UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

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| SANKTOKH SOHAL, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>vs.<br><br>ELLIS YAN, *et al.*,<br><br>Defendants. | No. 1:15-cv-00393-DAP<br><br>Judge Dan Aaron Polster<br><br>CLASS ACTION |

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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## I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff City of Warren Police & Fire Retirement System ("Lead Plaintiff") respectfully submits this memorandum of law in support of its motion for final approval of the settlement of this Litigation on the terms set forth in the Stipulation of Settlement filed on April 12, 2017 ("Stipulation" or "Settlement").[1] Dkt. No. 83-3. The Settlement provides for the payment on behalf of TCP International Holdings Ltd. ("TCPI" or the "Company"), Ellis Yan, Brian Catlett (together, the "TCPI Defendants"), Deutsche Bank Securities Inc., Piper Jaffray & Co., Canaccord Genuity Inc., and Cowen and Company, LLC (the "Underwriter Defendants," and with the TCPI Defendants, the "Defendants") of $7.175 million in cash and, if approved by the Court, will resolve this matter in its entirety between the parties. The Settlement is the result of extensive arm's-length negotiations between the parties with the assistance of Jed Melnick, Esq. of JAMS, a nationally recognized mediator. As discussed herein and in the accompanying Declaration of Jack Reise in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Reise Decl." or "Reise Declaration"), Lead Plaintiff and its counsel have obtained a very good result for the Class under the circumstances.[2]

This case was carefully investigated and vigorously litigated. Defendants asserted strong defenses, adamantly denied liability, and were firm in their belief that Lead Plaintiff could not prevail. While the case settled at a relatively early stage, a result consistent with the purposes of the

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[1] Unless otherwise noted, all capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Stipulation.

[2] The Court is respectfully referred to the accompanying Reise Declaration for a more detailed history of the Litigation, the extensive efforts of Lead Counsel, and the factors bearing on the reasonableness of the Settlement, Plan of Allocation, and counsel's request for an award of attorneys' fees and expenses.

Federal Rules of Civil Procedure,[3] Lead Counsel spent a considerable amount of time and resources on this case. The Settlement was achieved only after counsel: (i) conducted a thorough pre-filing investigation of Lead Plaintiff's claims, including a meticulous review of TCPI's public filings, analyst reports, and media items; (ii) drafted an Amended Complaint (the "First Amended Complaint" or "FAC"); (iii) briefed an opposition to Defendants' motion to dismiss the FAC; (iv) conducted further investigation and drafted the Second Amended Complaint ("SAC"); (v) reviewed pleadings in the *Hauser* Action against the Company and defendant Yan concerning similar allegations; (vi) prepared a full briefing on Defendants' motion to dismiss the SAC; (vii) prepared a full briefing related to Lead Plaintiff's motion for reconsideration regarding the dismissal of the SAC with prejudice; (viii) interviewed former employees of TCPI; (ix) completed targeted discovery to facilitate exploration of resolution of the Litigation; (x) prepared for and attended mediation with Jed Melnick, Esq.; and (xi) consulted with an economic expert with respect to Lead Plaintiff's loss causation and damage allegations. *See generally* Reise Decl. During the settlement negotiations, Lead Counsel made it clear that, while it was prepared to fairly assess the strengths and weaknesses of its case, it would continue to litigate rather than settle for less than an amount that was in the Class' best interest.

The Settlement takes into account the specific risks and obstacles that Lead Plaintiff and the Class would face if litigation were to continue. Lead Counsel is highly experienced in prosecuting securities class actions, and has concluded that the Settlement is a very good recovery in the light of the risks, delay and expense of continued litigation. This conclusion is based on, among other things, the certain recovery obtained when weighed against the significant risk, expense, and delay presented in continuing the Litigation through the completion of discovery, class certification,

[3] *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005) (noting that early resolution of the case is consistent with Rule 1 of the Federal Rules of Civil Procedure).

motion(s) for summary judgment, trial, and probable post-trial motions and appeal(s); a complete analysis of the facts adduced to date; past experience in litigating complex actions similar to the present action; and the serious disputes between the parties concerning the merits and damages. Reise Decl., ¶¶47-48.

As discussed herein and in the Reise Declaration, it is respectfully submitted that the Settlement is fair, reasonable, and adequate and should be approved by the Court. Lead Plaintiff also requests that the Court approve the Plan of Allocation. This plan, which was set forth in the Notice that was sent to Class Members, governs how claims will be calculated and ultimately, how money will be distributed to Authorized Claimants. The plan, which was developed with the assistance of Lead Plaintiff's consulting damages expert, tracks Lead Plaintiff's theory of damages, is fair, reasonable, and adequate, and should likewise be approved.

## II. THE NOTICE OF SETTLEMENT SATISFIES RULE 23 AND DUE PROCESS REQUIREMENTS

Pursuant to Federal Rule of Civil Procedure 23(e)(1), a district court, when approving a class action settlement, "'must direct notice in a reasonable manner to all class members who would be bound by the proposal.'" *Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (citation omitted). In addition to the requirements of Rule 23, the Constitution's Due Process Clause also guarantees unnamed class members the right to notice of certification or settlement. *See id.* Generally, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). A notice of settlement satisfies due process when it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Here, the Notice, in plain, easily-understood language, advises potential Class Members of the essential terms of the

Settlement, sets forth the procedure and deadline for submitting objections to the Settlement and requests for exclusion from the Class, identifies contacts for additional information, and provides specifics regarding the date, time, and place of the Settlement Hearing. The Notice also contains information regarding Lead Counsel's fee and expense application and the Plan of Allocation. Thus, the Notice provides the necessary information for Class Members to make an informed decision regarding the Settlement and their rights with respect to it.

Furthermore, in securities class actions, the Private Securities Litigation Reform Act of 1995 ("PSLRA") requires the notice of settlement to include: (1) "[t]he amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis"; (2) "[i]f the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title, a statement from each settling party concerning the issue or issues on which the parties disagree"; (3) "a statement indicating which parties or counsel intend to make . . . an application [for attorneys' fees or costs], the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought"; (4) "[t]he name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members"; and (5) "[a] brief statement explaining the reasons why the parties are proposing the settlement." 15 U.S.C. §78u-4(a)(7). The Notice, which was approved by the Court in its Order granting preliminary approval of the Settlement ("Preliminary Approval Order") (Dkt. No. 84), includes all of the information required by the PSLRA.

The Preliminary Approval Order also approved Lead Plaintiff's proposed notice plan. Preliminary Approval Order, ¶¶9-12.[4] Lead Plaintiff has satisfied all of the elements of the notice plan approved by the Court. *See generally* the Declaration of Carole K. Sylvester Regarding Dissemination of the Notice and Proof of Claim, Publication of the Summary Notice, and Requests for Exclusion Received to Date ("Mailing Decl."), submitted herewith. The notice program implemented in this Litigation constitutes the best notice practicable under the circumstances and satisfies the requirements of due process, Federal Rule of Civil Procedure 23, and the PSLRA. *See, e.g.*, *Manners v. Am. Gen. Life Ins. Co.*, No. 3-98-0266, 1999 U.S. Dist. LEXIS 22880, at *31 (M.D. Tenn. Aug. 11, 1999) (finding individual notice mailed to class members combined with summary publication constituted "'the best practicable notice' and were 'reasonably calculated, under the circumstances' to meet the requirements of" Rule 23 and due process) (citation omitted).

## III. THE SETTLEMENT SHOULD BE APPROVED BY THE COURT

### A. The Standards for Judicial Approval of Class Action Settlements

It is well settled that compromises of disputed claims are favored by the courts. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007). "Being a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement." *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1027 (S.D. Ohio 2001); *see also In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 U.S. Dist. LEXIS 77645, at *33-*34 (E.D. Mich. Aug. 2, 2010); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 246 (S.D. Ohio 1991) ("The law generally favors and encourages the settlement of class actions."). This is particularly true in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigors of prolonged litigation. *See Rankin v. Rots*, No. 02-

[4] The Court also certified the Class for settlement purposes only. Nothing has changed to alter the appropriateness of the Court's ruling and the Class should be finally certified for purposes of the Settlement.

CV-71045, 2006 U.S. Dist. LEXIS 45706, at *8-*9 (E.D. Mich. June 28, 2006) ("[T]he Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.").

Pursuant to Rule 23(e), a court should approve a class action settlement if it is fair, adequate, and reasonable. *UAW*, 497 F.3d at 631; *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983); *Telectronics*, 137 F. Supp. 2d at 1008; *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 903 (S.D. Ohio 2001). In determining whether a proposed settlement is fair, adequate, and reasonable, the Sixth Circuit and the district courts therein have established factors for a court to consider, including: (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the risk of fraud or collusion; (4) the stage of the proceedings and the amount of discovery completed; (5) the judgment of experienced trial counsel; (6) the nature of the negotiations; (7) the objections raised by the class members; and (8) the public interest. *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 244 (6th Cir. 2011); *UAW*, 497 F.3d at 631; *Gascho v. Glob. Fitness Holdings, LLC*, No. 2:11-cv-436, 2014 U.S. Dist. LEXIS 46846, at *46-*47 (S.D. Ohio Apr. 4, 2014). Courts have consistently utilized these factors in considering the fairness, reasonableness, and adequacy of proposed class action settlements. *See, e.g.*, *Williams*, 720 F.2d at 922; *Granada Invs., Inc. v. DWG Corp.*, 823 F. Supp. 448, 453 (N.D. Ohio 1993) (citing *Bronson v. Bd. of Educ.*, 604 F. Supp. 68, 73 (S.D. Ohio 1984)).

These factors should not be applied in a "formalistic" fashion. *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 140 (W.D. Ky. 1992) ("A class action settlement cannot be measured precisely against any particular set of factors."). "In considering these factors, the task of the court 'is not to decide whether one side is right or even whether one side has the better of these arguments. The question rather is whether the parties are using settlement to resolve a legitimate legal and

factual dispute.'" *Gascho*, 2014 U.S. Dist. LEXIS 46846, at *47 (quoting *UAW*, 497 F.3d at 632). Courts have consistently held that the function of a judge in reviewing a settlement is not to rewrite the settlement agreement reached by the parties or to try the case by resolving issues intentionally left unresolved. *See, e.g.*, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. They do not decide the merits of the case or resolve unsettled legal questions.") (citation omitted).

The view of experienced counsel favoring the settlement is entitled to great weight. *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 501 (E.D. Mich. 2000) (citing *Bronson*, 604 F. Supp. at 73). A court should "defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs." *Williams*, 720 F.2d at 922-23. Where, as here, a settlement is endorsed as fair by experienced and sophisticated counsel after rigorous arm's-length negotiations aided by a mediator, there is a strong initial presumption that the compromise is fair and reasonable.

When examined under the applicable criteria, this Settlement is a highly favored result for the Class. Lead Counsel believes that there are serious questions as to whether a more favorable monetary result against Defendants could or would be attained after summary judgment, trial, and the inevitable post-trial motions and appeals. The Settlement achieves a substantial and certain recovery for Class Members and is unquestionably superior to the distinct possibility that were the Litigation to proceed to trial, there could be no recovery at all. Analysis of the relevant factors demonstrates that the Settlement merits this Court's final approval.

### B. The Settlement Satisfies the Criteria for Final Approval

#### 1. The Likelihood of Success on the Merits Balanced Against Relief Offered

The most important factor courts consider in approving a class action settlement is the plaintiff's likelihood of success on the merits, balanced against the amount and form of relief offered

in settlement. *Poplar Creek*, 636 F.3d at 245, *Williams*, 720 F.2d at 922. As in every complex case of this kind, Lead Plaintiff faced formidable obstacles to recovery if litigation were to continue. The principal claims in this Litigation are based upon Sections 11 and 12(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. While Lead Counsel believes that it could prove the claims asserted, there is a great deal of risk present and there was certainly no guarantee that it would prevail at trial and ultimately collect on a larger judgment after trial and subsequent appeals. Post-PSLRA rulings make it clear that the risk of no recovery has increased exponentially since the PSLRA was adopted in 1995.[5] In cases filed after 2000, 44% of motions to dismiss have been granted in their entirety, and an additional 30% were granted in part. *See* Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* at 21 (NERA Jan. 23, 2017). This case was dismissed twice. *See* Reise Decl., ¶¶22-24, 26-28.

Securities litigation generally involves complex issues of fact and law, and this case is no exception. For example, to establish liability under Section 10(b), Lead Plaintiff bears the burden of proving, *inter alia*, that Defendants participated in the public dissemination of false or misleading information, that the information was material to investors in determining whether to invest in TCPI stock, that the information impacted the market price of the stock, caused damage to the Class, and that Defendants acted with scienter. *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999). Further litigation to establish both liability and damages posed a significant threat to any recovery for the Class.

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[5] *See In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA"). As the Fifth Circuit rightly recognized: "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

Lead Plaintiff's case centered on allegations that during the Class Period, Defendants made numerous false and misleading statements, misrepresentations and omissions regarding the Company's UL and Energy Star® approved products, adherence to its internal quality assurance and control processes and procedures, and material weakness in internal controls. Reise Decl., ¶¶19-20. Lead Plaintiff further alleged that news of the *Hauser* Action, which revealed the Company's and Defendant Yan's misconduct, caused the Company's stock price to fall $3.67 per share or over 57%, to close at $2.74 per share on February 27, 2015, resulting in losses to the Class. *Id.*, ¶21.

Lead Plaintiff and Lead Counsel considered the significant risks associated with proving the claims alleged prior to determining that settlement would be in the best interest of the Class. Initially, Defendants would have argued, as they did in their motions to dismiss, that Lead Plaintiff failed to allege the existence of a scheme to sell products that did not meet UL and EnergyStar® certifications. Reise Decl., ¶38. Specifically, Defendants would have argued that Lead Plaintiff could not prove that two isolated instances of improper UL certification amount to nothing more than inactionable corporate mismanagement. It would have also been difficult to prove that such a scheme existed given that substantially all of TCPI's manufacturing operations are in China. *Id.* Lead Plaintiff would have had to prove that the scheme was orchestrated by Defendants and actively perpetrated overseas. Given the millions of units of products manufactured, it would have been a challenge to establish the magnitude of improper certifications to establish the widespread scheme. *Id.*

Defendants would also be expected to continue to argue that Lead Plaintiff could not prove falsity or materiality. Reise Decl., ¶¶39-42. With respect specifically to the Securities Act claims, Defendants argued that Lead Plaintiff could not prove that any relevant conduct occurred prior to the IPO. *Id.*, ¶39. Defendants have also maintained that their statements of belief as to the Company's commitment to high quality and energy efficient products are statements of corporate optimism,

which are not actionable. *Id.*, ¶40. Defendants would have also argued that allegations related to Defendant Yan's misconduct are inactionable claims of corporate mismanagement. *Id.*, ¶41.

Although Lead Plaintiff believes that it would present sufficient evidence to support its claims, it was aware that Defendants would present counter-evidence and other substantial obstacles to obtaining a judgment in their favor after trial. There was no certainty that further discovery would support Lead Plaintiff's allegations. *See In re Delphi Corp. Sec.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (discussing "the risk that Defendants could prevail with respect to certain legal or factual issues, which could result in the reduction or elimination of Plaintiffs' potential recoveries").

Even if Lead Plaintiff established liability, it faced substantial risks in proving loss causation and damages. Defendants would present expert testimony purportedly demonstrating the absence of a causal link between the various stock price declines and the alleged false and misleading statements. Defendants had contended in the past, and would undoubtedly argue at summary judgment and/or trial, that the Company's stock price did not decline upon disclosure of the *Hauser* Action, but rather fell upon news of the Company's performance. Reise Decl., ¶44. If this argument was successful, Lead Plaintiff's Securities Act claims would fail. Regarding its Exchange Act claims, Defendants would argue that the decline in the Company's stock price in light of the *Hauser* Action are attributable to allegations of inactionable personal misconduct and corporate mismanagement, which do not relate to the issues in this case. *Id.*, ¶45.

The Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005), and subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than in the past. *See, e.g.*, *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) ("Proving loss causation would be complex and difficult."); *Meyer v. Green*, 710 F.3d 1189 (11th Cir. 2013) (affirming order granting motion to dismiss, finding, among other things, that announcement of SEC investigation, without more, failed to adequately support loss causation);

*Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming lower court ruling that granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor).

The amount of damages incurred by Class Members would also have been hotly contested at trial. Damages in securities class action cases are always difficult to prove. At trial, the damage assessments of Lead Plaintiff's and Defendants' experts were sure to vary substantially, and in the end, this crucial element at trial would have been reduced to a "battle of the experts." *Tyco*, 535 F. Supp. 2d at 260-61 ("even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages"). The reaction of a jury to competing expert testimony is highly unpredictable and in such a battle, a jury could be swayed by convincing experts for the Defendants, and find that there were no damages or only a fraction of the amount of damages Lead Plaintiff contended.[6] Here, Lead Plaintiff recovered a substantial recovery relative to the estimated maximum provable damages, without the risk of continued and expensive litigation. Lead Plaintiff's expert has estimated, based on certain assumptions and modeling, that the Class sustained damages of approximately $86 million. Reise Decl., ¶5. This Settlement thus represents approximately 8.3% of the maximum estimated losses, which is at the higher end of recoveries commonly achieved in securities settlements. *See, e.g.*, *In re Fannie Mae Sec., Derivative, & ERISA Litig.*, 4 F. Supp. 3d 94, 103-04 (D.D.C. 2013) (approving settlement amounting to 4%-8% of the "'best case scenario'" potential recovery and noting that such percentage "compares favorably with

[6] *See, e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at *30 (S.D.N.Y. Nov. 7, 2007) ("The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.").

other cases approving securities class action settlements") (citation omitted); *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"). *See also* Boettrich & Starykh, *supra*, at 28.

Even if Lead Plaintiff prevailed and obtained a substantial judgment after trial, there is little doubt that Defendants would file post-trial motions and if unsuccessful would appeal the verdict and award. The post-trial motions and appeals process would have likely spanned several years, during which the Class would have received no distribution on any damage award. In addition, an appeal of any verdict would carry the risk of reversal, in which case the Class would receive no recovery after having prevailed on the claims at trial. Finally, even with a judgment in hand, there is no guarantee that it would be collectable after years of delay. Therefore, the amount of damages the Class would actually recover is uncertain.

**2. The Complexity, Expense, and Likely Duration of the Litigation**

The complexity, expense, and likely duration of the litigation is another factor considered in determining the fairness of a settlement. *Telectronics*, 137 F. Supp. 2d at 1013. *See also Delphi*, 248 F.R.D. at 497 ("Courts have consistently held that the expense and possible duration of litigation are major factors to be considered in evaluating the reasonableness of a settlement."). There is no doubt that this securities class action involves complex factual issues relating to the Company's alleged disregard for its internal quality control processes and the sale of products with improper UL and EnergyStar® labels. Reise Decl., ¶11. Lead Plaintiff also alleges that TCPI's then-CEO had been consistently overriding and/or disregarding Company policies regarding, among other things, capital expenditures, customer credit and operating expenditure approvals, new product development processes, and products and legal issues relating to falsity, scienter and loss causation. *Id.* While

courts have long recognized that "stockholder litigation is notably difficult and notoriously uncertain," *Lewis v. Newman*, 59 F.R.D 525, 528 (S.D.N.Y. 1973), since the enactment of the PSLRA, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *Ikon*, 194 F.R.D. at 194; *see also New Eng. Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 631 (W.D. Ky. 2006) ("'Securities class actions are often "difficult and . . . uncertain."'") (citations omitted).

If not for this Settlement, the case would have continued to be fiercely contested by all parties. Defendants have demonstrated a commitment to defend the case through and beyond trial, if necessary, and they are represented by well-respected and highly-capable counsel. The expense of continued litigation would be substantial as Lead Plaintiff would have to successfully move to certify a class. The parties would then have had to complete a lengthy, extensive, and time-consuming discovery program, involving a review and analysis of documents from Defendants and non-parties and an extensive deposition program. Experts would have to be designated and expert discovery conducted. Inevitably, Defendants would have filed motion(s) for summary judgment and a motion to decertify the class (should a class have been certified).

Assuming Lead Plaintiff's claims survived summary judgment, a pre-trial order would have to be prepared, proposed jury instructions would have to be submitted, and motions *in limine* would have to be filed and argued. Moreover, any trial involving some or all of the Defendants would likely run several weeks, and involve numerous attorneys, witnesses, experts, and the introduction of voluminous documentary and deposition evidence, vigorously contested trial motions, and the expenditure of enormous amounts of judicial and counsel resources. Even if successful at trial, appeals would be virtually assured.[7] Taking into account the likelihood of appeal, absent the

[7] *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 373-74 (S.D. Ohio 2006) (explaining "the difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses,

Settlement, the Litigation likely would have continued for years, and would have caused Class Members who suffered economic losses to wait years longer for a resolution of their claims. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 837 (W.D. Pa. 1995) ("It is safe to say, in a case of this complexity, the end of that road might be miles and years away."). "To most people, a dollar today is worth a great deal more than a dollar ten years from now." *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002).

**3. The Stage of Proceedings and Extent of Discovery**

To ensure that a plaintiff had access to sufficient information to evaluate its case and to assess the adequacy of the settlement proposal, the stage of the proceedings and the extent of discovery is another factor which is considered in determining the fairness of the settlement. *Telectronics*, 137 F. Supp. 2d at 1015; *Kogan*, 193 F.R.D. at 502. In this Litigation, both the knowledge of Lead Counsel and the proceedings themselves reached a stage where an intelligent evaluation of the strengths and weaknesses of the Class' claims and the propriety of the Settlement could be made. *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 U.S. Dist. LEXIS 150427, at *58, *60 (E.D. Mich. Dec. 13, 2011) (concluding "the absence of extensive discovery does not weigh against final approval" of the settlement where the parties had proceeded with document discovery but the case was still in "a relatively early stage . . . before class certification and before the initiation of discovery in earnest").

As set forth above and in the Reise Declaration, this case has been vigorously litigated from start to finish. Prior to settlement, Lead Counsel, among other things, conducted an extensive and thorough investigation of the facts alleged; reviewed and analyzed an enormous quantity of publicly-available information about Defendants and the allegations; interviewed former TCPI employees;

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and a possible delay in recovery due to the appellate process, provide justifications for this Court's approval of the proposed Settlement").

drafted and filed detailed complaints; briefed Defendants' motions to dismiss the complaints; briefed Lead Plaintiff's motion for reconsideration; and consulted with an experienced damage and loss causation expert. The parties also participated in hard-fought settlement negotiations, including mediation with Jed Melnick, Esq. of JAMS, where the strengths and weaknesses of the parties' respective claims and defenses were fully explored. Moreover, prior to the mediation, Defendants produced to Lead Plaintiff several thousand pages of targeted documents designed to facilitate negotiations, and the parties thereafter prepared and exchanged detailed mediation statements which further highlighted the legal and factual issues in dispute.

There is no question that Lead Plaintiff and its counsel were in an excellent position to evaluate the strengths and weaknesses of the claims asserted and defenses raised, as well as the risks of continued litigation and the propriety of settlement. Having sufficient information to properly evaluate the case, Lead Plaintiff has settled the Litigation on terms highly favorable to the Class without the substantial expense, risk, and uncertainty of continued litigation.

**4. The Settlement Is the Result of "Arm's-Length" Negotiations Among Competent and Experienced Counsel**

In appraising the fairness of a proposed settlement, a court is entitled to rely heavily on the opinion of competent counsel. *Williams*, 720 F.2d at 922-23; *Telectronics*, 137 F. Supp. 2d at 1015-16. In fact, "[i]n deciding whether a proposed settlement warrants approval, the informed and reasoned judgment of plaintiffs' counsel and their weighing of the relative risks and benefits of protracted litigation are entitled to great deference." *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 532 (E.D. Ky. 2010), *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011). This is especially true where the stage of the proceedings indicates that counsel and the court are fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation. *See Armstrong v. Gallia Metro. Hous. Auth.*, No. 2:98-CV-373, 2001 U.S. Dist. LEXIS 26945, at *9 (S.D. Ohio Apr. 20, 2001). The

knowledge of Lead Counsel and the proceedings themselves reached a stage where Lead Counsel could make such an evaluation.

In evaluating the Settlement and the opinion of counsel, the Court may examine the negotiating process to confirm that there was no collusion in reaching the Settlement. The Settlement is the product of hard fought arm's-length negotiations between the parties with the substantial assistance of Jed Melnick, Esq. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). As a result of the negotiation process, Lead Counsel, having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence to support the claims asserted against Defendants, the likelihood of prevailing on these claims, and the risk, expense, and duration of continued litigation, has made a considered judgment that the Settlement for $7.175 million is not only fair and reasonable, but under the circumstances is a strong result for the Class.

**5. The Reaction of the Class**

To further support approval of a settlement, courts have also looked to the reaction of the class to the settlement. *Brotherton*, 141 F. Supp. 2d at 906. Of course, "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Id.* "'A certain number of . . . objections are to be expected in a class action.'" *Thacker*, 695 F. Supp. 2d at 533 (citation omitted). Moreover, "a relatively small number of class members who object is an indication of a settlement's fairness." *Brotherton*, 141 F. Supp. 2d at 906 (citing 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §11.48 (3d ed. 1992)).

In this case, over 7,300 copies of the Notice were mailed to potential Class Members and their nominees. Mailing Decl., ¶¶5-11. The Summary Notice was also published in *The Wall Street Journal* and over the *Business Wire*. *Id.*, ¶14. In addition, the Notice, Proof of Claim and Release,

the Stipulation, and the Preliminary Approval Order were posted on a case-specific website. *Id.*, ¶13. While the deadline for filing objections and submitting requests for exclusion from the Class – July 7, 2017 – has not yet expired, to date, no Class Member has objected to any aspect of the Settlement or the Plan of Allocation and the Claims Administrator has not received any requests for exclusion from the Class. *Id.*, ¶15.

**6. The Public Interest**

"'[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are "notoriously difficult and unpredictable" and settlement conserves judicial resources.'" *Hyland v. Homeservices of Am., Inc.*, No. 3:05-CV-612-R, 2012 U.S. Dist. LEXIS 61994, at *23 (W.D. Ky. May 3, 2012) (citations omitted). As discussed above, the Settlement provides a substantial recovery to a large class of people who purchased shares of the Company in the form of a $7.175 million settlement fund, plus interest, and demonstrates the viability of the private enforcement of the federal securities laws. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (recognizing "that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions"). The Settlement puts an end to contentious and protracted litigation, which absent settlement would have likely continued for many more years in this Court or in the Court of Appeals. *See Broadwing*, 252 F.R.D. at 376 ("[T]here is certainly a public interest in settlement of disputed cases that require substantial federal judicial resources to supervise and resolve.").

Accordingly, Lead Counsel submits that this Court should find that all of the relevant factors, taken together, weigh in favor of settlement and that the Settlement should be approved.

## IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

The Notice contains the Plan of Allocation, detailing how the Settlement proceeds are to be divided among claiming Class Members. A trial court has broad discretion in approving a plan of

allocation. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011); *In re Chicken Antitrust Litig.*, 810 F.2d 1017, 1019 (11th Cir. 1987). The test is simply whether the proposed plan, like the settlement itself, is fair, reasonable, and adequate. *See, e.g.*, *Packaged Ice*, 2011 U.S. Dist. LEXIS 150427, at *65. ""'Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable."'" *Id.* (citations omitted).

In determining whether a proposed plan is fair, courts look primarily to the opinion of counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) (stating that "[t]he court . . . affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved" in approving distribution of settlement proceeds). Here, Lead Counsel and its damage expert developed the Plan of Allocation of Settlement proceeds that reflects Lead Plaintiff's damage theory of the case.

The Plan of Allocation provides for distribution of the Settlement proceeds among Authorized Claimants on a *pro rata* basis based on "Recognized Loss" formulas tied to liability and damages. Lead Plaintiff's consulting damages expert analyzed the movement of the Company's shares and took into account the portion of the stock drops allegedly attributable to the challenged statements. The Plan of Allocation ensures that the net settlement proceeds will be fairly and equitably distributed based upon the amount of inflation in the price of the Company's shares during the Class Period that was allegedly attributable to the alleged wrongdoing. There have been no objections to the Plan of Allocation.

## V. CONCLUSION

For the foregoing reasons, Lead Plaintiff and its counsel respectfully request that the Court approve the Settlement and the Plan of Allocation as fair, reasonable, and adequate and in the best interests of the Class and finally certify the Class. Proposed orders will be submitted with Lead Plaintiff's reply papers, after the deadlines for objecting and seeking exclusion have passed.

DATED: June 23, 2017

Respectfully submitted,

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s/ Ellen Gusikoff Stewart

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 23, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

*/s/ Ellen Gusikoff Stewart*
ELLEN GUSIKOFF STEWART (*pro hac vice*)