlement represents a fair, reasonable, and adequate resolution of the litigation and warrants this Court's approval. *See* Phillips Decl. ¶2; Joint Decl. ¶55.

B. The Settlement Meets The Ninth Circuit Standard For Approval

1. Plaintiffs' Case Was Strong, But Entailed Risks

Courts evaluating proposed class action settlements consider the risks faced by plaintiffs in further litigation, if the case were to proceed without settlement. *See, e.g., Torrisi,* 8 F.3d at 1376. While the Named Plaintiffs believe that all of the claims asserted against Defendants have merit, they also recognize that there were risks of no recovery. For example, the Named Plaintiffs' alleged class claims for breach of fiduciary duty and other common-law violations relating to Defendants' provision of investment services. To prevail, the Named Plaintiffs would have to demonstrate that those claims do not sound in misrepresentation or omission in connection with the purchase and sale of securities. Otherwise, according to Defendants' arguments, the claims might be dismissed as barred by SLUSA. *See, e.g., Stoody-Broser v. Bank of Am., N.A.,* 2009 U.S. Dist. LEXIS 75599 (N.D. Cal. Aug. 25, 2009), *aff'd in part,* 2011 U.S. App. LEXIS 11431 (9th Cir. 2011).

Additionally, the Named Plaintiffs would have to demonstrate that certain common law claims for breach of fiduciary duty and gross negligence were not barred by purportedly exculpatory clauses in certain "Subadviser Agreements" between ARIM and third parties. Similarly, to prevail on the claims under the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. § 1001, *et seq*., and state law claims for breach of fiduciary duty, the Named Plaintiffs would be required to show that ARG and BRRC owed Plaintiffs a duty and breached that duty.

Moreover, even if the Named Plaintiffs prevailed on their claims, they would have to demonstrate compensable injury. According to Defendants, AXA Rosenberg's payment of $217 million in connection with AXA Rosenberg's prior settlement with the SEC adequately compensated the Class for any injury caused by the coding error.

From the outset, Lead Counsel and the Named Plaintiffs appreciated the unique and significant risks inherent in this litigation, which involved complex computerized quantitative investment modeling that included thousands of different inputs and variables. In particular, evaluating and understanding the impact of the coding error on AXA Rosenberg client accounts to ascertain a "but for" cause and effect in this Action required highly sophisticated computerized analyses and expertise.

Further, Defendants had available affirmative defenses that, if successful, could have precluded a meaningful recovery in this action. For example, AXA Rosenberg argued in its motion to dismiss that quantitative investing involves significant risks, that quantitative investment management firms often have errors within their models, that AXA Rosenberg makes no guarantees about the accuracy of its model, and that some AXA Rosenberg funds expressly disclosed the risk of errors to investors. Under such circumstances, Defendants argued, the mere existence of an error does not render Defendants negligent, or support a claim for breach of fiduciary duty. Furthermore, the Named Plaintiffs faced the danger that Defendants would succeed in convincing the Court, or the jury, that AXA Rosenberg exercised due care and employed reasonable measures under the circumstances to detect any errors before they were introduced into the model and/or that AXA Rosenberg took all appropriate actions in satisfaction of all legal duties once the error was discovered.[9]

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[9] Even if Plaintiffs prevailed through summary judgment, risks to the Class remain in connection with trial and appeal. *See In re JDS Uniphase Corp. Sec. Litig*., 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial, jury returned a verdict against plaintiffs, the

2. The Expense, Complexity, And Likely Duration Of Further Litigation

The certainty of an immediate substantial recovery for Class Members strongly weighs in favor of settlement given the costs, delays and risks of possibly achieving a larger recovery at some point in the future. *See, e.g., Officers for Justice,* 688 F.2d at 626. The established policy favoring settlement of disputed claims is even stronger for class actions due to the associated expense, complexity, and delays. *See In re Top Tankers, Inc. Sec. Litig.*, 2008 WL 2944620, at *3 (S.D.N.Y. July 31, 2008). Indeed, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *Id.*

There is no doubt that this class action involves complex factual and legal issues. The various risks and obstacles confronting the Class, as discussed above, could have resulted in little or no recovery for the Class at any time during the litigation. Instead of the lengthy, costly, and uncertain course of further litigation with Defendants, the Settlement provides an immediate and certain recovery for the Class. The Settlement clearly outweighs the substantial risks associated with lengthy continued litigation. *See* Joint Decl. ¶¶15-23.

3. The Amount Obtained In Settlement

The determination of whether a settlement is "reasonable" is not susceptible to a mathematical equation yielding a particular sum. In fact, "a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (quoting *Linney v. Cellular Alas. P'ship*, 151 F.3d 1234, 1242

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action was dismissed and plaintiffs were ordered to pay defendants the costs of defending the action). Alternatively, even success at trial does not conclusively eliminate all risk or guarantee any recovery. For example, in *In re Apple Computer Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an extended trial. The court, however, overturned the verdict, entered judgment notwithstanding the verdict for the individual defendants and ordered a new trial with respect to the corporate defendant; *see also In re BankAtlantic Bancorp, Inc.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (granting defendants' judgment as a matter of law following plaintiff verdict); *Robbins v. Kroger Props. Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning jury verdict for plaintiffs in case filed in 1973 and tried in 1988).

(9th Cir. 1998) (citations omitted)). Here the substantial amount of the Settlement clearly falls within the "range of reasonableness" and provides a tremendous benefit to the Class considering, *inter alia*, the then-pending motions to dismiss and arguments of the Defendants, and other litigation risks.

As discussed above, the Settlement provides for the recovery of $65 million in cash, allocated among Class Members after deduction for Court-approved fees and expenses. As noted above, the Settlement Amount was obtained as a result of arm's-length negotiations, including an in-person mediation session with the Mediator and pursuant to the Mediator's recommendation. *See* Phillips Decl. ¶¶1-8. As Judge Phillips concluded, the Settlement "represents an excellent recovery for the Class." Phillips Decl. ¶2.

Indeed, the $65 million Settlement was obtained in the face of numerous obstacles and represents a benefit to the Class ***in addition*** to the $217 million already paid by AXA Rosenberg in connection with the SEC settlement. Moreover, the Settlement provides a substantial recovery of the investment management fees paid by Class Members to AXA Rosenberg during the period of the coding error, a recovery that the SEC settlement did not address. While contested issues over damages might have yielded a smaller recovery after trial or none at all, even the possibility that the Class "might have received more if the case had been fully litigated is no reason not to approve the settlement."[10] Indeed, "[t]he dollar amount of the settlement by itself is not decisive in the fairness determination . . . Dollar amounts are 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 Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (citation omitted).

Here, the Settlement confers an immediate and valuable cash benefit to Class Members, including tens of millions of dollars above and beyond the SEC settlement amount and tens of

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[10] *Granada Inv., Inc. v. DWG Corp.*, 962 F.2d 1203, 1206 (6th Cir. 1992) (citation omitted); *see also Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658, 668 (S.D.N.Y. 1977) ("In evaluating the proposed settlement, the Court is not to compare its terms with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion.").

millions of dollars for investment management fees that were not addressed by the SEC settlement. Given the complexities of the litigation and the continued risks if the parties were to proceed throughout dispositive motions and trial, the Settlement presents a reasonable resolution of this action and eliminates the risk that the Class might not otherwise recover.

4. The Extent Of Discovery And The Stage Of The Proceedings

The stage of the proceedings and the amount of information available to the parties to assess the strengths and weaknesses of their case is one factor that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See Mego Fin.*, 213 F.3d at 459; *Rambus*, 2009 WL 166689, at *2. As detailed in the Joint Declaration, Lead Counsel conducted an extensive investigation and analysis of the claims prior to filing the Complaint and gained a comprehensive understanding of the strengths and weaknesses of the case and possible recoverable damages and losses throughout the litigation, including: (1) an exhaustive factual investigation into the events and circumstances underlying the claims, including reviewing and analyzing all relevant publicly available media, analyst reports, and SEC filings and public statements, as well as relevant nonpublic documents and information, including agreements, correspondence, memoranda and reports by or between AXA Rosenberg, industry consultants, and/or former AXA Rosenberg clients; (2) engaging in discussions with counsel to Defendants concerning Defendants' administration of the $217 million SEC settlement and any *ex parte* communications with Class Members; (3) drafting of several detailed class action complaints and a detailed consolidated complaint; (4) extensive preparation and briefing on Defendants' motions to dismiss; (5) obtaining evidence through informal discovery, including from public and non-public sources, document exchanges and meetings with Defendants, and review and analysis of Defendants' expert analyses; and (6) preparing for and participating in a full-day mediation session, including the preparation of a written mediation statement with extensive damages modeling and analyses and an oral presentation addressing potential recoverable damages. *See* Joint Decl. ¶¶5-26.

At the time the Settlement was reached and while Defendants' motions to dismiss were *sub judice*, Named Plaintiffs faced significant risks going forward, including that the Court

would find no liability, find that none of the Defendants owed any fiduciary duties to the Named Plaintiffs or the Class or that no such fiduciary duties had been breached, conclude that Defendants had not committed any ERISA-prohibited transaction, or would decline to certify a class, among other potential risks. In addition, even if the Named Plaintiffs were to prevail on the merits, there was the risk that the damages, if any, determined to be attributable to the alleged misconduct would be less than the Settlement Amount or that the Court or a jury would find that Class Members already had been adequately compensated for any losses caused by the computer error at AXA Rosenberg in connection with the payment of $217 million through AXA Rosenberg's settlement with the SEC. Accordingly, while the Named Plaintiffs believe that all of their claims have merit, one or more of these arguments or issues may have ultimately proved insurmountable and the Class may have ended up with little or no recovery. In light of these risks, the Settlement provides the class with an excellent result and provides an incremental 30% recovery on top of the $217 million SEC settlement, an amount that Defendants and the SEC have treated as providing for full recovery to investors who suffered losses due to the computer error.[11] Moreover, the Settlement provides tens of millions of dollars in returned investment fees paid by the Class as an additional recovery, as well.

Courts regularly approve settlements reached, as here, relatively early in litigation. *See, e.g.*, *In re Mego*, 213 F.3d at 459 (finding that even absent extensive formal discovery, class counsel's significant investigation and research supported settlement approval); *Linney*, 151 F.3d at 1239; *In re Critical Path, Inc.*, No. 01-cv-551, 2002 WL 32627559, at *7 (N.D. Cal. June 18, 2002) ("Through protracted litigation, the settlement class could conceivably extract more, but at a plausible risk of getting nothing"); *see also Glass v. UBS Fin. Servs., Inc.*, No. 06-cv-4068, 2007 WL 221862, at *15-*16 (N.D. Cal. Jan. 26, 2007) ("Class counsel achieved an excellent result for the class members by settling the instant action promptly."), *aff'd*, 331 Fed. Appx. 452, 457 (9th Cir. 2009) (unpubl.). In this case, the Named Plaintiffs and Lead Counsel were able to fully evaluate the strengths and weaknesses of claims and defenses in this Action and potential

[11] The SEC found the methodology for estimating losses caused by the computer error, as performed by AXA Rosenberg's retained expert Cornerstone Research, "not unacceptable."

recovery, particularly given the informal discovery and data analyses that occurred and the fact that further discovery would not have meaningfully added to existing evidence that the coding error in fact occurred, the impact of the coding error, and the timing of certain of the relevant events. *See In re TD Ameritrade Account Holder Litig.*, Nos. 07-cv-2852, 07-cv-4903, 2011 WL 4079226, at *6 (N.D. Cal. Sept. 13, 2011) (approving settlement after the filing of a motion to dismiss and prior to significant discovery where the defendant admitted that the data breach that gave rise to the claims occurred).

In sum, this Settlement is based upon adequate information and a sufficient investigation for an in-depth analysis and understanding of the Class's claims, Defendants' defenses, the potential recovery, and the risks inherent in continued litigation.

5. The Experience And Views Of Counsel And The Named Plaintiffs

Courts recognize that the opinion of experienced counsel supporting the settlement after vigorous arm's-length negotiations is entitled to considerable weight.[12] This makes sense, as counsel is "most closely acquainted with the facts of the underlying litigation."[13] This is because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Pac. Enters.*, 47 F.3d at 378. Thus, "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Heritage Bond*, 2005 WL 1594403, at *9 (internal citation omitted).

Here, the parties have been actively litigating this case since its commencement. Lead Counsel have many years of experience in litigating class actions throughout the country, and in

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[12] *See, e.g., Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight."); *see also In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 1992 WL 226321, at *2 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement).

[13] *In re Heritage Bond Litig.*, 2005 WL 1594403, at *9 (C.D. Cal. June 10, 2005) (citations omitted); *Rambus*, 2009 WL 166689, at *3; *Glass*, 2007 WL 221862, at *5.

assessing the relevant merits of each side's case.[14] As discussed above and in the Joint Declaration, at the time of the Settlement mediation before Judge Phillips, Lead Counsel had a thorough understanding of the strengths and weaknesses of the claims, both factually and legally, and were able to engage in a rigorous negotiation process with Defendants. Both Lead Counsel and Judge Phillips have attested to the fact that the Settlement is a reasonable and fair outcome. Phillips Decl. ¶2.

Additionally, throughout the litigation and settlement negotiations, Defendants have been represented by experienced counsel from prominent law firms, Mayer Brown LLP and Wilson Sonsini Goodrich & Rosati, with substantial experience in this type of litigation. The representation of the Defendants was no less rigorous than Lead Counsel's representation of the Class.

As a result, the parties' settlement negotiations were hard-fought. After extensive informal discovery, exchange of lengthy briefs, and preparation of mediation statements, the parties engaged in a formal in-person mediation session conducted under the direction of Judge Phillips, and agreed to resolve this action only after reaching an impasse and upon the mediator's informed recommendation. *See* Joint Decl. ¶¶24-29; Phillips Dec. ¶¶4-5.

With this background, there is no doubt that the Settlement was reached without collusion and after good-faith bargaining among the parties, and this factor supports a finding that the Settlement is fair, adequate, and reasonable. *See Lundell v. Dell, Inc.*, 2006 WL 3507938, at *3 (N.D. Cal. Dec. 5, 2006) (approving class action settlement that was "the result of intensive, arms'-length negotiations between experienced attorneys familiar with the legal and factual issues of this case").

Here, the Named Plaintiffs are sophisticated institutional investors, and their active participation in the prosecution of this case and the approval of the Settlement is compelling evidence that the Settlement is fair, reasonable and adequate. *See* Joint Decl. ¶41.

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[14] *See* Firm Biographies of Bernstein Litowitz Berger & Grossmann LLP and Lieff Cabraser Heimann & Bernstein, LLP, attached, respectively, as Exs. C, D to the Joint Declaration.

6. Reaction Of The Class Members To The Proposed Settlement

As courts have noted, the reaction of the class to the proffered settlement is weighed in considering its adequacy. *See Rambus*, 2009 WL 166689, at *3 (citation omitted). Indeed, courts have explained that "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Omnivision*, 559 F. Supp. 2d at 1043 (citation omitted).

Pursuant to the Preliminary Approval Order, the deadline for Class Members to object to any aspect of the Settlement, the proposed Plan of Allocation or Lead Counsel's fee and expense request will expire on March 9, 2012. In response to the 749 Notices sent to Class Members, to date no Class Member has objected. *See* Joint Decl. ¶35. While Plaintiffs will address objections, if any, in their reply briefing, the reaction of the Class thus far further supports approval of the Settlement.

C. The Notice Provided Adequate Information To The Class

As required by the Court's Preliminary Approval Order, beginning on December 28, 2011, the Court-appointed Claims Administrator, Epiq, notified Class Members of the Settlement by mailing a copy of the Notice packet to the 749 class members identified by Defendants. *See* Penning Decl. ¶5; Preliminary Approval Order ¶¶6-8. The Notice and the Summary Notice also referenced the Internet websites for Lead Counsel where investors could view and download the Notice and Claim Form, as well as the Court's December 6, 2011 Order. *See* Joint Decl. ¶33. This method of giving notice, previously approved by the Court, is appropriate because it directs notice in a "reasonable manner to all class members who would be bound by the propos[ed judgment]." Fed. R. Civ. P. 23(e)(1).

The Notice advises Class Members of the essential terms of the Settlement, sets forth the procedure for objecting to the Settlement, and provides specifics on the date, time and place of the final approval hearing. It also provides instructions for Class Members who wish to exclude themselves from the Class or object to the Settlement. The Notice also contains information regarding Lead Counsel's fee application and the proposed plan of allocating the settlement

proceeds among Class Members. Thus, the Notice provided the necessary information for Class Members to make an informed decision regarding the proposed Settlement.

The Notice is the best notice practicable under the circumstances and complies with the Court's Preliminary Approval Order, Federal Rule of Civil Procedure 23, and due process. *See In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *1 (N.D. Cal. Nov. 26, 2007) (approving similar notice regimen); *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.") (citations omitted).

D. The Plan Of Allocation Is Fair And Reasonable And Should Be Approved

Plaintiffs have proposed a plan to allocate the proceeds of the Settlement among Class Members who submit valid Proofs of Claim. The objective of the proposed Plan of Allocation is to equitably distribute the Settlement proceeds among Class Members who suffered harm as a result of the conduct alleged in the Complaint, including investment management fees paid during the period the coding error impacted AXA Rosenberg client accounts. While all Class Members' claims arise from the same conduct, the amount of such potential damages may vary depending on the different attributes or claims of the Class Members. Differences of this nature among class members are common in complex litigation and are typically addressed by a plan of allocation. *Cf. Glass*, 331 Fed. Appx. at 455 (unpubl.) (affirming plan for distributing settlement proceeds that treats various class members differently based on differences in recoverable damages).

The Named Plaintiffs considered different approaches for allocating the recovery to claimants and determined the plan of allocation following consultation with experts. In recognition that Plaintiffs' claims included both damages and claims for return of investment management fees, for purposes of allocation, the Settlement proceeds are divided equally between Class Members' "Recognized Investment Loss" and "Recognized Fees." For this purpose, the Plan of Allocation provides for allocation of the Net Settlement Fund among the Authorized Claimants on a *pro rata* basis based on their respective "Recognized Investment

Loss" and "Recognized Fees" as follows: one-half (50%) of the Net Settlement Fund is allocated for payment of aggregate Recognized Investment Loss, and one-half (50%) of the Net Settlement Fund is allocated for payment of aggregate Recognized Fees. An Authorized Claimant's Recognized Investment Loss and Recognized Fees are calculated based on AXA Rosenberg's and its affiliates' books and records.

Assessment of the adequacy of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan need be only fair, reasonable and adequate. *See Omnivision*, 559 F. Supp. 2d at 1045; *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (citation omitted).

The goal of an equitable plan of allocation is fairness to the class as a whole, taking into consideration the strengths of claims based upon available facts and evidence, as well as the size of the fund to be distributed. A plan of allocation that allocates settlement funds to class members based on the extent of their injuries or the strength of their claims is reasonable. *See Omnivision*, 559 F. Supp. 2d at 1045; *see also Glass*, 331 Fed. Appx. at 454; *Mego Fin.*, 213 F.3d at 461; *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1152 (8th Cir. 1999) (upholding distribution plan where class members received different levels of compensation and finding that no subgroup was treated unfairly).

The proposed Plan of Allocation in this case is based on such principles and therefore falls within the mainstream of allocation plans routinely approved by courts. It tracks the remedies theories in this litigation, takes into consideration the expert analyses during the litigation, and is fair, reasonable and adequate to the Class as a whole. In addition, the proposed Plan of Allocation was adequately explained in the Notice sent to Class Members.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve of the Settlement and Plan of Allocation, grant final certification of the Class as certified in the Court's

Preliminary Approval Order, and enter the [Proposed] Final Judgment and Order of Dismissal with Prejudice, attached as Exhibit B to the Stipulation of Settlement.

Dated: February 24, 2012

Respectfully submitted,

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