UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| GOVERNMENT OF GUAM RETIREMENT FUND, *et al.*,<br><br>Plaintiff,<br><br>vs.<br><br>INVACARE CORPORATION, *et al.*,<br><br>Defendants. | Case No. 1:13CV1165<br><br>JUDGE CHRISTOPHER A. BOYKO |

**DECLARATION OF BENJAMIN GALDSTON IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT, APPROVAL OF THE PLAN OF ALLOCATION, AND APPROVAL OF PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES**

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I, Benjamin A. Galdston, hereby declare under penalty of perjury as follows:

1. I am a partner in the law firm of Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz"). I submit this declaration in support of Lead Plaintiff's motion for final approval of the proposed Settlement and approval of the Plan of Allocation, as well as Plaintiffs' Counsel's motion for approval of attorneys' fees and reimbursement of Litigation Expenses.

## I. PRELIMINARY STATEMENT

1. Bernstein Litowitz is the Court-appointed Lead Counsel in this Action and counsel for Lead Plaintiff the Government of Guam Retirement Fund ("GGRF" or "Guam").[1] I have actively supervised and participated in the prosecution of this Action. As a result, I have personal knowledge of all material matters related to this Action.

2. On August 10, 2015, the Court granted preliminary approval of the proposed $11 million cash settlement with Defendants. ECF No. 79. Since then, the Claims Administrator has notified potential Settlement Class Members of the Settlement by mail in accordance with the Preliminary Approval Order. Summary Notice was also published through *Investor's Business Daily* and over the *PR Newswire*

3. The Court, having overseen this complex securities class action for over two years, is familiar with the claims and defenses asserted by the parties. Accordingly, this declaration does not seek to detail each and every event that has occurred during the litigation. Rather, it provides highlights of the litigation, the events leading to the Settlement, and the basis upon which Lead Plaintiff and Lead Counsel recommend its approval.

[1] When not defined herein, capitalized terms are defined in the Stipulation And Agreement Of Settlement (ECF No. 73, the "Stipulation"). "Plaintiffs' Counsel" includes Lead Counsel Bernstein Litowitz and Local Counsel Climaco, Wilcox, Peca, Tarantino & Garofoli Co., L.P.A.

4. Throughout the litigation, the stakes have been high, the risks substantial, and the battles hard-fought. Continued litigation posed serious risks that made any recovery uncertain. Indeed, the issues of scienter, falsity, materiality, loss causation, and damages were highly contested throughout the litigation, and would continue to be contested. For example, Defendants would continue to argue that many of the alleged misstatements are only general, aspiration statements concerning Invacare's legal compliance that are contained in general risk disclosures, including statements regarding Invacare's belief that it was compliant. Defendants would continue to argue that other misstatements are in the realm of soft information and puffery, for example, that regulatory compliance was a "high priority" and that Invacare was "currently addressing" the FDA's concerns. Although the Court denied Defendants' motion to dismiss on this basis, Defendants would continue to press this argument beyond the pleading stage. Likewise, Defendants would continue to argue that scienter and loss causation were lacking, and that the alleged misstatements were not material – an argument that the Court expressly reserved for the trier of fact. ECF No. 45. Had any of these arguments been accepted they could have eliminated or, at a minimum, dramatically limited any potential recovery.

5. Lead Counsel respectfully submits that the Settlement represents an excellent result and is in the best interest of the Settlement Class. The Settlement confers a guaranteed, immediate and substantial recovery to the Settlement Class and avoids the risks of protracted litigation, including the risk of recovering less or nothing after substantial delays.

6. On or about August 7, 2015, Defendants caused the $11 million Settlement Amount to be deposited into an escrow account for the benefit of the Settlement Class.

7. The proposed Settlement is the result of Lead Plaintiff's and Plaintiffs' Counsel's extensive investigation in preparation of the operative complaint, and vigorous prosecution of the

litigation on behalf of the Settlement Class, including defeating Defendants' motion to dismiss and motion for judgment on the pleadings, serving and responding to discovery requests, reviewing and analyzing documents, filing a motion for class certification supported by an expert declaration, and mediation and further negotiations before an experienced and nationally-recognized mediator. The parties reached an agreement to settle only after two years of litigation and protracted negotiations facilitated by an experienced mediator, Jed Melnick, Esq. of JAMS, followed by a "Mediator's Recommendation," which the parties ultimately accepted. *See* Declaration Of Mediator Jed D. Melnick, Esq. In Support Of Final Approval Of Class Action Settlement ("Melnick Decl" or "Mediator Decl"), attached hereto as Exhibit 5.

8. Lead Plaintiff supervised Lead Counsel, remained informed throughout the settlement negotiations, and ultimately approved the Settlement. *See* Declaration Of The Government Of Guam Retirement Fund In Support Of Final Approval Of Class Action Settlement And Plan Of Allocation And An Award Of Attorneys' Fees And Reimbursement Of Expenses ("Guam Decl."), attached hereto as Exhibit 1.

9. In addition to seeking final approval of the Settlement, Lead Plaintiff seeks approval of the proposed Plan of Allocation as fair and reasonable. To prepare the Plan of Allocation, Lead Counsel engaged Caliber Advisors, Inc., a full-service valuation and economic consulting firm. Under the proposed Plan of Allocation, the Net Settlement Fund will be distributed on a *pro rata* basis to Settlement Class Members who timely submit valid proofs of claim based on their "Recognized Claim" amount as calculated based on the Plan of Allocation. *See* Declaration of Bjorn I. Steinholt, CFA in Support of the Proposed Plan of Allocation ("Steinholt Decl." or "Steinholt Declaration"), attached hereto as Exhibit 3. Substantially similar

plans have been approved and used effectively to distribute recoveries in other securities class actions.

10. In addition, Plaintiffs' Counsel request an award of attorneys' fees for their extensive efforts in the face of extensive risk of recovery and reimbursement of litigation expenses. Specifically, Plaintiffs' Counsel are applying for an attorneys' fee of 25% of the $11 million Settlement Amount, or $2.75 million, plus 25% of the interest earned by the Settlement Fund until awarded (with the remaining 75% of the interest earned remaining with the Settlement Fund), and for reimbursement of Plaintiffs' Counsel's Litigation Expenses in the amount of $156,551.86, to be paid out of the Settlement Fund. The requested fee is equal to the 25% "benchmark" recognized by courts within the Sixth Circuit, is well within the range of fees approved by courts within the Sixth Circuit, including for securities class actions, and is amply supported by each of the relevant factors set forth in *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). The reasonableness of the 25% fee request is confirmed with a lodestar cross-check resulting in a multiplier of only 1.73, which is well within the range of multipliers awarded in other securities class action settlements of similar size. Plaintiffs' Counsel also request that the Court grant reimbursement of expenses incurred by Lead Plaintiff directly related to its service as Lead Plaintiff and representation of the Settlement Class pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), in the amount of $4,200, as supported by the Guam Declaration, attached hereto as Exhibit 1.

11. This Declaration describes: (a) the efforts undertaken by Plaintiffs' Counsel to prosecute the Action (Section II); (b) the events leading up to the Settlement, the Settlement and the risks that Lead Plaintiff and Plaintiffs' Counsel considered in determining that the Settlement provides an outstanding recovery for the Settlement Class (Sections III.A and III.B); (c) the Notice

to the Settlement Class (Section III.C); (d) the proposed Plan of Allocation for the Settlement (Section III.D); and (e) Plaintiffs' Counsel's fee and expense application (Section IV).

## II. PROSECUTION OF THE ACTION

### A. Overview Of The Allegations

12. At all times relevant to this Action, Invacare was a manufacturer and distributor of medical devices for use in the home and extended care settings, including custom manual and power wheelchairs, and manual and electric homecare beds. Invacare sold its products principally to home health care and medical equipment providers and distributors, and also served as a contractor to the Veterans Administration and other government entities. Lead Plaintiff alleges that Defendants made false and misleading statements about violations of FDA regulations and current Good Manufacturing Practices.

13. As explained herein, Defendants deny the existence of any material misstatements and omissions, and also assert myriad defenses.

### B. The Commencement Of The Action And Appointment Of Lead Plaintiff

14. On May 24, 2013, a class action complaint was filed in the United States District Court for the Northern District of Ohio asserting claims against Defendants and another defendant for violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder against all defendants, and violations of Section 20(a) of the Exchange Act against the individual defendants.

15. Following briefing, the Court appointed Guam as the Lead Plaintiff pursuant to the PSLRA, and approved Lead Plaintiff's selection of Bernstein Litowitz as Lead Counsel for the putative class.

### C. Filing Of The Amended Complaint And Defeating Defendants' Motion To Dismiss

16. On November 15, 2013, Lead Plaintiff filed the Amended Complaint For Violation Of The Federal Securities Laws (the "Complaint"), consisting of 132 pages of detailed allegations, and an additional 144 pages of supporting exhibits. ECF No. 34. The Complaint asserts claims on behalf of the Settlement Class against Invacare and its President and CEO Gerald Blouch ("Blouch") and its Chairman, founder and former CEO A. Malachi Mixon, III ("Mixon") (collectively, "Defendants") under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder; and against Blouch and Mixon under Section 20(a) of the Exchange Act.

17. Among other things, the Complaint alleges that Invacare and its senior management were repeatedly notified by the FDA of regulatory deficiencies, but deliberately refused to take steps that were necessary to correct the problems. The Complaint alleges that, instead, Defendants embarked on an aggressive growth campaign and publicly touted to investors Invacare's impressive financial results, while, at the same time, consistently and falsely assuring investors that Invacare was adhering to high standards of quality and safety and continuing to strengthen its programs to better ensure compliance with applicable regulations, including, specifically, by addressing the FDA's concerns. Lead Plaintiff alleges that Defendants made numerous false and misleading statements, misrepresentations and omissions during the Settlement Class Period regarding Invacare's purported compliance with the U.S. Food, Drug, and Cosmetic Act, related regulations and guidelines issued by the FDA, and current Good Manufacturing Practices concerning design and manufacture of the Company's best-selling products, including manual and powered wheelchairs, homecare bed systems, and other medical devices. The Complaint further alleges that the foreseeable risk of Defendants' intentional disregard of federal law and the FDA's repeated warnings began to materialize in January 2011, when Invacare announced that the FDA

intended to seek a consent decree of injunction against Invacare. Ultimately, Invacare was forced to enter into a consent decree, which required it to shut down all design, manufacturing, and distribution of products at its corporate headquarters and adjacent wheelchair manufacturing plant.

18. The Complaint was based on Lead Counsel's thorough investigation, which as detailed below, included, among other things, a review and analysis of publicly available information as well as Lead Counsel's identifying and interviewing multiple confidential witnesses.

19. On December 23, 2013, Defendants filed their motion to dismiss the Complaint, including a 30-page brief plus an additional 199 pages of exhibits. Their motion argued, among other things, that: (i) the Complaint failed to plead an actionable misstatement regarding legal compliance; (ii) the information alleged to have been omitted by Invacare was immaterial as a matter of law; (iii) the Complaint failed to satisfy the rigorous standards for scienter; and (iv) the Complaint failed to plead loss causation. ECF No. 36-1.

20. Lead Plaintiff filed its opposition to the motion to dismiss on January 22, 2014. Lead Plaintiff's 30-page opposition brief argued, among other things, that: (a) the Complaint adequately alleged actionable materially false and misleading statements and omissions; (b) the Complaint raised a strong inference of scienter, including through the detailed accounts of numerous percipient witnesses identified and interviewed by Lead Counsel; and (c) the Complaint adequately alleged loss causation. ECF No. 37.

21. On February 5, 2014, Defendants filed their reply brief, again arguing, among other things, that the Complaint failed to adequately plead scienter, the Complaint failed to plead any material misstatement or omission, and the Complaint failed to plead loss causation. ECF No. 38.

22. The parties thereafter submitted supplemental briefing regarding the recent opinions in *Kuyat v. BioMimetic Therapeutics, Inc.,* No. 13-5602, 2014 U.S. Dist. LEXIS 5738 (6th Cir. Mar. 28, 2014); *Mulligan v. Impax Labs., Inc.,* No. C-13-1037 EMC (N.D. Cal. Apr. 18, 2014); and *Florida Carpenters Regional Council Pension Plan v. Eaton Corp.*, Nos. 13-4059/13-4354, 2014 U.S. App. LEXIS 13489 (6th Cir. July 11, 2014). ECF Nos. 39-44.

23. On August 18, 2014, the Court entered a detailed 17-page Opinion And Order denying Defendants' motion to dismiss in its entirety. The Court held that: (i) the alleged misstatements constituted more than opinion and are verifiable and thus are actionable; (ii) the issue of materiality would be reserved for the trier of fact; (iii) the Complaint sufficiently alleged scienter, including through detailed accounts from confidential witnesses interviewed by Lead Counsel as part of its investigation; (iv) the Complaint sufficiently alleged loss causation; (v) dismissal based on Defendants' statute of limitations defense was inappropriate; and (vi) the Complaint sufficiently alleged claims against Individual Defendants Blouch and Mixon for control person liability under Section 20(a) of the Exchange Act. ECF No. 45.

24. Following the Court's sustaining of the Complaint, Defendants filed their Separate Answers on October 2, 2014. ECF Nos. 51, 52, 53.

**D. Defeating Defendants' Motion For Judgment On The Pleadings**

25. On October 23, 2014, Defendants filed a Motion for Judgment on the Pleadings or in the Alternative, Motion for Reconsideration of the Court's order denying Defendants' motion to dismiss. Defendants argued that the Sixth Circuit's newly issued decision in *KBC Asset Management N.V. v. Omnicare, Inc.*, No. 13-5597, 2014 U.S. App. LEXIS 19326 (6th Cir. Oct. 10, 2014), changed the pleading standard for scienter allegations relying on "soft information" to requiring allegations of "actual knowledge." ECF No. 55-1. Defendants further argued that the

Court's prior order denying Defendants' motion to dismiss relied on the earlier standard that the Sixth Circuit overruled in that new opinion, and that using the new standard required dismissal. *Id*.

26. On October 30, 2014, Lead Plaintiff filed its opposition to Defendants' motion. Lead Plaintiff argued that the new decision is inapposite because this Court found that Defendants' misstatements concern "hard information," and the Complaint adequately alleges Defendants' scienter under the new decision. ECF No. 57.

27. On November 13, 2014, Defendants filed their reply in support of their motion, again arguing that the new Sixth Circuit decision required reconsideration and dismissal of the Complaint. ECF No. 61.

28. By Opinion And Order dated December 9, 2014, the Court denied Defendants' Motion for Judgment on the Pleadings or in the Alternative, Motion for Reconsideration. The Court explained that it had, again, "painstakingly read all the allegations in the 132-page pleading," and that, taken in their entirety, the allegations give rise to a strong inference of scienter. ECF No. 62. The Court also distinguished the allegations in the *KBC Asset* case from the allegations in the instant Complaint, explaining, for example: "The Sixth Circuit found that the *KBC Asset* Complaint insufficiently tied the individual defendants to the audits showing that their Form 10-K securities statements were false. *KBC Asset*, 769 F.3d at 481. Not so here – where the FDA's Form 483's were addressed directly to Invacare's CEO." The Court found that "the Government of Guam's Amended Complaint sufficiently alleges verifiable statements, misstatements and omissions, made by the Individual Defendant CEO's, during the entire relevant class period (February 27, 2009 to December 7, 2011), with actual knowledge of falsity . . . ." The Court further rejected Defendants' argument that some allegations were insufficiently pleaded because

the alleged misstatements were couched in terms like "our belief" or "we believe" or "our highest priority." Instead, the Court expressly "agree[d] with the Sixth Circuit: 'In passing the 1934 Act, Congress did not intend to allow corporations or their officers to insulant themselves by simply attaching ***throat-clearing language*** to their public utterances.'" (Emphasis added in ECF No. 62).

**E. Lead Plaintiff's Repeated Efforts To Move The Litigation Forward**

29. Throughout the litigation, the parties met and conferred as required regarding the pretrial schedule, and Lead Plaintiff repeatedly sought to move forward the litigation. For example, pursuant to the Court's Notice of Case Management Conference, on September 25, 2013, the parties met and conferred telephonically, and thereafter filed the Joint Report of Parties' Planning Meeting Under Fed. R. Civ. P. 26(f) and L.R. 16.3(b) on September 30, 2013. ECF No. 31. The Joint Report set forth, among other things, the parties' proposed schedule for the filing of an amended complaint, briefing on Defendants' motion to dismiss, and for the parties to prepare a proposed discovery plan.

30. In addition, promptly following the Court's August 18, 2014 Opinion And Order denying Defendants' motion to dismiss, and thereby lifting the automatic discovery stay required by the PSLRA, on August 21, 2014, Lead Counsel requested that the parties schedule their Rule 26(f) conference for August 29, 2014, or as soon as practicable. *See* ECF No. 47 and attachments thereto. Lead Counsel set forth a proposed pretrial schedule, deposition schedule and other case management matters to facilitate an informed and productive conference. On August 26, 2014, counsel for Defendants refused Lead Plaintiff's request to schedule a Rule 26(f) conference unless and until the Court set a case management conference. In light of the impasse, on August 26, 2014, Lead Plaintiff requested that the Court set a case management conference pursuant to Fed. R. Civ. P. 16(b), and direct that the parties promptly participate in a Rule 26(f) conference. Defendants

replied that they did not oppose the setting of a case management conference, but requested that it be delayed until the end of October 2014. ECF No. 48.

31. On August 29, 2014, the Court entered a Notice Of Case Management Conference, scheduling a Case Management Conference ("CMC") for November 7, 2014. ECF No. 49. In advance of the CMC, on October 14, 2014, the parties met and conferred and filed their Report Of Parties' Planning Meeting Under Fed. R. Civ. P. 26(f) And Local Rule 16.3(b) ("Joint Report") on November 4, 2014. ECF No. 59. The Joint Report informed the Court that Lead Plaintiff had already fully complied with its obligations under Rule 26(a) to provide Defendants, without awaiting a discovery request, the name and contact information of each individual likely to have discoverable information (along with the subjects of that information), as well as copies of documents and information in Lead Counsel's possession, that Lead Plaintiff may use to support its claims. In addition, the Joint Report stated that Lead Plaintiff had already served its initial disclosures and supplemental initial disclosures, and that Lead Counsel had produced to Defendants documents pursuant to Rule 26(a)(1)(A)(ii), which Lead Counsel obtained from the U.S. Department of Health and Human Services pursuant to Lead Counsel's ongoing Freedom of Information Act ("FOIA") requests. Lead Plaintiff also informed the Court that it had already noticed depositions and served written discovery requests.

32. The Joint Report informed the Court that Defendants had not served any initial disclosures, and that Lead Plaintiff had therefore filed a motion to compel initial disclosures and discovery from Defendants. ECF No. 58. Lead Plaintiff's motion to compel requested that the Court compel Defendants to provide their initial disclosures within five days and to respond to Lead Plaintiff's written discovery by November 13, 2014. ECF No. 58-1.

33. Defendants took the position that discovery should again be stayed under the PSLRA due to Defendants' newly filed Motion for Judgment on the Pleadings or in the Alternative, Motion for Reconsideration, and that when discovery does proceed, it should be bifurcated into class certification and merits stages. ECF Nos. 58, 60. Lead Plaintiff opposed bifurcation, and set forth a proposed detailed discovery plan and pretrial schedule, which prepared the parties for trial within approximately one year. ECF No. 59.

34. The Court held a CMC on November 7, 2014. The Court ordered that discovery is stayed pending the Court's ruling on Defendants' Motion for Judgment on the Pleadings or in the Alternative, Motion for Reconsideration. The Court granted in part Lead Plaintiff's motion to compel Defendants to provide Initial Disclosures within seven days, but otherwise denied Lead Plaintiff's discovery motion.

35. Following the Court's December 9, 2014 Order denying Defendants' Motion for Judgment on the Pleadings, the Court ordered that the PSLRA discovery stay is lifted, and ordered the parties to proceed with class certification discovery, and to submit a joint proposed schedule for the Court's consideration. The Court also suggested to the parties that "The Court is open to conducting a settlement conference at any point in the litigation process; but only if all parties agree that the Court's intervention would be worthwhile." ECF No. 63.

36. Pursuant to the Court's Order, the parties met and conferred on December 10, 2014, and on December 12, 2014, submitted their Joint Proposed Schedule for Class Certification. ECF No. 64. The parties set forth their respective positions regarding the discovery necessary in advance of submission of a class certification motion; date for the class certification briefing and hearing; expert discovery deadlines; and dates for *Daubert* motion briefing and hearing.

37. By Order dated December 15, 2014, the Court adopted the parties' suggested schedule in part. The Court adopted the suggested schedule, with changes and additions regarding the deadline for amending the pleadings or adding parties, filing a class certification reply, completing class certification fact discovery, and conditionally setting an August 25, 2015 hearing on class certification and *Daubert* motions. ECF No. 65.

**F. Lead Counsel's Investigation And Discovery Efforts**

**1. Investigation To Prepare The Complaints**

38. Prior to filing the complaints in this case, Lead Counsel engaged in an extensive investigation. The investigation was multi-faceted and included, for example, review and analysis of: (i) Invacare's public filings with the SEC; (ii) publicly available filings and reports by government law enforcement and regulatory agencies relating to investigations and legal actions concerning Invacare, including in the action captioned *United States v. Invacare Corp.*, No. 1:12-cv-03086 (DAP) (N.D. Ohio); (iii) documents and information disclosed in other litigation naming Invacare and/or its directors as defendants or nominal defendants; (iv) research reports by securities and financial analysts regarding Invacare; (v) transcripts of Invacare investor conference calls; (vi) press releases and media reports; (vii) economic analyses of the historical movement, pricing and trading data for publicly traded Invacare common stock; (viii) consultation with relevant experts; and (ix) other publicly available material and data.

39. In addition, Lead Counsel's investigation included identifying and interviewing relevant percipient witnesses with direct knowledge of the facts alleged, including former Invacare employees. Information provided by nine confidential witnesses is detailed in the Complaint, and the Court cited the confidential witness statements in its Order denying Defendants' motion to dismiss.

**2. Formal Discovery**

40. As explained above, Lead Plaintiff actively pursued discovery. In furtherance of these efforts, Lead Plaintiff: (i) served its initial disclosures and supplemental initial disclosures; (ii) served requests for answers to a total of 45 interrogatories to the 3 Defendants; (iii) served a total of 132 requests for production of documents; (iv) served a total of 183 requests for admissions; and served subpoenas *duces tecum* with Schedule As on two third-parties.

41. In addition, Lead Plaintiff responded to 26 requests for production of documents.

42. Lead Plaintiff received, reviewed and analyzed over 1,000 pages of documents from Defendants, and nearly 3,000 pages of documents from third-parties, including documents obtained by Lead Counsel pursuant to its FOIA requests for documents and communications relating to: (i) Forms FDA 483 and Warning Letters issued by the FDA to Invacare; and (ii) the permanent injunction and consent decree entered against Invacare on December 20, 2012.

43. Lead Plaintiff also received and reviewed responses and objections, and supplemental responses and objections, to its discovery requests.

44. Lead Plaintiff also prepared for depositions and noticed the following seven depositions:

| NAME | POSITION |
|---|---|
| Defendant Mixon | Invacare's Chairman, founder and former CEO |
| Defendant Blouch | Invacare's President and CEO |
| Colleen Craven | Invacare's former Chief Compliance Officer |
| Doug J. Newlin | Invacare's former Senior Vice President Global Engineering |
| Ronald J. Clines | Invacare's Director, Product Risk and Quality Engineering |
| Louis Slangen | Invacare's former Senior Vice President/General Manager |
| Douglas J. Uelman | Invacare's Vice President, Quality/Regulatory Affairs |

### 3. Working With Experts And Consultants

45. In prosecuting the claims, Lead Counsel worked extensively with experts and consultants. Consultants were utilized to prepare the complaints, support class certification, prepare the mediation briefs, review Defendants' affirmative defenses, and prepare for negotiations. Experts were consulted in the specialized areas of causation, materiality, and damages.

### G. Lead Plaintiff's Motion For Class Certification

46. Pursuant to the parties' and the Court's agreed-upon pretrial schedule, on January 30, 2015, Lead Plaintiff filed its motion for class certification. The motion was supported by a detailed brief, as well as an expert report demonstrating that Invacare stock traded in an efficient market at all relevant times and explaining that class-wide damages are calculable based on the inflation in the price of Invacare's common stock. ECF Nos. 66-68.

47. Thereafter, on February 23, 2015, the parties requested that the Court amend the class certification briefing schedule to accommodate ongoing settlement discussions and a scheduled mediation, which the Court approved. ECF No. 70.

## III. THE SETTLEMENT

48. The Settlement of $11 million in cash was the result of arm's-length negotiations overseen by Jed Melnick, Esq. of JAMS. The Settlement provides the Settlement Class with an immediate and substantial benefit and eliminates the significant risks of continued litigation under circumstances where a favorable outcome could not be assured. Lead Counsel believes that the Settlement is fair, reasonable, and an excellent result for the Settlement Class considering the risk of recovering nothing or less after further substantial delay.

**A. Arm's-Length Settlement Negotiations**

49. As explained in the declaration of the mediator, Jed Melnick, Esq., attached hereto as Exhibit 5, the negotiations culminated in the parties ultimately accepting the "Mediator's Recommendation" to settle the Action for $11 million.

50. Specifically, following the parties' agreement to select Mr. Melnick as a mediator, in January 2015, the parties prepared detailed mediation statements and exhibits addressing the facts and law of the case. Settlement negotiations commenced on March 16, 2015, when Lead Counsel and Defendants' Counsel met with the mediator in New York for a full-day mediation session. During the session, the parties made presentations to the mediator and they discussed with him the merits of the case, including liability and damages. *See* Mediator's Decl., Exhibit 5 hereto.

51. Although the mediation session ended without a settlement agreement, the parties remained in communication with the mediator. Based on the mediator's careful review and analysis of the parties' mediation statements and presentations, and his extensive discussions with counsel for the parties, the mediator subsequently made a "Mediator's Recommendation" to settle the claims for $11 million in cash. The mediator recommended this settlement amount based on his involvement in the negotiations, review and analysis of the parties' mediation submissions and in-person presentations during the mediation, extensive communications with the parties, and assessment of the risks inherent in this litigation. *Id.*

52. On March 24, 2015, the parties separately accepted the Mediator's Recommendation, subject to the execution of a customary "long form" stipulation and agreement of settlement and related papers.

53. On March 25, 2015, the parties informed the Court that they had agreed to a proposed settlement and expected to finalize and file the documents with the Court in approximately sixty days.

54. On June 2, 2015, Lead Plaintiff filed the Stipulation And Agreement Of Settlement, along with its related exhibits, and Lead Plaintiff's unopposed motion for preliminary approval of the proposed Settlement. ECF Nos. 71-73.

55. On June 23, 2015, the Court scheduled a hearing on the motion for July 23, 2015, and set forth issues that the Court would plan to address at the hearing. ECF No. 76.

56. Following the hearing on July 23, 2015, the Court granted preliminary approval of the proposed Settlement; approved the form, content and manner of the Class Notices to Settlement Class Members; certified the proposed Settlement Class; and scheduled a Final Approval Hearing for November 19, 2015. The Court also ordered the parties to submit a revised proposed Preliminary Approval Order incorporating the discussions in Chambers and the findings on the record in open court at the hearing. ECF No. 77.

57. Pursuant to the Court's Order, on July 29, 2015, Lead Plaintiff submitted the parties' revised proposed Preliminary Approval Order and exhibits thereto, which the Court entered on August 10, 2015. ECF No. 79.

58. On August 24, 2015, Defendants filed their Notice of Proof of Settling Defendants' Compliance with CAFA, 28 U.S.C. § 1715, informing the Court, as discussed in Chambers, that on June 11, 2015, Defendants had timely and properly served the CAFA notice upon the United States Attorney General and the Attorneys General for all fifty states, the District of Columbia, American Samoa, Guam and Puerto Rico. ECF No. 80.

**B. Reasons For The Settlement**

59. Lead Plaintiff and Lead Counsel endorse the Settlement. *See* Guam Decl., Exhibit 1, attached hereto. Lead Plaintiff is a sophisticated institutional investor who has overseen the prosecution of this Action. Lead Plaintiff is also experienced serving as a representative plaintiff in securities and other class actions, including in, for example, *In re Wells Fargo Mortgage-Backed Certificates Litigation*, 09-CV-1376-LHK (N.D. Cal.); *In re Lehman Brothers Securities & ERISA Litigation,* 08-cv-5523-LAK (S.D.N.Y.); and *In re AXA Rosenberg Investor Litig.*, CV 11-00536 JSW (N.D. Cal.).

60. Lead Counsel specializes in complex securities litigation, and is highly experienced in such litigation. *See* Exhibit 4A-5 (Lead Counsel's attorney biographies). Based on their experience and knowledge of the facts and applicable law, Lead Counsel and Lead Plaintiff determined that the Settlement was in the best interest of the Settlement Class.

61. Although Lead Plaintiff and Lead Counsel believe that the claims asserted in the Action are meritorious, continued litigation posed risks that made any recovery uncertain. Indeed, the issues of scienter, falsity, materiality, loss causation, and damages were highly contested throughout the litigation, and would continue to be contested. For example, Defendants would continue to argue that many of the alleged misstatements are only general, aspiration statements concerning Invacare's legal compliance that are contained in general risk disclosures, including statements regarding Invacare's belief that it was compliant. Defendants would continue to argue that other misstatements are in the realm of soft information and puffery, for example, that regulatory compliance was a "high priority" and that Invacare was "currently addressing" the FDA's concerns. Although the Court denied Defendants' motion to dismiss on this basis, Defendants would continue to press this argument beyond the pleading stage. Likewise,

Defendants would continue to argue that the alleged misstatements were not material – an argument that the Court expressly reserved for the trier of fact. ECF No. 45.

62. Defendants would also continue to argue, and attempt to convince a jury, that they honestly believed they were addressing the FDA's concerns, and thus the element of scienter is lacking. Defendants would contend that many of the alleged misstatements constitute inactionable statements of Defendants' opinions and beliefs, including statements that Invacare "has established numerous policies and procedures that the company believes are sufficient to ensure" compliance with FDA regulations, as well as statements that Invacare "was working with the FDA" to address the agency's concerns, "had a good, active dialogue with the FDA," and was "happy with our progress" on compliance. It may be difficult for Lead Plaintiff to prove at trial, or produce sufficient evidence at the summary judgment phase, that Invacare did not implement the corrective actions Defendants said they did and that Defendants did not honestly believe they were "working with" the FDA and "addressing" the FDA's concerns based on the information that was provided to them. Defendants would likely emphasize that, as alleged in the Complaint, Invacare hired outside compliance experts and incurred $6 million in regulatory and compliance costs, in support of their purported scienter defense.

63. Even assuming that Lead Plaintiff prevailed at trial in establishing material untrue statements and omissions that were made with scienter, Defendants would continue to argue that loss causation was not established. During the course of the litigation, Defendants contended that the alleged revelations were simply confirmatory of information that was already known to investors, and thus, not actionable, and that the FDA's decision to issue a Warning Letter and to sue for an injunction against Invacare constituted an independent, intervening cause of any alleged

loss. Although the Court sustained the allegations at the pleading stage, Defendants would continue to press the argument at the summary judgment, trial, and appeal stages.

64. Had any of these arguments been accepted in whole or part, it could have eliminated or, at minimum, dramatically limited any potential recovery for the Settlement Class. Further, Lead Plaintiff would have had to prevail at several stages – motions for class certification and summary judgment, trial, and if it prevailed on those, on the appeals that were likely to follow.

65. The Settlement eliminates the above litigation risks and guarantees the Settlement Class a favorable and immediate cash recovery, as opposed to the risk of potentially no recovery after further litigation, trial, and exhausting appellate rights. Lead Counsel firmly believes that settling the Action at this juncture is in the best interest of the Settlement Class.

66. Lead Counsel engaged a consultant to assist in estimating potentially recoverable damages. Estimating aggregate damages can be challenging due, among other things, to assumptions that must be made regarding trading activity. Here, such estimate of potential maximum recoverable damages, assuming Lead Plaintiff prevailed on all claims as to each and every alleged misstatement against all Defendants and before taking into account Defendants' causation arguments and other defenses, was at most approximately $118 million. However, damages may be reduced or eliminated if the jury accepted any of Defendants' arguments, including finding that a portion or all of the losses are attributable to causes other than the alleged misstatements or omissions, or that certain statements are not actionable, or that other elements are not met. For example, if Defendants prevailed on loss causation arguments, the recoverable damages could be reduced to under $6 million, or eliminated altogether.[2]

[2] Even before accounting for Defendants' causation arguments and other defenses, the recovery of approximately 10% of the maximum recoverable damages is significantly higher than the 2.2% median settlement recovery as a percentage of estimated damages in securities class actions in

### C. Notice To The Settlement Class Meets The Requirements Of Due Process And Rule 23 Of The Federal Rules Of Civil Procedure

67. As required by the Court's Preliminary Approval Order, beginning on August 24, 2015, Lead Plaintiff, through the Claims Administrator, the Garden City Group, LLC ("GCG"), notified potential Settlement Class Members of the Settlement by mailing a copy of the Notice to potential Settlement Class Members and their nominees. GCG utilized several resources of data to reasonably identify Settlement Class Members. For example, pursuant to paragraph 7(a) of the Preliminary Approval Order and paragraph 19 of the Stipulation, Invacare was required to provide to GCG its lists of registered holders (consisting of names and addresses) of publicly traded common stock of Invacare who purchased during the Settlement Class Period. Invacare's counsel provided such information to Lead Counsel, who forwarded it to GCG, on July 24, 2015. *See* Declaration of Jennifer M. Keough Re Notice Dissemination and Publication ("Keough Decl."), attached hereto as Exhibit 2. In addition, GCG sent the Notice to entities identified on a proprietary list maintained by GCG of the largest and most common U.S. banks, brokerage firms, and nominees. *See id.* ¶¶2-10.

68. The Court-approved Notice requires nominees, within seven days, to either (i) request additional copies of the Notice to send to the beneficial owner of the securities, or (ii) provide to GCG the names and addresses of such persons. In the aggregate, as of October 7, 2015,

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2014, as recently reported by Cornerstone Research. *See* Cornerstone Research, "Securities Class Action Settlements: 2014 Review and Analysis," at p. 8, Figure 7, available at www.cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf; *see also* NERA, "Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review, at p. 32, Figure 27 (reporting a 0.7% median settlement value as a percentage of investor losses in 2014), available at www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf.

GCG has disseminated 27,712 copies of the Notice to potential Settlement Class Members and their nominees. *See id.* ¶10.

69. In addition, on August 27, 2015, the Summary Notice was published in the *Investor's Business Daily* and transmitted over the *PR Newswire*. *See id.* ¶11. Information regarding the Settlement, including copies of the Notice and Claim Form, was posted on the website established by the Claims Administrator specifically for this Settlement, *id.* ¶13, and on Lead Counsel's website. 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).

70. The Notice informs the Settlement Class of the pendency of the class action, the essential terms of the Settlement, and information regarding Plaintiffs' Counsel's fee and expense application and the proposed plan of allocating the Settlement proceeds among Settlement Class Members. The Notice also provides specifics on the date, time and place of the Final Approval Hearing and sets forth the procedures for objecting to the Settlement, the proposed Plan of Allocation or the application for attorneys' fees and expenses, and the procedure for requesting exclusion from the Settlement Class. To date, and after the execution of the Keough Declaration, two exclusion have been received. They are both from individuals. The individuals provided little, or no, or transactional information, as required by the Court's Preliminary Approval Order and explained in the Notice. One individual stated that he "exercised 1500 shares (stock options on 12/17/2010 at 30,25 USD," and the other provided no transaction information. Thus, it is unclear whether the individuals would otherwise be Settlement Class Members. After the October 29, 2015 deadline for submitting exclusion requests passes, Lead Plaintiff will submit to the Court,

with its reply papers, the parties' agreed-upon form of proposed Judgment, including a list of those persons and entities seeking exclusion, for the Court's consideration.

71. As explained in the accompanying memorandum of law in support of final approval of the Settlement, the Notice fairly apprises the Settlement Class Members of their rights with respect to the Settlement and therefore 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 Fidel v. Farley,* 534 F.3d 508 (6th Cir. 2008) (confirming that similar notice program comported with due process and Fed. R. Civ. P. 23).

**D. Plan Of Allocation**

72. Lead Plaintiff has proposed a plan to allocate the proceeds of the Settlement among members of the Settlement Class who submit valid Proofs of Claim. The objective of the proposed Plan of Allocation is to equitably distribute the Settlement proceeds to those Settlement Class Members who suffered economic losses as a result of the alleged misrepresentations and omissions.

73. Lead Plaintiff engaged Caliber Advisers, Inc., a full-service valuation and economic consulting firm, to assist in developing a plan to allocate the Settlement proceeds among Claimants. In developing the Plan of Allocation, Lead Plaintiff's expert calculated the amount of estimated alleged artificial inflation in the per share closing price of Invacare common stock which allegedly was proximately caused by Defendants' alleged false and misleading statements and material omissions. In calculating the estimated alleged artificial inflation caused by Defendants' alleged misrepresentations and omissions, Lead Plaintiff's expert considered the fraud-related price declines in Invacare's common stock price following the three alleged corrective disclosures that, according to Lead Plaintiff's allegations, revealed (at least partially) the alleged truth to the market. In doing so, Lead Plaintiff's expert performed an event study, a widely accepted

methodology used to isolate the company-specific portion of a price decline after controlling for market and industry factors, and to determine whether a decline is statistically significant. *See* Steinholt Decl., attached hereto as Exhibit 3.

74. The Steinholt Declaration explains the methods used to determine the amount of estimated artificial inflation that is used in calculating the Recognized Loss Amount in the Plan of Allocation.

75. The Notice explained the proposed Plan of Allocation to the Settlement Class. It was prepared in consultation with Lead Plaintiff's expert, tracks the theory of damages asserted by Lead Plaintiff, and is fair, reasonable and adequate to the Settlement Class as a whole.

76. In response to over 20,000 Notices, there have been no objections to date of the proposed Plan of Allocation.

77. Pursuant to paragraph 26 of the Stipulation, prior to distributing the Net Settlement Fund to Settlement Class Members who submit valid claims, Lead Counsel will apply to the Court, on notice to Defendants' Counsel, for a Class Distribution order, *inter alia*, approving the Claims Administrator's administrative determinations concerning the acceptance and rejection of the Claims submitted. In the event that any Claimant disagrees with the administrative determination as to his, her or its claim, and seeks the Court's review of that determination, they will be given the opportunity to dispute the determination and provide input to the Court at that time. Stipulation ¶24(d). To date there are no disputed claims.

78. As set forth in paragraph 72 of the Notice, if any portion of the Settlement Fund remains after further distributions to Authorized Claimants become no longer economically feasible, then Lead Plaintiffs will seek Court approval for distribution to a nonsectarian not-for-

profit charitable organization to be recommended by Lead Plaintiff and approved by the Court, or other distribution as directed by the Court.

## IV. PLAINTIFFS' COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

79. In addition to seeking final approval of the Settlement and Plan of Allocation, Plaintiffs' Counsel are also applying to the Court for an award of attorneys' fees and litigation expenses. Specifically, Plaintiffs' Counsel are applying for a fee of 25% of the Settlement Amount (*i.e.,* $2.75 million), plus interest in the amount of 25% of the interest earned on the Settlement Fund as of the date of the award (the remaining 75% of the interest earned shall remain with the Settlement Fund and be distributed to Authorized Claimants as part of the Net Settlement Fund), to be paid from the Settlement Fund. Plaintiffs' Counsel also request reimbursement of $156,551.86 in Plaintiffs' Counsel's Litigation Expenses, to be paid from the Settlement Fund.

80. In determining whether a requested award of attorneys' fees is reasonable under the circumstances, district courts are guided by the following factors:

> (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides.

*Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). Based on consideration of each of the foregoing factors as further discussed below, and on the additional legal authorities set forth in the accompanying memorandum of law in support of Plaintiffs' motion for attorneys' fees and reimbursement of Litigation Expenses (the "Fee Memorandum") filed contemporaneously herewith, Plaintiffs' Counsel respectfully submit that their requested fee should be granted.

## A. Plaintiffs' Counsel's Application For Attorneys' Fees

### 1. The Requested Fee Of 25% Is A Reasonable Percentage Of The Common Fund Obtained

81. For their extensive efforts on behalf of the Settlement Class, Plaintiffs' Counsel are applying for compensation from the Settlement Fund on a percentage basis. As set forth in the accompanying Fee Memorandum, the percentage method is the appropriate method of fee recovery because, among other things, it aligns the lawyers' interest in being paid a fair fee with the interest of the Settlement Class in achieving the maximum recovery in the shortest amount of time required under the circumstances, is supported by public policy, has been recognized as appropriate by the Supreme Court for cases of this nature and represents the overwhelming current trend in the Sixth Circuit and most other circuits.

82. Based on the benefit obtained for the Settlement Class, the extent and quality of work performed, and the risks of the litigation and the contingent nature of the representation, Plaintiffs' Counsel submit that a 25% fee award is justified and should be approved. The institutional investor Lead Plaintiff approves of Plaintiff's Counsel's fee request. *See* Guam Decl., Exhibit 1 attached hereto.

83. As discussed in the Fee Memorandum, a 25% fee is fair and reasonable for attorneys' fees in common fund cases such as this, is equal to the "benchmark" recognized by courts in this Circuit, and is well within, or below, the range of the percentages typically awarded in securities class actions in this Circuit.

84. As explained above, litigation of this case posed risks that made any recovery uncertain. In the face of those risks, Plaintiffs' Counsel took this case on a contingency basis, committed their resources and litigated it for approximately two years without any compensation

or guarantee of success. Against this backdrop, Plaintiffs' Counsel's efforts successfully achieved a recovery of $11 million in cash.

**2. The Value Of Plaintiffs' Counsel's Services On An Hourly Basis**

85. Lead Plaintiff accepted the Mediator's Recommendation only after Plaintiffs' Counsel had gathered adequate information to prepare allegations that were sufficient to overcome the heightened pleading standard of the PSLRA. To do so, Lead Counsel conducted an extensive investigation, including, as detailed above, review and analysis of all relevant publicly available information, and identifying and interviewing relevant percipient witnesses with direct knowledge of the facts alleged, several of which are cited in the complaints and referenced in the Court's Order sustaining the Complaint. Plaintiffs' Counsel committed time and sources to, among other things, filing the complaints; fully briefing Defendants' motions to dismiss and motion for judgment on the pleadings; serving and responding to discovery requests; reviewing and analyzing documents obtained from Defendants and third-parties; engaging and conferring with experts and consultants; researching the applicable law with respect to the claims of Lead Plaintiff's and the Settlement Class, as well as Defendants' potential defenses and other litigation issues; filing Lead Plaintiff's motion for class certification; and engaging in hard-fought settlement negotiations with experienced defense counsel.

86. I maintained daily control and monitoring of the work performed in this case. While I personally devoted substantial time to this case, other experienced attorneys at my firm and at Local Counsel undertook particular tasks appropriate to their levels of expertise, skill and experience, and more junior attorneys and paralegals worked on matters appropriate to their experience levels.

87. As described in the Fee Memorandum, the requested fee is not only fair and reasonable under the percentage approach but a lodestar cross-check – demonstrating the value of

Plaintiffs' Counsel's services on an hourly basis – confirms the reasonableness of the fee. Attached hereto as Exhibits 4A and 4B are declarations from Plaintiffs' Counsel in support of an award of attorneys' fees and reimbursement of Litigation Expenses. Included with each firm's declaration is a schedule identifying the lodestar of each firm (by individual, position, billing rate, and time billed), as well as the expenses incurred by specific category. *See* Exhibits 4A-1 and 4B-1.

88. Plaintiffs' Counsel expended a total of 3,079.50 hours in the prosecution and investigation of the Action. The resulting lodestar is $1,593,005.00. The requested fee, therefore, yields a multiplier of less than 1.73, and is fair and reasonable based upon the significant risk of the litigation and the quality of representation by Plaintiffs' Counsel in achieving the Settlement now before the Court. Indeed, as discussed in the Fee Memorandum, when using a lodestar cross-check, courts have routinely awarded fee requests with similar and larger lodestar multipliers.

89. The lodestar summaries were prepared from daily time records regularly prepared and maintained in the ordinary course of business. As explained in the declarations, Plaintiffs' Counsel's hourly rates are the same as, or comparable to, the rates submitted by the firms for lodestar cross-checks in other securities or other class action litigation for fee applications that have been granted, including within this Circuit.

90. Attached hereto as Exhibits 4A-5 and 4B-3 are biographies of Plaintiffs' Counsel's firms. Many of the firms' attorneys – at all levels – have worked for Plaintiffs' Counsel for years, and have extensive experience in securities class action litigation. Each attorney that prosecuted this Action performed substantive work that directly benefited the Settlement Class. The time spent by each attorney was reasonable, non-duplicative, beneficial to the effective and efficient litigation, and was important to Plaintiffs' Counsel's and Lead Plaintiff's ability to understand the strengths and weaknesses of the case in order to negotiate intelligently and evaluate the Settlement,

ultimately leading to the successful resolution of the case. A "Task Breakdown" describing the work performed in this case by each attorney of Lead Counsel is also included as Exhibit 4A-4.

91. Plaintiffs' Counsel took this case on a contingency basis, committed their resources and litigated it for approximately two years without any compensation or guarantee of success. Based on the excellent result achieved for the Settlement Class, the quality of work performed, the risks of prosecuting the Action and the contingent nature of the representation, I respectfully submit that the request for a 25% fee award is fair and reasonable and consistent with other similar cases within the Sixth Circuit.

**3. The Complexity Of The Litigation**

92. Litigation of the claims in this case raised many complex issues, as is evidenced by the 132-page Complaint (plus exhibits); the voluminous briefing and exhibits dedicated to addressing Defendants' motion to dismiss, with additional briefing on Defendants' motion for judgment on the pleadings; and the Court's 17-page Opinion And Order denying Defendants' motion to dismiss and additional 8-page Opinion and Order denying Defendants' Motion for Judgment on the Pleadings. The litigation also raised a number of complex questions that required – and would continue to require – substantial efforts by all counsel, and the Court, including through complicated analysis of the factual record and the assistance of sophisticated expert testimony. Lead Counsel's consultation with experts was necessarily extensive given the complex nature of the subject matter underlying the claims. Plaintiffs' Counsel undertook to create a compelling record addressing these and other complicated issues. Accordingly, the complexity of the litigation support the conclusion that the requested fee is fair and reasonable.

**4. The Contingent Nature Of The Representation And Society's Stake In Rewarding Attorneys Who Produce Such Benefits To Maintain An Incentive To Others**

93. As noted above, Plaintiffs' Counsel undertook this Action on a wholly contingent basis. From the outset, Plaintiffs' Counsel understood that they were embarking on a complex and expensive litigation with no guarantee of compensation for the investment of time, money and effort that the case would require. Plaintiffs' Counsel correctly anticipated that Defendants would raise myriad challenges to the sufficiency of the pleadings. In addition, had the litigation continued, undoubtedly, they would have continued to dispute essentially all elements of the claims during all phases of the litigation, including at class certification, summary judgment, trial, and on appeal.

94. In undertaking the responsibility for prosecuting the Action, Plaintiffs' Counsel assured that sufficient attorney resources were dedicated to the investigation of the Settlement Class' claims and that sufficient funds were available to advance the expenses required to pursue and complete such complex litigation. Plaintiffs' Counsel, in total, incurred $156,551.86 in expenses in prosecuting this Action for the benefit of the Settlement Class.

95. Plaintiffs' Counsel also bore the risk that no recovery would be achieved. As discussed herein, this case presented a number of risks and uncertainties which could have prevented any recovery whatsoever. Despite the vigorous and competent efforts of Plaintiffs' Counsel, success in contingent-fee litigation, such as this, is never assured.

96. Lead Counsel firmly believes that the commencement of a securities class action does not guarantee a settlement. To the contrary, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win at trial, or to induce sophisticated defendants to engage in serious settlement negotiations.

97. Courts have repeatedly recognized that it is in the public interest to have experienced and able counsel enforce the securities laws. As recognized by Congress through the passage of the PSLRA, vigorous private enforcement of the federal securities laws can only occur if private plaintiffs − particularly institutional investors such as Guam − take an active role in protecting the interests of securities purchasers. If this important public policy is to be carried out, plaintiffs' counsel should be adequately compensated, taking into account the risks undertaken in prosecuting securities class actions.

**5. The Professional Skill And Standing Of Counsel Involved On Both Sides**

98. The expertise and experience of counsel are other important factors in setting a fair fee. As demonstrated by Plaintiff's Counsel's biographies, attached hereto as Exhibits 4A-5 and 4B-3, the attorneys at Plaintiffs' Counsel are experienced and skilled class action securities litigators and have a successful track record in class actions throughout the country.

99. The quality of the work performed by counsel in attaining the Settlement should also be evaluated in light of the quality of opposing counsel. Plaintiffs' Counsel were opposed in this case by a skilled defense firm who spared no effort in the defense of their clients. In the face of this defense, Plaintiffs' Counsel were nonetheless able to develop a case that was sufficiently strong to persuade Defendants to settle on terms that represent a fair, reasonable and adequate recovery to the Settlement Class.

**6. Lead Plaintiff's Approval And The Reaction Of The Settlement Class To Date Supports Approval Of The Settlement**

100. As set forth above, Notices have been disseminated to at least 21,712 potential members of the Settlement Class and their nominees. Keough Decl. ¶10. In addition, the Summary Notice was published in *Investor's Business Daily* and over the *PR Newswire*. *See id*.

¶11. The Notice explains the Settlement and that Plaintiffs' Counsel would seek fees in an amount not to exceed 25% of the Settlement Amount, plus interest in the amount of 25% of the interest earned by the Settlement Fund as of the date of the award. The deadline to object to Plaintiffs' Counsel's fee request is October 29, 2015. To date, no member of the Settlement Class has objected. [3]

101. In sum, given the benefit rendered to the Settlement Class, the value of Plaintiffs' Counsel's services on an hourly basis, the contingency nature of the representation in the face of serious risks, society's stake in rewarding attorneys who produce such benefits, the complexity of the litigation, and the professional skill and standing of Plaintiffs' Counsel and defense counsel, I respectfully submit that the requested attorneys' fees are reasonable and should be approved.

**B. Application For Reimbursement Of Litigation Expenses**

102. Plaintiffs' Counsel also request $156,551.86 in reimbursement of Litigation Expenses reasonably and necessarily incurred by Plaintiffs' Counsel in the prosecution of this Action, to be paid from the Settlement Fund.[4] Lead Counsel respectfully submit that the application for payment of Plaintiffs' Counsel's Litigation Expenses is appropriate, fair, and reasonable and should be approved in the amounts submitted herein.

103. From the beginning of the case, Plaintiffs' Counsel were aware that they might not recover any of their expenses, and, at the very least, would not recover anything until the Action was successfully resolved in whole or in part, through trial (and appeals) or settlement. Plaintiffs'

[3] If any objections are received, they will be addressed in Lead Plaintiff's reply papers to be filed on November 12, 2015.

[4] As set forth in the declarations attached hereto as Exhibits 4A and 4B, the expenses of Plaintiffs' Counsel for which reimbursement is sought are reflected on the books and records of the respective firms, which are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

Counsel also understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate them for the lost use of the funds advanced to prosecute this Action. Thus, Plaintiffs' Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action.

104. The expenses were necessary and appropriate for the prosecution of this Action. These include charges for experts and consultants; service of process; computer research devoted to the case; costs incurred for travel; charges for photocopying, telephone, postal and express mail charges; and similar case-related costs.

105. Included in the amount of expenses is $97,086.25 for Lead Plaintiff's experts and consultants. This encompasses over 62% of Plaintiffs' Counsel's total Litigation Expenses. As discussed above, Lead Counsel worked extensively with experts and consultants on various specialized issues in the case.

106. The expenses also include the costs of online research in the amount of $30,683.95. These are the charges for computerized factual and legal research services such as *LexisNexis*, *Westlaw*, and PACER. It is standard practice for attorneys to use *LexisNexis*, *Westlaw*, and PACER to assist them in researching legal and factual issues, and, indeed, courts recognize that these tools create efficiencies in litigation and, ultimately, save clients and the class money.

107. In addition, Lead Counsel were required to travel in connection with prosecuting and settling the Action, and thus incurred the related costs of transportation (coach only), meals and lodging. Included in the expense request above is $12,496.73, for travel expenses necessarily incurred for the prosecution of this litigation, and $10,500.00 for mediation fees.

108. Plaintiffs' Counsel also seek approval for reimbursement of certain costs and expenses incurred by Lead Plaintiff directly relating to its representation of the Settlement Class pursuant to the PSLRA, as set forth in Exhibit 1 attached hereto, in the amount of $4,200.00.

109. The application for Litigation Expenses is less than half of the upper limit of $400,000.00 contained in the Notice mailed to the Settlement Class. As noted above, in response to dissemination of over 20,000 Notices, as of the date of this Declaration, there are no objections to such expenses.

110. Approval of the Settlement is independent from approval of Plaintiffs' Counsel's application for an award of attorneys' fees and expenses; any determination with respect to Plaintiffs' Counsel's application for an award of attorneys' fees and expenses will not affect the Settlement, if approved.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15th day of October, 2015

*/s/ Benjamin A. Galdston*
BENJAMIN A. GALDSTON