UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AH KIT TOO, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. ROCKWELL MEDICAL, INC., ROBERT L. CHIOINI, AND THOMAS E. KLEMA, Defendants.	Lead Case No. 1:18-CV-04253 Judge Allyne R. Ross CLASS ACTION
ROBERT SPOCK, Individually and on behalf of all others similarly situated, Plaintiff, vs. ROCKWELL MEDICAL, INC., ROBERT L. CHIOINI, AND THOMAS E. KLEMA, Defendants.	Consolidated Case No. 1:18-CV-04993 Judge Allyne R. Ross CLASS ACTION

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

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Pursuant to Fed. R. Civ. P. 23(e), the Court-appointed Lead Plaintiffs Robert Spock and Duck Pond Partners, LP ("Lead Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement and Plan of Allocation.[1]

I. INTRODUCTION

After a year and a half of litigation, Lead Plaintiffs, through their counsel, have obtained a $3,700,000 all cash, non-reversionary settlement for the benefit of the Settlement Class. As described below and in the Joint Declaration, the Settlement is an excellent result for the Settlement Class, providing a significant and certain recovery in a case that presented numerous hurdles and risks. In fact, the Settlement represents 32% of the Settlement Class's maximum recoverable class-wide aggregate damages, which is an extremely favorable result when compared to the median recovery in securities class action settlements with similar aggregate damages. Moreover, the Settlement was reached only after extensive, arm's-length negotiations conducted by experienced counsel with the assistance of a well-respected mediator, Jed D. Melnick, Esq. of JAMS, following an all-day mediation session.

Lead Plaintiffs' and Lead Counsel's substantial efforts and well-developed understanding of the strengths and weaknesses of the Action also support final approval. Lead Plaintiffs' efforts, which are detailed in the Joint Declaration, included, among other things: (i) a comprehensive factual investigation aided by an experienced private investigator; (ii) rigorous analysis of

[1] Unless otherwise noted, capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated August 6, 2019 (ECF No. 55-8, the "Stipulation") or the concurrently filed Declaration of Austin P. Van and Casey E. Sadler in Support of (1) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."). All citations to "¶ __" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and Exhibits to, the Joint Declaration.

Rockwell's public filings and Defendants' public statements; (iii) review of news articles and analyst reports about the Company; (iv) interviews of numerous former Rockwell employees; (v) consultation with experts on loss causation and damages; (vi) drafting two factually-detailed complaints incorporating forgoing research and investigation efforts; (vii) researching and drafting an opposition to Defendants' two letters requesting permission from the Court to file motions to dismiss; (viii) preparing for and attending the Rule 26(f) Conference with the Court; (ix) preparing a detailed mediation statement, along with exhibits; (x) participating in a full-day mediation session with Mr. Melnick; and (xi) negotiating the memorandum of understanding and Stipulation with Defendants' Counsel. ¶¶7(i)-(vi), 15-17, 20-26. In view of the foregoing, Lead Plaintiffs and their counsel had a comprehensive understanding of the strengths and weaknesses of the case and had sufficient information to make an informed decision regarding the fairness of the Settlement before entering into it and presenting it to the Court.

Lead Plaintiffs and Lead Counsel believe that the Settlement is a very good result for the Settlement Class. This belief is supported by, among other things, the certainty of a $3,700,000 recovery today versus the significant risk of a smaller or even no recovery following years of additional litigation; an analysis of the facts adduced to date; past experience in litigation complex securities class actions; the serious disputes between the parties concerning the merits; and the favorable reaction of the Settlement Class. ¶¶8, 29-41, 48.

Lead Plaintiffs also move for approval of the Plan of Allocation of the Net Settlement Fund. The Plan of Allocation was developed in conjunction with Lead Plaintiffs' damages expert and is designed to fairly and equitably distribute the proceeds of the Net Settlement Fund to Settlement Class Members. ¶¶9, 50-54. As such, Lead Plaintiffs respectfully submit that it too should be approved.

For these reasons, and those set forth below and in the Joint Declaration, Lead Plaintiffs respectfully request that the Court grant final approval of the Settlement and Plan of Allocation and grant final certification of the Settlement Class for settlement purposes.

II. STANDARDS GOVERNING APPROVAL OF CLASS ACTION SETTLEMENTS

Rule 23(e) requires court approval for any settlement of class action claims, and such approval should be granted "only after a hearing and only on finding that [a proposed settlement] is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This determination entails scrutiny of both the procedural and substantive aspects of the proposed settlement. *See In re Virtus Inv. Ptnrs., Inc. Sec. Litig.*, No. 15-cv-1249, 2018 WL 6333657, at *1 (S.D.N.Y. Dec. 4, 2018) ("[T]he settlement must be both procedurally and substantively fair.").[2]

As a matter of public policy, courts strongly favor the settlement of complex class action litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context."); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (noting the "general policy favoring the settlement of litigation"); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

Courts in the Second Circuit have long considered the following factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), in evaluating whether a class action settlement is fair, reasonable, and adequate under Rule 23:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial;

[2] Unless otherwise noted, all internal citations and quotations are omitted and emphasis is added.

> (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 463, *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). In conducting its analysis, "not every factor must weigh in favor of [the] settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

Rule 23(e)(2), as amended on December 1, 2018, also instructs that the Court should determine whether the Settlement is "fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The factors set forth in Rule 23(e)(2) are not intended to "displace" the Second Circuit's *Grinnell* factors, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Advisory Committee Notes to 2018 Amendments, 324 F.R.D. 904, 918 (Apr. 26, 2018); *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. Jan. 28, 2019) ("The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors."). As demonstrated herein, the Settlement readily satisfies the factors set forth in Rule 23(e)(2) and *Grinnell* and, accordingly, warrants final approval.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Settlement Is Procedurally Fair

Rule 23(e)(2)(A), requiring adequate representation, and Rule 23(e)(2)(B), requiring arm's-length negotiations, "constitute the 'procedural' analysis" of the fairness inquiry. *Payment Card*, 330 F.R.D at 29. Each aspect of procedural fairness is satisfied here.

1. Lead Plaintiffs and Lead Counsel Adequately Represented the Settlement Class

Representative plaintiffs provide adequate representation of a class where they have suffered the same injury as the class members, "vigorously pursu[ed] the claims of the class," and have "no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006).[3]

Lead Plaintiffs have adequately represented the Settlement Class here by vigorously pursuing their shared claims against Defendants, including by communicating with Lead Counsel on case developments, reviewing significant filings, and conferring with Lead Counsel throughout the settlement negotiations. ¶74; Exs. 1 and 2. Moreover, the Lead Plaintiffs—investors who purchased Rockwell securities during the Settlement Class Period and suffered damages as a result—have suffered the same injury as other Settlement Class Members, shared the interests of other Settlement Class Members in obtaining the largest possible recovery from Defendants, and had no interests antagonistic to interests of other Settlement Class Members. They have adequately represented the Settlement Class.

Lead Counsel have also adequately represented the Settlement Class throughout the litigation. Counsel are highly qualified and experienced in securities and other complex litigation, as

[3] *See also In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest").

set forth in their firm resumes.[4] They vigorously prosecuted the action against skilled opposing counsel and achieved an excellent result. Indeed, the Settlement was achieved only after Lead Counsel thoroughly investigated the Settlement Class's claims and successfully convinced the Court that Defendants' proposed motion to dismiss was meritless. ¶¶7(i)-(iii), 20-24. Based on their expertise, experience, and the work done in this case, Lead Counsel, with a thorough understanding of the strengths and weaknesses of the action, respectfully recommend that final approval of the Settlement is in the best interests of the Settlement Class. ¶8; *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331(CM), 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (judgment of counsel "who have extensive experience in prosecuting complex class actions" is entitled to "great weight.").

2. The Settlement Was Reached After Substantial Litigation and Arm's-Length Negotiations Between Experienced Counsel Conducted Under the Auspices of a Well-Respected Mediator

The Court must also consider whether the settlement was "negotiated at arm's-length" in weighing approval of a class action settlement. Fed. R. Civ. P. 23(e)(2)(B). This "procedural" fairness determination also encompasses the third *Grinnell* factor, which assesses "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 Facebook, Inc. IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015); *see also Global Crossing*, 225 F.R.D. at 459 (final approval warranted where counsel had "developed an informed basis from which to negotiate a reasonable compromise").

Courts have recognized that the participation of an experienced, respected mediator weighs in

[4] *See* Exs. 5-C (Glancy Prongay & Murray LLP firm resume) and 6-C (Pomerantz LLP firm resume).

favor of a proposed settlement's procedural fairness. *See, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."). "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132(CM), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). Because counsel are "most closely acquainted with the facts of the underlying litigation," courts give "great weight" to the recommendations of counsel regarding settlement, especially when negotiations are facilitated by an experienced third-party mediator. *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008); *see also Palacio v. E*TRADE Fin. Corp.*, No. 10 CIV. 4030 LAP DCF, 2012 WL 2384419, at *2 (S.D.N.Y. June 22, 2012) (noting that in evaluating a settlement, the court should give weight to the parties' judgment).

Here, the Settlement was reached only after extensive arm's-length negotiations between experienced counsel who thoroughly evaluated the merits of the claims and were well-aware of the strengths and weaknesses of the case. ¶¶7(i)-(ix), 14-17, 20-26 (detailing the investigation and work performed by Lead Counsel). And, the mediation process—which included a full-day mediation that resulted in an agreement to settle in principle, followed by weeks of additional negotiations—was led by Mr. Melnick, an experienced and well-respected neutral. ¶26. Courts in the Second Circuit have favorably noted Mr. Melnick's participation as a factor in granting final approval of securities class action settlements,[5] and his participation in the instant Settlement underscores that it is the

[5] *See Yang v. Focus Media Holding Ltd.*, No. 11 CIV. 9051 CM GWG, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) ("The participation of this highly qualified mediator [Jed D. Melnick, Esq.] strongly supports a finding that negotiations were conducted at arm's length and without collusion."); *In re GSE Bonds Antitrust Litig.*, No. 19-CV-1704 (JSR), 2019 WL 6842332, at *2 (S.D.N.Y. Dec. 16, 2019) (approving settlement while noting that involvement from mediator, Jed Melnick, can help

product of non-collusive, arm's-length negotiations.

Furthermore, the conclusion of Lead Plaintiffs and Lead Counsel that the Settlement is fair, adequate, and reasonable and in the best interests of the Settlement Class further supports its approval. Lead Plaintiffs took an active role in supervising this litigation and recommend that the Settlement be approved. *See* Ex. 1 (Declaration of Robert Spock) at ¶¶3-7; Ex. 2 (Declaration of Duck Pond Partners, LP) at ¶¶3-8. Lead Counsel, who have extensive experience in prosecuting securities class actions, have also concluded that the Settlement is in the Settlement Class's best interests, and their judgment is entitled to "great weight." *Telik*, 576 F. Supp. 2d at 576.

B. The Settlement Is Substantively Fair: the Relief Provided Is Adequate, Taking into Account the Costs, Risks, and Delay of Continued Litigation

Rule 23(e)(2)(C) instructs the Court to consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" along with other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). Rule 23(e)(2)(C)(i) essentially incorporates six of the traditional *Grinnell* factors: the complexity, expense, and likely duration of the litigation (first factor); the risks of establishing liability and damages (fourth and fifth factors); the risks of maintaining class action status through the trial (sixth factor); and the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation (eighth and ninth factors). *Grinnell*, 495 F.2d at 463. As discussed below, each of these factors supports approval of the Settlement.

1. The Complexity, Expense, and Likely Duration of the Litigation

"Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp.*

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demonstrate a settlement negotiation's fairness).

S.p.A. Sec. Litig., 233 F.R.D. 306, 310 (E.D.N.Y. 2006).[6] Courts routinely recognize the "notorious complexity" of securities class actions, in particular. *See, e.g., In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006). This Action is no exception. Putting aside the significant risk of proving liability and damages (*see* Sec. III.B.2, *infra*), Lead Plaintiffs' best-case damages scenario of $11.3 million constitutes a non-trivial portion of Rockwell's total market capitalization. This lack of a "deep pocket" means any recovery would likely be funded by the Company's officers' and directors' insurance. These funds, which have already been partly used for defense costs in this litigation, would be rapidly depleted by defense costs if litigation were to continue. ¶37.

Additionally, were the litigation to continue, a potential recovery—if any—"would occur years from now, substantially delaying payment . . . to the Settlement Class." *Shapiro*, 2014 WL 1224666, at *8; *see also AOL Time Warner*, 2006 WL 903236, at *8 (settlement "circumvents the difficulty and uncertainty inherent in long, costly trials"). In contrast, the Settlement provides an immediate and substantial recovery for the Settlement Class—approximately 32% of maximum damages—without exposing the Settlement Class to the risk, expense, and delay of continued litigation.

2. Risks of Establishing Liability and Damages

In considering this factor, "the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Global Crossing*, 225 F.R.D. at 459. While Lead Counsel believes that Lead Plaintiffs' claims are meritorious, they also recognize that they

[6] *See also In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) ("[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court."); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (class action suits generally "have a well-deserved reputation as being most complex").

faced substantial obstacles to proving liability and damages. When compared to the certainty of the significant benefit conferred by the Settlement, these risks militate against further litigation, and support a determination that the Settlement is fair, reasonable and adequate.

Establishing Liability: Lead Plaintiffs faced numerous hurdles to establishing liability. While Lead Plaintiffs believe they adequately alleged and would be able to prove falsity and scienter, they recognize the risks of establishing these elements at summary judgment and trial. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *8 (S.D.N.Y. Dec. 19, 2014) ("Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet."); *see also In re AOL Time Warner*, 2006 WL 903236, at *11 (recognizing that "avoiding dismissal at the pleading stage does not guarantee that scienter will be adequately proven at trial"). Indeed, scienter is often considered "the most difficult and controversial aspect of a securities fraud claim." *Fishoff v. Coty Inc.*, No. 09 Civ. 628 (SAS), 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011).

Here, Defendants maintained throughout the Action that Lead Plaintiffs could not prove a material misstatement or omission. Specifically, Defendants argued, and would have continued to argue, that their failure to disclose an email communication from the Center for Medicare & Medicaid Innovation ("CMMI") stating that "[CMMI] will not be able to pursue this model" (referring to the model of separate reimbursement for Triferic) was not actionable because the Company's lobbyist had nevertheless expressed optimism about Triferic's separate reimbursement model's approval by the Center for Medicare & Medicaid Services ("CMS"). ¶30. Defendants likewise argued that statements addressing inventory reserves following the receipt of the above email were not actionable because estimates of inventory reserves, and related potential write-offs thereto, are inherently subjective. *Id.* Defendants also argued that statements in the Company's

Form 10-Q for Q3 2017 and 2017 Form 10-K regarding the adequacy of Rockwell's internal controls were not false because Lead Plaintiffs failed to allege that Rockwell's controls were inadequate prior to the first quarter of 2018. *Id.*

Additionally, Defendants would have continued to argue that Lead Plaintiffs could not establish scienter. Defendants claimed that no one at the Company saw the CMMI email described above prior to Rockwell filing its Form 10-Q for Q1 2018. ¶31. Defendants also argued that they had a good faith basis to believe that CMS's approval of separate reimbursement for Triferic based on their lobbyist's expressed optimism and that they had "key supporters in Congress and other influential agencies." *Id.*

While Lead Plaintiffs were confident that they would be successful in demonstrating falsity and scienter, there is always a risk that the Court or a jury may have accepted Defendants' arguments.

Loss Causation and Damages: Lead Plaintiffs also would have faced considerable challenges in establishing loss causation and damages. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear the burden of proving "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover'"). While Lead Plaintiffs would have argued that the declines in Rockwell's stock price were attributable to corrections of the alleged misstatements and omissions that occurred on May 25, 2018, May 29, 2018, June 27, 2018 and June 28, 2018, Defendants would have asserted that much of the decline was due to other negative news. ¶33. Disentangling the market's reaction to various pieces of news is a "complicated concept, both factually and legally." *Global Crossing*, 225 F.R.D. at 459. Accordingly, the "[c]alculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged

fraud." *Id.* Moreover, Defendants would have likely argued that loss causation was absent for some of the alleged corrective disclosures found in the Complaint. For example, Defendants would have likely argued that there was no connection between any decline on May 25, 2018 (disclosure of removal of officers) and a prior fraudulent statement. *Id.* If Defendants were to prevail on such an argument at any stage, it would have substantially reduced the amount of potential damages.

In complex securities cases, it is axiomatic that the Parties would rely on expert testimony to assist the jury in determining damages. *See Global Crossing*, 225 F.R.D. at 459 ("[P]roof of damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury."). Here, Defendants almost certainly would have presented their own damages expert(s), who would have no doubt presented conflicting conclusions and theories for Rockwell's price declines on the alleged disclosure dates. ¶35; s*ee also In re IMAX Securities Litig.*, 283 F.R.D. 178, 193 (S.D.N.Y. 2012) ("[I]t is well established that damages calculations in securities class actions often descend into a battle of experts."). In such a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found" by the jury. *Telik*, 576 F. Supp. 2d at 579-80.

Therefore, even if liability were established at trial, "a jury could find that damages were only a fraction of the amount that plaintiffs contend" because "[a] jury could be swayed by experts for the Defendants, who would minimize the amount of Plaintiffs' losses." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 365 (S.D.N.Y. 2002). If a jury were to accept Defendants' arguments, damages in this case could be greatly reduced, or even eliminated. *In re Marsh & McLennan Cos., Sec. Litig.*, No. 04 CIV. 8144 (CM), 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) ("[i]f there is anything in the world that is uncertain when a case like [a securities class action] is taken to trial, it is what the jury will come up with as a number for damages."). As a result, "the

risks faced by the securities plaintiffs in establishing damages are substantial, and this factor favors approving the settlement." *Global Crossing*, 225 F.R.D. at 459.

3. The Risk of Maintaining Class Action Status

At the time the Settlement was reached, Lead Plaintiffs had not yet moved for class certification. Although Lead Plaintiffs believe such a motion would have been meritorious, there is no guarantee that the Court would have agreed, or even if it did, that the Second Circuit would not have granted a Rule 23(f) motion for interlocutory review and overturned the decision. Furthermore, Rule 23 provides that a class certification order may be altered or amended any time before a decision on the merits. Thus, as in any class action suit, there was a risk that even if the class was certified it could be modified or decertified prior to a decision on the merits. Fed. R. Civ. P. 23(c)(1)(C); *Annunziato v. Collecto, Inc.*, 293 F.R.D. 329, 340 (E.D.N.Y. 2013) ("[U]nder rule 23, district courts have the power to amend class definitions or decertify classes as necessary. . . .").

4. The Settlement Amount Is Within the Range of Reasonableness in Light of the Best Possible Recovery and Attendant Risks of Litigation

Courts often analyze the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. In so doing, courts "consider and weigh 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." *Id*. at 462. This is not a "mathematical equation yielding a particularized sum." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Instead, "there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Shapiro*, 2014 WL 1224666, at *11 (settlement judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case").

Lead Plaintiffs submit that the $3.7 million Settlement is well within the range of

reasonableness in light of the best possible recovery and attendant risks of litigation. If Lead Plaintiffs overcame all the obstacles noted above to establishing liability, the ***maximum*** recoverable damages in the Action would be approximately $11.3 million. ¶6. The Settlement thus represents approximately 32% of the Settlement Class's ***maximum*** damages. Indeed, this percentage of recovery is exceptional when compared to the median recovery in securities class actions in 2018 was approximately 2.6% of alleged losses, and it far exceeds the 19.4% median percentage of recovery in cases alleging less than $20 million in damages. *Id.*[7] Given the significant litigation risks described above, including the risks that the Settlement Class would recover a lesser amount many years in the future—or nothing at all—if the Action continued, the Settlement is an excellent outcome for the Settlement Class, and it is certainly well within the range of reasonableness. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in class action[] securities litigations").

C. The Settlement Class's Reaction to the Settlement Supports Final Approval

The second *Grinnell* factor—the reaction of the Class—overlaps with Rules 23(e)(4), on the opportunity for exclusion, and 23(e)(5), on the opportunity to object. As required by Rule 23(e)(4) & (5), the Settlement affords Settlement Class Members the opportunity to request exclusion from, or object to, the Settlement. Ex. 3-D ("Bravata Decl.") (Notice at pp. 19-21). The Settlement Class's reaction to the Settlement—as exhibited the fact that there have been no requests for exclusion or objections—demonstrates strong support for the Settlement. *See, e.g.*, *Del Global*, 186 F. Supp. 2d at 362 ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.").

[7] Citing Ex. 4 (Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* (NERA Jan. 29, 2019)) at p. 36, Fig. 28; *id*. at p. 35, Fig. 27.

Here, in accordance with the Court's Preliminary Approval Order, as of January 21, 2020, the Claims Administrator, Strategic Claims Services ("SCS"), caused 7,650 copies of the Postcard Notice to be sent to potential Settlement Class Members and nominees by First-Class Mail and 2,416 potential Settlement Class Members to be informed by electronic mail, and the Summary Notice to be published in the national edition of *Investor's Business Daily* and transmitted over the PR Newswire on October 21, 2019. Bravata Decl. ¶¶7, 10. SCS also established a dedicated website, www.RockwellSecuritiesSettlement.com, to provide potential Settlement Class Members with information concerning the Settlement and access downloadable copies of the full Notice and Claim Form, as well as copies of the Stipulation, Preliminary Approval Order, and the Complaint. *Id.* at ¶12. To date, there have been no requests for exclusion received, and no objections have been filed on this Court's docket. *Id.* at ¶13; Joint Decl. at ¶48.

As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers in support of the Settlement on February 19, 2020, after the deadline for requesting exclusions or objecting has passed. Lead Plaintiffs' reply papers will address any requests for exclusion and objections received and/or filed.

D. Defendants' Ability to Withstand a Greater Judgment

Rockwell's ability, or potential lack thereof, to withstand a greater judgment (*Grinnell* factor seven) weighs in favor of final approval. Here, Plaintiffs' best-case-scenario damages of $11.3 million constitute a non-trivial amount of Rockwell's current total market capitalization. This lack of a "deep pocket" means that any recovery would likely have been funded out of Rockwell's officers' and directors' insurance. ¶37. These funds, which have already been partly used for defense costs in this litigation, would be rapidly drained by defense costs if the Company continued to litigate this case. *Id.* This factor thus weighs in favor of granting final approval of the Settlement.

E. The Remaining Rule 23(e) Factors Support Final Approval

1. The Proposed Method of Distribution to the Class Is Effective (Rule 23(e)(2)(C)(ii))

The Settlement proceeds will be allocated to Settlement Class Members who submit valid Claim Forms in accordance with the Plan of Allocation. *See* Sec. IV, *infra*. SCS will review and process all Claim Forms received, provide claimants with an opportunity to cure any deficiency in their claim or request review of the denial of their claim, and ultimately mail a check to or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund as calculated under the Plan of Allocation, upon approval of the Court. This type of claims processing and method for distributing settlement proceeds is standard in securities and other class actions and is effective. Moreover, the Settlement is not "claims-made"—none of the Settlement will revert to Rockwell.

2. The Proposed Award of Attorneys' Fees Is Fair and Reasonable (Rule 23(e)(2)(C)(iii))

The relief provided for the Settlement Class is also adequate when the terms of the proposed award of attorneys' fees are taken into account. As discussed in detail in the accompanying Fee Memorandum, the proposed attorneys' fees of 33%, to be paid upon approval by the Court, are reasonable in light of the substantial work and efforts of Lead Counsel, their significant investment of resources in the case, their skillful prosecution of the action for the benefit of the Settlement Class, the risks that they faced in the litigation, and the overall benefit of the Settlement achieved. Most importantly, with respect to the Court's consideration of the Settlement's fairness, the approval of attorneys' fees is entirely separate from approval of the Settlement; neither Lead Plaintiffs nor Lead Counsel may terminate the Settlement based on the ultimate award of attorneys' fees or expenses.

3. Identification of Agreements in Connection with the Settlement (Rule 23(e)(2)(C)(iv) and Rule 23(e)(3))

The Parties entered into a confidential agreement establishing conditions under which Defendants may terminate the Settlement if a certain threshold of Settlement Class Members submit valid and timely requests for exclusion. This type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the Settlement. *See Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-cv-1152, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018) (approving settlement with similar confidential agreement).

4. The Settlement Treats Class Members Equitably Relative to Each Other (Rule 23(e)(2)(D))

Rule 23(e)(2)(D) requires that the Court assess whether "the proposal treats class members equitably relative to each other." The Settlement does that. All Authorized Claimants will receive their *pro rata* share of the Net Settlement Fund based on the amount of their Recognized Loss calculated under the Plan of Allocation. Ex. 3-D (Notice at pp. 11-18); *see also* Sec. IV, *infra* (regarding Plan of Allocation).

* * *

Accordingly, each of these factors favors approval of the Settlement.

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

A plan of allocation, like a settlement itself, "must be fair and adequate" to warrant approval. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015). A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *City of Providence*, 2014 WL 1883494, at *10. Accordingly, "courts look primarily to the opinion of counsel" in determining whether a proposed plan of allocation is fair and adequate to warrant approval. *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011).

The proposed Plan of Allocation, developed by one of Lead Plaintiffs' experts in conjunction with Lead Counsel, reflects an assessment of the damages that Lead Plaintiffs contend could have been recovered under the theories of liability asserted in the Action.[8] ¶51. More specifically, the Plan of Allocation reflects, and is based on, Lead Plaintiff's allegation that the price of Rockwell securities was artificially inflated during the period from November 8, 2017 through and including June 26, 2018, due to Defendants' alleged materially false and misleading statements and omissions. *Id.* The Plan of Allocation is based on the premise that the decreases in the price of Rockwell securities that followed the alleged corrective disclosures that occurred on May 25, 2018, May 29, 2018, June 27, 2018 and June 28, 2018 may be used to measure the alleged artificial inflation in the price of Rockwell securities prior to these disclosures. *Id.*; Ex. 3-D (Notice, pp. 11-18). The same methodology would have been proffered by Lead Plaintiffs at summary judgment and trial had the Action not settled.

An individual Claimant's recovery under the Plan of Allocation will depend on a number of factors, including how many shares of Rockwell securities the Claimant purchased, acquired, or sold during the Settlement Class Period, when that Claimant bought, acquired, or sold the shares, and the number of valid claims filed by other Claimants. ¶53. If a Claimant has an overall market gain with respect to his, her, or its overall transactions in Rockwell stock during the Settlement Class Period, or if the Claimant purchased shares during the Settlement Class Period, but did not hold any of those shares through at least one of the alleged corrective disclosures, the Claimant's recovery under the Plan of Allocation will be zero, as any loss suffered would not have been caused by the revelation of the alleged fraud. *Id.*

[8] The Plan of Allocation is detailed in the Notice. *See* Ex. 3-D (Notice at pp. 11-18). The Notice is posted online at www.RockwellSecuritiesSettlement.com, is downloadable, and may be mailed to Settlement Class Members upon request.

Lead Plaintiffs and Lead Counsel believe that the proposed Plan of Allocation will result in a fair and equitable distribution of the Net Settlement Fund among Settlement Class Members similar to the result if Lead Plaintiffs prevailed at trial. ¶54. To date, no objections to the Plan of Allocation have been filed on this Court's docket or received by Lead Counsel. ¶48. For these reasons, Lead Plaintiffs respectfully requests that the Court approve the proposed Plan of Allocation.

V. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Court's September 12, 2019 Preliminary Approval Order certified the Settlement Class for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3). *See* ECF No. 56 at ¶ 1. There have been no changes to alter the propriety of class certification for settlement purposes. Thus, for the reasons stated in Lead Plaintiffs' Preliminary Approval Brief (*see* ECF No. 55), Lead Plaintiffs respectfully request that the Court affirm its determinations in the Preliminary Approval Order certifying the Settlement Class under Rules 23(a) and (b)(3).

VI. THE NOTICE PROGRAM SATISFIES RULE 23 AND DUE PROCESS

For any class certified under Rule 23(b)(3), due process and Rule 23 require that class members be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974).

Courts routinely find that a combination of a mailed postcard directing class to a more detailed online notice sufficient to satisfy due process requirements. *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 183 n.3 (S.D.N.Y. 2014) (citing cases). In accordance with the Preliminary Approval Order, SCS, mailed, via first-class mail, 7,650 individual copies of the Postcard Notice to all Settlement Class Members who could be identified with reasonable effort, as well as brokerage firms and other nominees who regularly act as nominees for beneficial purchasers

of securities. Bravata Decl. ¶7. The Postcard Notice directed potential Settlement Class Members to downloadable versions of the Notice and Claim Form posted online at www.RockwellSecuritiesSettlement.com. *Id.* at ¶12. In addition, SCS arranged for the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* on October 21, 2019. *Id.* at ¶10.

The Notice provides all the necessary information required by Rule 23(c)(2)(B). The Notice sets forth in plain, easily understandable language: (a) the nature of the action; (b) the Settlement Class Definition; (c) a description of the claims at issue and the defenses to those claims; (d) the ability of Settlement Class Members to enter an appearance through counsel; (e) the Settlement Class Member's ability to be excluded and the process for exclusion from the Settlement Class; (f) the binding effect of a Class judgment; (g) the contact information for Lead Counsel to answer questions; (h) the address for the Settlement website; and (i) instructions on how to access the case file in person.

Additionally, the notice program satisfies the requirements of the PSLRA, 15 U.S.C. § 78u-4(a)(7), by setting forth in plain, easily understandable language: (a) a cover page summarizing the information in the Notice; (b) a statement of plaintiff recovery, and the estimated recovery per damaged share; (c) a statement of potential outcomes of the case; (d) a statement of attorneys' fees or costs sought; (e) identification of lawyers' representatives; and the (vi) reasons for settlement.

In sum, the notice program fairly apprises Settlement Class Members of their rights with respect to the Settlement, and is the best notice practicable under the circumstances.

VII. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate; and finally certify the

Settlement Class for the purposes of settlement.

Dated: January 22, 2020

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned say:

I am not a party to the above case and am over eighteen years old.

On January 22, 2020, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Eastern District of New York, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 22, 2020.

s/ Casey E. Sadler
Casey E. Sadler