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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. CYAN, INC., et al., Defendants.	Lead Case No. CGC-14-538355 (Consolidated with No. CGC-14-539008) CLASS ACTION Assigned to: Judge A.C. Massullo PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION DATE: June 5, 2019 TIME: 9:00 a.m. DEPT: 304 DATE ACTION FILED: 04/01/14

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I. INTRODUCTION

Plaintiffs Beaver County Employees Retirement Fund, Retirement Board of Allegheny County and Delaware County Employees Retirement System ("Plaintiffs") respectfully submit this memorandum in support of their motion for final approval of the settlement of this class action on the terms set forth in the Amended Stipulation of Settlement dated December 6, 2018 (the "Stipulation" or "Settlement"), and for approval of the proposed Plan of Allocation of the Net Settlement Fund.[1]

The Settlement provides for payment by or on behalf of Defendants of $15,000,000 for the benefit of the Class.[2] This substantial Settlement is the culmination of vigorous litigation among the Parties[3] over more than four years, including argument before the United States Supreme Court on an important jurisdictional issue, and is the product of arm's-length negotiations between the Parties with the substantial assistance of the Honorable Layn Phillips (Ret.), one of the nation's most well-respected and effective mediators of securities class actions. The Settlement resolves all claims against Defendants. Lead Counsel believes that the Settlement represents a highly favorable result for the Class and warrants this Court's approval.

As further discussed below, the Settlement should be presumed fair because it was reached through arm's-length bargaining and Lead Counsel's investigation and prosecution of this case assured that Plaintiffs entered into the Settlement on a fully informed basis. Further, Lead Counsel is

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation.

[2] "Class" means the Class certified by the Court in its Order dated May 18, 2015; *i.e.*, all Persons who purchased or otherwise acquired Cyan common stock from May 9, 2013 to November 4, 2013, except for purchases or acquisitions of non-registered shares in a private transaction. Excluded from the Class are Defendants and their respective successors and assigns; past and current officers and directors of Cyan and the Underwriter Defendants; members of the immediate families of the Individual Defendants; the legal representatives, heirs, successors or assigns of the Individual Defendants; any entity in which any of the above excluded persons have or had a majority ownership interest; and any Person who validly requested exclusion from the Class.

[3] "Parties" shall mean Plaintiffs and Defendants Cyan, Mark A. Floyd, Michael W. Zellner, Michael L. Hatfield, Paul A. Ferris, Promod Haque, M. Niel Ransom, Michael J. Boustridge, Robert E. Switz, Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, Jefferies LLC, and KeyBanc Capital Markets Inc.

experienced in securities class action litigation, and there have been no objections to the Settlement or Plan of Allocation to date.

Moreover, there is nothing to rebut the presumption of fairness. While Plaintiffs and Lead Counsel believe that the litigation has substantial merit and they would have prevailed at trial, they considered the numerous risks raised by the arguments Defendants made during the case and in settlement negotiations, as well as the risks in establishing liability and damages at trial. At trial, the jury could have sided with Defendants on some or all of the determinative issues, leaving the Class with little or no recovery.

Lead Counsel, well-respected and experienced in prosecuting shareholder class actions, has concluded that the Settlement is a highly favorable result and in the best interest of the Class. This conclusion is based on, among other things, the substantial recovery obtained when weighed against the significant risk, expense and delay presented in continuing this litigation through trial and probable appeal; a complete analysis of the evidence obtained; past experience in litigating complex actions similar to the present action; and the serious disputes among the Parties on both merits and damages issues.

For these and other reasons set forth below, as well as those set forth in the previously filed Declaration of John K. Grant in Support of Motion for Preliminary Approval of Class Action Settlement ("Grant Decl."), dated November 5, 2018,[4] Plaintiffs respectfully request that the Court grant final approval to the Settlement and approve the Plan of Allocation as fair, reasonable, and adequate to Class Members.[5]

[4] The Grant Declaration details Plaintiffs' claims, the procedural history of the litigation, the efforts of Lead Counsel in prosecuting this case, the risks of continued litigation, and why the Settlement is in the best interests of the Class.

[5] This memorandum focuses primarily upon the legal standards for approving the Settlement, and evaluating the Plan of Allocation. A separate memorandum is being submitted herewith in support of the motion for an award of attorneys' fees and expenses. For a complete factual recitation, Lead Counsel respectfully refers the Court to the Grant Declaration, incorporated by reference herein.

II. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE AND WARRANTS FINAL APPROVAL

A. Standards Governing Final Approval of Class Action Settlements

"A class action shall not be dismissed, settled, or compromised without the approval of the court." Cal. Civ. Code §1781(f). When assessing a proposed class action settlement, the court's inquiry centers on whether the settlement is "fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). The inquiry "'must be limited to the extent necessary to reach a reasoned judgment that the 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.'" *Id.*[6]

Accordingly, the Court need not inquire into the result that might have been obtained at trial. *See Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 245 (2001), *overruled on other grounds by Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018). A review of the likely rewards of settlement and the risks and costs of continued litigation suffices. *See N. Cty. Contractor's Ass'n v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1091 (1994) (court must determine if settlement is in the "ballpark"). "'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).[7] Further, longstanding public policy strongly favors settlements. *See, e.g.*, *Hamilton v. Oakland Sch. Dist.*, 219 Cal. 322, 329 (1933) ("[I]t is the policy of the law to discourage litigation and to favor compromises."). This policy becomes an "overriding public interest" in class actions. *Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1608 (1991).

In determining whether a settlement is fair, adequate, and reasonable, there is a "presumption of fairness . . . where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in

[6] Unless otherwise noted, citations are omitted throughout.

[7] California courts also look to the standards developed by federal courts in reviewing and approving class action settlements. *See, e.g.*, *La Sala v. Am. Sav. & Loan Ass'n*, 5 Cal. 3d 864, 872 (1971).

similar litigation; and (4) the percentage of objectors is small." *Dunk*, 48 Cal. App. 4th at 1802; *see also Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010) (same).

The court in *Dunk* set forth additional factors to be considered along with this presumption, including (1) the settlement amount; (2) the risks of continued litigation; (3) the stage of proceedings; (4) the complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel; and (6) the reaction of class members. 48 Cal. App. 4th at 1801. As discussed below, the Settlement is entitled to a presumption of fairness, and readily satisfies the additional *Dunk* factors.

B. The Settlement Should Be Accorded a Presumption of Fairness

The Settlement is presumptively fair.

First, the Parties negotiated the Settlement at arm's length under the direct supervision of former Judge Layn Phillips (Ret.), a highly experienced and effective mediator in cases like this. *See In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 26635, at *7 (N.D. Cal. Mar. 3, 2015) (finding Judge Phillips to be "an experienced mediator"); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (approving settlement when parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal Judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech, Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *2 (D. Nev. Oct. 19, 2012) (settlement was fair when it "was reached following arm's length negotiations between experienced counsel that involved the assistance of an experienced and reputable private mediator, retired Judge Phillips"). The negotiations included two day-long mediation sessions during which the Parties' positions on merits and damages issues were discussed, as well as extensive follow-up negotiations, all of which were informed by detailed mediation briefs and supporting materials exchanged in advance of the negotiations. *See* Grant Decl., ¶¶26, 38-39.

Second, the Parties engaged in extensive pretrial investigation and discovery and other proceedings to evaluate the strengths and weaknesses of the claims and defenses, and therefore entered into the Settlement on a fully informed basis. Lead Counsel, among other things:

(a) Conducted an extensive factual investigation of the events underlying Cyan's May 9, 2013 IPO;

(b) Retained an investigator to identify, locate, contact and interview potential witnesses, including former Cyan and Cyan customer employees;

(c) Supervised the investigation and participated in select interviews and reviewed interview memoranda prepared by the investigator;

(d) Reviewed and analyzed the representations made by the Company in the Registration Statement and Prospectus ("Registration Statement"), as well as subsequent U.S. Securities and Exchange Commission ("SEC") filings;

(e) Reviewed and analyzed industry and securities analyst reports and comprehensive news reports, press releases and other media files concerning Cyan;

(f) Researched and filed initial and consolidated complaints;

(g) Briefed, opposed and prevailed against Defendants' demurrer seeking to dismiss this Action for failure to state a claim;

(h) Briefed, opposed and prevailed against Defendants' motion for judgment on the pleadings seeking to dismiss this Action for failure to state a claim;

(i) Researched and prepared to respond to Defendants' writ of mandate to the California First Appellate District and Defendants' petition for review to the California Supreme Court seeking to overturn Judge Munter's order denying Defendants' motion for judgment on the pleadings for lack of subject matter jurisdiction;

(j) Retained and consulted with specialist counsel with experience before the United States Supreme Court to assist in preparing briefs for that Court and arguing the matter;

(k) Prepared and filed a brief in opposition to Defendants' petition for writ of certiorari to the United States Supreme Court;

(l) Prepared and submitted a brief to the United States Solicitor's office opposing granting Defendants' petition for writ of certiorari, and met with representatives of the Solicitor's office to discuss the merits of granting or denying certiorari;

(m) Prepared and filed papers with the United States Supreme Court opposing the appeal to the Supreme Court;

(n) Prepared for and argued before the United States Supreme Court, through specially retained counsel, the hearing addressing the subject matter jurisdiction of state courts to entertain cases brought pursuant to §11 of the Securities Act of 1933 ("Securities Act");

(o) Responded to Defendants' discovery requests and defended Plaintiffs' depositions;

(p) Retained and consulted with a damages expert regarding the calculation of damages under the Securities Act;

(q) Moved for and obtained class certification and provided notice of the pendency of this litigation to Class Members;

(r) Obtained and reviewed over 500,000 pages of document discovery produced by Defendants pursuant to Plaintiffs' requests;

(s) Took 22 depositions of Defendants, Cyan employees and other non-party witnesses;

(t) Prepared witnesses and defended four Plaintiff depositions;

(u) Retained two expert witnesses to provide expert opinions on the subjects of loss causation and underwriter due diligence;

(v) Analyzed the reports of and deposed Defendants' two expert witnesses on the same subjects;

(w) Prepared for and defended the depositions of Plaintiffs' expert witnesses;

(x) Prepared for and participated in two arm's-length mediation sessions with the substantial assistance of the Hon. Layn Phillips (Ret.);

(y) Prepared and filed an affirmative motion for summary judgment against Defendants;

(z) Prepared and filed opposition briefs in response to Defendants' motions for summary judgment; and

(aa) Prepared reply briefs in support of Plaintiffs' motion for summary judgment. Grant Decl., ¶5. Given these substantial efforts, Lead Counsel plainly were in a position to negotiate the Settlement based on a fully informed evaluation of the strengths and weaknesses of the claims asserted, the defenses raised, and the risks of continued litigation.

Third, although the Court must independently review the Settlement, the judgment of experienced counsel regarding the Settlement is entitled to great weight and supports a presumption of fairness. *See Nat'l Rural*, 221 F.R.D. at 528 ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *Dunk*, 48 Cal. App. 4th at 1802. Lead Counsel here has extensive experience and expertise in the prosecution of securities class actions in federal and state courts throughout the country. *See* Grant Decl., ¶¶56-57 & Ex. A thereto (Robbins Geller resume). Lead Counsel fully supports the Settlement, and believes that the substantial and certain recovery of $15,000,000 is a highly favorable result for the Class when weighed against the uncertainty and substantial risk and expense of continuing this litigation through trial and appeals. *Id.*, ¶¶48-55. The fact that qualified and well-informed counsel endorse the Settlement as being fair, adequate, and reasonable favors this Court's approval of the Settlement.

Fourth, the reaction of the Class to the Settlement supports a presumption of fairness. Pursuant to the Court's Order Granting Preliminary Approval of Class Action Settlement ("Notice Order"), more than 13,300 copies of the Notice of Proposed Settlement of Class Action ("Notice") and Proof of Claim and Release ("Proof of Claim") were sent to potential Class Members and their nominees. *See* Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received ("Sylvester Decl."), ¶¶4-12, submitted herewith. The Notice described the nature of the litigation, the terms of the Settlement, and the manner in which the Net Settlement Fund will be allocated among Class Members and an estimate of the per share recovery. The Notice also advised Class Members of their right to object and the procedures and deadline for objecting to the Settlement, the Plan of Allocation, or counsel's request for an award of attorneys' fees and expenses. In addition, the Summary Notice was transmitted over *Business Wire* and published in *The Wall Street Journal* on January 31, 2019. *Id.*, ¶13. The Notice, Proof of Claim, Stipulation, Notice Order, and other relevant

documents and information, including all deadlines, have been made publicly available on a case-dedicated website for the Settlement, www.CyanSecuritiesLitigation.com. *Id.*, ¶15.

Although Class Members have until April 25, 2019 to object to the Settlement, Lead Counsel is not aware of any objections to the Settlement or the Plan of Allocation as of the date hereof. The lack of objections by the Class to date supports a presumption of fairness.[8] *See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1153 (2000) (one factor that "lead[s] to a presumption the settlement was fair" is that only "a small percentage of objectors" came forward); *Nat'l Rural*, 221 F.R.D. at 529 (small number of objections raises strong presumption that settlement is fair).

C. The Settlement Readily Satisfies the Additional *Dunk* Factors

1. The Amount of the Settlement Balanced Against the Strength of Plaintiffs' Case Favors Approval

Each of the additional *Dunk* factors supports final approval. Under the Settlement, Cyan has paid $15,000,000 in cash for the benefit of the Class, with no right of reversion. This $15,000,000 Settlement, if approved, would be well within the range of court-approved settlements in recent years in class actions asserting federal statutory claims in California Superior Court for alleged material misstatements in the offering documents for a public stock offering.

Based on the assumption that Plaintiffs would meet their burden of proof and persuade the jury at trial as to each element of their *prima facie* claims, and that Plaintiffs would successfully rebut every affirmative defense Defendants intended to establish, maximum estimated damages could reach as high as $67 million. Grant Decl., ¶41. Accordingly, the percentage of recovery is approximately 22%, well above the median settlement as a percentage of estimated damages courts have approved in cases only involving §11. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements – 2017 Review and Analysis* at 9, Fig. 8 (Cornerstone Research 2018) (the "Cornerstone Research Report") (analyzing 70 class action settlements asserting §§11 and/or 12(a)(2) claims filed between 2008 and 2017, and finding the median settlement as a percentage of "simplified statutory

[8] If any objections are received, Plaintiffs will address them in a reply memorandum to be filed on May 29, 2019, in accordance with this Court's Notice Order.

damages" was 7.5%).[9] Moreover, the median settlement was 9.2% where, as here, "simplified statutory damages" were between $50 and $149 million. *Id.* at 10, Fig. 9. Not surprisingly, Defendants estimated damages at a fraction of the amount estimated by Plaintiffs' expert.

Regardless of the specific percentage of recovery yielded by the Settlement, however, the Settlement is unquestionably better than another possibility – little or no recovery at all in view of the risks of continued litigation, discussed below. *See Wershba*, 91 Cal. App. 4th at 250 ("Compromise is inherent and necessary in the settlement process . . . even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'"). This factor supports final approval of the Settlement.

2. The Substantial Risks of Continued Litigation

a. Risks Related to Establishing Liability

While Plaintiffs believe their claims are strong on the merits, success is hardly assured. Plaintiffs understand that Defendants would argue that all or most of Plaintiffs' losses were due to facts that arose after Cyan's IPO. For example, there is some evidence that would allow Defendants to argue that although Windstream's engineers intended to and would have continued to purchase Cyan products following the IPO, a decision was made by senior Windstream executives to restrict capital expenditures in order to protect Windstream's balance sheet. Grant Decl., ¶49. Windstream's apparent request to substitute leasing arrangements for straight purchases may have been an example and evidence of this dynamic. *Id.* The eventual decline in sales to Windstream may also have been aggravated by sales to Windstream in excess of Windstream's needs immediately after the IPO. *Id.* In addition, a few quarters after the collapse of Windstream's purchases, Windstream again began to purchase significant amounts of products from Cyan. *Id.* Thus, there was a real possibility that Defendants could persuade a jury that the decline in sales to Windstream was due in large part to events

[9] The 2018 Cornerstone Report is available online at: https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2017-Review-and-Analysis.pdf.

that occurred after the IPO that would not support a recovery for misrepresentations in the Registration Statement. *Id.* Defendants would also have argued that the Registration Statement contained numerous disclosures regarding the risks associated with Cyan's business with Windstream, *see id*., ¶50, and the uncertain nature of Cyan's future operating results and revenue, *id*., ¶51. While Plaintiffs have substantive responses to these arguments, the uncertainty of continued litigation weighs strongly in favor of approval of the Settlement. As one court has observed:

> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

W. Va. v. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *see also Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413-W-AJB, 2008 WL 5458986, at *7 (S.D. Cal. Dec. 10, 2008) ("[W]hile Class Counsel believe strongly in the merit of the class claims, they also recognize that any case encompasses risks and that settlement of contested cases is preferred in this circuit. Indeed, even if Plaintiff were to prevail at trial, risks to the class remain."); *In re Heritage Bond Litig*., No. 02-ML-1475 DT, 2005 WL 1594403, at *7 (C.D. Cal. June 10, 2005) ("Also favoring approval of the Settlement is the knowledge that, while Plaintiffs are confident of the strength of their case, it is imprudent to presume ultimate success at trial and thereafter.") (both citing *Chas. Pfizer*, 314 F. Supp. at 743-44). The numerous uncertainties and risks of proving liability at and after trial support approval of the Settlement.

b. Risks Relating to Establishing Causation and Damages

Although Plaintiffs were confident that they could establish damages assuming a finding of liability, Plaintiffs faced a risk that the Court or jury would substantially reduce or even eliminate damages. Under §11(e) of the Securities Act, a defendant can reduce or eliminate damages through a showing that the false or misleading statements or omissions alleged were not the cause, in whole or in part, of the loss sustained by the class. As noted above, Defendants intended to argue "negative causation" at both summary judgment and trial.

The Parties' respective experts would offer sharply divergent testimony concerning damages at both summary judgment and trial, reducing the determination of this element to a "battle of the experts." *See In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) (fact that "trial would likely involve a confusing 'battle of the experts' over damages" supported approval of settlement). Plaintiffs faced a substantial risk that the factfinder would credit Defendants' contentions that damages were not linked to the misstatements in the offering documents or that damages were a fraction of the amount Plaintiffs proffered. *See 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).

Even if Plaintiffs were to obtain 100% of their damages, the risks would not end there. *See In re Mfrs. Life Ins. Co. Premium Litig.*, No. 96-CV-230 BTM (AJB), 1998 WL 1993385, at *5 (S.D. Cal. Dec. 21, 1998) ("[E]ven if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent – there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings."). There are numerous cases in which a successful verdict has been overturned either by motion after trial or an appeal. In *In re Apple Comput. Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298, at *1 (N.D. Cal. Sept. 6, 1991), for example, the jury rendered a verdict for plaintiffs after an extended trial. Based upon the jury's findings, recoverable damages would have exceeded $100 million. The court, however, overturned the verdict, entered judgment for the individual defendants, and ordered a new trial with respect to the corporate defendant. *See also, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 433 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction under *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011)); *In re BankAtlantic Bancorp, Inc.*, No. 07-61542-CIV, 2011 WL 1585605, at *20 (S.D. Fla. Apr. 25, 2011) (after plaintiffs' jury verdict, court granted defendants' motion for judgment as a matter of law and entered judgment for

defendants), *aff'd*, 688 F.3d 713 (11th Cir. 2012) (finding trial court erred, but defendants nevertheless entitled to judgment as a matter of law based on lack of loss causation). Litigation risks on liability and damages support approval of the Settlement.

3. Plaintiffs Had Sufficient Information to Negotiate and Obtain a Fair Settlement

This factor focuses on whether the Parties had sufficient information to conduct an informed negotiation for a settlement that adequately reflects the merits of the case.

As detailed above, when the Parties reached the Settlement, Lead Counsel had sufficiently investigated and researched the merits of its claims and Defendants' potential defenses to determine that the terms of the Settlement are fair, reasonable, and adequate and in the best interests of the Class. Lead Counsel's reasoned judgment was obtained after more than four years of litigation, during which time it briefed a demurrer, a motion for judgment on the pleadings, appeals regarding subject matter jurisdiction, including a successful United States Supreme Court appeal; propounded multiple sets of written discovery requests on each Defendant group; reviewed over 500,000 pages of documents; took depositions of Defendant Cyan's employees and other non-party witnesses; defended each of the Plaintiffs' depositions and obtained class certification; retained experts and defended their depositions; took Defendants' experts depositions; filed a motion for summary judgment; opposed Defendants' summary judgment motions; and participated in mediated settlement negotiations with Judge Phillips during which the strengths and weaknesses of the Parties' positions were fully explored and debated. *See generally* Grant Decl. The knowledge and insight gained through these activities provided Lead Counsel with sufficient information to evaluate the strengths and weaknesses of the Class' claims and Defendants' defenses, as well as the likelihood of obtaining a larger recovery from Defendants had the litigation continued.

Class action settlements are regularly approved after having completed similar or less discovery than that completed here. *See, e.g.*, *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 53 (2008) (class action settlement affirmed as fair, adequate, and reasonable when "before settling, the parties engaged in extensive discovery, including written discovery, document production, and depositions of key . . . employees" and where "[c]lass counsel had previously undertaken its own prefiling investigation"); *see*

also, e.g., *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 403 (2010) (final approval of class action affirmed when no depositions had been taken, just written discovery completed). This factor weighs significantly in favor of approval.

4. Balancing the Certainty of an Immediate Recovery Against the Complexity, Expense, and Likely Duration of Continued Litigation and Trial Favors Settlement

The immediacy and certainty of a recovery balanced against the complexity, expense and duration of continued litigation is another factor for the Court to balance in determining whether the Settlement is fair, adequate, and reasonable. *See Wershba*, 91 Cal. App. 4th at 244-45; *Dunk*, 48 Cal. App. 4th at 1801. The benefit of the present settlement must be balanced against the expense of achieving a more favorable result at a trial in the future.

Approval of the Settlement assures a prompt and significant recovery for Class Members. If not for the Settlement, this litigation would continue to proceed through the completion of summary judgment, trial, and likely appeal. A trial would occupy teams of attorneys for weeks and would require substantial and costly expert testimony on both sides. Further, a judgment favorable to the Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and appeals, which would prolong the case for several more years. *See Warner Commc'ns*, 618 F. Supp. at 745 (delay from appeals is a factor to be considered). Delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Class Members to wait many more years for any recovery, further reducing its value. Settlement of this litigation ensures an immediate recovery, and eliminates the risk of no recovery at all.

The essence of a settlement is compromise, "'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982). "'[T]he agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.'" *Id*. The certainty of recovery balanced against the complexity, expense, and duration of continued litigation weighs in favor of approval of the Settlement.

5. The Recommendation of Experienced Counsel Favor Approval of the Settlement

The views of the attorneys actively conducting the litigation, while not conclusive, are entitled to weight in the fairness analysis. *Dunk*, 48 Cal. App. 4th at 1802; *see also In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007) ("'The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'"). Lead Counsel, who has extensive experience in the prosecution of securities class actions, recommends the Settlement to the Court as in the best interests of the Class.[10] *See* Grant Decl., ¶¶56-58 & Ex. A thereto.

In sum, because each of the *Dunk* factors supports a finding that the Settlement is fair, reasonable, and adequate, the Court should approve the Settlement.

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

Plaintiffs also seek approval of the Plan of Allocation. The Plan of Allocation is set forth in full in the Notice mailed to potential Class Members. *See* Sylvester Decl., Ex. A at 4-5. Assessment of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). An allocation formula "'need only have a reasonable, rational basis, particularly if recommended by experienced and competent'" class counsel. *See, e.g.*, *In re Zynga Inc. Sec. Litig*., No. 12- cv-04007-JSC, 2015 WL 6471171, at *12 (N.D. Cal. Oct. 27, 2015). No objections to the Plan of Allocation have been filed to date.

The Plan of Allocation provides an equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Proof of Claim. The Plan of Allocation was developed by Lead Counsel with the assistance of its damages consultant, and follows the statutory framework for calculating damages under §11(e) of the Securities Act. Accordingly, Plaintiffs respectfully submit that the Plan of Allocation is a fair and reasonable method for allocating the Net Settlement Fund among the members of the Class.

[10] The reaction of the Class is also relevant to the fairness of the Settlement. *See Dunk*, 48 Cal. App. 4th at 1801. As noted above, there have been no objections to date. If any timely objections are submitted, Plaintiffs will address them in a reply memorandum. *See* note 8, *supra*.

IV. CONCLUSION

The Settlement reached by Lead Counsel is an excellent one, and for the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval to the Settlement, approve the Plan of Allocation, and enter the proposed Judgment.

DATED: March 25, 2019

Respectfully submitted,

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DECLARATION OF SERVICE BY LEXIS FILE AND SERVE XPRESS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on March 25, 2019, declarant served PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION by serving electronically via Lexis File & Serve Xpress to the parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 25, 2019, at San Diego, California.

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