UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CELADON GROUP, INC. SECURITIES LITIGATION	No. 17-cv-02828-JFK

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Court-appointed Lead Plaintiffs Greater Pennsylvania Carpenters' Pension Fund ("Greater Pennsylvania") and Arkansas Teacher Retirement System ("ATRS") (collectively, "Lead Plaintiffs"), on behalf of themselves and the other members of the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement of the above-captioned action (the "Action"), approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation"), and final certification of the Settlement Class.[1]

PRELIMINARY STATEMENT

As detailed in the Stipulation, Celadon Group, Inc. ("Celadon" or "the Company"), and Bobby L. Peavler ("Peavler") and Paul A. Will ("Will") (the "Individual Defendants," and, together with Celadon, the "Defendants") have agreed to settle the claims in the Action and all Released Claims in exchange for a payment of $5,500,000 in cash. The terms of the Settlement are set forth in the Stipulation, which was previously filed with the Court. ECF No. 59-1. This recovery is a favorable result for the Settlement Class and avoids the substantial risks and expenses of continued litigation, including the risk of recovering less than the Settlement Amount, or nothing at all.

The Settlement was reached only after Lead Plaintiffs and Lead Counsel had a well-

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated October 3, 2018 (ECF No. 59-1) (the "Stipulation") or in the Declaration of Carol C. Villegas in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Villegas Declaration" or "Villegas Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Villegas Declaration.

All exhibits herein are annexed to the Villegas Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Villegas Declaration and the second reference is to the exhibit designation within the exhibit itself.

developed understanding of the strengths and weaknesses of the claims. As more fully described in the Villegas Declaration,[2] by the time the Settlement was agreed to, Lead Counsel had, among other things: (i) conducted a thorough investigation into the alleged misconduct, which included consulting with experienced experts in the fields of damages and accounting, analyzing the Company's historical financial statements with the aid of Lead Plaintiffs' accounting expert, conducting 12 interviews of former Celadon employees and other potential witnesses, and reviewing the public record; (ii) drafted and filed a detailed consolidated complaint (the "Complaint"); (iii) reviewed 3,600 pages of documents produced by Defendants in connection with the mediation; (iv) exchanged detailed mediation statements with Defendants and engaged in vigorous arm's-length settlement negotiations; and (v) consulted with bankruptcy counsel. The Settlement is also the product of extensive arm's-length negotiations between the Parties, which included an in-person mediation session under the auspices of a respected and experienced mediator, Robert Meyer Esq. of JAMS.

The Settlement is a favorable result in light of the risks of continued litigation. While Lead Plaintiffs and Lead Counsel believe that the claims asserted against Defendants are strong, they recognize that this Action presented a number of substantial risks, especially in light of Defendants' anticipated challenges to scienter, loss causation, and damages. While Lead Plaintiffs would advance credible counter arguments to Defendants' liability defenses, they nonetheless recognize a substantial risk that Defendants' anticipated motions to dismiss might be granted in part or in full. Even if Defendants' motions to dismiss were unsuccessful, Defendants likely would have continued to press their arguments at summary judgment, at trial, and through

[2] The Villegas Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation; among other things.

appeals. These risks are in addition to the genuine risk of a much smaller recovery, or no recovery at all, given the Company's precarious financial condition and competing claims to the proceeds of insurance policies available to pay the claims of the Settlement Class.

In light of these risks, as discussed further below and in the Villegas Declaration, Lead Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and warrants final approval by the Court. *See* Declaration of James R. Klein, on Behalf of Greater Pennsylvania (Ex. 1 at ¶¶6, 8) and Declaration of Ron Graves, on Behalf of ATRS (Ex. 2 at ¶¶6, 8).

Additionally, Lead Plaintiffs request that the Court approve the Plan of Allocation, which was set forth in the Notice sent to Settlement Class Members. The Plan of Allocation, which was developed by Lead Counsel in consultation with Lead Plaintiffs' consulting damages expert, provides a reasonable and equitable method for allocating the Net Settlement Fund among Settlement Class Members who submit valid claims. The Plan of Allocation is fair and reasonable, and should likewise be approved.

ARGUMENT

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

A. The Law Favors and Encourages Settlement of Class Action Litigation

Public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*") ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context.")[3]. This policy would be well-served by approval of the Settlement of this complex securities class action, that absent resolution, would consume years of

[3] All internal quotations and citations are omitted unless otherwise stated.

additional time of this Court.

B. The Standards for Final Approval

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In ruling on final approval of a class settlement, courts in the Second Circuit have held that a court should examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Visa*, 396 F.3d at 116; *In re Citigroup Inc. Sec. Litig.*, No. 09 MD 2070 (SHS), 2014 WL 2112136, at *2-3 (S.D.N.Y. May 20, 2014); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012).

The standards governing approval of class action settlements are well established in the Second Circuit. In *City of Detroit v. Grinnell Corp*., the Second Circuit held that the following factors should be considered in evaluating a class action settlement:

> (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; (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.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by, Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Visa*, 396 F.3d at 117; *In re Advanced Battery Techs. Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014); *In re Bear Stearns, Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265-66 (S.D.N.Y. 2012).

Additionally, pursuant to the recent amendments to Rule 23(e)(2), a court may approve a settlement as "fair, reasonable, and adequate" after considering the following four factors, most of which overlap with the *Grinnell* factors:

(A) whether the class representatives and class counsel have adequately represented the class;

(B) whether the proposal was negotiated at arm's length;

(C) whether 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 ward of attorneys' fees, including timing of payment; and

iv. any agreement required to be identified under Rule 23(e)(3); and

(D) whether the proposal treats class members equitably relative to each other.

For the reasons discussed herein, and in Lead Counsel's Fee and Expense Application, the proposed Settlement meets the criteria set forth by the Second Circuit and the federal rules.

C. The Settlement Was Reached after Robust Arm's-Length Negotiations, Is Procedurally Fair, and Is Entitled to a Presumption of Reasonableness

A settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116; *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x. 37 (2d Cir. 2016).

The Settlement here merits such a presumption of fairness because it was achieved after thorough arm's-length negotiations between well-informed and experienced counsel, under the supervision of an experienced Mediator, and an extensive investigation into the claims. As a result, Lead Plaintiffs and Lead Counsel had a well-informed basis for assessing the strength of the Settlement Class's claims and Defendants' defenses when they agreed to settle the Action.

The judgment of Lead Counsel—a law firm that is highly experienced in securities class action litigation—that the Settlement is in the best interests of the Settlement Class is entitled to "great weight." *City of Providence v. Aeropostale Inc. et al.*, No. 11 civ. 7132, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014), *aff'd*, *Arbuthnot v. Pierson*, 607 F. App'x. 73 (2d Cir. 2015); *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014); *accord, In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts consistently give "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation"). Moreover, Lead Plaintiffs are sophisticated institutional investors that took an active role in supervising this litigation, as envisioned by the PSLRA, and strongly endorse the Settlement. *See* Exs. 1 and 2. A settlement reached "with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

Accordingly, the Settlement is entitled to a presumption of reasonableness.

D. Application of the Second Circuit's *Grinnell* Factors Supports Approval of the Settlement as Substantively Fair, Reasonable, and Adequate

The Settlement is also substantively fair, reasonable, and adequate. "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)). Additionally, in deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply

substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007). Here, the Settlement fully satisfies the criteria for approval articulated in *Grinnell*.

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

Securities class actions like this one are by their nature complicated, and district courts in this Circuit have long recognized that "[a]s a general rule, securities class actions are 'notably difficult and notoriously uncertain' to litigate." *In re Facebook,* 2015 WL 6971424, at *3; *Bear Stearns,* 909 F. Supp. 2d at 266; *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010); *In re Gilat Satellite Networks, Ltd*., No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007) ("Securities class actions are generally complex and expensive to prosecute.").

This case was no exception. As discussed in the Villegas Declaration, this case involved complex and financially intricate accounting issues related to, among other things, accounting for trucking assets, the trucking industry and markets, and off-balance sheet transactions with joint ventures and third-parties. Lead Plaintiffs surviving the motions to dismiss, prevailing on summary judgment and then achieving a litigated verdict at trial (and sustaining any such verdict in the appeals that would inevitably ensure) would have been a very complex and risky undertaking that would have required substantial additional time and expense. *See In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 481 (S.D.N.Y. 2009) (finding that the complexity, expense and duration of continued litigation supports final approval where, among other things "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable").

Indeed, the trial of the Action here would have required extensive expert testimony on

numerous contested issues, including falsity, materiality, causation and damages, all within the context of nuanced and esoteric accounting issues. Courts routinely observe that these sorts of disputes—requiring dueling testimony from experts—are particularly difficult for plaintiffs to litigate. *See*, *e.g.*, *In re Telik, Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008) (in a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited").

Of course, even if Lead Plaintiffs had prevailed at trial, it is virtually certain that appeals would be taken, which would have, at best, substantially delayed any recovery for the Settlement Class. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery."). At worst, there is always a risk that the verdict could be reversed by the trial court or on appeal. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *cf. In re Apollo Grp., Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 WL 5927988 (9th Cir. June 23, 2010) (trial court overturned unanimous verdict for plaintiffs, later reinstated by the Ninth Circuit Court of Appeals, and judgment re-entered after denial of *certiorari* by the U.S. Supreme Court).

In contrast to costly, lengthy and uncertain litigation, the Settlement provides a significant and certain recovery of $5.5 million for members of the Settlement Class.

Accordingly, this factor supports approval of the Settlement.

2. The Reaction of the Settlement Class to the Settlement

The reaction of the class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *Bear Stearns*, 909 F. Supp. 2d at 266-67; *FLAG Telecom*, 2010 WL 4537550, at *16; *Veeco*, 2007 WL 4115809, at *7.

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), began mailing copies of the Claim Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and nominees on October 26, 2018. *See* Declaration of Alexander Villanova, Ex. 5 at ¶¶3-11. As of December 10, 2018, Epiq has mailed 32,458 copies of the Claim Packet to potential Settlement Class Members. *Id*. ¶10. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over the internet using *PR Newswire* on November 5, 2018. *Id*. ¶12.

The Notice set out the essential terms of the Settlement, Lead Counsel's Fee and Expense Application, and the proposed Plan of Allocation and informed potential Settlement Class Members of, among other things, their right to object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Settlement Class Members to object (December 26, 2018) has not yet passed, to date, no objections have been received. *See In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515, 2009 WL 2025160, at *2 (S.D.N.Y. July 10, 2009) (no class member objections since preliminary approval supported final approval). As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than January 9, 2019 addressing any objections.

3. The Stage of the Proceedings and the Amount of Information Available to Counsel Support Approval of the Settlement

In considering this factor, "the question is 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." *Bear Stearns*, 909 F. Supp. 2d at 267. To satisfy this factor, parties need not have even engaged in formal or extensive discovery. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 363 (S.D.N.Y. 2002).

Here, as detailed in the Villegas Declaration, before filing the consolidated Complaint, Lead Counsel conducted a robust investigation that included interviews of 12 witnesses (former employees of Celadon or third parties with relevant knowledge); extensive consultation with forensic accounting and damages/causation experts; and a thorough review of Celadon's historical financial statements, as well as the Company's public agreements with Element Financial Corporation ("Element"), and 19th Capital I and II, to trace the respective assets of these entities, among many other types of documents. Villegas Decl. ¶¶19-26. Lead Counsel reviewed over 3,600 pages of documents provided by Defendants that included minutes and presentations of the Company's Board of Directors, Audit Committee, Nominating and Corporate Governance Committee, and Compensation Committee, as well as non-public agreements and financial forecasts relevant to Celadon's financial condition, prior to participating in the full-day mediation session. *Id*. ¶¶ 43-44. Lead Counsel also consulted with bankruptcy counsel concerning the financial condition and prospects of the Company. *Id*. ¶40.

Armed with this substantial base of knowledge, Lead Plaintiffs were in a position to balance the proposed settlement amount with a well-educated assessment of the likelihood of overcoming the risks of litigation, as well as the Company's precarious financial condition. Accordingly, Lead Plaintiffs and Lead Counsel respectfully submit that they had "a clear view of the strengths and weaknesses of their case[]" and of the range of possible outcomes at trial.

Teachers Ret. Sys. of La. v. A.C.L.N., Ltd., No. 01-Civ-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004). The Court thus should find that this factor also supports approval.

4. The Risks of Establishing Liability and Damages Support Approval of the Settlement

In assessing the fairness, reasonableness, and adequacy of a settlement, courts should consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463. Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See In re AOL Time Warner Inc.*, No. 02 cv 5575, 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *In re Alloy, Inc. Sec. Litig.*, No. 03-1597, 2004 WL 2750089, at *1 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in securities action presented significant hurdles to proving liability).

Lead Plaintiffs faced very real risks in surmounting Defendants' anticipated motions to dismiss and in proving both liability and damages at trial. According to the most recent analysis of securities class action filings by Cornerstone Research, in recent years, securities class actions may have become riskier than in prior years. Cornerstone notes that the outcomes of securities class action filings in 2015 showed higher rates of dismissal than in previous years, and that filings in 2017 are "on pace to have the highest rate of dismissals within the first year of filing on record." *See* Cornerstone Research, *Securities Class Action Filings 2017 Year In Review*, at 2 (Cornerstone Research 2018), Ex. 4. From 1997 to 2016, 43% of securities class actions were dismissed and 50% settled. *Id*. at 15.

(a) Risks to Proving Liability

While Lead Plaintiffs and Lead Counsel believe that the claims against Defendants are strong, they recognize that Defendants would have surmounted meaningful defenses to liability

that would have presented true obstacles. Absent the Settlement, there was a significant risk that the Court might have granted Defendants' anticipated motions to dismiss in part or in whole, or could find against Lead Plaintiffs in connection with summary judgment and/or at trial.

The principal claims in the Action are based on Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. To establish a claim under the Exchange Act, "a plaintiff must prove: (1) the defendant made a material misrepresentation or omission; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp. PLC*, 783 F.3d 383, 389 (2d Cir. 2015). Here, in particular, Defendants would have vigorously challenged Lead Plaintiffs on scienter and loss causation.

The central allegations of the Action are that an accounting fraud at Celadon concealed massive liabilities and a deteriorating financial condition at the Company throughout the Class Period. Defendants' alleged manipulation resulted in the Company announcing the need to restate its financials, going back as far as 2014. The Settlement Class faced a significant challenge in proving that Defendants acted with scienter as "[p]roving a defendant's state of mind is hard in any circumstances." *Telik,* 576 F. Supp. 2d at, 579. Among other things, Defendants would have argued that the mere existence of a restatement is insufficient to plead securities fraud. *See, e.g.*, *Wyche v. Advanced Drainage Sys., Inc.*, No. 15 CIV. 5955 (KPF), 2017 WL 971805, at *16 (S.D.N.Y. Mar. 10, 2017), *aff'd*, 710 F. App'x. 471 (2d Cir. 2017) (dismissing Rule 10b–5 claim for failure to plead scienter and rejecting argument that restatement was sufficient to plead scienter absent "additional supporting allegations indicating that a defendant had possessed and ignored contrary facts"); *Plumbers & Pipefitters Local Union*

No. 719 Pension Tr. Fund v. Conseco Inc., No. 09-6966, 2011 WL 1198712, at *22-24 (S.D.N.Y. Mar. 30, 2011) (dismissing Rule 10b–5 claim for failure to plead a "strong inference" of scienter, noting "the fact that the company was required, in 2008, to restate several prior periods' financial results does not indicate that the defendants had previously made false statements with scienter"); *City of Brockton Ret. Sys. v. Shaw Grp. Inc.*, 540 F. Supp. 2d 464 (S.D.N.Y. 2008) (dismissing complaint with prejudice for failure to plead a "strong inference" of scienter because "it is well settled that mere fact of a restatement of earnings does not support a strong, or even a weak, inference of scienter"); *In re DRDGOLD Ltd. Sec. Litig.*, 472 F. Supp. 2d 562, 573-74 (S.D.N.Y. 2007) (restatement insufficient to plead a "strong inference" of fraudulent intent because "the misreported financial information which led to the restatement 'may have been caused by intentional fraud or recklessness, [or] could well be the products of negligence or mismanagement'"). Moreover, they would have argued that Lead Plaintiffs could neither plead nor prove that Defendants acted with the requisite intent throughout the five year Class Period.

Lead Plaintiffs would of course seek to counter these contentions and would argue that the Complaint sufficiently alleged, and that the evidence would establish, that Defendants knew or recklessly disregarded the Company's accounting failings and deficient internal controls because, among other reasons, Defendants Peavler and Will each signed the quarterly and yearly financial reports, all of which assured investors of the effectiveness of the Company's internal control over financial reporting. Complaint ¶215.

Finally, even if Lead Plaintiffs were to be successful on the motions to dismiss, many of these same arguments could have been continued at summary judgment, trial, or on appeal, and, in the absence of any settlement, presumably would have been. Thus, there were very significant risks attendant to the continued prosecution of the Action.

(b) Risks Related to Loss Causation and Damages

Even if Defendants' liability could be established, loss causation and damages remains a "complicated and uncertain process, typically involving conflicting expert opinion about the difference between the purchase price and [share]s true value absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004). In order to resolve most of the disputed issues regarding loss causation and damages, among others, the Parties would have had to rely heavily on expert testimony. Though Lead Plaintiffs' consulting damages expert estimated maximum class-wide aggregate damages of approximately $87 million to $120 million, depending on whether, at trial, pre-class period gains are subtracted based on six alleged corrective events, Defendants and their experts would have made several credible arguments that the Settlement Class is unable to recover for most or even all of these events because the events did not reveal new information. ¶¶32-35. Had Defendants succeeded with these arguments, Defendants estimated that damages would be significantly lower than what Lead Plaintiffs' expert estimated.

For example, Lead Plaintiffs anticipate that Defendants would have strenuously argued at the motion to dismiss stage, and thereafter, that the class period should end on May 1, 2017, the date on which Celadon warned the public that its auditor did not have a reasonable basis to support its previously issued reports on Celadon's 2016-2017 financial statements and that those financial statements "should not be relied upon." Defendants would have argued that the class period cannot extend beyond this date, because Lead Plaintiffs would not be able to show that any stock decline following this point resulted from the disclosure of curative information that revealed new material information that had allegedly been concealed from the market. ¶33.

Defendants would also likely have argued that any stock decline following Celadon's April 2018 press release resulted from inactionable uncertainties related to Celadon's financing

prospects and the NYSE delisting. *Id*. Defendants would have argued that the risk of NYSE delisting was known to the market once Celadon's 2016-2017 financial statements were publicly withdrawn on May 1, 2017, and that the securities laws do not provide redress for the materialization of a known risk. *Id*. In Lead Counsel's judgment, these arguments created a significant risk that class could only recover for the decline following the Company's disclosure on May 1, 2017, which would have substantially reduced damages. ¶¶31-35.

Defendants would have also likely argued that the April 2, 2018 press release addressed several subjects, which would require Lead Plaintiffs to disaggregate which information, if any, was actually curative of the alleged fraud. For example, Defendants would likely argue that the disclosure of the $20 million write down related to out-of-market equipment transactions was small in magnitude, compared to the other items addressed in the press release, and was not expected to have an ongoing impact on cash flow. Had Defendants succeed with their disaggregation arguments, Defendants estimated that damages would also be significantly lower than what Lead Plaintiffs proffered. ¶34.

While Lead Counsel would work extensively with Lead Plaintiffs' damages expert with a view towards presenting compelling arguments to the jury and prevailing on these matters at trial, Defendants would have put forth well-qualified experts of their own who were likely to opine at trial that the Settlement Class suffered little or no damages. As Courts have long recognized, the substantial uncertainty as to which side's experts' view might be credited by the jury presents a serious litigation risk. *See IMAX*, 283 F.R.D. at 193 ("[I]t is well established that damages calculations in securities class actions often descend into a battle of experts."); *Telik,* 576 F. Supp. 2d at 579-80 (in this "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found");

In re Global Crossing Sec. & ERISA Litig., 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.").

Given all of these risks with respect to liability, loss causation, and damages, Lead Plaintiffs and Lead Counsel respectfully submit that it is in the best interests of the Settlement Class to accept the certain and substantial benefit conferred by the Settlement.

5. The Risks of Maintaining Class Certification

Although class certification had not yet been briefed in this case, Defendants would undoubtedly have raised vigorous challenges to class certification, and such disputes "could well devolve into yet another battle of the experts." *Bear Stearns*, 909 F. Supp. 2d at 268. Additionally, class certification can be reviewed and modified at any time by the Court before final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). Although Lead Plaintiffs believe there are strong grounds for certifying a litigation class, discussed in Lead Plaintiffs' motion for preliminary approval of the Settlement (ECF Nos. 57-58), the Settlement avoids any uncertainty with respect to class certification and risks of maintaining certification of the Settlement Class through trial and on appeal. *See Ebbert v. Nassau Cty.*, No. CV 05-5445 AKT, 2011 WL 6826121, at *12 (E.D.N.Y. Dec. 22, 2011) (risk of de-certification of the certified class supported approval of Settlement); *Ingles v. Toro*, 438 F. Supp. 2d 203, 214 (S.D.N.Y. 2006).[4]

[4] In the Preliminary Approval Order (ECF No. 65), the Court preliminarily certified the Settlement Class for settlement purposes. There have been no developments in the case that would undermine that determination and, for all the reasons stated in the Lead Plaintiffs' Memorandum of Law in Support of Unopposed to Motion for Preliminary Approval of Proposed Class Action Settlement (ECF Nos. 57-58), incorporated herein by reference, Lead Plaintiffs now request that the Court reiterate its prior certification of the Settlement Class pursuant to Fed. R. Civ. P. 23(a) and (b)(3), for settlement purposes, and the appointment of Lead Plaintiffs as Class Representatives and Labaton Sucharow as Class Counsel.

6. The Ability of Defendants to Withstand a Greater Judgment

The ability of a defendant to pay a judgment greater than the amount offered in settlement is relevant to whether the settlement is fair. *Grinnell*, 495 F.2d at 463. Defendants' precarious financial condition here, *see* Villegas Decl. ¶¶36-40, strongly weighs in favor of approval of the Settlement. *See, e.g.*, *Maley*, 186 F. Supp. 2d at 365 ("given Del Global's dire financial condition, it is unlikely that the Company could withstand a substantial judgment"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 460 (ability to withstand a greater judgment supports final approval where the "main settlement funds available to the individuals are the insurance proceeds" which "would be largely consumed by defense costs if this litigation were to continue"); *Teachers' Ret. Sys. of La.,* 2004 WL 1087261, at *4 (likely depletion of D & O insurance supports settlement approval).

Here, as set forth in the Villegas Declaration (¶¶36-40), in light of the dwindling insurance available to Defendants and the competing claims to the proceeds of that insurance arising from the Delaware Derivative Action, the Federal Derivative Action, the State Derivative Action, the SEC investigation and the DOJ investigation, there was a very real possibility that Lead Plaintiffs –even if they succeeded in continued litigation –would have recovered less than the Settlement, or nothing at all, at the point of a judgment favorable to the Settlement Class, given that Defendants would have no, or only very limited, insurance funds to satisfy the judgment. In contrast, pursuant to the Stipulation, the $5,500,000 Settlement Amount has already been deposited into the Escrow Account, and the Settlement Class is earning interest. *Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811(MGC), 2010 WL 476009, at *5 (S.D.N.Y. Jan. 6, 2010) (approving settlement and noting that "[t]he settlement eliminated the risk of collection by requiring Defendants to pay the Fund into escrow…"). Accordingly, Defendants' ability to withstand a greater judgment strongly weighs in favor of approval of the Settlement.

7. The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and all the Attendant Risks of Litigation Support Approval of the Settlement

The last two substantive factors courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. In analyzing these factors, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. 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 Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). 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, according to analyses prepared by Lead Plaintiffs' consulting damages expert, the Settlement represents a recovery of between approximately 4.6% and 6.3% of the class's highest possible damages of approximately $87 million to $120 million, under a best case scenario where Lead Plaintiffs were able to prove liability for the entire Class Period and liability with respect to all alleged corrective disclosures. Villegas Decl. ¶5. This recovery falls well within the range of reasonableness that courts regularly approve in similar circumstances. *See, e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving $40.3 million settlement representing approximately 6.25% of estimated damages and noting was at the "higher end of the range of reasonableness of recovery in class actions securities litigation"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (approving settlement that

was "between approximately 3% and 7% of estimated damages [and] within the range of reasonableness for recovery in the settlement of large securities class actions"); *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *Int'l Bhd of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving $12.5 million settlement recovering 3.5% of maximum damages and noting that the amount is within the median recovery in securities class actions settled in the last few years).

The Settlement also presents a favorable recovery when compared to the median settlement value in securities class actions in 2017, which was reported by Cornerstone Research to be $5 million. *See* Laarni T. Bulan, Ellen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlements – 2017 Review and Analysis*, at 3 (Cornerstone Research 2018), Ex. 3.

In sum, the *Grinnell* factors support approval of the Settlement.

E. Application of the Factors Identified in the Amendments to Rule 23(e)(2) Support Approval of the Settlement as Fair, Reasonable, and Adequate

The proposed Settlement also meets the criteria set forth in the recent amendments to Rule 23(e)(2), most of which are covered by the Second Circuit factors discussed above.

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

There can be little doubt that Lead Plaintiffs and Lead Counsel have adequately represented the Settlement Class.

As set forth in the previously filed motion for Preliminary Approval of the Settlement and their motion seeking appointment as lead plaintiffs, Lead Plaintiffs, like all other members of the Settlement Class, acquired shares of Celadon stock during the Class Period, when its value was allegedly artificially inflated by false and misleading statements. Thus, the claims of the

Settlement Class would prevail or fail in unison, and the common objective of maximizing recovery from Defendants aligns the interests of Lead Plaintiffs and all members of the Settlement Class. *See, e.g., 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 between the class representatives and other class members." Moreover, Greater Pennsylvania provides pension benefits for thousands of beneficiaries across Pennsylvania and has approximately $800 million in assets under management. *See* Ex. 1 at ¶1. Lead Plaintiff ATRS is an extremely sophisticated institutional investor, which provides retirement, disability, and survivor benefits to employees of Arkansas public schools and educationally related agencies. *See* Ex. 2 at ¶1. Both have been appointed lead plaintiff in numerous securities class actions and, with an informed understanding, agreed to the Settlement.

Additionally, throughout the Action, Lead Plaintiffs had the benefit of the advice of knowledgeable counsel well-versed in shareholder class action litigation and securities fraud cases. Labaton Sucharow is among the most experienced and skilled firms in the securities litigation field, and has a long and successful track record in such cases. *See* Ex. 6-C.

2. The Settlement is the Result of Arm's-Length Negotiations

As discussed in Section I.C., above, the Settlement was reached after arm's-length negotiations between counsel and overseen by an experienced Mediator. This factor clearly supports approval of the Settlement.

3. The Relief Provided to the Settlement Class is Adequate

Section (i) of Rule 23(e)(2)(C), whether "the relief provided for the class is adequate, taking into account the costs, risks, and delay of trial and appeal," has been explained above.

Rule 23(e)(2)(C)(ii) considers whether the relief is adequate, taking into account the "effectiveness of any proposed method of distributing relief to the class, including the method of

processing class-member claims." As set forth below in Section II., discussing the proposed Plan of Allocation, the proceeds of the Settlement will be distributed to Settlement Class Members who submit valid and timely claims. The Claims Administrator will calculate claimants' Recognized Losses using the transactional information provided by claimants in their Claim Forms, which can be mailed to the Claims Administrator, submitted online using the settlement website, or, for large investors, with hundreds of transactions, via e-mail to the Claims Administrator's electronic filing team. Because most securities are held in "street name" by the brokers that buy them on behalf of clients, the Claims Administrator, Lead Counsel, and Defendants do not have Settlement Class Members' transactional data and a claims process is required. Because the Settlement does not recover 100% of alleged damages, the Claims Administrator will determine each eligible claimant's *pro rata* share of the Net Settlement Fund based upon each claimant's total "Recognized Claim" compared to the aggregate Recognized Claims of all eligible claimants.

Once the Claims Administrator has processed all submitted claims, notified claimants of deficiencies or ineligibility, processed responses, and made claim determinations, distributions will be made to eligible claimants in the form of checks and wire transfers. After an initial distribution of the Net Settlement Fund, if there is any balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise) after at least six (6) months from the date of initial distribution, Lead Counsel will, if feasible and economical, re-distribute the balance among eligible claimants who have cashed their checks. These re-distributions will be repeated until the balance in the Net Settlement Fund is no longer feasible to distribute. *See* Stipulation ¶ 26. Any balance that still remains in the Net Settlement Fund after re-distribution(s), which is not feasible or economical to reallocate, after payment of any

outstanding Notice and Administration Expenses or Taxes, will be contributed to a non-sectarian, not-for-profit charitable organization(s) serving the public interest, designated by Lead Plaintiffs and approved by the Court.

The terms of any proposed award of attorneys' fees, including timing of payment (Rule 23(e)(2)(C)(iii)), are discussed in Lead Counsel's accompanying Fee and Expense Application.

Finally, Rule 23(e)(2)(C)(iv) asks the Court to consider the fairness of the proposed Settlement in light of any agreement required to be identified under Rule 23(e)(3). The only agreements made by the Parties in connection with the Settlement are the August 9, 2018 Term Sheet, the Stipulation, and the confidential Supplemental Agreement, dated as of October 4, 2018, concerning the circumstances under which Defendants may terminate the Settlement based upon the number of exclusion requests. *See* Stipulation ¶40. It is standard to keep such agreements confidential so that a large investor, or a group of investors, cannot intentionally try to leverage a better recovery for themselves by threatening to opt out, at the expense of the class. The Supplemental Agreement can be provided to the Court *in camera* or under seal.

II. THE PLAN OF ALLOCATION FOR THE PROCEEDS OF THE SETTLEMENT IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation with a "rational basis" satisfies this requirement. *FLAG Telecom*, 2010 WL 4537550, at *21; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d at 497. A plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See IMAX*, 283 F.R.D. at 192. However, a plan of allocation does not need to be tailored to fit each and every class member with "mathematical precision." *PaineWebber*, 171 F.R.D. at 133.

Here, the proposed Plan of Allocation, which was developed by Lead Counsel in consultation with Lead Plaintiffs' consulting damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among class members who submit valid Claim Forms. The Plan is set forth in full in the Notice. *See* Ex. 5-B at pp. 10-16. It provides for the distribution of the Net Settlement Fund based upon each Settlement Class Member's "Recognized Loss," as calculated by the formulas described in the Notice. In developing the Plan, Lead Plaintiffs' expert considered the amount of artificial inflation in the per share prices of Celadon common stock that allegedly was proximately caused by Defendants' alleged false and misleading statements and omissions. ¶¶54-58; Ex. 5-B at ¶51. Lead Plaintiffs' expert calculated the estimated artificial inflation by considering share price changes in reaction to public disclosures.

Epiq, as the Court-approved Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's total Recognized Loss compared to the aggregate Recognized Losses of all Authorized Claimants, as calculated according to the Plan of Allocation. A claimant's total Recognized Losses will depend on, among other things, when their shares were purchased and/or sold during the Class Period in relation to the disclosure dates alleged in the Action, whether the shares were held through or sold during the statutory 90-day look-back period, *see* 15 U.S.C. § 78u-4(e) (providing methodology for limiting damages in securities fraud actions), and the value of the shares when they were sold or held. Accordingly, the proposed Plan of Allocation is designed to fairly and rationally allocate the proceeds of this Settlement among the Settlement Class.

For these reasons, Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund. *See In re Giant Interactive*

Grp., Inc. Sec. Litig., 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (same). Moreover, as noted above, as of December 10, 2018, 32,458 copies of the Notice, which contains the Plan of Allocation and advises Settlement Class Members of their right to object to the proposed plan, have been sent to potential Settlement Class Members and their nominees, *see* Ex. 5 ¶10, and, to date, no objections to the proposed plan have been received. ¶59.

III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Lead Plaintiffs have provided the Settlement Class with notice of the proposed Settlement that satisfied all the requirements of Rule 23(e) and due process, which require that notice of a settlement be "reasonable"—*i.e.*, it must "fairly apprise the [prospective] members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114. Both the substance of the Notice and the method of its dissemination to potential members of the Settlement Class satisfied these standards.

The Notice provided all of the necessary information for Settlement Class Members to make an informed decision regarding the Settlement, the Fee and Expense Application, and the Plan of Allocation. The Notice informed Settlement Class Members of, among other things: (1) the amount of the Settlement; (2) the reasons why the Parties are proposing the Settlement; (3) the estimated average recovery per affected share of Celadon common stock; (4) the maximum amount of attorneys' fees and expenses that will be sought; (5) the identity and contact information for the representatives of Lead Counsel who are reasonably available to answer questions from Settlement Class Members concerning matters contained in the Notice; (6) the right of Settlement Class Members to object to the Settlement; (7) the binding effect of a

judgment on Settlement Class Members; and (8) the dates and deadlines for certain Settlement-related events. *See* 15 U.S.C. § 78u-4(a)(7). The Notice also contained the Plan of Allocation and provided Settlement Class Members with information about how to submit a Claim Form in order to be eligible to receive a distribution from the Net Settlement Fund.

On October 26, 2018, Epiq began mailing copies of the Notice and Claim Form via first-class mail to potential Settlement Class Members that could be identified through reasonable effort, in accordance with the Preliminary Approval Order. *See* Ex. 5 ¶¶3-11. In addition, Epiq caused the Summary Settlement Notice to be published in *Investor's Business Daily* and to be released over the internet using *PRNewswire* on November 5, 2018. *Id.* ¶12. Epiq also created the website for this case, www.CeladonGroupSecuritiesLitigation.com, to provide members of the Settlement Class and other interested persons with information about the Settlement and the applicable deadlines, as well as access to copies of the Notice, the Claim Form, Stipulation, and the Preliminary Approval Order, Ex. 5 ¶16, and Lead Counsel posted copies of the Notice and Claim Form on its website, Villegas Decl. ¶51.

This combination of individual first-class mail to those who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmitted over a newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *12-13 (S.D.N.Y. Dec. 23, 2009).

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement as fair, reasonable, and adequate and approve the Plan of Allocation as fair, reasonable, and adequate. Proposed orders will be submitted with Lead Plaintiffs reply papers, after the deadline for objections has passed.

Dated: December 12, 2018

Respectfully submitted,

LABATON SUCHAROW LLP

/s/ *Carol C. Villegas*
Carol C. Villegas
Alec T. Coquin
140 Broadway
New York, New York 10005
Telephone: 212-907-0700
Facsimile: 212-818-0477
cvillegas@labaton.com
acoquin@labaton.com

Lead Counsel for Lead Plaintiffs and the Class

BLOCK & LEVITON LLP
Jason Leviton
155 Federal Street, Suite 400
Boston, MA 02110
Telephone: (617) 398-5600
Facsimile: (617) 507-6020
Email: jason@blockesq.com

Additional Counsel for Lead Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, I caused the foregoing Memorandum of Law in Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation to be served electronically through the Court's ECF system upon all registered ECF participants.

/s/Carol C. Villegas
Carol C. Villegas