UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BEAVER COUNTY EMPLOYEES' RETIREMENT FUND; ERIE COUNTY EMPLOYEES' RETIREMENT SYSTEM; and LUC DE WULF, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

TILE SHOP HOLDINGS, INC.; ROBERT A. RUCKER; THE TILE SHOP, INC.; TIMOTHY C. CLAYTON; PETER J. JACULLO, III; JWTS, INC.; PETER H. KAMIN; TODD KRASNOW; ADAM L. SUTTIN; WILLIAM E. WATTS; ROBERT W. BAIRD & CO. INCORPORATED; CITIGROUP GLOBAL MARKETS, INC.; CJS SECURITIES, INC.; HOULIHAN LOKEY CAPITAL, INC.; PIPER JAFFRAY & CO.; SIDOTI & COMPANY, LLC; TELSEY ADVISORY GROUP LLC; and WEDBUSH SECURITIES, INC.,

Defendants.

Civ. No. 0:14-cv-00786-ADM-TNL

CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF DISTRIBUTION

DATE: May 3, 2017
TIME: 10:00 a.m.
CTRM: The Honorable Ann D. Montgomery

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court-appointed Class Representatives Beaver County Employees' Retirement Fund ("Beaver County"), Erie County Employees' Retirement System ("Erie County") and Luc DeWulf ("DeWulf") (collectively, "Class Representatives" or "Lead Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement of this Action and approval of the Plan of Distribution of the settlement proceeds. The terms of the proposed settlement are set forth in the Stipulation of Settlement dated January 13, 2017 (the "Stipulation" or "Settlement"), which was previously filed with the Court.[1]

The Settlement, which provides for the payment of $9.5 million in cash for the benefit of the Class, comes after more than two and one-half years of hard-fought litigation and settlement negotiations, including extensive motion practice, the completion of fact and expert discovery, and protracted arm's-length settlement negotiations. The fact and expert discovery included, among other things, the production of nearly one million pages of documents by Defendants and third parties. Class Counsel also took 18 fact and expert depositions, and defended seven fact and expert depositions. At the time the Parties reached an agreement-in-principle to settle the Action, motions for summary judgment and to exclude expert testimony were pending and a March 13, 2017 trial date was looming. There is no question that as a result of extensive litigation efforts and settlement negotiations, Class Representatives and Class Counsel had a thorough understanding of the relative strengths and weaknesses of the Class' claims and the propriety of settlement.[2]

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[1] Unless otherwise noted, all defined terms have the same meanings as in the Stipulation.

[2] The efforts of Class Counsel in obtaining this favorable result are set forth in greater detail in the accompanying Joint Declaration of Matthew L. Mustokoff and Joseph Russello in Support of (I) Class Representatives' Motion for Final Approval of Class Action Settlement and Plan of Distribution; and (II) Class Counsel's Motion for Attorneys' Fees and Expenses and Reimbursement of Class Representatives' Costs and Expenses ("Joint Decl.").

While Class Counsel believe that the Class' claims have significant merit based on the evidence adduced, from the outset, Defendants adamantly denied liability and asserted that they possessed absolute defenses to the Class' claims. During extensive settlement negotiations, including three mediations with three different mediators, Class Counsel made it clear that while they were prepared to fairly assess the strengths and weaknesses of this case, they would continue to litigate (and, in fact, did) rather than settle for less than fair value. Indeed, Class Representatives and their counsel persisted for more than one and one-half years from the initial mediation until they achieved an amount that they believe is in the best interest of the Class.

Class Counsel, who are well-respected and experienced in prosecuting securities class actions, have concluded that the Settlement is a highly favorable result and is in the best interest of the Class based on an analysis of all the relevant factors present here, including *inter alia*: (a) the substantial risk, expense, and uncertainty in continuing the litigation through the pending summary judgment and *Daubert* motions, trial, probable post-trial motion(s), and appeal(s); (b) the relative strengths and weaknesses of the claims and defenses asserted; (c) a complete analysis of the evidence obtained and the legal and factual issues presented; (d) past experience in litigating complex actions similar to this Action; and (e) the serious disputes between the Parties concerning the merits and damages.[3] Importantly, the Settlement is fully supported by all three Class Representatives, including Beaver County and Erie County – the type of institutional investors favored by Congress when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA").

The reaction of the Class thus far also supports the Settlement and the Plan of Distribution. Pursuant to the January 19, 2017 Order Preliminarily Approving Settlement

[3] The Court is respectfully referred to the accompanying Joint Declaration for a more detailed history of the Action, the efforts of counsel in obtaining this result, and the factors bearing on the reasonableness of the Settlement and Plan of Distribution.

and Providing for Notice and Settlement Hearing ("Preliminary Approval Order"), 29,903 copies of the Notice of Class Action Determination, Proposed Settlement, and Hearing on Settlement (the "Notice") and Proof of Claim and Release Form (the "Claim Form") were mailed to potential Class Members and their nominees.[4] In addition, the Summary Notice was published in *The Wall Street Journal* and over the *PR Newswire*. Sylvester Decl., ¶13. While the April 3, 2017 deadline to object to the Settlement, the Plan of Distribution or Class Counsel's request for an award of attorneys' fees and expenses has not yet passed, to date, not a single Class Member has submitted an objection to any of the relief requested. Accordingly, it appears that the members of the Class support the reasonableness of the Settlement and the Plan of Distribution.

For all of the reasons discussed herein and in the Joint Declaration, it is submitted that the Settlement is not only fair, reasonable, and adequate, but it is also a highly favorable result for the Class and should be approved by the Court.[5] Likewise, the Plan of Distribution of the settlement proceeds, which was developed with the assistance of Class Representatives' damages expert, is fair, reasonable, and adequate, and should be approved by the Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 13, 2014, pursuant to the PSLRA, the Court appointed Beaver County, Erie County and DeWulf as co-lead plaintiffs. ECF No. 35. On May 23, 2014, Lead Plaintiffs filed the Consolidated Complaint asserting claims against, among others: (i)

[4] *See* Declaration of Carole K. Sylvester Regarding (A) Mailing of the Notice and Proof of Claim, (B) Publication of the Summary Notice, and (C) Requests for Exclusion Received to Date ("Sylvester Decl."), ¶¶3-10, submitted herewith.

[5] The Class consists of all Persons who purchased or otherwise acquired Tile Shop Holdings, Inc. ("Tile Shop") common stock between August 22, 2012 and January 28, 2014, inclusive, but excluding (a) Defendants, their spouses, and anyone (other than a tenant or employee) sharing the household of any Defendant, (b) Fumitake Nishi, and (c) any Persons who submit valid and timely requests for exclusion pursuant to the Notice.

Defendants Tile Shop, Robert A. Rucker ("Rucker") and Timothy C. Clayton ("Clayton") for violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder; and (ii) Tile Shop, Rucker, Clayton, Tile Shop's outside directors[6] and nine underwriting firms[7] (the "Underwriters") involved in the Company's December 2012 and June 2013 public securities offerings for violations of §§11, 12(a)(2) and 15 of the Securities Act of 1933 ("Securities Act").

The Consolidated Complaint alleged that Tile Shop and its Chief Executive Officer Robert A. Rucker failed to disclose—in violation of a U.S. Securities and Exchange Commission ("SEC") regulation and U.S. Generally Accepted Accounting Principles ("GAAP")—that Rucker's brother-in-law and the Company's purchasing supervisor, Fumitake Nishi ("Nishi"), owned and controlled Beijing Pingxiu ("BP"), a Chinese import-export company that did substantial business with the Company. ECF No. 66, ¶¶4, 131-132, 137-142, 145-149, 152-158. The Consolidated Complaint further alleged that, as a result of Defendants' materially false statements and omissions, the Company's common stock traded at artificially inflated price levels during the Class Period and that, as the truth was revealed, Tile Shop's stock price declined. *Id.*, ¶¶158-159, 163, 199. In addition, the Consolidated Complaint alleged that the outside directors—as signatories of the Company's registration statements for two secondary public offerings during the Class Period—and the Underwriters who conducted the offerings, were also liable for failing to disclose the related-party transactions with Nishi and BP. *Id.*, ¶¶19, 21-24, 26-35.

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[6] The Director Defendants are Peter J. Jacullo III, Peter H. Kamin, Todd Krasnow, Adam L. Suttin, and William E. Watts.

[7] The Underwriter Defendants are Robert W. Baird & Co. Inc., Citigroup Global Markets Inc., CJS Securities, Inc., Houlihan Lokey Capital, Inc., Piper Jaffray & Co., Sidoti & Company, LLC, Telsey Advisory Group LLC, and Wedbush Securities, Inc. All claims against Piper Jaffray & Co. and CJS Securities, Inc. have been dismissed. Nevertheless, for purposes of the Settlement, they have been included among the Defendants.

On July 25, 2014, Defendants moved to dismiss the claims asserted against them under Fed. R. Civ. P. 12(b)(6). ECF Nos. 81, 86, 90. Lead Plaintiffs filed an opposition to Defendants' motions to dismiss on September 26, 2014. ECF No. 100. Defendants filed reply memoranda of law in further support of their motions to dismiss on October 27, 2014. ECF Nos. 102-104. The Court granted in part and denied in part Defendants' motions on March 4, 2015. ECF No. 108. On April 2, 2015, Defendants answered the Consolidated Complaint and discovery commenced. ECF Nos. 119-127.

Lead Plaintiffs filed their Motion for Class Certification, Appointment of Class Representatives and Appointment of Class Counsel (the "Motion for Class Certification") on December 1, 2015. ECF No. 177. Defendants filed their opposition to the Motion for Class Certification on March 28, 2016 (ECF No. 233), and Lead Plaintiffs filed a reply in further support of their motion on May 2, 2016. ECF No. 242. Thereafter, the Court granted Lead Plaintiffs' Motion for Class Certification on July 28, 2016. ECF No. 275.[8] In its Order, the Court appointed Lead Plaintiffs as Class Representatives, and also appointed Kessler Topaz Meltzer & Check, LLP and Robbins Geller Rudman & Dowd LLP as Class Counsel. *See id.* at 31.

As part of the discovery process in the Action, Lead Plaintiffs conducted extensive fact and expert discovery, including: conducting 18 fact and expert depositions; defending seven fact and expert depositions; serving over 35 nonparty subpoenas; reviewing and analyzing the production of nearly one million pages of documents produced by Defendants and various third parties; propounding and answering multiple sets of interrogatories; and

[8] The Class certified by the Court consists of "[a]ll persons and entities who purchased or otherwise acquired Tile Shop common stock between August 22, 2012, and January 28, 2014." ECF No. 275 at 31. The Court also certified a subclass of "[a]ll persons and entities who purchased or otherwise acquired Tile Shop common stock pursuant and/or traceable to the prospectus and registration statement issued in connection with Tile Shop's public offering of common stock in December 2012." *Id.*

preparing expert reports. Joint Decl., ¶¶20-35. In addition, Lead Plaintiffs filed and argued four motions to compel before The Honorable Tony N. Leung, successfully compelling revised interrogatory responses and the production of various categories of documents, including testimony and documents from a prior Minnesota state court proceeding involving Rucker. *Id.*, ¶¶20, 22. Lead Plaintiffs also filed and successfully pursued a motion to compel Gotham City Research LLC to produce information regarding its preparation of the Gotham Report—litigation that took place in California federal court. *Id.*, ¶¶20, 23 n.16.

On October 14, 2016, Class Representatives filed a motion for partial summary judgment, asking this Court to find that the "misstatement or omission" element of their Section 10(b) and Sections 11 and 12(a)(2) claims had been satisfied as a matter of law, in light of the Company's admission that the Nishi related-party transactions had not been disclosed. ECF No. 340. On the same date, Defendants filed motions for summary judgment on various grounds, including scienter and loss causation with respect to the Exchange Act claims and affirmative showings of due diligence and negative causation with respect to the Securities Act claims. ECF Nos. 283, 302, 313, 333. Both sides also filed several motions to exclude expert testimony pursuant to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The Parties filed oppositions to the various summary judgment and *Daubert* motions on November 22, 2016. ECF Nos. 357, 360, 362, 365-367, 369-371. Trial was scheduled to begin on March 13, 2017.

During discovery, the Parties engaged the services of three mediators: (i) Hunter R. Hughes, Esq., a Fellow of the American College of Civil Trial Mediators; (ii) Hon. Joel Pisano (ret.), a former New Jersey federal district judge; and (iii) Hon. Daniel Weinstein (ret.), a former California state judge. Joint Decl., ¶¶42-44. As might be expected, throughout the mediation process there were numerous issues about which the Parties disagreed, including: (i) whether the statements made, or facts allegedly omitted, were

materially misleading; (ii) whether Class Representatives could prove that Defendants acted with scienter with respect to the Section 10(b) claim; and (iii) whether Class Representatives could prove loss causation or recoverable damages.

Although the initial mediation sessions with Mr. Hughes in April 2015 and Judge Pisano in January 2016 did not produce a settlement, Class Representatives and Defendants developed a better understanding of each other's positions through these sessions. Following the completion of fact and expert discovery, and with trial approaching, the Parties scheduled a third mediation session on December 6, 2016 with Judge Weinstein. *Id.*, ¶44. At the December 2016 mediation, the Parties reached an agreement-in-principle to settle the Action for $9.5 million. *Id.* Thereafter, the Parties spent the next few weeks negotiating the specific terms of the Settlement set forth in the Stipulation and accompanying exhibits. The Stipulation was executed by the Parties on January 13, 2017. *Id.*, ¶¶45-46.

III. ARGUMENT

A. The Standards for Final Approval of Class Action Settlements

In complex class action lawsuits such as this, the policy of favoring voluntary resolution through settlement is particularly strong. *See George v. Uponor Corp.*, No. 12-249 (ADM/JJK), 2015 WL 5255280, at *6 (D. Minn. Sept. 9, 2015) ("'The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context.'") (citation omitted). Indeed, in the Eighth Circuit, "'strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.'" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (citation omitted).

In deciding whether to approve a proposed settlement of a class action under Rule 23(e), the court must find that the proposed settlement is fair, reasonable, and adequate. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). The

Eighth Circuit has established four factors to determine whether a proposed settlement is "fair, reasonable, and adequate: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *Id.* at 932. As discussed herein and in the Joint Declaration, an analysis of the relevant factors weighs strongly in favor of granting final approval of the Settlement.

In exercising its discretion, the court's examination is limited to determining whether the settlement agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. *See Petrovic*, 200 F.3d at 1148 (judges should not substitute their judgment for that of the litigants); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) ("'neither the trial court in approving the settlement nor this Court in reviewing the approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute'") (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)). As explained below, applying these criteria demonstrates that the Settlement warrants this Court's final approval.

B. The Settlement Is Entitled to a Presumption of Fairness

As noted above, the Eighth Circuit recognizes that "'strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.'" *Petrovic*, 200 F.3d at 1148 (quoting *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990)). Indeed, district courts in the Eighth Circuit have held that "there is a presumption of fairness when a settlement is negotiated at arm's length by well informed counsel." *In re Charter Commc'ns, Inc.*, No. 4:02-cv-1186-

CAS, 2005 WL 4045741, at *5 (E.D. Mo. June 30, 2005).[9] In this context, courts afford "considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved." *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993). *See also In re Flag Telecom Holdings, Ltd.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *13 (S.D.N.Y. Nov. 8, 2010) ("'"Great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.'") (citation omitted). This is particularly so when those negotiations are facilitated by a mediator. *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.").

Here, the Settlement was negotiated between highly experienced counsel with a firm understanding of the strengths and weaknesses of the claims and defenses asserted. The negotiations were at all times hard fought and at arm's length. Class Counsel zealously advanced Class Representatives' positions and were fully prepared to try the case against Defendants rather than accept a settlement that was not in the best interests of the Class. The fair and honest nature of the negotiations is further evidenced by the fact that, throughout the settlement negotiations, all Parties were represented by counsel with vast experience and expertise in securities litigation. *See, e.g.*, *Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009) ("If the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable."); *Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal.

[9] *See also In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2012 WL 5055810, at *6 (D. Minn. Oct. 18, 2012) ("'There is usually a presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for approval.'"); *George*, 2015 WL 5255280, at *6 (settlement agreements are presumptively valid, where a settlement has been negotiated at arm's length discovery is sufficient, the settlement proponents are experienced in similar matters and there are few objectors).

July 18, 1997) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair.").

In addition, the Parties' settlement discussions were assisted by three experienced mediators, two of whom are former judges. The assistance of a neutral, well-respected mediator to close out the settlement negotiations—in this case, Judge Weinstein—further demonstrates that the Settlement was fairly and honestly negotiated. *See, e.g.*, *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) (describing Judge Weinstein as "one of the nation's premier mediators in complex, multi-party, high stakes litigation").[10] All three mediators who assisted the Parties in this case—with the full participation of counsel for the Class, Defendants and the Company's insurers—ensured the integrity of the process by which the Parties negotiated the Settlement.

The Settlement is thus the product of extensive, arm's-length negotiations conducted by experienced counsel and mediated by well-respected neutrals, after extensive and meaningful discovery and litigation efforts. Accordingly, the Settlement is presumptively fair, reasonable and adequate and final approval should be granted.

C. The Settlement Is Fair, Reasonable and Adequate Under the Factors Considered in Evaluating a Class Action Settlement in the Eighth Circuit

1. The Merits of the Class' Claims, Weighed Against the Terms of the Settlement, Support Final Approval of the Settlement

"The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is 'the strength of the case for plaintiffs on the merits, balanced

[10] *See also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) ("Judge Weinstein's role in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion.").

against the amount offered in settlement.'" *Wireless*, 396 F.3d at 933 (citation omitted). This case involved allegations that Defendants either intentionally or recklessly made false and misleading statements to, and concealed material information from, the investors of Tile Shop, which caused the Company's common stock to trade at artificially inflated prices during the Class Period. Class Representatives believe that, based on the evidence developed to date, they had a strong case on liability.

At the same time, however, Class Representatives also recognize that establishing liability at trial was by no means guaranteed and was, in fact, subject to significant risk of an adverse result. As evidenced by their motions for summary judgment, Defendants continue to deny wrongdoing and have articulated various defenses to Class Representatives' claims that may have been accepted by the Court at summary judgment or a jury at trial. If any one of Defendants' arguments found favor with the Court or the jury, the Class risked the possibility of no recovery at all. Indeed, "[t]o 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).[11]

Class Representatives faced numerous hurdles to establishing liability. For example, Defendants throughout this Action argued that they did not act with "scienter," the requisite state of mind to establish securities fraud, in omitting Tile Shop's transactions with Nishi from the Company's related-party disclosures. Joint Decl., ¶¶53-54. Scienter requires plaintiffs to prove that defendants made the alleged misrepresentations (and omitted material information) either intentionally or recklessly—which raises subjective issues for the jury

[11] *See also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02 Civ. 5575(SWK), 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation."); *In re Eng'g Animation Sec. Litig.*, 203 F.R.D. 417, 422 (S.D. Iowa 2001) (approving settlement and noting "[c]ontinued litigation present[ed] significant risks for plaintiffs" in light of issues present in securities action).

that render proof extremely difficult and unpredictable. *See, e.g.*, *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (recognizing scienter is "complex and difficult to establish at trial" and concluding "settlement is a prudent course"); *Smith v. Dominion Bridge Corp*., No. 96-7580, 2007 U.S. Dist. LEXIS 26903, at *17 (E.D. Pa. Apr. 11, 2007) ("Since stockholders normally have 'little more than circumstantial and accretive evidence to establish the requisite scienter,' proving scienter is an 'uncertain and difficult necessity for plaintiffs.'") (citation omitted).

The risks of proving scienter were heightened in this case, given that Class Representatives would have to show, among other things, that Defendant Rucker, and not simply lower-level managers, was aware (or reckless in not knowing) that his brother-in-law Nishi had assumed ownership of BP during the Class Period. Joint Decl., ¶53. While the Court rejected Defendants' arguments at the pleading stage, Defendants raised these defenses again at summary judgment. ECF No. 285. Defendants argued in their summary judgment papers that there was no direct evidence that Rucker or anyone else knew that Nishi was conducting this related-party business with Tile Shop as the owner of BP, and that the presence of a related-party transaction policy and other internal controls within the Company negated any finding of scienter. ECF No. 285 at 18-22. Defendants further argued that Rucker and Tile Shop had no motive to lie about or conceal the Nishi transactions, given that the Company had disclosed various other related-party transactions in its SEC filings. *Id.* at 13; Joint Decl., ¶54.

Class Representatives also faced the risk of proving that the omissions of the Nishi transactions were material. Joint Decl., ¶50. Defendants argued in their motions for summary judgment that because Tile Shop's relationship with BP did not have any substantial impact on the Company's financial statements (as determined by an independent investigation of outside auditors), the non-disclosure of the relationship was immaterial to

investors. *Id.* Defendants also argued that because Tile Shop was not required to restate its financial statements as a result of Tile Shop's relationship with BP, Class Representatives would be unable to prove that the statements were material. Joint Decl., ¶50. Although Class Representatives were prepared to argue that the Nishi/BP relationship was material—as evidenced by, among other things, analyst commentary, empirical studies on the valuation of companies engaged in related-party business, and the SEC disclosure rules — Defendants had viable arguments that the omissions of the Nishi transactions were immaterial that could have been accepted by the Court or the jury at trial. *Id.*, ¶51.

Even if Class Representatives were successful in establishing liability, they faced significant risks in establishing loss causation and damages. At the time the Settlement was reached, Defendants' motion to exclude the testimony of Class Representatives' damages expert, Chad Coffman, was pending. Defendants maintained that Mr. Coffman failed to put forth a reliable methodology for disaggregating the impact of the revealed Nishi transactions on Tile Shop's stock price from the impact of non-fraud-related factors. *See* ECF No. 312 (Defendants' Motion to Exclude the Testimony of Plaintiffs' Proffered Expert Chad Coffman). While Class Representatives believed the Court would deny Defendants' motion, there was a risk that the Court would grant (in whole or in part) Defendants' motion. Assuming a ruling in Class Representatives' favor, the resolution of those issues likely would have come down to an inherently unpredictable and fiercely disputed "battle of the experts at trial."[12] Both Class Representatives and Defendants retained highly qualified

[12] *See In re Top Tankers, Inc. Sec. Litig.*, No. 06 Civ. 13761(CM), 2008 WL 2944620, at *5 (S.D.N.Y. July 31, 2008) (addressing significant risk of establishing damages at trial, particularly when, as here, "the crucial element of damages would likely be reduced at trial to a 'battle of the experts'"); *Nguyen v. Radient Pharms. Corp.*, No. SACV 11-00406 DOC (MLGx), 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (approving settlement in securities case when "[p]roving and calculating damages required a complex analysis, requiring the jury to parse divergent positions of expert witnesses in a complex area of the law" and "[t]he outcome of that analysis is inherently difficult to predict and risky").

experts whose damages assessments were at substantial odds. A jury's reaction to such expert testimony is highly unpredictable, and Class Counsel recognized the possibility that a jury could be swayed by Defendants' experts and find that there were no damages or only a fraction of the amount of damages Class Representatives contended. Thus, the amount of damages the Class would actually recover at trial, even if successful on liability issues, was uncertain. *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 Inc. 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."). Accordingly, in the absence of a settlement, there was a very real risk that the Class would recover an amount less than the $9,500,000 – or even nothing at all.

Finally, the Settlement Amount is well within the range of reasonableness. First, the $9.5 million obtained for the benefit of the Class represents a recovery of approximately 6.8% to 9.5% of Class Representatives' damages expert's estimate of the Class' maximum provable damages (ranging between $100 million and $140 million). This range far exceeds the median recovery of 2.5% of estimated damages in similar securities class actions settled in 2016. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review and Analysis* at 7, Fig. 6 (Cornerstone Research 2017).[13] The Settlement also exceeds the median settlement as a percentage of estimated damages in the Eighth Circuit from 2007 through 2016 (3.3%). *Id.* at 23, Appx. 3.

[13] Attached as Ex. 1 to the Joint Decl.

Considering all of the circumstances and risks that Class Representatives would have faced if they continued to litigate the Action through a decision on the pending summary judgment motions and, if successful, trial, Class Representatives and Class Counsel concluded that the Settlement – which provides an immediate and certain payment of $9.5 million – was in the best interest of the Class. Thus, this factor strongly supports the Settlement's approval.

2. Defendants' Financial Condition Supports Final Approval of the Settlement

Notwithstanding Tile Shop's apparent ability to pay a sum larger than the Settlement Amount, this fact, does not standing alone, indicate that the Settlement is unreasonable or inadequate. *See Petrovic*, 200 F.3d at 1152 (noting, while defendant "could pay more than it is paying in this settlement, this fact, standing alone, does not render the settlement inadequate"). Indeed, "a defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008). However, even where defendants' solvency is not at issue, courts have found that this factor supports approval because a settlement avoids any future risk of insolvency. *Deem v. Ames True Temper*, No. 6:10-cv-01339, 2013 U.S. Dist. LEXIS 72981, at *9 (S.D.W.V. May 23, 2013) ("Although the court is unaware of any threat to Defendant's solvency, recovery of a litigated judgment cannot be taken for granted in these uncertain economic times. The proposed settlement avoids all risk of eventual insolvency and provides immediate cash to Class Members.").

Moreover, as a practical matter, the prospects of recovering a substantially greater sum at trial (or any sum at all), were by no means certain, and would have been further discounted by the inevitable post-trial motions and appeals that Defendants would pursue

following any judgment. The Settlement eliminates this risk as well as the risk of collection. Pursuant to the Stipulation, Defendants have paid the Settlement Amount into escrow, which is earning interest. *See Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811 (MGC), 2010 WL 476009, at *5 (S.D.N.Y. Jan. 6, 2010) (approving settlement and noting that "[t]he settlement eliminated the risk of collection by requiring Defendants to pay the Fund into escrow"). Accordingly, this factor supports final approval of the Settlement.

3. The Complexity and Expense of Further Litigation Supports Final Approval of the Settlement

Courts have consistently recognized that the complexity, expense, and likely duration of the litigation are critical factors in evaluating the reasonableness of a settlement, especially when the settlement being evaluated is a securities class action. *See, e.g.*, *Charter*, 2005 WL 4045741, at *4 ("'Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.'") (citations omitted). This case is no exception. "While all cases carry the potential for uncertain verdicts, securities cases in particular are complex and difficult to prove." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 257 (E.D. Va. 2009). Here, Class Representatives' claims involved numerous complex legal and factual issues, including those related to due diligence in securities offerings, the materiality of related-party transaction violations, loss causation, and damages, each of which required expert reports and testimony. The Parties' summary judgment and *Daubert* briefing was extensive and required a substantial investment of the Parties' resources and time.

In the absence of a settlement, this case would require the expenditure of substantial additional time and money, "'all the while class members would receive nothing.'" *Wireless*, 396 F.3d at 933 (citation omitted). Assuming Class Representatives successfully

opposed Defendants' motions for summary judgment, a trial in this case would take weeks and would be a complicated undertaking for the Court and jurors. *See AOL*, 2006 WL 903236, at *8 (due to their "notorious complexity," securities class actions often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials"). Even if Class Representatives were successful at trial, post-trial motions and appeals certainly would have followed. The post-trial motions and appeals process likely would have spanned years, during which time the Class would have received no distribution of any damages award. In addition, a post-trial motion or an appeal of any favorable verdict would carry the risk of reversal, in which case the class would receive no recovery at all, even after having prevailed on the claims at trial. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming a 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). Accordingly, analysis of this factor supports final approval of the Settlement.

4. The Reaction of the Class to Date Supports Final Approval of the Settlement

Pursuant to this Court's Preliminary Approval Order, the Court-approved Notice and Claim Form were mailed to potential Class Members who could be identified with reasonable effort and the Summary Notice was published once in *The Wall Street Journal*, and once over the *PR Newswire*.[14] The Notice advises the Class of the terms of the Settlement and the Plan of Distribution as well as the procedure and deadline for filing objections. As of March 17, 2017, more than 29,000 Notices and Claim Forms have been mailed to potential Class Members and nominees. While the objection deadline, April 3, 2017, has not yet passed, not a single Class Member has filed an objection to the Settlement,

[14] *See* Sylvester Decl., ¶¶3-13.

the Plan of Distribution, or Class Counsel's request for an award of attorneys' fees and expenses.[15]

Of course, "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). "'A certain number of . . . objections are to be expected in a class action.'" *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 533 (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) (citation omitted). Moreover, "a relatively small number of class members who object is an indication of a settlement's fairness." 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §11.48 (3d ed. 1992); *see also Petrovic*, 200 F.3d at 1152 (approving settlement where less than 4% of the class objected).[16]

Each of the above factors fully supports a finding that the Settlement is fair, reasonable, and adequate, and therefore deserves this Court's final approval.

IV. THE PLAN OF DISTRIBUTION IS FAIR, REASONABLE AND ADEQUATE

Class Counsel also seek approval of the Plan of Distribution of the settlement proceeds. The Plan of Distribution is set forth in the Notice mailed to Class Members. The Plan of Distribution provides an equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Claim Form.

Assessment of a plan of distribution in a class action under Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and

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[15] *See In re Wireless Tel. Fed. Cost. Recovery Fees Litig.*, No. 4:03-MD-015, 2004 WL 3671053, at *13 (W.D. Mo. Apr. 20, 2004) (finding lack of objections to be "strong indicator" that class as a whole views the settlement as fair, and weighs heavily in favor of settlement). In addition, to date, not one request for exclusion from the Class has been received. *See* Sylvester Decl., ¶14.

[16] In accordance with the Preliminary Approval Order, Class Representatives will respond to any objections on or before April 26, 2017.

reasonable. *See Charter*, 2005 WL 4045741, at *5; *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992); *Atlas v. Accredited Home Lenders Holding Co.*, No. 07-CV-00488-H (CAB), 2009 U.S. Dist. LEXIS 103035, at *13 (S.D. Cal. Nov. 4, 2009). District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982).

The objective of a plan of distribution is to provide an equitable basis upon which to distribute the settlement fund among eligible class members. An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White*, 822 F. Supp. at 1420. Here, the Plan of Distribution was based on Class Representatives' damages expert's analysis and reflects an assessment of the damages that Class Representatives contend could have been recovered under the theories asserted in the Action. *See* Joint Decl., ¶¶68-71. Class Counsel believe that the Plan of Distribution will result in a fair and equitable distribution of the proceeds among Class Members who submit valid Claim Forms and, thus, it should be approved.

V. CONCLUSION

The Settlement here represents a highly favorable result, given the presence of skilled counsel for all Parties, the extensive litigation efforts and settlement negotiations, the considerable risk, expense, and delay if the Action were to continue, and the certain and immediate benefit of the Settlement to members of the Class. In addition, the Plan of Distribution will result in a fair and equitable distribution of the proceeds among eligible Class Members and is necessarily fair, reasonable, and adequate. Therefore, Class

Representatives respectfully request that this Court approve the Settlement of this Action and the Plan of Distribution as fair, reasonable, and adequate.

DATE: March 20, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BEAVER COUNTY EMPLOYEES' RETIREMENT FUND; ERIE COUNTY EMPLOYEES' RETIREMENT SYSTEM; and LUC DE WULF, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

TILE SHOP HOLDINGS, INC.; ROBERT A. RUCKER; THE TILE SHOP, INC.; TIMOTHY C. CLAYTON; PETER J. JACULLO, III; JWTS, INC.; PETER H. KAMIN; TODD KRASNOW; ADAM L. SUTTIN; WILLIAM E. WATTS; ROBERT W. BAIRD & CO. INCORPORATED; CITIGROUP GLOBAL MARKETS, INC.; CJS SECURITIES, INC.; HOULIHAN LOKEY CAPITAL, INC.; PIPER JAFFRAY & CO.; SIDOTI & COMPANY, LLC; TELSEY ADVISORY GROUP LLC; and WEDBUSH SECURITIES, INC.,

Defendants.

Civ. No. 0:14-cv-00786-ADM-TNL

CLASS ACTION

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1 WORD-COUNT AND TYPE-SIZE LIMITS REGARDING MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF DISTRIBUTION

I, Joseph Russello, hereby certify that the Memorandum of Law in Support of Class Representatives' Motion for Final Approval of Class Action Settlement and Plan of Distribution complies with the word-count limitation of Local Rule 7.1(f), and the type-size limitation of Local Rule 7.1(h). The Memorandum was prepared using Microsoft Word 2010, and is in a 13-point font. The Memorandum contains 6,348 words, exclusive of the caption designation, tables of contents and authorities and signature-block text. I further certify that the word-count function of my word-processing software has been applied specifically to include all text, including headings, footnotes and quotations.

DATED: March 20, 2017

Respectfully submitted,

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0:14-cv-00786-ADM-TNL Beaver County Employees' Retirement Fund et al v. Tile Shop Holdings, Inc. et al

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