

The Hon. Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH MCGUIRE and DAVID
WILCZYNSKI, on Behalf of Themselves
and All Others Similarly Situated,

Plaintiffs,

vs.

DENDREON CORPORATION,
MITCHELL GOLD, and DAVID URDAL,

Defendants.

Case No. C07-800 MJP

CLASS ACTION

**PLAINTIFFS' UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT AND
APPROVAL OF NOTICE**

Note on Motion Calendar:
October 25, 2010

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1 The parties to this Action have entered into a Stipulation of Settlement (“the
2 Stipulation”).¹ The settlement provides for the payment of \$16,500,000 in cash in
3 settlement of the claims brought on behalf of the Class. The settlement represents a multiple
4 of the maximum amount of damages estimated by defendants’ expert, and a substantial
5 percentage of the maximum amount of damages estimated by plaintiffs’ expert, that could
6 have been obtained at trial had plaintiffs succeeded before a jury on their claims. The
7 settlement is an excellent result for the Class. If approved by the Court, the settlement will
8 conclude this case as to all parties.

9
10 Plaintiffs respectfully request that the Court enter the proposed Order Granting
11 Preliminary Approval of Settlement and Providing for Notice (the “Preliminary Approval
12 Order”), attached as Exhibit A to the Stipulation, and lodged separately herewith. The
13 Preliminary Approval Order, among other things: (i) preliminarily approves the settlement
14 as within a range of reasonableness; (ii) schedules a hearing (the “Settlement Hearing”) to
15 consider the fairness, reasonableness, and adequacy to the Class of the proposed settlement,
16 the Plan of Allocation of the Net Settlement Fund (“Plan of Allocation” or “Plan”), and
17 Class Counsel’s application for an award of attorneys’ fees, costs, and expenses;
18 (iii) approves the forms and methods of disseminating pre-hearing notice to the Class and
19 directs that such notice be issued; (iv) appoints the Claims Administrator recommended by
20 Class Counsel to administer the settlement and assist with its implementation; (v) establishes
21 procedures and the deadline for Class members to object to the terms of the settlement, the
22 Plan of Allocation, or the requested attorneys’ fees, costs, and expenses; and (vii) establishes
23 procedures and the deadline for Class members to submit Proofs of Claim to be eligible to
24 share in the Net Settlement Fund.
25

26
27 ¹ The Stipulation, dated as of October 25, 2010, is attached as Exhibit 1 to the Declaration of
28 Marc M. Seltzer, filed concurrently herewith. The terms used in this motion are the same as
the defined terms used in the Stipulation.

1 If the Court grants preliminary approval to the settlement, plaintiffs respectfully
2 propose the following schedule for the Court's consideration of the settlement and the
3 settlement approval process:

- 4 ▪ Mailing of individual Notice of Proposed Settlement of Class Action to all Class
5 members who can be identified through reasonable effort: 5 business days after
6 entry of the Preliminary Approval Order (the "Notice Date").
- 7 ▪ Publication of Summary Notice of Proposed Settlement of Class Action once in
8 *Investor's Business Daily* and once over the *PR Newswire*: 8 business days after
9 entry of the Preliminary Approval Order.
- 10 ▪ Deadline for filing with the Court any papers in support of Class Counsel's
11 request for attorneys' fees and expenses: the Notice Date.
- 12 ▪ Deadline for filing with the Court any papers in support of final approval of the
13 settlement or the Plan of Allocation: 21 calendar days before the Settlement
14 Hearing.
- 15 ▪ Deadline for submission of objections to the settlement, Plan of Allocation, or
16 motion for attorney's fees and expenses: 30 days after the Notice Date.
- 17 ▪ Any reply papers in further support of the settlement, the Plan of Allocation, or
18 Class Counsel's request for attorneys' fees and expenses: 7 calendar days
19 before the Settlement Hearing.
- 20 ▪ Deadline for filing by Class Counsel of one or more affidavits or declarations
21 showing timely compliance with the mailing and publication requirements:
22 3 calendar days before the Settlement Hearing.
- 23 ▪ Settlement Hearing: 45 days after entry of the Preliminary Approval Order.
- 24 ▪ Postmark deadline for submission of Proofs of Claim: 120 days after the Notice
25 Date.

26 **I. PROCEDURAL AND FACTUAL BACKGROUND OF THIS LITIGATION**

27 This is a class action brought by plaintiffs Kenneth McGuire and David Wilczynski
28 on behalf of all persons who purchased the common stock of Dendreon Corporation during a
defined period of time. The defendants are Dendreon Corporation ("Dendreon"), Dr.
Mitchell Gold, and Dr. David Urdal.

Commencing in May of 2007, several securities fraud class actions were filed against
Dendreon and various individual defendants by, and on behalf of, purchasers of Dendreon

1 securities who purchased such securities during the time period covering March 30, 2007
2 through May 8, 2007. One action, commenced on June 6, 2007, by Kenneth McGuire and
3 others, initially alleged a longer class period covering March 1, 2007 through May 8, 2007.
4 On October 4, 2007, these actions were consolidated for all purposes by an Order of the
5 Court.

6 Plaintiff Kenneth McGuire (the "Lead Plaintiff") was appointed as the lead plaintiff
7 pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA") by an Order of
8 the Court on October 4, 2007. By the same Order of the Court, dated October 4, 2007, Marc
9 M. Seltzer of Susman Godfrey L.L.P. was appointed as Lead Counsel for the Class. On
10 November 30, 2007, Lead Plaintiff designated as the operative complaint the complaint filed
11 on June 6, 2007 with the caption and case number *McGuire, et al. v. Dendreon Corporation,*
12 *et al.*, Case No. C07-0869-RSM.

13
14 On December 21, 2007, defendants moved to dismiss Lead Plaintiff's complaint. On
15 April 18, 2008, the Court granted defendants' motion with leave to amend. On June 2,
16 2008, Lead Plaintiff filed a first amended complaint. On July 2, 2008, defendants moved to
17 dismiss the first amended complaint. On December 5, 2008, the Court granted in part and
18 denied in part defendants' motion with leave to amend. On January 5, 2009, Lead Plaintiff
19 and David Wilczynski filed a second amended complaint against defendants. On
20 January 29, 2009, defendants moved to dismiss the second amended complaint. On May 21,
21 2009, the Court granted in part and denied in part defendants' motion with leave to amend.

22 On June 8, 2009, Lead Plaintiff and David Wilczynski filed their third amended
23 complaint alleging a class period covering March 29, 2007 through May 8, 2009.
24 Defendants answered the third amended complaint, and it is the currently operative
25 complaint in this action.

26
27 The third amended complaint alleges, among other things, that Dendreon and the
28 individual defendants, who were controlling persons of Dendreon, made false and

1 misleading statements and omissions of material fact to the investing public, thereby
2 artificially inflating the market price of Dendreon's common stock and damaging members
3 of the Class. In particular, the third amended complaint alleges that, on March 29, 2007,
4 during a conference call with securities analysts and other members of the investing public,
5 Dr. Urdal said that Dendreon had "hosted a good inspection, I think," in response to a
6 question about an inspection by the United States Food and Drug Administration (the
7 "FDA") of Dendreon's manufacturing facility in New Jersey in February 2007 in
8 conjunction with Dendreon's biologics license application for its Provenge (sipuleucel-T)
9 product. Plaintiffs allege that Dr. Urdal's statement was materially false and misleading in
10 that he failed to disclose that the FDA had identified significant objectionable conditions
11 during that inspection and had issued a Form 483 to Dendreon afterwards. Plaintiffs allege
12 that defendants concealed and misrepresented the result of the FDA inspection and disclosed
13 the fact of the issuance of the Form 483 only at the end of the Class Period. The third
14 amended complaint also alleges that Dr. Gold engaged in illegal insider trading of Dendreon
15 common stock.
16

17 On July 6, 2009, defendants answered the third amended complaint. Defendants
18 denied plaintiffs' claims and asserted multiple affirmative defenses. In doing so, defendants
19 contend that they are not liable to plaintiffs and the Class and Subclass.

20 On January 14, 2010, Lead Plaintiff and Mr. Wilczynski moved the Court for an
21 order certifying the Class and Subclass pursuant to Rule 23. By its Order dated May 27,
22 2010, the Court certified the Class and Subclass and appointed Messrs. McGuire and
23 Wilczynski as Class Representatives, Mr. Wilczynski as Subclass Representative, and their
24 counsel of record—Susman Godfrey L.L.P.—as Class Counsel.

25 On August 2, 2010, the Court appointed Gilardi & Co., LLC, as the Notice
26 Administrator and ordered the Notice Administrator to mail the Notice of Pendency of Class
27 Action, in the approved form, to all Class members who could be identified with reasonable
28

1 effort. The Court further ordered the Notice Administrator to post the Notice of Pendency
2 of Class Action on a website and to publish a Summary Notice of Pendency of Class Action,
3 in the approved form. In accordance with the Court's Order, the Notice Administrator
4 mailed the Notice of Pendency of Class Action to 69,258 potential Class members, posted
5 the Notice of Pendency of Class Action on its website, and published the Summary Notice
6 of Pendency of Class Action in *Investor's Business Daily* and on *Business Wire*.
7 Declaration of Michael Joaquin ("Joaquin Decl.") ¶¶ 8–10, filed concurrently herewith.
8 Pursuant to the Court's Order, Class members were notified of their opportunity to request
9 exclusion from the Class, the time for which has now expired. A total of sixty-one Persons
10 requested exclusion from the Class. Joaquin Decl. ¶ 11.

11
12 Pretrial discovery is complete. Fact and expert discovery in the Action has been
13 extensive. During the course of the litigation, defendants produced to plaintiffs more than
14 550,000 pages of documents, and the total document production by parties and non-parties
15 amounts to approximately 570,000 pages. Declaration of Marc M. Seltzer ("Seltzer Decl.")
16 ¶ 2, filed concurrently herewith. The parties have deposed nineteen different witnesses,
17 including fourteen witnesses associated with defendants. *Id.* In addition, to date, the parties
18 have exchanged twelve expert reports and have taken six expert depositions. *Id.*

19 On June 21, 2010, defendants filed a motion for partial summary judgment. On
20 July 19, 2010, plaintiffs responded to the motion. On July 30, 2010, defendants filed their
21 reply. The motion has not been decided. At the time the parties agreed to settle this Action,
22 a jury trial had been set to commence on October 18, 2010.

23 On August 21, 2010, the parties held a day-long mediation with Hon. Daniel
24 Weinstein, Judge of the California Superior Court (Ret.). Following the mediation, the
25 parties engaged in extensive, arm's-length negotiations under Judge Weinstein's
26 supervision. On or about September 16, 2010, the parties agreed to settle the action on the
27 terms set forth in the Stipulation.
28

1 **II. THE SETTLEMENT AGREEMENT**

2 **A. Settlement Consideration**

3 Under the terms of the settlement, defendants have agreed to settle the Class
4 members' claims for \$16,500,000, inclusive of any attorneys' fee and expense awarded to
5 Class Counsel, reimbursement of costs and expenses to plaintiffs, and notice and claims
6 administration costs.

7 In determining to settle the action, plaintiffs and Class Counsel have taken into
8 account the substantial expense and length of time necessary to prosecute the litigation
9 through trial, post-trial motions, and likely appeals, taking into consideration the significant
10 uncertainties in predicting the outcome of this complex litigation. Based on their
11 consideration of all of these factors, plaintiffs and Class Counsel have concluded that it is in
12 the best interests of the Class to settle the action on the agreed-to terms. The settlement
13 provides substantial and immediate benefits to the Class. Class Counsel believes the
14 settlement is fair, reasonable, and adequate to the Class.

15 Defendants, while continuing to deny all allegations of wrongdoing or liability,
16 desired to settle and terminate all existing or potential claims against them without in any
17 way acknowledging fault or liability. During the course of the litigation, defendants, in
18 addition to denying any liability, disputed that plaintiffs or the members of the Class or the
19 Subclass were damaged by any wrongful conduct on their part.

20 **B. Plan of Allocation**

21 Under the Plan of Allocation, and subject to the approval of the Court, Gilardi & Co.,
22 LLC, an independent settlement and claims administrator previously approved as the Notice
23 Administrator by the Court in its August 2, 2010 Order, will act as the Claims Administrator
24 and shall calculate each Authorized Claimant's allocation from the Net Settlement Fund
25 based on the information supplied in a Proof of Claim submitted by each Authorized
26 Claimant.
27
28

1 The structure of the Plan, which is set forth in full in the Notice, allocates the Net
2 Settlement Fund across Authorized Claimants according to the percentage of the Net
3 Settlement Fund that each Authorized Claimant's "Eligible Net Shares Purchased" bears to
4 the total of the Eligible Net Shares Purchased of all Authorized Claimants ("pro rata
5 share"). An Authorized Claimant's Eligible Net Shares Purchased are those the Authorized
6 Claimant purchased during the Class Period and continued to own at the end of the Class
7 Period, with all sales of shares during the Class Period matched against purchases during the
8 Class Period. The Class Representatives and the Subclass Representative submit that the
9 Plan is fair and reasonable and should be approved together with the settlement at the
10 Settlement Hearing.
11

12 The Plan is not a part of or a condition of approval of the settlement. Under the
13 settlement, the Net Settlement Fund may be distributed in accordance with the proposed
14 Plan or such other plan as the Court may approve.

15 **III. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED.**

16 In approving the settlement of a class action, the Court must make a "preliminary
17 determination of the fairness, reasonableness, and adequacy of the settlement terms." FED.
18 JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004). The settling
19 parties request that this Court preliminarily approve the settlement not only because public
20 policy favors the settlement of complex class actions such as this one, but also, as
21 demonstrated herein, because the settlement achieves an excellent result for the Class. The
22 settling parties respectfully submit that the proposed settlement is fair, reasonable, and
23 adequate and warrants preliminary approval by this Court.
24

25 **A. Standard for Preliminary Approval of Settlement**

26 Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise
27 of claims brought on a class basis. Approval of a proposed settlement is a matter within the
28 discretion of the court. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th

1 Cir. 1992). This discretion should be exercised in the context of a public policy which
 2 strongly favors the pretrial settlement of class action lawsuits. *Id.*; *Officers for Justice v.*
 3 *Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (“Voluntary conciliation and
 4 settlement are the preferred means of dispute resolution”); *Van Bronkhorst v. Safeco*
 5 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *In re NVIDIA Corp. Deriv. Litig.*, No. C-06-
 6 06110-SBA, 2008 WL 5382544, at *2 (N.D. Cal. Dec. 22, 2008). As the court in *Nelson v.*
 7 *Bennett* explained:

8
 9 [T]he suggestion that there is no federal policy to encourage settlement truly
 10 borders on the absurd. Not only have federal courts long recognized the
 11 public policy in favor of the settlement of complex securities actions, but the
 12 Ninth Circuit in particular has stated: “It hardly seems necessary to point out
 13 that there is an overriding public interest in settling and quieting litigation.
 14 This is particularly true in class action suits . . . which frequently present
 15 serious problems of management and expense.” Especially in these days of
 16 burgeoning federal litigation, the promotion of settlement is as a practical
 17 matter, an absolute necessity.

18 662 F. Supp. 1324, 1334 (E.D. Cal. 1987) (internal citations omitted) (quoting *Van*
 19 *Bronkhorst*, 529 F. 2d at 950).

20 Approval of class action settlements normally proceeds in two stages: preliminary
 21 approval, followed by notice to the class, and then final approval. This case is now at the
 22 first stage of the process. At this stage,

23 “If the preliminary evaluation of the proposed settlement does not disclose
 24 grounds to doubt its fairness or other obvious deficiencies, such as unduly
 25 preferential treatment of class representatives or of segments of the class, or
 26 excessive compensation for attorneys, and appears to fall within the range of
 27 possible approval, the court should direct that notice under Rule 23(e) be
 28 given to the class members of a formal fairness hearing, at which arguments
 and evidence may be presented in support of and in opposition to the
 settlement.”

NEWBURG ON CLASS ACTIONS (4th ed.) § 11:25 (quoting MANUAL FOR COMPLEX
 LITIGATION (3d ed.) § 30.41). The Court need not “engage in analysis as rigorous as is
 appropriate for final approval.” ANNOTATED MANUAL FOR COMPLEX LITIGATION, FOURTH §
 21.63 commentary, p. 489 (2008); *see also Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665

1 (E.D. Cal. 2008) (stating that a court need do no more than a “cursory review of the terms of
2 the parties’ settlement for the purpose of resolving any glaring deficiencies”).

3 An evaluation of the costs and benefits of settlement must be tempered by a
4 recognition that any compromise involves concessions of the part of *all* of the settling
5 parties. *In re NVIDIA Corp.*, 2008 WL 5382544, at *3. Indeed, “the very essence of a
6 settlement is compromise, a yielding of absolutes and an abandoning of higher hopes.” *Id.*
7 (quoting *Officers for Justice*, 688 F.2d at 624) (internal quotation marks omitted). As the
8 Fifth Circuit noted in *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977): “The trial court
9 should not make a proponent of a proposed settlement justify each term of settlement against
10 a hypothetical or speculative measure of what concessions might have been gained”
11 (internal quotation marks omitted).
12

13 Applying the foregoing standards in this case, it is respectfully submitted that the
14 proposed settlement should be preliminarily approved.

15 **B. The Proposed Settlement Is the Product of Good Faith, Arm’s-Length**
16 **Negotiations Among Experienced Counsel Mediated by an Experienced**
17 **Mediator.**

18 “The involvement of experienced class action counsel and the fact that the settlement
19 agreement was reached in arm’s length negotiations, after relevant discovery had taken place
20 create a presumption that the agreement is fair.” *Linney v. Cellular Alaska P’ship*, No.
21 C 96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff’d*, 151 F.3d 1234
22 (9th Cir. 1998).

23 This settlement was achieved only after plaintiffs had the benefit of full development
24 of the facts, evidence, and legal issues relating to their claims. Pretrial discovery had been
25 completed before the settling parties engaged in their first mediation session. During the
26 course of this litigation, defendants produced more than half a million pages of documents,
27 responded to twenty-five interrogatories, and served six expert reports. Seltzer Decl. ¶ 2. A
28 total of nineteen witnesses were deposed by the settling parties, including fourteen witnesses

1 associated with defendants. *Id.* In addition, plaintiffs produced documents to defendants,
2 responded to sixty-seven interrogatories, and testified at depositions. *Id.* Plaintiffs served
3 six expert reports and presented three experts for depositions. *Id.* Plaintiffs also obtained
4 discovery from two non-parties. *Id.* Furthermore, Class Counsel engaged in an extensive
5 analysis of the legal and factual issues involved in the claims against defendants. *Id.*

6 There were numerous issues in this action that caused the parties to have different
7 views of the settlement value of this case. These issues included: (1) whether any defendant
8 engaged in any conduct violative of the federal securities laws; (2) the amount, if any, by
9 which the market price of Dendreon common stock was allegedly artificially inflated during
10 the Class Period; (3) the effect of extraneous market forces influencing the market price of
11 Dendreon common stock at various times during the Class Period; (4) the extent, if any, to
12 which the various matters that plaintiffs alleged were materially false or misleading affected
13 the market price of Dendreon common stock during the Class Period; (5) the extent, if any,
14 to which the various allegedly adverse material facts that plaintiffs alleged were omitted
15 influenced the market price of Dendreon common stock during the Class Period; (6) whether
16 the defendants made false or misleading statements of material fact; and (7) even if liability
17 could be proven, the amount, if any, of any damages proximately caused by such statements.
18

19 The procedural history of this litigation, etched in the record of this case, clearly
20 reflects adversarial and arm's-length relationships among the parties. This action was filed
21 more than three years ago, and the parties have engaged in vigorous litigation since then,
22 involving extensive motion practice by the parties and comprehensive fact discovery. A
23 settlement was reached only after the litigation was brought to the brink of trial.
24

25 Throughout this process, all parties were represented by attorneys with extensive
26 experience in presenting and defending securities class action litigation. Courts have given
27 considerable weight to the opinion of experienced and informed counsel who support
28 settlement. In deciding whether to approve a proposed settlement of a class action, “[t]he

1 recommendations of plaintiffs' counsel should be given a presumption of reasonableness."
2 *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (internal
3 quotation marks omitted). In *Omnivision*, the court held that the recommendation of counsel
4 weighed in favor of a securities class action settlement given their familiarity with the
5 dispute and their significant experience in securities litigation. *Id.* Class Counsel likewise
6 has a thorough understanding of the merits of the action and extensive experience in
7 securities litigation. Seltzer Decl. ¶¶ 2, 3. The belief of Class Counsel in the fairness,
8 reasonableness, and adequacy of the settlement warrants a presumption of reasonableness.

9
10 Finally, courts have recognized that a settlement resulting from a mediation before a
11 retired judge is "highly indicative of fairness." *In re Immune Response Secs. Litig.*, 497 F.
12 Supp. 2d 1166, 1171 (S.D. Cal. 2007). "The assistance of an experienced mediator in the
13 settlement process confirms that the settlement is non-collusive." *Satchell v. Federal*
14 *Express Corp.*, No. C03-2659 SI, 2007 WL 1114010, at *4 (N.D.Cal. Apr. 13, 2007). Here,
15 the settling parties' dispute was mediated by Hon. Daniel Weinstein, an experienced,
16 nationally prominent, and respected mediator who is a retired Judge of the California
17 Superior Court. This further supports preliminary approval of the settlement.

18 **C. The Proposed Settlement Is Within the Range of Possible Approval.**

19 The settlement here unquestionably falls well within the range of possible approval.
20 There is no evidence of fraud or collusion, the settlement is the result of good faith, arm's-
21 length bargaining, and the settlement represents a substantial recovery against sophisticated
22 and well-represented defendants.

23 The \$16,500,000 settlement is an excellent result. As set forth more fully below, the
24 maximum aggregate damages plaintiffs could have reasonably expected to obtain at trial is
25 estimated by plaintiffs' expert to be \$115.1 million. Seltzer Decl. ¶ 4. The proposed
26 settlement represents 14.3 percent of this amount.
27
28

1 The maximum aggregate damages is based on plaintiffs' damages expert's estimate
2 of the amount that Dendreon's stock price was inflated during the Class Period as a result of
3 defendants' misrepresentations and failure to disclose that the FDA had identified significant
4 objectionable conditions during the February 2007 inspection and had issued a Form 483.
5 On May 9, 2007, Dendreon announced that the FDA had not approved its biologics license
6 application for Provenge. The FDA's decision letter noted issues relating to the efficacy of
7 Provenge as well as unresolved inspectional issues. As a result, Dendreon stock dropped by
8 \$11.34, according to an estimate by plaintiffs' damages expert. Seltzer Decl. ¶ 4. Plaintiffs'
9 damages expert determined the amount of this loss attributable to the undisclosed
10 inspectional issues by relying on the opinions of plaintiffs' regulatory experts, who
11 concluded that the inspectional issues would have resulted in regulatory approval delays for
12 Provenge of at least six months, independent of any efficacy issues that might also have
13 affected approval (a conclusion vigorously disputed by defendants). *Id.* Based on this
14 estimated delay, plaintiffs' damages expert estimated the inflation of Dendreon stock during
15 the Class Period due to non-disclosure of the inspectional issues to have been \$1.55 per
16 share. *Id.* This results in aggregate Class damages of \$115.1 million, including aggregate
17 Subclass damages of approximately \$313,000. *Id.*

19 By comparison, defendants' damages expert found the aggregate damages to have
20 been substantially lower. Assuming for the sake of his analysis that plaintiffs were able to
21 demonstrate the alleged violations of the federal securities laws, defendants' expert
22 concluded that damages could not be shown at all. Seltzer Decl. ¶ 5. In the alternative,
23 defendants' expert concluded the maximum amount of aggregate damages by any measure
24 was \$8.8 million. *Id.* The settlement is therefore almost double the maximum damages of
25 defendants' damages expert's most generous analysis, all made under the assumption that a
26 violation could be proven at trial.
27
28

1 The settlement offers the Class a significant recovery on claims that defendants
2 vigorously dispute and will eliminate the risk that the Class may not prevail on their claims
3 at trial or on appeal. Defendants at all times vigorously contended that they had no liability
4 whatsoever to the Class and that, in the unlikely event liability were established, the
5 damages sought were nonexistent or far less than the settlement amount. Although plaintiffs
6 believe they have meritorious claims against defendants, the parties and their respective
7 experts could be expected to offer sharply conflicting testimony and opinions at trial on the
8 very complex liability, loss causation, and damages issues if this case were to be tried.
9 Thus, the settlement eliminates the considerable risks of a trial and will provide a very
10 substantial recovery to the Class.
11

12 Additionally, the cost of litigating this dispute has been significant, and such costs
13 can only increase as trial approaches. As recently noted by one district court:

14 Had Federal Plaintiffs continued to litigate, they would have faced a host of
15 potential risks and costs, including the potential for successful attacks on the
16 pleadings, high costs associated with lengthy and complex litigation,
17 potential loss on summary judgment, and risks and costs associated with trial,
18 should the case progress that far. Indeed, even a favorable judgment at trial
19 may face post-trial motions and even if liability was established, the amount
20 of recoverable damages is uncertain. The Settlement eliminates these and
21 other risks of continued litigation, including the very real risk of no recovery
22 after several years of litigation.

23 *In re NVIDIA Corp.*, 2008 WL 5382544, at *3. The same observations ring true here.

24 Given the uncertainty and substantial expense of going forward with trial against
25 defendants, it is the informed opinion of plaintiffs' experienced counsel that the proposed
26 settlement is eminently fair, reasonable, and adequate and warrants judicial approval.
27 Seltzer Decl. ¶ 6.
28

**D. The Proposed Settlement Has No Obvious Deficiencies and Does Not
Improperly Grant Preferential Treatment to Class Representatives or
Segments of the Class.**

The settlement has no obvious deficiencies and does not improperly grant
preferential treatment to the Class Representatives or segments of the Class. As discussed

1 above, the \$16,500,000 recovery constitutes a significant and certain benefit for the Class.
2 The Class Representatives intend to apply to the Court for an award of their costs and
3 expenses incurred in litigating the action. The Class Representatives will otherwise receive
4 a distribution from the Net Settlement Fund in accordance with the Plan of Allocation in the
5 same manner as distributions to all other Class members. The Plan of Allocation will
6 allocate the recovery on a *pro rata* basis based on the number of affected shares of each
7 Authorized Claimant. Under the Plan of Allocation, Subclass members share in the Net
8 Settlement Fund in the same manner as all other Class members.

9
10 In sum, nothing in the course of the settlement negotiations or the terms of the
11 settlement itself discloses grounds to doubt its fairness. Rather, the substantial recovery to
12 the Class, the arm's-length nature of the negotiations, and the participation of sophisticated
13 counsel throughout the action support a finding that the proposed settlement is, on its face,
14 sufficiently fair, reasonable, and adequate to justify notice to the Class and a hearing on final
15 approval. Accordingly, the settling parties request preliminary approval of the settlement.

16 **IV. THE PROPOSED NOTICE FAIRLY APPRISES THE CLASS MEMBERS OF**
17 **THE TERMS OF THE SETTLEMENT AND CLASS MEMBERS' RIGHTS**
18 **THEREUNDER.**

19 The Court should approve the proposed form of notice, which will advise Class
20 members of the proposed settlement and Class Counsel's application for a fee and expense
21 award. The settling parties agree that the form of notice is fair and adequate under the
22 circumstances.

23 Federal Rule of Civil Procedure 23 provides that "[t]he court must direct notice in a
24 reasonable manner to all class members who would be bound by the [proposed settlement]."
25 FED. R. CIV. P. 23(e)(1). The rule also states that, "For any class certified under Rule
26 23(b)(3), the court must direct to class members the best notice practicable under the
27 circumstances, including individual notice to all members who can be identified through a
28 reasonable effort." FED. R. CIV. P. 23(c)(2)(B). Proper notice should include:

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1201 Third Avenue, Suite 3800
Seattle, WA 98101-3000
Tel: (206) 516-3880; Fax: (206) 516-3883

- 1 ▪ the essential terms of the proposed settlement;
- 2 ▪ disclosure of any special benefits provided to the class representatives;
- 3 ▪ information regarding attorney fees;
- 4 ▪ the time and place of the hearing to consider approval of the settlement, and the
5 method for objecting to the settlement;
- 6 ▪ explanation of the procedures for allocating and distributing settlement funds;
7 and
- 8 ▪ prominently display the address and phone number of class counsel and the
9 procedure for making inquiries.

10 *Id.* Here, the proposed Notice adequately describes the facts underlying this action. It states
11 who members of the Class are and it provides the terms of the settlement. It also provides
12 information regarding attorneys' fees, how Class members may object to the settlement, and
13 how to contact Class Counsel.

14 Notice will be provided to the Class in the following ways:

- 15 ▪ The Claims Administrator will send by first class mail to all potential Class
16 members who can be identified with reasonable effort a copy of the Notice
17 substantially in the form annexed as Exhibit A-1 to the Stipulation;
- 18 ▪ The Claims Administrator will post the Notice on a website established for this
19 purpose; and
- 20 ▪ The Claims Administrator will publish once in *Investor's Business Daily* and
21 once over the *PR Newswire* a Summary Notice in the form annexed as Exhibit
22 A-2 to the Stipulation.

23 The proposed notice plan fully comports with the requirements of Rule 23(c)(2)(B) and
24 (e)(1) and due process because it constitutes the best notice practicable under the
25 circumstances.

26 In addition, the PSLRA requires that the notice contain: (1) a statement of plaintiff
27 recovery; (2) a statement of potential outcome of the case; (3) a statement of attorneys' fees
28 and costs sought; (4) identification of lawyers' representatives; (5) the reasons for
settlement; and (6) a cover page summarizing the information contained in the foregoing

1 statements. 15 U.S.C. § 78u-4(a)(7). The proposed Notice satisfies each of these
2 requirements.

3 **V. THE SETTLEMENT HEARING**

4 The settling parties respectfully request the Court to conduct a hearing to determine
5 whether the judgment and order should be entered (1) approving the settlement as fair,
6 reasonable, and adequate to the Class and Subclass; (2) dismissing this action on the merits
7 and with prejudice as against defendants; (3) barring plaintiffs and all Class members from
8 prosecuting, pursuing, or litigating any of the Released Claims, as defined in the Stipulation,
9 against defendants; and (4) awarding Class Counsel's fees, costs, and expenses from the
10 Settlement Fund.

11 **VI. CONCLUSION**

12 For the foregoing reasons, plaintiffs respectfully request that this Court grant
13 preliminary approval to the settlement, approve the forms and methods of notice, and issue
14 the proposed Preliminary Approval Order annexed to the Stipulation and lodged
15 concurrently herewith.

16 Dated: October 25, 2010.

17 Respectfully submitted,

18 By: /s/ Marc M. Seltzer

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

By: /s/ Daniel J. Shih
Daniel J. Shih