UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PRAKASH MOHANTY, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. AVID TECHNOLOGY, INC., LOUIS HERNANDEZ, JR., and ILAN SIDI, Defendants.	Case No. 1:16-cv-12336-IT CLASS ACTION

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

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Court-appointed lead plaintiff, David Wayne Hammond ("Lead Plaintiff"), by and through his undersigned counsel, submits this memorandum of law in support of his motion, pursuant to Federal Rule of Civil Procedure 23(e), respectfully requesting that the Court: (i) grant final approval of the proposed Settlement, which the Court preliminarily approved on January 12, 2018 (Dkt. 55, the "Notice Order"); (ii) approve the proposed Plan of Allocation; (iii) find that notice to the Class satisfied due process; (iv) grant final certification of the Class for settlement purposes; and (v) enter the proposed Final Judgment and Order of Dismissal with Prejudice of this Action.[1]

I. INTRODUCTION

As set forth herein, and in the Fistel Decl., the $1,325,000.00 all-cash Settlement represents a very good result for the Class. Indeed, the Settlement was reached only after, *inter alia*, an extensive investigation by Lead Counsel, the filing of the original complaint and the Corrected Amended Complaint for Violations of the Federal Securities Laws (the "Complaint") (Dkt. Nos. 1 and 42), full briefing regarding Defendants' motion to dismiss (Dkt. Nos. 43, 44, 45, 46), and extensive arm's-length settlement negotiations with a highly experienced, nationally-recognized mediator, Jed D. Melnick, Esq. of JAMS, who believes the proposed Settlement is "reasonable, arm's length, and consistent with the risks and potential rewards of the claims asserted in the Action."[2]

[1] Unless otherwise defined herein, all capitalized terms used herein are defined in the Stipulation and Agreement of Settlement, dated November 30, 2017 (the "Stipulation") (Dkt. No. 50-2), and the Declaration of Michael I. Fistel, Jr. in Support of (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement, Approval of the Plan of Allocation, and Final Certification of the Class for Settlement Purposes; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Expenses, and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Fistel Decl."), along with its exhibits, submitted herewith.

[2] See Declaration of Jed D. Melnick, Esq. in Support of Final Approval of Class Action Settlement ("Melnick Decl.") (Ex. 1 to the Fistel Decl.) at ¶2.

It is also Lead Counsel's informed opinion that, in light of the significant risks and the delay, expense, and uncertainty of proceeding with the Action further, including pursuing the Action through trial and any subsequent appeals, the Settlement is a certain and reasonable result for the Class. The benefit that the proposed Settlement will provide to the Class weighs in favor of final approval when considered against the risks that, absent the Settlement, the Class might recover less (or nothing at all) if the Action continued to be litigated through summary judgment, trial, and any appeals that would likely follow, a process that could last many additional months, if not years. While Lead Plaintiff believes that he has meritorious responses to each of Defendants' arguments against liability and damages, the proposed Settlement, if approved, will enable the Class to be compensated for alleged damages without incurring the risk of further litigation. Indeed, Lead Counsel estimates that the recovery here is approximately 6.8% of the likely recoverable damages, which exceeds a recent Cornerstone Research study which found that the median recovery as a percentage of estimated damages in all securities class action settlements was 2.5% during 2006-2015, and only 1.8% in 2015. *Id.* at ¶¶32-33, 50. Accordingly, Lead Counsel, which has extensive experience in prosecuting shareholder class actions and other complex litigation, strongly believes that the proposed Settlement is fair, reasonable, and adequate, and in the best interests of the Class. *Id.* at ¶¶7-11, 50-57. Moreover, the Plan of Allocation, which Lead Counsel developed with the assistance of a damages consultant, is a fair, reasonable, and adequate method for distributing the Net Settlement Fund to Class Members. *Id.* at ¶¶31-36.

The fairness of the Settlement is further evidenced by the fact that, to date, members of the Class have reacted positively to the Settlement. Pursuant to the Court's Notice Order, copies of the Notice were sent to 7,388 potential Class Members and nominees beginning on January 29, 2018, and a Summary Notice was published in *IBD Weekly* and transmitted over the PR Newswire

also on January 29, 2018.[3] Additionally, Settlement-related documents were posted on the Claims Administrator's website at www.AvidSecuritiesSettlement.com. *Id.* at ¶14. While the deadline for Class Members to object to the Settlement and Plan of Allocation has not yet passed, to date, there have been no objections to any aspect of the Settlement, and no requests for exclusion from the Class have been received.[4] *Id.* at ¶15; Fistel Decl. at ¶¶9, 36, 57.

Finally, the proposed Class meets all of the elements for certification under Fed. R. Civ. P. 23. Accordingly, Lead Plaintiff respectfully requests that the Court grant final approval of this Settlement and Plan of Allocation and grant final certification of the Class for settlement purposes.

II. HISTORY AND BACKGROUND OF THE ACTION

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Fistel Decl. for a detailed discussion of the factual background and procedural history of the Action, the efforts undertaken by Lead Plaintiff and Lead Counsel during the course of the Action, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement.

III. ARGUMENT

A. APPLICABLE STANDARDS GENERALLY FAVOR APPROVAL OF CLASS ACTION SETTLEMENTS

In determining whether to approve the Settlement, the Court should be guided by the "strong public policy in favor of settlements" over continued litigation, particularly complex actions. *See, e.g., U.S. v. Davis*, 261 F.3d 1, 27 (1st Cir. 2001);[5] *U.S. v. Comunidades Unidas*

[3] *See* Declaration of Jennifer M. Bareither Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date (Ex. 2 to the Fistel Decl.) ("Bareither Decl."), submitted herewith on behalf of the Court-appointed Claims Administrator for the Settlement, Garden City Group, LLC ("GCG"), at ¶¶11-12.

[4] The objection deadline is April 9, 2018. If any timely objections are received, Lead Counsel will address them in a reply memorandum due no later than April 23, 2018.

[5] Internal citations are omitted, and emphasis is added throughout, unless otherwise noted.

Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000) (same). To grant final approval of a class action settlement, the court must find that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e); *Voss v. Patrick*, 592 F.3d 242, 251 (1st Cir. 2010) (same).

While the First Circuit has not espoused any single test for determining whether a proposed settlement is fair, reasonable, and adequate,[6] courts within this Circuit commonly reference factors identified by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) (overruled on other grounds by *Missouri v. Jenkins*, 491 U.S. 274, 229 (1989)); *see Lupron*, 228 F.R.D. at 93. Courts in this Circuit have further distilled the *Grinnell* factors into a more concise list, examining:

> (1) risk, complexity, expense and duration of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations.

In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 259-60 (D.N.H. 2007).

Moreover, in evaluating whether a settlement is fair, reasonable, and adequate, courts should balance the benefits of settlement and the risks of continued litigation. *Patrick,* 592 F.3d at 251. "The court cannot, and should not, use as a benchmark the highest award that could be made to the plaintiff[s] after full and successful litigation of the claim[s]." *Rolland v. Cellucci*, 191 F.R.D. 3, 14-15 (D. Mass. 2000) (Neiman, J.). As the First Circuit has observed:

> [a]ny settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion.

[6] *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005) ("[T]he First Circuit has not established a formal protocol for assessing the fairness of a settlement . . . ."); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003) ("There is no single test in the First Circuit for determining fairness, reasonableness and adequacy of a proposed class action settlement.").

Greenspun v. Bogan, 492 F.2d 375, 381 (1st Cir. 1974) (overruled on other grounds by *Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 132 (1st Cir. 2004)); *see also Compact Disc*, 216 F.R.D.at 211 ("I am not to prejudge the merits of the case . . . and I am not to second-guess the settlement; I am only to determine if the parties' conclusion is reasonable."); *Lupron*, 228 F.R.D. at 97 (the court should not "hypothesize about larger amounts that might have been recovered."). In this case, an examination of the foregoing factors firmly demonstrates that the Settlement is fair, reasonable, and adequate to the Class, and should be approved by the Court.

B. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

1. The Settlement Was Reached After Significant Investigation and Is the Product of Arms'-Length Negotiations Among Experienced Counsel

Where, as here, the Settling Parties have bargained at arms-length, "there is a presumption in favor of the settlement." *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009) (quoting *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)); *see also Roberts v. TJX Cos.*, No. 1:13-cv-13142-ADB, 2016 U.S. Dist. LEXIS 136987, at *20 (D. Mass. Sep. 30, 2016) (Burroughs, J.) (where "the parties' Settlement is the product of arms-length negotiation by competent counsel, . . . it is entitled to a presumption of reasonableness"). Moreover, where, as here, the settlement was reached with the assistance of an experienced mediator, there is "a presumption that the settlement achieved meets the requirements of due process." *In re Penthouse Executive Club Comp. Litig.*, No. 10 CIV. 1145 (KMW), 2013 U.S. Dist. LEXIS 63065, at *8 (S.D.N.Y. Apr. 29, 2013) ("the assistance of [an] experienced mediator. . . reinforces that the Settlement Agreement is non-collusive").

At the time of the Settlement, all Parties were in an excellent position to understand the strengths and weaknesses of their respective claims and defenses. As described more fully in the Fistel Decl., Lead Counsel conducted a detailed investigation prior to and during the prosecution

of this Action. Fistel Decl. at ¶¶3-29. Further, the Settling Parties' settlement negotiations also included the exchange of detailed mediation statements followed by a formal all-day mediation session and several weeks of continued follow-up emails and telephone calls under the guidance of the Mediator. *Id.* at ¶¶4, 6, 29, 55-56; Melnick Decl. at ¶¶5-6. This accumulation of information permitted Lead Plaintiff and Lead Counsel to be well-informed about the strengths and weaknesses of the case, resulting in a significant recovery of $1.325 million for the Class. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("the question is whether the parties had adequate information about their claims"). Thus, the proposed Settlement is procedurally fair and entitled to a presumption of reasonableness. *See Bussie v. Allmerica Fin. Corp*, 50 F. Supp. 2d 59, 77 (D. Mass. May 19, 1999) ("[S]ettlement negotiations . . . conducted at arms' length over several months . . . support 'a strong initial presumption' of the Settlement's substantive fairness.").

Moreover, the judgment of experienced and well-informed class counsel should be accorded great weight by the Court. *Rolland*, 191 F.R.D. at 10 ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Bussie*, 50 F. Supp. 2d at 77 ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that they believe the settlement provides to the Class relief that is fair, reasonable and adequate."). Here, Lead Counsel is a national shareholder's rights law firm with significant experience in securities litigation like the Action, as well as other shareholder and complex litigation.[7]

[7] *See* Declaration of Michael I. Fistel, Jr. of Johnson Fistel, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Expenses, and an Award to Lead Plaintiff

In sum, the thoroughness of Lead Counsel's investigation, the arms'-length nature of the settlement negotiations which were mediated by a respected neutral, and the experience of Lead Counsel all support granting final approval of the Settlement in this case.

2. The Risk, Complexity, and Expense of Continued Litigation Favors Final Approval

While Lead Plaintiff believes that the claims asserted against Defendants have merit, he recognizes that there were significant risks as to whether Lead Plaintiff would ultimately be able to prove liability and establish damages on his claims, and that continued litigation would be complex, risky, and costly to prove at trial. *See In re StockerYale, Inc. Sec. Litig.*, No. 1:05CV00177-SM, 2007 U.S. Dist. LEXIS 94004, at *8 (D.N.H. Dec. 18, 2007) (this factor "captures the probable costs, in both time and money, of continued litigation") (citation omitted). Securities class actions are "notorious[ly] complex[]" and "[t]he difficulty of establishing liability is a common risk of securities litigation." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 CIV. 5575 (SWK), 2006 U.S. Dist. LEXIS 17588, at *31, *39 (S.D.N.Y. Apr. 6, 2006). The Settlement provides an immediate benefit to the Class that, when balanced against the potential costs and risks associated with continued litigation, supports a finding that the Settlement is fair, reasonable, and adequate. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 74 (D. Mass. 2005) (Young, J.) ("Although fully litigating the claims through trial could possibly result in a higher recovery, the settlement represents a necessary compromise between inherent risks of doing so and a guaranteed cash recovery.") (citation omitted).

For example, Defendants have vigorously contested their liability and have denied and continue to deny each and every claim and allegation of wrongdoing alleged by Lead Plaintiff in

Pursuant to 15 U.S.C. §78u-4(a)(4) ("Johnson Fistel Decl.") at Ex. C (Johnson Fistel, LLP firm résumé). The Johnson Fistel Decl., along with its exhibits, is attached as Ex. 4 to the Fistel Decl.

the Action. Specifically, in support of their motion to dismiss, Defendants contended that they did not make any materially false or misleading statements, that they disclosed all material information required to be disclosed by the federal securities laws, and that many of the allegations in the Complaint were either inactionable puffery or forward-looking statements accompanied by sufficiently meaningful cautionary language. Defendants also argued that the Complaint failed to raise the strong inference of scienter required by the Private Litigation Reform Act of 1995 ("PSLRA"), and that any losses allegedly suffered by the Class were not caused by any false or misleading statements or omissions by Defendants and/or were caused by intervening events. Although Lead Plaintiff believes he sufficiently pleaded each of the required elements of his claims, and sufficiently responded to each of these arguments in opposing Defendants' motion to dismiss, each such argument presents a significant potential hurdle to recovery. Moreover, even if Lead Plaintiff did succeed in defeating Defendants' motion to dismiss, Defendants would almost certainly reiterate most, if not all, such arguments at summary judgment, trial, and on appeal.

Another costly hurdle for Lead Plaintiff in this Action is that, in order to prove damages at trial, Lead Plaintiff bears the burden of establishing loss causation. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (holding that plaintiffs bear the burden of proving "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover'") (quoting 15 U.S.C. § 78u-4(b)(4)). Here, proof of loss causation and damages would ultimately have required expert testimony before the jury. While Lead Plaintiff contends he adequately pleaded loss causation, and that he would be able to present a cogent and persuasive expert's view establishing loss causation and damages, Defendants would also present well-qualified experts who would opine against a finding of loss causation with respect to the alleged price declines. Lead Plaintiff cannot be certain which expert's view would be credited by the jury and who would

prevail at trial in this "battle of the experts"; accordingly, this created an additional level of litigation risk. *See 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 . . . ."); *In re Flag Telecom Holdings*, No. 1:02-cv-03400, 2010 U.S. Dist. LEXIS 119702, at *54 (S.D.N.Y. Nov. 8, 2010) ("The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable.").

When viewed in the context of these significant litigation risks and the uncertainties involved with any litigation, and the fact that the Settlement provides a guaranteed recovery for the Class avoiding the risk of continued litigation, the Settlement represents a favorable and certain result. Accordingly, this factor supports approval of the Settlement. *See, e.g.*, *StockerYale*, 2007 U.S. Dist. LEXIS 94004, at *10 (This factor supported settlement where the defendants had defenses to liability and loss causation that "could result in no liability and zero recovery for the class."); *In re OCA, Inc. Sec. & Derivative Litig.*, No: 05-2165, 2009 U.S. Dist. LEXIS 19210, at *44-45 (E. La. March 2, 2009) (finding that the substantial risks that plaintiffs faced in establishing loss causation and proving scienter favored approval of the settlement); *Schwartz v. TXU Corp.*, No. 3:02-cv-02243-K, 2005 U.S. Dist. LEXIS 27077, at *62 (N.D. Tex. Nov. 8, 2005) ("[P]laintiffs' uncertain prospects of success through continued litigation"—including challenges in proving that "the statements made by Defendants were false when made" and in establishing scienter—favored approval of the settlement.).

3. Comparing the Proposed Settlement to the Likely Result of Continued Litigation Weighs in Favor of Final Approval

Under this factor, the Court considers the reasonableness of the settlement fund in light of the possible recovery in the litigation and risks of the litigation. The issue is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and

weaknesses of the case. Thus, the court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. Mar. 20, 1997); *accord Relafen*, 231 F.R.D. at 73 ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes . . . ."). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, the $1.325 million cash settlement is well within the range of reasonableness under the circumstances so as to warrant final approval of the Settlement. Specifically, Lead Counsel estimates that the Settlement Amount is approximately 6.8% of the likely recoverable damages, which exceeds a recent Cornerstone Research study which found that the median recovery as a percentage of estimated damages in all securities class action settlements was 2.5% during 2006-2015 and only 1.8% in 2015. Fistel Decl. at ¶¶32-33, 50; *see also* Laarni T. Bulan, Glen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlements: 2015 Review and Analysis* (Cornerstone Research 2016) (Ex. 3 to Fistel Decl.) at 9, Figure 8; *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (citing studies indicating that the average securities fraud class action settlement since 1995 has resulted in a recovery of 5.5%-6.2% of estimated losses). Thus, the Settlement achieved here represents a very good result for the Class and is reasonable in light of the best possible recovery, especially when compared to overall range of recovery involving securities class action settlements. Indeed, when weighed against the risks of continued litigation, including the risk that there could be no recovery at all, the proposed Settlement provides

certainty and is a fair result. Thus, Lead Plaintiff respectfully submits that this this factor supports final approval.

4. Lead Plaintiff Had Sufficient Information to Make Informed Decisions About Settling this Case

This factor questions "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos., Inc. Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012). "The threshold necessary to render the decisions of counsel sufficiently well informed, … is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012); *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474 (D.P.R. Sep. 13, 2011) (Even where formal discovery had not occurred, counsel's investigation and informal discovery provided "sufficient information to make a well informed decision.").

Prior to filing the initial case and, once the case was initiated during the PSLRA-mandated discovery stay, Lead Counsel conducted a thorough review of Avid's press releases, public statements, SEC filings, regulatory filings and reports, and securities analysts' reports and advisories about the Company, and reviewed other publicly available information relating to Avid. Lead Counsel also retained a private investigator to interview former employees knowledgeable about the claims at issue and communicated with a damages consultant. Lead Counsel also researched the applicable law with respect to the claims asserted in the Action and the potential defenses thereto, and prepared extensive briefs and other papers relating to the Action, including the detailed Complaint and opposition to Defendants' motion to dismiss. Finally, the Parties exchanged detailed mediation statements focusing on liability, loss causation, and damages, and

engaged in negotiations under the guidance of an experienced mediator. *See* Fistel Decl. at ¶¶6, 29, 55-56; Melnick Decl. at ¶¶5-6. Thus, Lead Plaintiff and Lead Counsel engaged in sufficient investigation to thoroughly understand the claims, merits, and weaknesses of the Action when agreeing to the Settlement.

5. The Favorable Reaction of the Class to Date Supports Final Approval

To date, no objections or exclusions have been received. Fistel Decl. at ¶¶9, 36, 57. Such a favorable reaction of the Class to the Settlement also supports its approval. While not dispositive, "[t]he number of requests for exclusion from the settlement, as well as the number and substance of objections filed…constitutes strong evidence of fairness of proposed settlement and supports judicial approval." *Bussie*, 50 F. Supp. 2d at 77 (finding a 0.003% objection rate and 0.05% requesting exclusion was de minimis); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 35-36 (D.N.H. 2006) (Court approved class action settlement after no objections and three opt-outs); *Compact Disc*, 216 F.R.D. at 211 (finding 11 objections representing 22 class members and 121 optouts "miniscule" where over 3.5 million class members submitted claims). Moreover, Lead Plaintiff fully supports the Settlement as well.[8] *See StockerYale*, 2007 U.S. Dist. LEXIS 94004, at *3 ("The Court finds it significant that the Lead Plaintiff is fully in support of the settlement.").

Pursuant to the Notice Order, on January 29, 2018, the Claims Administrator caused a total of 2,090 Notice packets to be mailed to potential Class Members, including Brokers and Other Nominees. *See* Bareither Decl. at ¶6. Including names and addresses of potential Class Members thereafter provided by Brokers and Other Nominees, in the aggregate, approximately 7,388 Notice packets have been mailed to potential Class Members. *Id.* at ¶11. The Claims Administrator also

[8] *See* Declaration of David Wayne Hammond in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and for an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) (Ex. 6 to Fistel Decl.) at ¶7.

caused the Summary Notice to be published in *IBD Weekly* and transmitted over PR Newswire on January 29, 2018. *Id.* at ¶12. To date, no objections to the Settlement, the Plan of Allocation, Lead Counsel's application for an award of attorneys' fees and expenses, or Lead Plaintiff's application for an award pursuant to 15 U.S.C. §78u-4(a)(4) have been served on the Claims Administrator or Lead Counsel, and no requests for exclusion from the Settlement have been received. *Id.*. at ¶15; Fistel Decl. at ¶¶9, 36, 57, 75. Accordingly, the Class Members' positive reaction to the Settlement supports final approval.

C. THE PLAN OF ALLOCATION SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See Tyco*, 535 F. Supp. 2d at 262 ("Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate."). A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 07132(CM), 2014 U.S. Dist. LEXIS 64517, at *29 (S.D.N.Y. May 9, 2014) ("A plan of allocation 'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'") (citation omitted); *IMAX*, 283 F.R.D. at 192 (same).

A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable, and the plan "need not necessarily treat all class members equally." *Schwartz*, 2005 U.S. Dist. LEXIS 27077, at *78. A reasonable plan of allocation "may consider the relative strength and values of different categories of claims." *IMAX*, 283 F.R.D. at 192; *see also Cabletron.*, 239 F.R.D. at 35 (approving a plan of allocation that took into consideration "the strengths and weaknesses of the claims of the various types of class members"); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 669 (E.D. Va. Jul. 10, 2001) (approving plan that "sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims").

Here, the Plan of Allocation was developed by Lead Counsel in consultation with its professional damages consultant and reflects the requirements for establishing damages promulgated by *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005). The Plan of Allocation is set forth in the Notice at pp. 7-10 and summarized in ¶¶31-36 of the Fistel Decl. Lead Counsel believes the proposed Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members, an opinion entitled to "considerable weight" by the Court in deciding whether to approve the plan. *See In re Advanced Battery Techs. Secs. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. March 24, 2014) ("When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel."); *see also In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 163 (S.D.N.Y. Nov. 2, 2011) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel . . . .").

Further, to date, no objections to the Plan of Allocation have been received, suggesting that the Class also finds the Plan of Allocation to be fair, reasonable, and adequate. *See* Fistel Decl. at ¶¶9, 36, 57; Bareither Decl. at ¶15. Finally, similar plans have repeatedly been approved by courts within this Circuit. *See, e.g.*, *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 110 (D. Mass. April 27, 2010) (approving a plan allocating settlement funds to members based on when they bought and sold common in relation to certain disclosure events); *Cabletron*, 239 F.R.D. at 35 (approving a plan where claimants would "receive a pro rata share of the Net Settlement Fund"). In sum, the Plan of Allocation in this Action represents a fair and equitable method for allocating the Net Settlement Amount among Class Members, and it merits final approval from the Court.

D. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23, COMPLIES WITH DUE PROCESS, AND IS REASONABLE.

The Notice provided to the Class satisfied the requirements of Fed. R. Civ. P. 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual

notice to all members who can be identified through reasonable effort." *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Fed. R. Civ. P. 23(e)(1), which requires that notice of a settlement be directed "in a reasonable manner to all class members who would be bound" by the settlement, and that the notice "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Bogan*, 492 F.2d at 382.

Both the substance of the Notice and the method of dissemination to potential members of the Class satisfy these standards. The Notice program was carried out by a nationally-recognized claims administrator. The Notice contains the information required by Fed. R. Civ. P. 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and claims asserted; (ii) the definition of the Class; (iii) a description of the key terms of the Settlement, including the consideration amount and the releases to be given; (iv) the Plan of Allocation; (v) the Settling Parties' reasons for proposing the Settlement; (vi) a description of the attorneys' fees and expenses that will be sought; (vii) an explanation of Class Members' right to request exclusion from the Class and to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members. The Notice also provides instructions for submitting a Proof of Claim in order to be eligible to receive a distribution from the Net Settlement Fund, relevant deadlines, and contact information, including a dedicated toll-free telephone hotline and link to the settlement website.

In accordance with the Court's Preliminary Approval Order, GCG has mailed7,388 copies of the Notice by first-class mail to potential members of the Class and their nominees. *See* Bareither Decl. at ¶11. In addition, GCG caused the Summary Notice to be published in *IBD Weekly* and transmitted over the PR Newswire on January 29, 2018. *Id.* at ¶12. Copies of the

Notice, Proof of Claim, Notice Order, and Stipulation were made available on the Settlement website maintained by GCG, www.AvidSecuritiesSettlement.com. *Id.* at ¶14. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in a widely circulated business publication, transmitted over the newswire, and set forth on a dedicated website, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., StockerYale*, 2007 U.S. Dist. LEXIS 94004, at *8 (finding that due process was satisfied where notice mailed by first class mail to all class members who could be identified with reasonable effort and summary notice was published once in *Investor's Business Daily* and over PR Newswire); *Cabletron*, 239 F.R.D. at 35-36 (combination of individually mailed notice packets, published notice in *The Wall Street Journal*, a dedicated website, and a dedicated phone hotline met the notice standard). Thus, the Notice here easily meets the due process, Rule 23, and PSLRA requirements for providing notice to the Class.

E. FINAL CLASS CERTIFICATION FOR PURPOSES OF THE PROPOSED SETTLEMENT IS APPROPRIATE

The Court's Notice Order preliminarily certified for settlement purposes the following Class: "All Persons who purchased or otherwise acquired Avid common stock between August 4, 2016 and November 9, 2016, inclusive, who incurred damages."[9] Notice Order (Dkt. 55) at ¶3. If

[9] Excluded from the Class are Defendants, members of the immediate family of any such Defendant, any Person, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has or had a controlling interest during the Class Period; the officers and directors of Avid during the Class Period; and legal representatives, agents, executors, heirs, successors, or assigns of any such excluded Person; the Defendants or any entity in which any of the Defendants has or had a controlling interest (for purposes of this paragraph, together a "Defendant-Controlled Entity"), to the extent that such Defendant-Controlled Entity itself purchased a proprietary (i.e., for its own account) interest in the Company's common stock; to the extent that a Defendant-Controlled Entity purchased Avid stock in a fiduciary capacity or otherwise on behalf of any third-party client, account, fund, trust, or employee-benefit plan that otherwise falls within the Class, neither such Defendant-Controlled Entity nor the third-party client, account, fund, trust, or employee-benefit plan shall be excluded from the Class with respect to such Avid stock; and those Persons who timely and validly exclude themselves therefrom.

all of Rule 23's requirements are met, a class may be certified for purposes of a settlement. *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Relafen*, 231 F.R.D. at 68. "[T]he district court may take the proposed settlement into consideration when examining the question of certification" and, when determining whether to certify a class for settlement purposes only, "'a district court [] need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.'" *In re Lease Oil Antitrust Litig*. (No. II), 186 F.R.D. 403, 418 (S.D. Tex. 1999) (*quoting Amchem*, 521 U.S. at 620-21). Here all of Rule 23's requirements are easily satisfied; thus, final certification of the Class should be granted.

1. The Class Is Sufficiently Numerous

A class is sufficiently numerous when joinder of all members is "impracticable." Fed. R. Civ. P. 23(a)(1). There is no fixed number of class members which either compels or precludes certification, but courts have found that classes consisting of as few as 40 members are generally sufficient to establish numerosity. *See McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 307 (D. Mass. 2004) (finding that a 51-person class was above the "critical mass of 40" members). District courts "may draw reasonable inferences from the facts presented to find the requisite numerosity." *In re Volkswagen & Audi Warranty Extension Litig.*, 273 F.R.D. 349, 352 (D. Mass. 2011). Here, with over 7,388 individual Notices sent to potential Class Members throughout the country, the numerosity requirement is easily satisfied. *See* Fistel Decl. at ¶¶9, 57; Bareither Decl. at ¶11.

2. Common Questions of Law or Fact Exist

The commonality requirement of Rule 23(a)(2) is satisfied when common questions of law or fact are present. *See Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003).

Notice Order (Dkt. 55) at ¶3(a)-(b).

It is not necessary that all issues of fact and law be common. *Volkswagen*, 273 F.R.D. at 352; *Relafen*, 231 F.R.D. at 69. In fact, only a single common question of fact or law is necessary to meet this requirement. *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 131 (D.P.R. 2010). Indeed, where, as here, a class of stock purchasers is allegedly defrauded over a period of time by similar misrepresentations due to defendants' common course of conduct, cases are regularly certified. *See, e.g.*, *Blackie v. Barrack*, 524 F.2d 891, 904-05 (9th Cir. 1975). Rule 23(a)(2) is therefore satisfied.

3. Lead Plaintiff's Claims Are Typical of Those of the Class

Under Rule 23(a)(3), claims are typical where "named plaintiffs' claims arise from the same course of conduct that gave rise to the claims of the absent [class] members." *Rodrigues v. Members Mortg. Co.*, 226 F.R.D. 147, 151 (D. Mass. 2005); *see also Volkswagen*, 273 F.R.D. at 352; *Payne*, 216 F.R.D. at 26. "For purposes of demonstrating typicality, '[a] sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *Relafen*, 231 F.R.D. at 69. In this case, the typicality requirement is met. There is no conflict or antagonism between Lead Plaintiff's interests and those of the Class. Like all of the Class Members, Lead Plaintiff purchased Avid securities at prices allegedly artificially inflated by the Defendants' materially false and misleading statements or omissions, without knowledge of material facts the Defendants allegedly either knew or concealed. Thus, Lead Plaintiff was affected in the same ways as the other members of the Class, satisfying the typicality requirement Rule 23(a)(3).

4. Lead Plaintiff is An Adequate Class Representative

Under Rule 23(a)(4), a plaintiff must also "fairly and adequately protect the interests of the class." Adequacy "'requires that Plaintiff demonstrate that [his] interests will not conflict with those of class members and that [his] counsel is qualified, experienced and able to vigorously

conduct the proposed litigation.'" *Rodrigues*, 226 F.R.D. at 151. The adequacy test is met here. Lead Plaintiff's interest does not conflict with the Class Members' interests and is typical of the claims of the Class. Substantial common questions of fact and law exist and Lead Plaintiff's interests are aligned with those of the Class. Lead Plaintiff also retained experienced, specialized counsel to prosecute this case, and participated in all aspects of this Action. Lead Counsel and Liaison Counsel each possess extensive experience in the area of shareholder litigation.[10] Thus, Lead Plaintiff and his counsel have adequately represented the Class and have fulfilled the requirements of Rule 23(a)(4).

5. The Proposed Class Satisfies Rule 23(b)(3)

Rule 23(b)(3) authorizes certification where, in addition to the prerequisites of Rule 23(a), common questions of law or fact predominate over any individual questions and a class action is superior to other available means of adjudication. *Amchem*, 521 U.S. at 591-94; *Volkswagen*, 273 F.R.D. at 353. This case easily meets Rule 23(b)(3)'s requirements.

a. Common Questions of Law and Fact Predominate Over Individual Questions

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "The Rule 23(b)(3) predominance inquiry is satisfied 'unless it is clear that individual issues will overwhelm the common questions and render the class action valueless.'" *Volkswagen*, 273 F.R.D. at 353. "Predominance is a test readily met in certain cases alleging . . . securities fraud . . . ." *Amchem*, 521 U.S. at 625. The First Circuit does not require an "entire universe" of common issues, but

[10] *See* Johnson Fistel Decl. at ¶¶10-11 and at Ex. C; Declaration of Theodore M. Hess-Mahan, Esq., Of Counsel to Hutchings Barsamian Mandelcorn, LLP, in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Expenses, and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) (Ex. 5 to Fistel Decl.) at ¶¶10-11 and Ex. C.

does require a "sufficient constellation" of them. *Relafen*, 231 F.R.D. at 70. As discussed above, there are numerous questions of law and fact that are common to the class, particularly concerning the core inquiries of liability and loss causation. These questions predominate over individual questions because the Defendants' alleged conduct affected all Class Members in the same manner—by artificially inflating the price of Avid securities and damaging them once the truth was revealed. Thus, the predominance requirement is clearly met.

b. Superiority is Satisfied

The requirement of superiority "ensures that resolution by class action will 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Relafen*, 231 F.R.D. at 70 (citing *Amchem*, 521 U.S. at 615). As further explained in *Amchem*, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." 521 U.S. at 620. While no management problems were foreseen here, any such problems that may have existed or arisen are eliminated by the Settlement. In sum, because each element of Rule 23 is satisfied, a class action is the superior method of adjudicating Class Members' claims in this case.

IV. CONCLUSION

Based on the foregoing, Lead Plaintiff respectfully requests that the Court: (i) grant final approval of the proposed Settlement; (ii) approve the proposed Plan of Allocation; (iii) find that notice to the Class satisfied due process; (iv) finally certify the proposed Class for purposes of the Settlement; and (v) enter the proposed Final Judgment and Order of Dismissal with Prejudice of this Action submitted herewith.

DATED: February 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 23, 2018.

s/ *Michael I. Fistel, Jr.*

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