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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE NEW CENTURY

Case No. 2:07-cv-00931-DDP (FMOx)
(Lead Case)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENTS AND PLAN OF ALLOCATION

Date: November 8, 2010
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Dean D. Pregerson

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I. PRELIMINARY STATEMENT

Lead Plaintiff, the New York State Teachers' Retirement System ("NYSTRS"), and Plaintiffs Carl Larson and Charles Hooten (collectively, "Plaintiffs"), respectfully submit this Memorandum in support of their motion for final approval of the Settlements and Plan of Allocation in the above-captioned class action. Plaintiffs request that the Court: (i) grant final approval of the class action Settlements on the terms set forth in the Stipulations filed with the Court on July 30, 2010[1]; (ii) approve the Plan of Allocation for distributing the net settlement fund to Class Members; and (iii) grant final certification of the Class as certified in this Court's Order Preliminarily Approving Settlements And Providing for Notice ("Preliminary Approval Order," ECF No. 489).[2]

As set forth in the Stipulations, the Settlements provide for the collective payment of approximately $125 million in cash (the "Settlement Amount") plus

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[1] The three Settlements are as follows: (a) the settlement with the New Century Financial Corp. ("New Century" or the "Company") officer and director Defendants ("Individual Defendants") in the amount of $65,077,088; (b) the settlement with KPMG LLP ("KPMG") in the amount of $44,750,000; and (c) the settlement with the Underwriter Defendants in the amount of $15,000,000.

[2] The Class, as certified in the Court's Preliminary Approval Order, is defined as follows: all persons and entities who purchased or otherwise acquired New Century common stock, New Century Series A Preferred Stock, New Century Series B Preferred Stock, and/or New Century call options and/or who sold New Century put options, during the time period from May 5, 2005, through and including March 13, 2007, either in the Offerings, pursuant to a registration statement, or in the market, and who, upon disclosure of certain facts alleged in the Complaint, were injured thereby. Certain persons and entities are excluded from the Class as set forth in the Court's Preliminary Approval Order. Also excluded from the Class are any persons who exclude themselves by filing a request for exclusion in accordance with the requirements set forth in the Notice. The basis for class certification is set forth in Plaintiffs' Memorandum of Points and Authorities in Support of Unopposed Motion for Preliminary Approval of Settlements filed July 30, 2010 (ECF No. 484), which is incorporated by reference.

interest earned thereon, for the benefit of the Class.[3] Lead Counsel believes this is the second highest sub-prime securities class action settlement to date.[4]

The proposed Settlements were reached only after extensive litigation and negotiations. The negotiations – including 32 parties and 11 insurance carriers and their respective counsel, and 11 in-person mediation sessions and numerous negotiations over the course of more than 1 year – were overseen by an experienced mediator, the Honorable Daniel Weinstein (Ret.). The Court-appointed Lead Plaintiff, NYSTRS, through its General Counsel or Associate General Counsel, actively participated in the negotiations, including by personally attending each of the mediation sessions.[5] In the words of Judge Weinstein, the negotiations were "***procedurally one of the most challenging that I have***

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[3] The settlement with the Individual Defendants includes payments to resolve claims brought by the New Century Liquidating Trustee (the "Trustee"), plaintiffs in the related action *Kodiak Warehouse LLC, et al. v. Brad A. Morrice, et al.*, Case No. 08-1265-DDP-FMO ("Kodiak"), and the Securities & Exchange Commission ("SEC"). That settlement provides for a total of $91,102,331.51 in cash and $944,029.49 in other consideration. The settlement further provides an agreed-to allocation of these payments to the Class and the plaintiffs in the other actions. The Class is receiving over 70% of the amount paid by or on behalf of the New Century officers and directors in that settlement, or $65,077,088, all in cash.

[4] Lead Counsel is aware of the settlements reached in the sub-prime securities class action *In re Merrill Lynch & Co., Inc. Sec., Deriv. and ERISA Litig.*, 07-cv-9633 (S.D.N.Y.), totaling $625 million, but is aware of no other higher sub-prime related securities class action that has been granted final approval as of this motion. *See* Declaration of Salvatore J. Graziano in Support of Plaintiffs' Motion for Final Approval of Settlements and the Proposed Plan of Allocation, and in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses ("Graziano Decl."), ¶8. References to Exhibits ("Ex.") herein are to the Graziano Decl. unless otherwise indicated.

[5] *See* Declaration of Wayne Schneider in Support of Final Approval of Settlements and Plan of Allocation, and Request for Attorneys' Fees and Reimbursement of Litigation Expenses ("Schneider Decl.," Ex. B).

encountered." Declaration of The Honorable Daniel H. Weinstein ("Weinstein Decl.," Ex. A), ¶13.

The proposed Settlements represent an outstanding result for Plaintiffs and the Class, particularly in light of New Century's bankruptcy and the risks to the Class if the action continued, including the risks of establishing Defendants' liability and the Class's full amount of damages and the risks that there would be significantly less funds available to satisfy any judgment or post-trial settlement.

Plaintiffs submit this motion pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. If approved, the Settlements will resolve all claims against all Defendants and their related parties.[6] Lead Plaintiff and Lead Counsel – based upon their evaluation of the facts, applicable law, and the decisions in this case – submit that the proposed Settlements are in the best interests of the Class and provide an excellent recovery for the Class.

On August 10, 2010, following a hearing, the Court granted preliminary approval of the Settlements. Beginning on August 12, 2010, the settlement funds were deposited into interest-bearing escrow accounts. Pursuant to the Preliminary Approval Order, beginning on August 17, 2010, the Court-approved Notice of Pendency of Class Action and Proposed Settlements, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the

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[6] The Defendants include the following: (i) "Individual Defendants" who are former officers and directors of New Century, including Robert K. Cole, Brad A. Morrice, Estate of Edward Gotschall, Patti M. Dodge, Fredric J. Forster, Michael M. Sachs, Harold A. Black, Donald E. Lange, Terrence P. Sandvik, Richard A. Zona, Marilyn A. Alexander, David Einhorn, and William J. Popejoy; (ii) "Underwriter Defendants," including Bear, Stearns & Co. Inc., Deutsche Bank Securities Inc., Piper Jaffray & Co., Stifel, Nicolaus & Co., Inc., JMP Securities LLC, Roth Capital Partners, Morgan Stanley & Co., Inc., and Jeffries & Co., Inc.; and (iii) KPMG. New Century was not named as a defendant due to its filing of bankruptcy.

"Notice") was sent to potential Class Members and their nominees.[7] Over 50,000 Notices have been sent to potential Class Members. *Id.* ¶8. In addition, the Court-approved Summary Notice was published in *The Wall Street Journal* and over the *PR Newswire* on August 24, 2010. *Id.* ¶10.

Pursuant to the Preliminary Approval Order, the deadline for Class Members to file objections to the Settlements, Plan of Allocation or the fee and expense application, or to seek exclusion from the Class, will expire on October 18, 2010. To date, there are ***no objections***. In addition, only one Class Member representing 300 shares has sought exclusion from the Class.[8]

II. DESCRIPTION OF THE LITIGATION

A. Nature Of The Action

Plaintiffs' case involves several federal securities claims asserted against various Defendants. Specifically, the operative complaint, the Second Amended Consolidated Class Action Complaint (the "Complaint" or "SAC"), alleges that the Underwriter Defendants and the Individual Defendants who signed the registration statements for two offerings violated § 11 of the Securities Act of 1933 ("Securities Act") because the registration statements included false and misleading statements. The Complaint alleges that Defendant KPMG violated § 11 of the Securities Act and § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") by issuing unqualified opinions in connection with the Company's financial statements and internal controls for the year-ended December 31, 2005. The Complaint further alleges that Individual Defendants Cole, Morrice, Gotschall, and Dodge (all former New Century officers) violated

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[7] *See* Declaration of Richard W. Simmons: Notice Dissemination and Publication ("Simmons Decl.," Ex. C), ¶¶3-8.

[8] *See* Graziano Decl. ¶14. A list of those seeking exclusion will be included in Ex. 1 attached to the proposed Final Judgments that will be submitted to the Court following expiration of the deadline for seeking exclusion.

§ 10(b) of the Exchange Act by issuing false and misleading statements with scienter, and are liable as control persons under § 20(a) of the Exchange Act and § 15 of the Securities Act.

B. Procedural History Of The Litigation

Plaintiffs respectfully refer the Court to the accompanying Graziano Declaration, which contains a detailed description of the procedural history of the litigation, the investigation and drafting of the three consolidated complaints, motions to dismiss, discovery and summary judgment motion briefing.

C. The Extensive Negotiations Leading To The Global Settlements

As detailed in the Weinstein and Graziano Declarations, the Settlements are the result of intensive, arm's-length negotiations between all parties, involving eleven in-person mediation sessions over more than a one-year period, as well as extensive direct and indirect negotiations between counsel. Settlement negotiations occurred while litigation was ongoing, including the briefing and discovery related to KPMG's summary judgment motion, and Plaintiffs' review of over 38 million pages of documents. The negotiations were particularly complex due to the parties' disputes over the claims and defenses in the action; New Century's bankruptcy; the number of defendants in this case; potential claims by KPMG against certain Individual Defendants; and the existence of claims against certain of the Defendants by the Trustee, Kodiak, and the SEC.[9]

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[9] Thus, for example, Plaintiffs could not have been successful in resolving their claims against the Individual Defendants (whose insurance was being wasted in defending four separate actions brought by Plaintiffs, the Trustee, Kodiak, and the SEC) without resolving their claims against KPMG who had preserved its claims against those same Defendants. At the same time, KPMG had filed a fully briefed motion for summary judgment on the issue of loss causation which threatened to extinguish all claims against KPMG and greatly reduce the size of Plaintiffs' claims against the Individual Defendants and Underwriter Defendants. In addition, the Individual Defendants argued that they did not have scienter because they

In the end, the parties reached global settlements on all claims, including not only those claims alleged in the instant class action, but also the claims brought by the Trustee, Kodiak, and the SEC, which was necessary to achieve the Settlements here. *See* Weinstein Decl. ¶¶6-12; Graziano Decl. ¶¶129-36.

III. 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.[10] 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." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

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, that it is fair, reasonable and adequate. *See also Woo v. Home Loan Group, L.P.*, 2008 WL 3925854, at *3 (S.D. Cal. Aug. 25, 2008). On a motion for final 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 Washington Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989).

A court's role in settlement approval is essentially twofold, determining whether the settlement: (i) is tainted by fraud or collusion; and (ii) is fair,

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relied upon KPMG's audit, which could have been particularly problematic if KPMG was dismissed from the action.

[10] *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *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.").

reasonable and adequate. *See Officers for Justice*, 688 F.2d at 625. In exercising its discretion to approve the settlement of a class action, a court should consider the following factors: (1) "the strength of the plaintiff's case"; (2) "the risk, expense, complexity, and likely duration of further litigation"; (3) "the risk of maintaining a class action throughout the trial"; (4) "the amount offered in settlement"; (5) "the extent of discovery completed and the stage of the proceedings"; (6) "the experience and views of counsel"; and (7) "the reaction of the class members." *In re Rambus Inc. Deriv. 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)). "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.[11]

The presumption of reasonableness in this action is fully warranted because the Settlements are the product of extraordinarily extensive arm's-length negotiations presided over by an experienced retired judge mediator. It is the considered judgment of the Mediator, Lead Counsel, and the sophisticated institutional investor Lead Plaintiff that the Settlements represent a fair, reasonable,

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[11] *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").

and adequate resolution of the litigation and warrants this Court's approval. *See* Mediator Decl. ¶20; Graziano Decl. ¶5; Schneider Decl. ¶12.

B. The Settlements Meet 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. *See, e.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (affirming district court approval of settlement where deteriorating financial condition of company defendant was a risk supporting reasonableness of the settlement). While Plaintiffs believe that all of the claims asserted against Defendants have merit, they also recognize that there were serious risks, not only as to eventual collectability from certain defendants (as discussed below), but also as to whether Plaintiffs would ultimately prevail on the merits. For example, to prevail on their § 10(b) claims, Plaintiffs would have the burden of establishing that: (1) Defendants made a material misrepresentation or omission of a material fact; (2) scienter; (3) Plaintiffs' reliance on the misrepresentation; and (4) the misrepresentations caused Plaintiffs' damages ("loss causation"). *See In re New Century,* 588 F. Supp. 2d 1206, 1222, 1236 (C.D. Cal. 2008); *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). With respect to the § 11(a) claims, Plaintiffs would have the burden of establishing that (1) the registration statements contained an omission or misrepresentation, and (2) the omission or misrepresentation was material, that is, it would have misled a reasonable investor about the nature of his or her investment. *See New Century,* 588 F. Supp. 2d at 1238 (citing *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403-04 (9th Cir.1996)). Defendants could have attempted to establish an affirmative

defense to the § 11 claims of "negative causation," *i.e.,* that the alleged misrepresentation did not cause Plaintiffs' damages.[12]

Defendants repeatedly argued throughout this case that Plaintiffs could not prove loss causation and that Defendants could show negative causation. There was a risk that Defendants could successfully argue at summary judgment or at trial that the stock price drops on the alleged corrective disclosure dates were only partially recoverable on one of those days, or not at all, which would have significantly reduced – or eliminated altogether – the recoverable damages against those Defendants with sufficient assets to satisfy a judgment, as discussed below and in the declaration of Plaintiffs' damages expert, the Declaration of H. Nejat Seyhun, Ph.D. ("Seyhun Decl.," Ex. D) ¶¶55-57.[13]

Specifically, Defendants would have argued that the declines in the share price of New Century's common stock on February 8, 2007 and March 5, 2007 – as well as various other dates – were only partially caused by the alleged fraud, if at all. *See* Graziano Decl. ¶113.

With regard to the February 7, 2007 disclosure, Defendants would have continued to argue that the disclosure of the restatement only pertained to the first three quarters of 2006 and did not pertain at all to the Company's financial results in 2005. Defendants thus would have argued that the financial results issued prior to the first quarter of 2006 were not actionable. If successful, this argument would

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[12] *See New Century,* 588 F. Supp. 2d at 1238 (citing 15 U.S.C. § 77k(e)). The control person claims require that Plaintiffs establish: (1) an underlying primary violation of the securities laws; and (2) the defendant controlled the person or entity committing the primary violation. *See New Century*, 588 F. Supp. 2d at 1233; *see also Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000).

[13] *See* Graziano Decl. ¶¶108-17. For example, in *In re Omnicom Group, Inc. Sec. Litig.,* following 5½ years of litigation and millions of dollars in time and expense incurred by plaintiff's counsel, the court granted defendant's summary judgment motion based on loss causation grounds, dismissing all claims in their entirety. The Second Circuit Court of Appeals affirmed. 597 F.3d 501 (2d Cir. 2010).

have ended Plaintiffs' case against KPMG and greatly reduced Plaintiffs' case against the Underwriter Defendants, leaving only the Individual Defendants whose insurance coverage would likely have been greatly expended by then. *See id.* ¶114.

With regard to the March 2, 2007 corrective disclosure, Defendants would have argued that the fall in the price of New Century securities was not caused by the fraud. Indeed, in its motion for summary judgment, KPMG argued that it could not be held liable for losses from this disclosure because the disclosure revealed nothing about KPMG's misconduct or New Century's 2005 financial results. Moreover, all of the Defendants would have argued that the loss from the March 2, 2007 disclosure did not cause New Century investors' losses because the drop was caused by other news and information announced by New Century and had nothing to do with the fraud or restatement. Thus, Plaintiffs also faced the risk of no recovery for the stock price drop following the March 2 disclosure. *Id.* ¶115.

Additionally, with regards to the March 13, 2007 corrective disclosure, Defendants would have argued that the delisting of New Century's securities from the NYSE was not caused by Defendants' fraud but, instead, by the decline in the mortgage industry or other news. Thus, Plaintiffs also faced the risk of no recovery for the March 13, 2007 drop. *See id.* ¶116.

Defendants also would have continued to argue that they could not be held liable under § 10(b) of the Exchange Act because they did not have the requisite scienter. The Individual Defendants would have argued that their transactions in New Century stock and their retention of shares negate scienter. They also would have argued that they relied on the audit opinion of KPMG in connection with New Century's financial results, and that any financial misstatements were committed by lower level employees without their knowledge. *See id.* ¶109.

Defendants would have contended that there were no material misstatements; that the Company's statements during the Class Period were true when made; that the Company repeatedly warned investors of the risk that loans

may default; and that Defendants adequately disclosed the risks that eventually materialized, rendering the alleged omissions non-material. *See id.* ¶¶110-17.

Although Plaintiffs believe that they have sufficient evidence to overcome scienter, materiality, falsity, and loss causation, there were very real risks that the arguments of Defendants and their experts would be successful at summary judgment or trial. Plaintiffs and their counsel considered that, even if Plaintiffs were to prevail on the merits, the ability to recover as much as the Settlement Amount on a judgment, much less more, was far from certain. *See id.* ¶111.

Even if Plaintiffs prevailed through summary judgment, risks to the Class remained. Plaintiffs considered that certain contested issues would have been decided by a jury in the event of a trial, including whether Defendants acted with an intent to mislead investors, whether the alleged misrepresentations were false and material to investors, whether all of the Class Members' losses were caused by the alleged misrepresentations, and the amount of damages. Even a meritorious case can be lost at trial.[14] Even success at trial does not eliminate the risk.[15]

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

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[14] *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 action was dismissed and plaintiffs were ordered to pay defendants' costs).

[15] 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.

(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.*

In this particular area of law, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Thus, "in evaluating the settlement of a securities class action, federal courts . . . 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (citations omitted).

There is no doubt that this action involves complex factual and legal issues. As detailed in the Graziano Declaration, the various risks and obstacles confronting the Class – including, for example, establishing loss causation and the full amount of the Class's damages – would necessarily "flow from the complexities and difficulties inherently involved in shareholder securities fraud litigation." *In re Nat'l Student Mktg. Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974).

If the Settlements here had not been achieved, the action would likely have continued for years and the substantial insurance funds available to fund the Settlements likely would have been fully expended in defense costs of this action, the Trustee action, the Kodiak action, and the SEC action. Given the stakes involved in this litigation, an appeal was virtually assured regardless of the result of trial. Instead of the lengthy, costly, and uncertain course of further litigation with Defendants, the Settlements provide an immediate and certain recovery for the Class. The Settlements clearly outweigh the substantial risks associated with lengthy continued litigation. *See* Graziano Decl. ¶¶108-24.

3. The Amount Obtained In Settlement

The determination of a "reasonable" settlement is not susceptible to a mathematical equation yielding a particularized sum. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d

689, 693 (2d Cir. 1972). 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."[16] 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). In fact, a settlement may be acceptable even if it amounts to only a fraction of the potential recovery that might be available at trial.[17]

Here, the Settlements provide for the recovery of approximately $125 million in cash plus interest. The recoveries obtained by Plaintiffs through the Settlements are particularly extraordinary in light of the multiple parties involved in the negotiations and the need for a global settlement. For example, as detailed in the Stipulations, Plaintiffs were able to obtain substantial sums from the New Century insurance carriers that will be allocated to settle the claims asserted by the Class, the Trustee, and the Kodiak plaintiffs. The Class will be paid over 70% of the cash portion of that settlement, or $65,077,088. In addition, the Settlements provide for payment of additional funds by KPMG ($44,750,000 in cash) and the Underwriter Defendants ($15,000,000 in cash), solely for the benefit of the Class.

As detailed below and in the Graziano Declaration, these Settlements were

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[16] *Granada Invest., 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.").

[17] *See Nat'l Rural Telcomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (citations omitted)).

obtained in the face of numerous obstacles, including in particular, establishing loss causation and the full extent of the Class's damages, as well as significant limitations on sources of recovery. Lead Counsel took into account the fact that the Class could have a far less recovery if, for example, KPMG succeeded on its motion for summary judgment because KPMG's motion threatened to eliminate all claims against KPMG and to greatly reduce damages recoverable against the Underwriter Defendants. *See* Graziano Decl. ¶¶11, 108-24.

In addition, New Century was bankrupt and could not contribute to the Settlements. Continued litigation as to the Individual Defendants would have further depleted the available insurance which was the primary source of available recovery as to those Defendants. Moreover, the claims of the competing claimants – the Trustee, the Kodiak plaintiffs, and the SEC – had to be factored into the availability of the directors and officers insurance ("D&O insurance"). Plaintiffs had to obtain the cooperation of the Trustee, the Kodiak plaintiffs, and the SEC – and each of the 11 different insurance carriers and each of the 28 defendants – before the Settlements could be reached.[18]

Lead Counsel obtained cash contributions to the global officer and director Settlement from certain of the New Century officers and directors after hard fought negotiations and having conducted an assessment of their financial statements and

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[18] As explained in the Graziano Decl. (¶130), although there was substantial D&O insurance, by the time the mandatory discovery stay of the PSLRA was lifted after the Defendants' motions to dismiss were denied, the primary layer of the insurance – $10 million – had already been used for defense costs. Moreover, the D&O insurance was complex. Not only did the D&O policy consist of 14 excess policies underwritten by 10 different insurance companies, but the 14 excess polices were divided into 3 different towers consisting of ABC coverage, Side A coverage and Independent Directors Liability ("IDL") coverage, which meant that cooperation and agreement to payment from numerous insurance carriers were required to achieve the Settlements. In addition, the IDL tower applied only to New Century's independent directors, and then only with respect to one-seventh of the IDL tower for each of the independent directors who was found liable.

ability to pay. Those contributions were limited by the individuals' assets and the fact that Plaintiffs would have had to give up significantly more in insurance proceeds before they could get to their assets. *Id.* ¶132. In addition, Defendant KPMG threatened to sue the Individual Defendants. Thus, a release of the Individual Defendants and the insurance carriers by the other Defendants was required before the Settlements could be effectuated. *Id.* ¶133.

Notwithstanding these complicated dynamics and New Century's bankruptcy, Plaintiffs achieved an excellent recovery of approximately $125 million in cash for the Class. Plaintiffs' expert estimates that this represents approximately 8%-16% of maximum recoverable damages (assuming all Class Members file proofs of claim). *See* Seyhun Decl. ¶¶44-57.

As explained in Professor Seyhun's Declaration, in calculating maximum potential recoverable damages, he calculated the artificial inflation in New Century securities throughout the Class Period consistent with the allegations in the Complaint, and applied the damages per share to his estimated calculation of the number of damaged New Century securities, to arrive at an estimated calculation of maximum recoverable damages. Based on these calculations, Professor Seyhun estimates that maximum recoverable damages in this action are between $778 million and $1.6 billion. *Id.* ¶¶44, 56, 57. Thus, even under Plaintiffs' maximum damage estimates, Plaintiffs have achieved a recovery of between 8% and 16%. This assumes, however, that 100% of Class Members would submit valid claims. Empirical studies indicate that a substantial percentage of class members may elect not to file claims. *See id.* ¶53. To the extent that Class Members do not file claims, the percentage of recovery per share for claims filed will increase. For instance, if claims were filed for only half of the damaged shares, then the recovery rate would double to between 16% and 32%. This is a particularly successful result here given the complexities of the Settlements and the very limited funds available to the Individual Defendants to satisfy a judgment after trial.

Plaintiffs submit that the Settlements are well within the range of reasonableness in light of the amount obtained and all the risks of litigation, especially when compared to the percentages of recovery in other class action settlements.[19] In sum, these recoveries, totaling nearly $125 million and obtained in the face of a lesser or no recovery at all, support approval of the Settlements.

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[19] *See, e.g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir 1974) (affirming approval of settlement that was between 3.2% and 12% of recoverable damages; "[i]n fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery") (affirming in part *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1386 (S.D.N.Y. 1972) (approving settlement valued at 3.2% to 3.7% as "'well within the ball park'")); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993) (settlement of between 6% and 10% of damages); *see also* Laura E. Simmons & Ellen M. Ryan, "Post-Reform Act Securities Settlements, 2005 Review and Analysis," at 5 (Cornerstone Research 2006) (www.cornerstone.com) (finding that, in 2005, settlement were approximately 3% of plaintiffs' estimated damages); *cf. In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.,* 2005 U.S. Dist. LEXIS 13627, at *27-28 (C.D. Cal. June 10, 2005) (citing "Recent Trends in Securities Class Action Litigation: 2003 Early Update" 1430 PLI/Corp. 429, 440, 437 (May 20-21, 2004) ("In 2003, the median percentage of investor losses paid in settlement remained its all-time low at 2.8%, up from 2.7% in 2002") and Elaine Buckberg, *et al.*, "Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements," at 8 (NERA Feb. 2005) (www.nera.com) ("In 2004, the median percentage of investors losses paid in settlement reached a new low of 2.3% . . . .")); Todd Foster, Ronald I. Miller and Stephanie Plancich, "Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar," at 9 (NERA Jan. 2007) (www.nera.com) (finding that, in 2006, median recoveries were just 2.2% of losses); Stephanie Plancich and Svetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2009 Year-End Update," at 20 (NERA Dec. 2009) ("2009 NERA Report"), available at www.nera.com (finding that the ratio of settlements to investor losses has been between 2% and 3% of investor losses from 2002 onward, and that over the past few years, this ratio has stayed at approximately 2.5%).

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

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 Graziano Declaration, at the outset of and throughout this litigation, Lead Counsel conducted an extensive investigation into Defendants' alleged wrongful conduct, including locating and interviewing approximately 200 confidential witnesses and reviewing and analyzing extensive publicly available media, analyst reports, and SEC filings and public statements. Lead Counsel's investigation uncovered substantial information – which was shared with the Examiner appointed by the Bankruptcy Court to investigate the accounting and financial statement irregularities of New Century – and which formed the basis of Plaintiffs' detailed and particularized complaints. *See* Graziano Decl. ¶¶34-100.

Following the Court's denial of Defendants' second round of motions to dismiss, Plaintiffs actively pursued discovery. Beginning in February 2009, Plaintiffs served document requests on each of the Defendants. The requests sought, among other things, documents concerning New Century's announced restatement of financial results, New Century's loan underwriting, New Century's internal controls, and New Century's accounting for residual interests and repurchase reserves, and audit workpapers. Plaintiffs also issued document subpoenas to 49 nonparties, including to the Liquidating Trustee of the New Century Liquidating Trust, who had maintained New Century's business records following the Company's filing of bankruptcy. *See id.* ¶¶75-76.

Due in part to Plaintiffs' two largely successful motions to compel documents from KPMG, Plaintiffs ultimately obtained over 38 million pages of documents, including 35 million pages from the New Century Liquidating Trust,

over 2.8 million pages from KPMG, over 600,000 pages from the Underwriter Defendants, and approximately half a million pages from various nonparties. Plaintiffs also produced documents to Defendants, including trade confirmations, brokerage statements, investment manuals, and other materials in their possession concerning New Century. *See id.* ¶¶77-89.

Plaintiffs also fully analyzed and responded to KPMG's motion for summary judgment and expert report submitted in support thereof. Plaintiffs prepared and filed their opposition to KPMG's motion and a related motion to exclude KPMG's expert on loss causation. In support of their opposition, Plaintiffs also filed three expert reports. Plaintiffs also noticed and prepared for five KPMG audit member depositions. *See id.* ¶¶92-100.

Plaintiffs retained and conferred with several experts, each of whom played a significant part in the prosecution of the action. These experts assisted Plaintiffs in evaluating the strengths and weaknesses of their claims, and possible recoverable damages in the action, in connection with the extensive settlement negotiations that took place for over a year. *See id.* ¶¶101-07.

In sum, Plaintiffs actively prosecuted this case for the benefit of the Class for more than three years. The parties reached agreements to settle the litigation at a point when they were well informed as to the facts, legal issues, and considerable risks of the action. This further supports approval of the Settlements.

5. The Experience And Views Of Lead Counsel And Lead Plaintiff

Courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight.[20] This makes sense, as counsel is

[20] *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"); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979); *see also In re First Capital*

"most closely acquainted with the facts of the underlying litigation."[21] 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." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). 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 for over three years since its commencement in February 2007. Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") has many years of experience in litigating complex securities actions throughout the country – including in this District – and in assessing the relevant merits of each side's case.[22]

Additionally, throughout the litigation and settlement negotiations, Defendants have been represented by experienced counsel from prominent law

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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); *see also Omnivision*, 559 F. Supp. 2d at 1043 (citation omitted) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.") (quoting *Boyd*, 485 F. Supp. at 622).

[21] *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 v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007), *aff'd*, 331 Fed. Appx. 452 (9th Cir. 2009) (unpubl.).

[22] *See, e.g., In re Int'l Rectifier Corp. Sec. Litig.*, 07-02544-JFW (C.D. Cal.) (serving as Co-Lead Counsel, Bernstein Litowitz successfully obtained a settlement in the amount of $90 million); *In re Gemstar-TV Guide Int'l Inc. Sec. Litig.*, 02-CV-2775-MRP (C.D. Cal.) (serving as Lead Counsel, Bernstein Litowitz successfully obtained settlements in the amount of $92.5 million); *see also* Firm Resume of Bernstein Litowitz, attached as Ex. 3 to the Declaration of Edward Grossmann in Support of Petition for Attorneys' Fees and Reimbursement of Expenses Filed on Behalf of Bernstein Litowitz Berger & Grossmann LLP, Ex. F.

firms.[23] Counsel for the eleven separate insurance carriers also were involved in the negotiations. As a result, the parties' negotiations were hard-fought. The negotiations required eleven mediation sessions – conducted under the direction of Judge Weinstein, a retired judge and well-regarded mediator with extensive experience in the mediation of complex actions – and extensive negotiations in connection with the mediation sessions. *See* Weinstein Decl. With this background, there is no doubt that the Settlements were reached without collusion and after good-faith bargaining among the parties, and this factor supports a finding that the Settlements are 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").

Moreover, under the regime put in place with the enactment of the PSLRA, the Lead Plaintiff's approval of a settlement should be accorded "special weight because [the Lead Plaintiff] may have a better understanding of the case than most members of the class." *DIRECTV*, 221 F.R.D. at 528 (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.44 (1995)). Congress enacted the PSLRA in large part to encourage sophisticated institutional investors to take control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. CONF. REP. 104-369, at *32 (1995). Here, the Lead Plaintiff, NYSTRS, is a sophisticated institutional investor,

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[23] The Individual Defendants were represented by, among others, Munger, Tolles & Olson LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Latham & Watkins LLP; Crowell & Moring LLP; and Gibson Dunn & Crutcher LLP. Defendant KPMG was represented by Sidley Austin LLP, and the Underwriter Defendants were represented by Paul, Hastings, Janofsky & Walker LLP.

and its extensive participation in the prosecution of this case – including its in-person participation in all of the mediation sessions – and its approval of the Settlements, is compelling evidence that the Settlements are fair, reasonable and adequate. *See* Schneider Decl. ¶¶7-12.

6. Reaction Of The Class Members To The Proposed Settlements

The reaction of the Class to the Settlements is a significant factor in determining the adequacy of the Settlements. *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 the Settlements, the Plan of Allocation or Lead Counsel's fee and expense request will expire on October 18, 2010. In response to over 50,000 Notices sent to potential Class Members, to date no Class Member has objected. The favorable reaction of the Class further supports approval of the Settlements.[24]

C. The Class Received Adequate Notice

The Court's Preliminary Approval Order appointed the firm of Analytics, Inc. ("Analytics") as the Claims Administrator to supervise and administer the notice procedure as well as the processing of claims pursuant to the Plan of

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[24] *See* Simmons Decl. ¶¶8, 14. The Settlements also received unsolicited favorable reaction by an experienced commentator as follows: "I suspect that this was an enormously difficult settlement to pull off. Given the number of parties, the number of proceedings, the number of insurers, and the amount of money at stake, trying to settle this case undoubtedly was challenging, particularly since continuing defense expenses eroded the amount of insurance remaining as the settlement negotiations went forward. I tip my hat to the lawyers involved in bringing this settlement together." Ex. J.

Allocation. *See* Preliminary Approval Order, ¶6. Analytics was selected and approved by Lead Plaintiff following a competitive bidding process with three claims administrators. *See* Graziano Decl. ¶139.

As required by the Court's Preliminary Approval Order, beginning on August 17, 2010, Analytics disseminated copies of the Notice and the Proof of Claim and Release (the "Notice Packet," Ex. A to the Simmons Decl.) to potential Class Members and their nominees. The Notice contains a thorough description of the Settlements, the Plan of Allocation and Class Members' rights to participate in and object to the Settlements, or to exclude themselves from the Class. *Id.* Analytics obtained the names and addresses of potential Class Members from the New Century Bankruptcy Trustee and the Underwriter Defendants, and used Analytics' database of names of brokerage firms, institutions and other nominees that it maintains, as well as names provided by banks, brokers and nominees pursuant to the Preliminary Approval Order for purposes of its initial mailing. *See* Simmons Decl. ¶¶3-8.

In addition to direct mail, the Summary Notice was published once each in the national edition of *The Wall Street Journal* and over the *PR Newswire* on August 24, 2010. *Id.* ¶10. Information regarding the Settlements, including downloadable copies of the Notice and Claim Form, was posted on the website established by the Claims Administrator (www.newcenturysettlement.com), *id.* ¶12, as well as on Lead Counsel's website (www.blbglaw.com). 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 fairly apprises Class Members of their rights with respect to the Settlements 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, the PSLRA, and due process.[25]

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

Lead Plaintiff has proposed a plan to allocate the settlement proceeds among Class Members who submit valid Proofs of Claim. The objective of the proposed Plan of Allocation is to equitably distribute the settlement proceeds to those Class Members who suffered economic losses as a result of the alleged false and misleading statements set forth in the Complaint. *See* Graziano Decl. ¶149.

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 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).

Lead Plaintiff, in consultation with the other Named Plaintiffs, worked with Professor Seyhun in drafting the Plan of Allocation; and in Professor Seyhun's expert opinion, the Plan of Allocation is fair and reasonable. *See* Seyhun Decl. ¶¶17-43. Professor Seyhun's Declaration explains the methods used to determine the Plan of Allocation.

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[25] *See In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *1 (N.D. Cal. Nov. 26, 2007) (approving similar notice regimen); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1170 (S.D. Cal. 2007); *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).

The Plan of Allocation set forth in paragraphs 32 through 85 of the Notice (attached as Ex. A to the Simmons Decl.) provides that Class Members who file timely and valid Proof of Claim forms will receive a *pro rata* share of the settlement funds based on their recognized losses.

The Plan of Allocation is based upon the following premises: (1) the market price of New Century securities was artificially inflated; (2) the degree of inflation varied throughout the Class Period and decreased with each partial disclosure of adverse information; and (3) the value of the Recognized Loss Claim varies depending on when the claimant bought and/or sold the New Century securities.

The Plan of Allocation also recognizes differences among the claims applicable to the various settling defendants. First, Securities Act claims were brought (and could only be brought) only on behalf of the Preferred Shares, and not on behalf of the other securities, against the Underwriter Defendants. Thus, as explained in the Notice, the net settlement amount being paid by the Underwriter Defendants ($15 million) will be distributed only to Authorized Claimants who purchased Preferred Shares, whereas the net settlement amounts being paid by or on behalf of KPMG and the Individual Defendants will be distributed to all Authorized Claimants pursuant to the Plan of Allocation.

Second, in the view of experienced Lead Counsel and Professor Seyhun, in light of the more speculative and derivative nature of options securities, the relative risks of prevailing at trial on behalf of purchasers of Call Options and sellers of Put Options were greater than the risks of prevailing on the claims on behalf of purchasers of Common Stock and Preferred Shares. Taking this factor into account, the Plan of Allocation allocates a limit of 10% of the overall disbursements from the KPMG and Individual Defendants settlements to Call Options and Put Options, representing a 50% discount to what those securities would otherwise potentially receive on a *pro rata* basis. Differences of this nature

among class members are common in securities litigation and are commonly addressed by a plan of allocation.[26]

Finally, the proposed Plan of Allocation was adequately explained in the Notice sent to Class Members. In response to over 50,000 Notices, as of the date of this filing, there have been no objections to the proposed Plan of Allocation. *See* Simmons Decl. ¶¶8, 14. In sum, the Plan of Allocation has a rational basis, is fully supported by Plaintiffs' Counsel and Plaintiffs, and should be approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlements and Plan of Allocation.

Dated: October 4, 2010

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ Salvatore J. Graziano
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[26] *See Glass,* 331 Fed. Appx. at 455 (affirming plan for distributing settlement proceeds that treats various class members differently based on differences in recoverable damages); *see also In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) (finding it is "reasonable to allocate more of the settlement to class members with stronger claims on the merits"); *Omnivision,* 559 F. Supp. 2d at 1045; *Mego Fin.*, 213 F.3d at 461.

-and-

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