UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

RAJESH M. SHAH, et. al., Plaintiffs, v. ZIMMER BIOMET HOLDINGS, INC., et. al. Defendants.	Case No. 3:16-cv-00815-PPS-MGG

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

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Court-appointed Lead Plaintiffs Rajesh Shah and Matt Brierley, and additional plaintiffs UFCW Local 1500 and Steven Castillo (collectively, "Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this Memorandum of Law in support of their motion ("Motion"), pursuant to Rule 23 of the Federal Rules of Civil Procedure, for final approval of the proposed Settlement in this Action (the "Settlement"), and for approval of the proposed plan of allocation of the net proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

After more than three years of hard-fought litigation, Plaintiffs, through their counsel, obtained a $50,000,000 all cash, non-reversionary settlement for the benefit of the Settlement Class. As described below and in the Wolke Declaration,[2] the proposed Settlement is an excellent result for the Settlement Class, providing a significant and certain recovery while avoiding the substantial risks and expenses of continued litigation, including the risk of recovering less than the Settlement Amount, or nothing at all. In fact, in Plaintiffs' estimation, the Settlement represents between 8% and 53% of the maximum recoverable class-wide aggregate damages—an extremely favorable result. *See* Ex. 8 (2019 median recovery in securities class action settlements was approximately 4.8% of estimated damages); *see also*, § II.C.1.d, *infra* (discussing range of possible recovery). Moreover, the Parties reached the

[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated April 14, 2020 (ECF No. 246-1) (the "Stipulation"), or the concurrently filed Declaration of Kara M. Wolke in Support of: (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Wolke Declaration" or "Wolke Decl."). Citations herein to "¶ __" and "Ex. ___" refer, respectively, to paragraphs in and exhibits to, the Wolke Declaration.

[2] The Wolke 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: procedural history and the prosecution of the claims at issue; the negotiations leading to the proposed Settlement; the risks and uncertainties of continued litigation; and a description of the services Class Counsel have provided for the benefit of the Settlement Class.

Settlement only after two separate, full-day, mediation sessions before the Honorable Daniel Weinstein (Ret.) and Jed D. Melnick, Esq., of JAMS (the "Weinstein Team"), both whom are experienced mediators of securities class actions and other complex litigation. The second mediation session ended with the Weinstein Team presenting a mediators' recommendation that the Action be settled for $50 million, which the Parties accepted. *See* Ex. 1 (Declaration of Honorable Daniel Weinstein (Ret.) ("Weinstein Decl."), ¶7. Thus, the Settlement is both substantively and procedurally fair.

The substantial efforts of Plaintiffs and Plaintiffs' Counsel, and their well-developed understanding of the strengths and weaknesses of the Action, also support final approval. Plaintiffs' efforts, which are detailed in the Wolke Declaration (¶¶23-90), included, among other things:

- conducted a comprehensive investigation into the allegedly wrongful acts, which included, among other things: (1) reviewing and analyzing (a) Zimmer Biomet Holdings, Inc.'s ("ZBH" or the "Company") filings with the U.S. Securities and Exchange Commission ("SEC"), (b) public reports, blog posts, research reports prepared by securities and financial analysts, and news articles concerning ZBH, (c) transcripts of ZBH's investor calls, and (d) documents produced in response to numerous Freedom of Information Act ("FOIA") requests to the U.S. Food and Drug Administration ("FDA") and appeals thereof; (2) retaining and working with a private investigator who conducted numerous interviews of former Company employees and other third parties with potentially relevant information; and (3) reviewing and analyzing court filings and other publicly available material related ZBH;
- drafted the initial complaint in the Action;
- made the sole Lead Plaintiff application pursuant to the PSLRA;
- retained and worked with FDA, accounting, market efficiency, and loss causation and damages experts;
- drafted and filed two amended complaints, including the comprehensive, factually-detailed, 172-page Second Amended Class Action Complaint for Violations of the Federal Securities Laws, plus exhibits (the "Operative Complaint") based on the foregoing investigation;
- researched and drafted oppositions to Defendants' motions to dismiss;
- opposed Defendants' motion to amend the Court's September 26, 2018 Opinion and

Order to include a certification under 28 U.S.C. § 1292(b) and to stay proceedings pending appeal (the "1292 Motion"), and presented argument in opposition thereto;

- researched and fully briefed the motion for class certification, which included working with Professor Daniel Fischel on the submission of his opening and supplemental reports on market efficiency, taking the deposition of Defendants' class certification expert, Dr. Vinita Juneja, and defending the depositions of each of the four Plaintiffs, Wedge Capital Management (an advisor to Plaintiff UFCW Local 1500), Professor Fischel, and Winslow Capital Management, LLC (another advisor to UFCW Local 1500);
- negotiated a comprehensive confidentiality order to govern the treatment of confidential evidence produced in this case;
- engaged in extensive discovery, including, but not limited to: (1) serving six sets of requests for production of documents on Defendants; (2) responding to interrogatories and document requests directed to each of the Plaintiffs; (3) collecting, conducting a privilege review and producing documents to Defendants; (4) serving twenty eight (28) comprehensive third-party subpoenas *duces tecum*; (5) participating in lengthy and detailed meet and confer negotiations with counsel for Defendants and numerous third parties regarding search terms and/or the scope of document requests or subpoenas *duces tecum*; (6) reviewing and analyzing more than 1.23 million pages of documents produced by Defendants and third parties; (7) serving two sets of requests for admissions; (8) identifying 32 percipient witnesses for deposition and preparing deposition kits for 28 of them, consisting of an outline of questions and relevant documents for use at their depositions; and (9) preparing deposition kits for the noticed Rule 30(b)(6) deposition of ZBH;
- drafted two detailed mediation statements along with relevant exhibits that set forth the facts of the case and analyzed liability, loss causation and damages;
- participated in two separate, full-day mediation sessions overseen by the Weinstein Team, nationally recognized mediators of complex cases;
- drafted and then negotiated the Stipulation and related exhibits;
- worked with Plaintiffs' damages expert to craft a plan of allocation that treats Plaintiffs and all other members of the proposed Settlement Class fairly; and
- drafted the preliminary approval and final approval briefs. ¶10.

Based on the foregoing, Plaintiffs and their counsel had sufficient information to make an informed decision regarding the fairness of the Settlement before entering into it and presenting it to the Court. Indeed, Plaintiffs and Lead Counsel believe that the Settlement is an excellent result for the Settlement Class. This belief is supported by, among other things: (1) the certainty of a $50,000,000 recovery today versus the significant risk of a smaller or even no recovery

following years of additional litigation (¶¶8-9); (2) Plaintiffs' analysis of the documents produced and facts adduced to date (¶¶10, 59-82); (3) Plaintiffs' Counsel's past experience in litigating complex securities class actions (¶151); (4) the serious disputes between the Parties concerning the merits (¶¶91-115); and (5) the favorable reaction of the Settlement Class (¶¶5, 125). Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate.

Plaintiffs also move for approval of the proposed Plan of Allocation of the Net Settlement Fund. Lead Counsel developed the Plan of Allocation in conjunction with Plaintiffs' damages expert, and it is designed to fairly and equitably distribute the proceeds of the Net Settlement Fund to Settlement Class Members. ¶12. As such, Plaintiffs respectfully submit that the Court also should approve the Plan of Allocation.

For these reasons, and those set forth below and in the Wolke Declaration, 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.

ARGUMENT

I. Standards Governing Approval of Class Action Settlements

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of the settlement of claims brought on a class-wide basis. The standard for determining whether to grant final approval to a class action settlement is whether the settlement is "fundamentally fair, adequate, and reasonable." Fed. R. Civ. P. 23(e)(2). "Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *see also E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888–89 (7th Cir. 1985) (recognizing that there is a "general policy favoring voluntary settlements of class action disputes").[3] This is

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

because "[s]ettlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, 2016 WL 772785, at *6 (N.D. Ill. Feb. 29, 2016).

Rule 23(e)(2), as amended on December 1, 2018, requires courts to consider the following factors in determining whether a proposed settlement is fair, reasonable, and adequate:

> (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 award of attorneys' fees, including timing of payment;
>
> iv. any agreement required to be identified under Rule 23(e)(3); and
>
> whether the proposal treats class members equitably relative to each other.

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

Factors (A) and (B) "identify matters . . . described as procedural concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement," while factors (C) and (D) "focus on . . . a substantive review of the terms of the proposed settlement" (*i.e.*, "[t]he relief that the settlement is expected to provide to class members"). *See* Advisory Committee Notes to 2018 Amendments (324 F.R.D. 904, 919 (2018)).

The four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by the courts, 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." *Id.* For this reason, the traditional Seventh Circuit factors in *Wong v. Accretive Health, Inc.*, 773 F.3d 859 (7th Cir. 2014), for evaluating whether a class action settlement is

fair, reasonable and adequate under Rule 23—certain of which overlap with Rule23(e)(2)—are still relevant to the analysis. Those factors are:

> (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed.

Wong, 773 F.3d at 863 (internal citation omitted).

As discussed below, application of the factors set forth in Rule 23(e)(2), and the relevant, non-duplicative Seventh Circuit factors, confirm that the Settlement merits final approval.

II. The Settlement is Fair, Reasonable, and Adequate

A. Plaintiffs and Plaintiffs' Counsel Adequately Represented the Settlement Class

Rule 23(e)(2)(A) requires the Court to consider whether the "class representatives and class counsel have adequately represented the class." Here, Plaintiffs adequately represented the Settlement Class by actively pursuing their shared claims against Defendants, including communicating regularly with their counsel on case developments, discussing significant filings and orders filed in the Action, producing documents and responding to written discovery, preparing for and sitting for their depositions, and participating in settlement discussions with Plaintiffs' Counsel. Exs. 4-7 (Plaintiffs' declarations). Moreover, Plaintiffs—investors who purchased ZBH common stock and/or call options or sold put options during the Settlement Class Period and suffered damages as a result—suffered the same injury as other Settlement Class Members, thereby aligning Plaintiffs' interest in obtaining the largest possible recovery in the Action with the interests of other Settlement Class Members. *See In re Northfield Labs., Inc. Sec. Litig.*, 2012 WL 366852, at *3 (N.D. Ill. Jan. 31, 2012) (finding adequacy where lead plaintiffs and class members shared the same interest—obtaining the maximum amount of

recovery); *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 between the class representatives and other class members.").

Likewise, Plaintiffs' Counsel have adequately represented the Settlement Class throughout the litigation. As set forth above, and detailed in the Wolke Declaration, Plaintiffs' Counsel vigorously prosecuted the Action against skilled opposing counsel and achieved an excellent result. Indeed, the Parties achieved the Settlement only after Plaintiffs' Counsel, among other things: (1) thoroughly investigated Plaintiffs' claims; (2) consulted with an FDA expert consultant regarding ZBH's compliance with FDA regulations and with economic experts regarding the complex and integral loss causation and damages issues presented by this Action; (3) drafted two amended complaints, including the Operative Complaint; (4) researched, drafted, and successfully opposed Defendants' multiple motions to dismiss and subsequent 1292 Motion despite the PSLRA's heightened pleading standard and automatic stay of discovery; (5) fully briefed Plaintiffs' motion for class certification, including submitting Professor Fischel's opening and supplemental reports on market efficiency and defending the depositions of each of the Plaintiffs and Professor Fischel; (6) conducted an extensive fact discovery program, including the review and analysis of over 1.2 million pages of documents, many of which were highly-technical documents relating to compliance with FDA regulations and/or relating to ZBH's broad portfolio of medical manufacturing devices; (7) prepared two mediation statements addressing liability and damages; and (8) engaged in vigorous arm's-length settlement discussions before, during, and after two separate, in-person mediation sessions. ¶¶10, 23-90; *see also* Exs. 9-11 (Plaintiffs' Counsel firm résumés).

Based on the foregoing, it is clear that Plaintiffs and their counsel adequately represented the Settlement Class. *See Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019) (finding adequacy of representation of the class under 23(e)(2)(A) where named plaintiffs "participated in the case diligently" and class counsel "fought hard throughout the litigation and pursued mediation when it appeared to be an advisable and feasible alternative").

B. The Settlement Resulted from Extensive Arm's-Length Negotiations Between Experienced Counsel Under the Auspices of Two Well-Respected Mediators

In reviewing a class action settlement, the court should next consider whether the settlement was "negotiated at arm's length." Fed R. Civ. P. 23(e)(2)(B). This includes the court's consideration of other related circumstances to ensure the "procedural" fairness of a settlement, including (i) "the opinion of competent counsel";[4] (ii) "stage of the proceedings and the amount of discovery completed";[5] and (iii) the involvement of a mediator. All these considerations support approval of the Settlement here.

The Parties reached the Settlement only after protracted 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. ¶¶10, 23-90 (detailing the investigation and work performed by Lead Counsel). As this Court and other courts in this Circuit have found, this fact creates a presumption of fairness. *See, e.g.*, *In re Groupon, Inc. Sec. Litig.*, 2016 WL 3896839, at *3 (N.D. Ill. July 13, 2016) (finding no fraud or collusion in settlement of securities class action negotiated by well-informed and experienced counsel); *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) ("a settlement proposal arrived at after arms-length

[4] *See Wong*, 773 F.3d at 863 (fifth factor).

[5] *See id.* (sixth factor).

negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate").

Moreover, the mediation process—which included two separate full-day mediation sessions (September 17, 2019 and December 12, 2019) that ultimately resulted in a mediator's recommendation—were led by the Weinstein Team, two highly respected and experienced mediators who have significant experience mediating securities class actions and other complex litigation. Judge Weinstein also endorses the Settlement as fair, reasonable, and adequate, as detailed in his declaration. Weinstein Decl. ¶10. The assistance of experienced mediators like Judge Weinstein and Mr. Melnick in the settlement process supports the conclusion that the Settlement is fair, reasonable, and adequate, and was achieved free of collusion. *See Silverman v. Motorola, Inc.*, 2012 WL 1597388, at *3 (N.D. Ill. May 7, 2012), *aff'd,* 739 F.3d 956 (7th Cir. 2013) (approving settlement and describing Judge Weinstein as "a nationally-recognized and highly-respected mediator"); *City of Providence v. Aeropostale, Inc.*, 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) ("[t]his initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations and, ultimately, with the assistance of Judge Daniel Weinstein, one of the nation's premier mediators in complex, multi-party, high stakes litigation"); *Swift v. Direct Buy, Inc.*, 2013 WL 5770633, at *4 (N.D. Ind. Oct. 24, 2013) (presumption of fairness as to the parties' negotiations when the parties engaged a retired judge of JAMS as a neutral mediator); *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (finding that "Mr. Melnick's role in the settlement negotiations overcomes any hesitation this court might have about approving a settlement reached prior to any discovery" and "[t]he participation of this highly qualified

mediator strongly supports a finding that negotiations were conducted at arm's length and without collusion").[6]

C. The Relief Provided for the Settlement Class is Adequate

The Court next considers whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," as well as other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). Rule 23(e)(2)(C) encompasses two of the factors traditionally considered by the Seventh Circuit when evaluating a proposed class action settlement: (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; and (2) the complexity, length, and expense of further litigation. *See Wong*, 773 F.3d at 863-64. As demonstrated below, these factors support approval of the Settlement under Rule 23(e)(2)(C).

1. The Strength of Plaintiffs' Claims Compared to the Amount of the Settlement

When deciding whether to approve a proposed class action settlement under *Wong* and Seventh Circuit precedent, the primary consideration is "the strength of the plaintiff's case on the merits balanced against the amount offered in settlement." *Snyder*, 2019 WL 2103379, at *6 (citing *Wong*, 773 F.3d at 864). Under this factor, courts consider whether the proposed settlement is reasonable in light of the risks of proceeding with the litigation. *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 959, 961, 963-64 (N.D. Ill. 2011). The $50 million cash recovery obtained for the benefit of the Settlement Class here is well within the range of reasonableness considering the legal, factual, and practical risks of continued litigation.

[6] *See also*, *In re Career Educ. Corp. Sec. Litig.*, 2008 WL 8666579, at *3 (N.D. Ill. June 26, 2008) (settlement "resulted from arms-length negotiations and voluntary mediation between experienced counsel"); *Wong*, 773 F.3d at 864 (settlement "was proposed by an experienced third-party mediator after an arm's-length negotiation where the parties' positions on liability and damages were extensively briefed and debated").

In considering whether to enter into the Settlement, Plaintiffs, represented by experienced counsel, weighed the $50 million Settlement Amount against the strength of Plaintiffs' claims, taking into consideration the risks inherent in proving materiality, scienter, loss causation, and recoverable damages, as well as the expense and likely duration of the Action. Indeed, as this Court noted in its 1292(b) Opinion and Order, "in the end, . . . of course more than mere allegations will be necessary to survive summary judgment or win at trial. As with all lawsuits, if the admissible evidence does not live up to the allegations, plaintiffs won't win their case." 2019 WL 762510, at *9; *see also*, *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *2 (N.D. Ill. Dec. 10, 2001) (finding the risk of ongoing litigation weighed in favor of approval in securities class action, noting that it is not certain that plaintiff would have been able to prevail at trial); *Great Neck Capital Appreciation Inc. P'ship v. PricewaterhouseCoopers L.L.P.*, 212 F.R.D. 400, 409 (E.D. Wis. 2002) (approving a settlement and noting that the "factual and legal issues in the case are not simple, and a jury would have to evaluate conflicting evidence on such issues as scienter, materiality, causation and damages, as well as conflicting expert testimony").

a. Risks of Class Certification

At the time that the Parties agreed in principle to settle the Action, Plaintiffs' motion for class certification was fully briefed and pending the Court's ruling. Plaintiffs and Lead Counsel recognized the serious risk had the Court denied Plaintiffs' motion, which would have dramatically reduced, or eliminated altogether, the Class's potential recovery.[7] Moreover, even assuming class certification was achieved, the Court could have revisited certification at any time—presenting a continuous risk that this case, or particular claims, might not be maintained

[7] *In re Northfield Labs., Inc. Sec. Litig.*, 267 F.R.D. 536, 549 (N.D. Ill. May 18, 2010) (denying class certification).

on a class-wide basis through trial. *See, e.g.*, *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (even if a class is certified, "there is no guarantee the certification would survive through trial, as Defendants might have sought decertification or modification of the class").

b. Risks to Proving Liability

As in every complex case of this kind, Plaintiffs and the Settlement Class faced formidable obstacles to recovery at trial, both with respect to liability and damages. Although Plaintiffs believe that they would be successful and that the allegations of the Operative Complaint would ultimately be borne out by the evidence, they also recognize that they faced significant hurdles in proving liability and damages at trial.

Defendants forcefully argued in their motion to dismiss, and undoubtedly would continue to argue in a motion for summary judgment or at trial, that they made no actionable misrepresentations or omissions under the federal securities laws. ¶95. Defendants argued that there was no duty to disclose ZBH's internal Quality Systems problems, related remediation requirements, and adverse business impacts from FDA inspections either under the federal securities laws, or specifically under Item 303 of Regulation S-K. *Id.* Separately, Defendants argued, and would likely have continued to argue, that any alleged misstatements and omissions were protected by the PSLRA's statutory safe harbor provision for forward-looking statements, and specifically, that the findings of ZBH's internal audit reports would support the conclusion that there was no need for Defendants to update their risk warnings. ¶96.

Defendants further argued that, even if a duty to disclose existed, Plaintiffs failed to specifically allege, and would not be able to prove, that Defendants had the requisite state of mind. ¶97. Specifically, Plaintiffs would not be able to prove that Defendants knew or reasonably expected that ZBH's Quality System problems and related remediation would have a

material effect on ZBH's business and financial position. *Id.* Additionally, Defendants vigorously disputed Plaintiffs' allegations that the Company's earlier 2016 internal audits showed ominous red flags relating to the eventual North Campus product holds. ¶98. Defendants argued that there was nothing to suggest that the internal audit findings identified anything other than routine issues. *Id.*

While Plaintiffs believe that they have meritorious counterarguments, success was not a foregone conclusion. *In re Mexico Money Transfer Litig. (W. Union & Valuta)*, 164 F. Supp. 2d 1002, 1019 (N.D. Ill. 2000) ("Defendants are highly motivated to defend these cases vigorously…. [C]ontinued litigation would require resolution of complex issues at considerable expense and would absorb many days of trial time.").

c. Risks of Proving Loss Causation and Damages

Additionally, even if Plaintiffs were successful in establishing liability at trial, they would still face substantial risks in establishing loss causation and damages on a class-wide basis. *See Goldsmith v. Tech. Sols. Co.*, 1995 WL 17009594, at *4 (N.D. Ill. Oct. 10, 1995) (approving settlement and noting that "even if plaintiffs were to prevail in establishing liability, providing causation and the existence and amount of damages would be problematic"). As previewed in Defendants' opposition to class certification, Defendants would likely argue at summary judgment and/or trial that the Q3 revenue miss announced on October 31, 2016 was due to supply chain integration issues that had nothing to do with Plaintiffs' alleged fraud, and thus, any stock price decline flowing therefrom would need to be disaggregated from this other confounding news. ¶105. Additionally, Defendants also would likely argue that ZBH's Quality Systems problems only impacted the Company's reduction of Q4 2016 guidance announcement on October 31, 2016, and that the explanation of which was both sufficient and protected by the PSLRA safe harbor for forward-looking statements. *Id.* As discussed in more detail below, if

Plaintiffs failed to prove loss causation for the October 31, 2016 disclosure, the Settlement Class's estimated maximum recoverable damages would be reduced from a total estimate of $625 million to only approximately $95 million. ¶114.

Finally, Plaintiffs' proposed damages calculation would have come under sustained attack by Defendants, and the correct measure of damages would likely have come down to an inherently unpredictable and hotly disputed "battle of the experts" where it would be impossible to predict with any certainty which arguments would find favor with a jury. ¶¶107-108; *see also*, *In re Tyco Int'l, Ltd*., 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) ("Proving loss causation would be complex and difficult. Moreover, even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages.").

d. The Settlement Amount

In light of the substantial risks detailed above, the proposed Settlement, which provides a substantial and certain recovery of $50 million for the benefit of the Settlement Class, is an excellent result. Indeed, Plaintiffs' damages expert estimates that if Plaintiffs had fully prevailed on their claims at both summary judgment and after a jury trial, if the Court certified the same class period as the Settlement Class Period, and if the Court and jury accepted Plaintiffs' damages theory, including proof of loss causation—*i.e.*, Plaintiffs' ***best-case scenario***—the total ***maximum*** damages would be approximately $625 million. Thus, the $50 million Settlement Amount represents approximately 8% of the total ***maximum*** damages ***potentially*** available in this Action. ¶114.

Conversely, if Defendants' colorable arguments concerning loss causation and damages were accepted, the maximum recoverable damages would be drastically reduced. For example, if Plaintiffs failed to prove loss causation for the October 31, 2016 disclosure, the Settlement Class's estimated maximum recoverable damages would be reduced to approximately $95

million. *Id.* Under such a scenario, the $50 million recovery equates to 53% of damages. A recovery of 8%-53% of maximum recoverable damages is well above the average recovery in similar situations. *See* Ex. 8 (Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements 2019 Review and Analysis*, at p. 6 Figure 5 (Cornerstone Research 2020) (reporting median percentage of 2019 recoveries of 3.3% and 9.4% in cases alleging between $500-$999 million and $75-$149 million in damages, respectively, and 4.8% overall for all securities class actions)); *Medoff v. CVS Caremark Corp.*, 2016 WL 632238, at *6-7 (D.R.I. Feb. 17, 2016) (approving $48 million settlement representing approximately 5.33% of estimated recoverable damages and noting that this is "well above the median percentage of settlement recoveries in comparable securities class action cases"); *In re Nu Skin Enters., Inc., Sec. Litig.*, No. 14 Civ. 33 (D. Utah Oct. 13, 2016) Final Order and Judgment, ECF No. 149 (approving $47 million settlement representing approximately 6% of estimated losses).

Accordingly, the $50 million recovery achieved by the Settlement represents an excellent result for the Settlement Class especially when balanced against the substantial risks in this case.

2. The Complexity, Length, and Expense of Further Litigation Support Approval of the Settlement

Courts have consistently acknowledged that the prolonged and costly nature of complex class actions weighs in favor of negotiated settlements. *See, e.g., In re AT&T*, 789 F. Supp. 2d at 961 ("Were the Class Members required to await the outcome of a trial and inevitable appeal . . . they would not receive benefits for many years, if indeed they received any at all"); *In re Harnischfeger Indus., Inc., Sec. Litig.*, 212 F.R.D. 400, 409 (E.D. Wis. 2002) (approving settlement and noting "[s]hareholder class actions are difficult and unpredictable, and skepticism about optimistic forecasts of recovery is warranted"); *Retsky*, 2001 WL 1568856, at *2 (settlement favored because "securities fraud litigation is long, complex and uncertain").

In the absence of the Settlement, the Parties would have continued the completion of extensive fact discovery, expert discovery on complicated issues pertaining to loss causation and damages, briefing on summary judgment, potential additional class certification briefing, *Daubert* motions, pre-trial evidentiary motions, and trial—all with no guarantee of a better result. Indeed, even a meritorious case can be lost at trial. *See In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556, at *1 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial, jury returned a verdict against plaintiffs and the action was dismissed). Further, a successful jury verdict does not eliminate the risk to the class, and the additional delay of post-trial motions and the appellate process could last for years. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 413 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction); *Robbins v. Koger Props.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict for securities fraud). Thus, the present value of a certain recovery now, as opposed to the mere chance for a possibly greater recovery years later, supports approval of a Settlement that eliminates the expense and delay of continued litigation and the risk that the Settlement Class could receive no recovery.

3. All Other Factors Established by Rule 23(e)(2)(C) Support Approval of the Settlement

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," "the terms of any proposed award of attorney's fees, including timing of payment," and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors also supports approval of the Settlement or is neutral and does not suggest any basis for inadequacy of the Settlement.

First, the Net Settlement Fund will be allocated to Settlement Class Members who submit valid Claim Forms in accordance with the Plan of Allocation. *See* § III, *infra*. JND Legal Administration ("JND")—the Claims Administrator selected by Lead Counsel and approved by the Court—will process claims under the guidance of Lead Counsel, allow claimants an opportunity to cure any deficiencies in their claims or request the Court to review a denial of their claims, and, lastly, mail 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.[8] The manner of processing Claims proposed here is standard in securities class action settlements and courts have found this process to be effective, as well as necessary insofar as neither Plaintiffs nor Defendants possess the individual investor trading data required for a claims-free process to distribute the Net Settlement Fund.[9] *See New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 233-34, 245 (E.D. Mich. 2016) (approving settlement with a nearly identical distribution process), *aff'd*, 2017 WL 6398014 (6th Cir. Nov. 27, 2017).

Second, the relief provided for the Settlement Class in the Settlement is also adequate when the terms of the proposed award of attorneys' fees are considered. As discussed in the accompanying Fee Memorandum, the proposed attorneys' fees of 33.3%, to be paid upon approval by the Court, are reasonable in light of the substantial work and efforts of Plaintiffs' Counsel, the risks they faced in the litigation, the results achieved, and awards in similar complex cases. *See, e.g.*, *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *10 (S.D. Ill. Dec. 16, 2018) ("Courts within the Seventh Circuit, and elsewhere, regularly award

[8] JND has substantial experience serving as the claims administrator in securities class actions and was selected by Lead Counsel following an RFP process in which it was the low bidder.

[9] This is not a claims-made settlement. If the Settlement is approved, Defendants will not have any right to the return of a portion of the Settlement based on the number or value of the claims submitted. *See* Stipulation ¶14.

percentages of 33.33% or higher to counsel in class action litigation."); *Swift*, 2013 WL 5770633, at *8 ("payment of 33% of the common fund is widely accepted by the Seventh Circuit as a reasonable fee in a class action"). Most importantly, the Court's consideration of the proposed award of attorneys' fees is entirely separate from approval of the Settlement, and neither Plaintiffs nor their counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. *See* Stipulation ¶17.

Third, with respect to Rule 23(e)(2)(C)(iv), 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, e.g.*, *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) (observing that such "opt-out deals are not uncommon as they are designed to ensure that an objector cannot try to hijack a settlement in his or her own self-interest," and granting final approval of class action settlement); *accord* MANUAL FOR COMPLEX LITIGATION, Fourth (2004) § 21.631 ("[k]nowledge of the specific number of opt outs that will vitiate a settlement might encourage third parties to solicit class members to opt out.").

D. All Settlement Class Members are Treated Equitably

The proposed Settlement treats members of the Settlement Class equitably relative to one another. As discussed in § III, *infra*, under the Plan of Allocation, eligible claimants approved for payment by the Court will receive their *pro rata* share of the recovery based on their transactions in ZBH Securities. Plaintiffs will receive precisely the same level of *pro rata* recovery (based on their Recognized Claims as calculated under the Plan of Allocation) as all other similarly situated Class Members.

E. The Remaining Seventh Circuit Factors—The Amount of Opposition to the Settlement and Reaction of the Settlement Class to the Settlement—Warrant Final Approval of the Settlement

The reaction of Settlement Class Members also supports approval of the Settlement. Two related Seventh Circuit factors—"the amount of opposition to the settlement" and "the reaction of members of the class to the settlement" (*Wong*, 773 F.3d at 863)—overlap 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. *See* Ex. 3-A ("Segura Decl.") (Notice at pp. 25-28).

In accordance with the Preliminary Approval Order, JND began mailing copies of the Notice and Claim Form (together, the "Notice Packet") to potential Settlement Class Members and nominees on June 19, 2020. *See* Segura Decl., at ¶¶4, 7. As of July 21, 2020, over 154,600 copies of the Notice Packet have been disseminated to potential Settlement Class Members and nominees. *See id.* ¶12. To date, only three (3) requests for exclusion has been received and no objections have been filed with the Court.[10] ¶125; Segura Decl., ¶18; Ex. 3-C. The Settlement Class's reaction to the Settlement—as exhibited the fact that there have been only three (3) requests for exclusion and no objections—demonstrates strong support for the Settlement.

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

III. The Plan of Allocation is Fair and Reasonable

In the Preliminary Approval Order, the Court preliminarily approved the Plan of Allocation. Plaintiffs now request final approval of the Plan of Allocation. Assessment of a plan

[10] As provided in the Preliminary Approval Order, Plaintiffs will file reply papers in support of the Settlement on August 27, 2020, after the deadline for requesting exclusion or objecting has passed, that will address any requests for exclusion or objections received after this filing.

of allocation of settlement proceeds in a class action under Rule 23 is governed by "[t]he same standards of fairness, reasonableness and adequacy that apply to the settlement[.]" *Retsky*, 2001 WL 1568856, at *3. "When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012); *see also In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *13 (S.D.N.Y. Dec. 23, 2009) ("In determining whether a plan of allocation is fair, courts look largely to the opinion of counsel."). District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982).

Here, the proposed Plan of Allocation, which was developed by Plaintiffs' damages experts in consultation with Lead Counsel, is set forth in the Notice, and provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who submit valid Claim Forms. Ex. 3-A (Notice) at pp. 15-25. Under the Plan of Allocation, the Claims Administrator will calculate a Recognized Loss amount for each Settlement Class Member's purchases of ZBH common stock and call options, and sales of put options, during the Settlement Class Period for which adequate documentation is provided.[11] *Id.*

The calculation of each Settlement Class Member's Recognized Loss under the Plan of Allocation is explained in detail in the Notice and will be based on several factors, including when the ZBH Securities were purchased and sold, the type of ZBH Securities purchased or sold, the purchase and sale price of the ZBH Securities, and the estimated artificial inflation (or

[11] The Plan of Allocation caps aggregate payments to options holders to 0.5% of the Settlement Amount because options holders' total estimated damages account for less than 0.5% of the total aggregate of damages to all Settlement Class Members. *See* Notice at 21 n. 12.

deflation in the case of put options) in the respective prices of the ZBH Securities at the time of purchase and at the time of sale as determined by Plaintiffs' damages expert.[12] The Net Settlement Fund will be allocated to Authorized Claimants—including Plaintiffs—on a *pro rata* basis based on the type of security (*i.e.*, common stock or option) and the relative size of their Recognized Loss(es). Similar plans have repeatedly been approved by federal courts in securities class actions.[13] *See, e.g.*, *Harnischfeger*, 212 F.R.D. at 410 ("The plan is similar to those utilized in other securities class action cases and provides an equitable basis for distributing the fund to eligible class members."); *Wong*, 773 F.3d at 865 (examining and affirming similar plan of allocation); *Groupon*, 2016 WL 3896839, at *3 (approving plan of allocation that compensated class members based on timing and price of class period stock purchases).

Lead Counsel believe that the proposed Plan of Allocation provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who suffered losses as a result of the conduct alleged in the Action. ¶127. To date, no objections to the Plan of Allocation have been riled on this Court's docket or received by Lead Counsel, suggesting that the Settlement Class also finds the Plan of Allocation to be fair and reasonable. ¶135. Accordingly, Plaintiffs respectfully submit that the proposed Plan of Allocation is fair and reasonable, and merits final approval from the Court.

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[12] For those Settlement Class Members that purchased ZBH common stock pursuant to or traceable to the Offerings, the Recognized Loss will be the maximum of the Settlement Class Member's Recognized Loss under Section 10(b) or the statutory damages provided under Section 11(e) of the Securities Act. *See* Ex. 3-A (Notice) at 16-17.

[13] *See, e.g.*, Notice, *In re Stericycle, Inc. Sec. Litig.*, No. 16 Civ. 7145, (N.D. Ill. June 17, 2019), ECF No. 119-4 (setting forth similar plan of allocation in $45 million securities fraud settlement); Order Approving Plan of Allocation, *In re Stericycle*, No. 16 Civ. 7145 (N.D. Ill. Aug. 12, 2019), ECF No. 143 (approving plan of allocation of net settlement fund); Stipulation of Settlement, *Rubinstein v. Gonzalez*, No. 14 Civ. 9465, (N.D. Ill. June 19, 2019), ECF No. 274-1 (setting forth similar plan of allocation in settlement of securities fraud class action); Order Approving Plan of Allocation, *Rubinstein v. Gonzalez*, No. 14 Civ. 9465, (N.D. Ill. Oct. 22, 2019), ECF No. 296 (approving plan of allocation).

IV. The Settlement Class Should be Finally Certified

The Court's May 21, 2020 Preliminary Approval Order certified the Settlement Class for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3). *See* ECF No. 251, pp. 5-8. There have been no changes to alter the propriety of class certification for settlement purposes. Thus, for the reasons stated in Plaintiffs' Preliminary Approval Brief (*see* ECF No. 245 at 22-23), 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).

V. The Notice Program Satisfied Rule 23 and Due Process

The Notice provided to Settlement Class Members satisfied the requirements of both Fed. R. Civ. P. 23(c)(2) and 23(e). Rule 23(e) requires that notice of the proposed settlement be given "in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(B) further requires certified classes to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In securities class actions, the the notice must contain the information outlined in Rule 23(c)(2)(B) and the PSLRA. *See* 15 U.S.C. §§ 78u–4(a)(7), 77z-1(a)(7).

Both the substance of the Notice and the method of its dissemination to potential members of the Settlement Class satisfy these standards here. As noted above, in accordance with the Court's Preliminary Approval Order, JND, the Court-approved Claims Administrator, began disseminating copies of the Notice Packet to potential Settlement Class Members and nominees on June 19, 2020. *See* Segura Decl. ¶¶4, 7. As of July 21, 2020, JND disseminated 154,613 Notice Packets to potential Settlement Class Members and nominees. *See id*. ¶12. In addition, JND caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* on July 6, 2020. *See id.* ¶13. JND also established a toll-free helpline (888-670-1171) and a case-specific website dedicated to this Settlement,

www.ZimmerBiometSecuritiesLitigation.com, to provide potential Settlement Class Members with information concerning the Settlement and to request or access to copies of the Notice and Claim Form, as well as the Stipulation and Preliminary Approval Order. *Id.* ¶¶ 14-15.

This combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmission over a newswire, and publication on internet websites, was "the best notice . . . practicable under the circumstances." *See* Fed. R. Civ. P. 23(c)(2)(B). Courts in this Circuit routinely find that comparable notice programs meet the requirements of due process, the PSLRA, and Rule 23. *See*, *e.g., Groupon*, 2016 WL 3896839, at *2 (finding comparable notice in securities class action satisfied requirements of Rule 23, PSLRA, and due process); *City of Lakeland Emps.' Pension Plan v. Baxter Int'l Inc.*, 2016 WL 10571629, at *1 (N.D. Ill. Jan. 22, 2016) (securities class action settlement notice satisfied Rule 23 requirements).

In sum, the Notice complied with the Court's Preliminary Approval Order, as well as the requirements of Fed. R. Civ. P. 23, the PSLRA and due process.

CONCLUSION

For the reasons stated in this memorandum and in the Wolke Declaration, Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate, and certify the Settlement Class for purposes of settlement.

Dated: July 30, 2020

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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a copy of this document was served on all counsel of record by operation of the Court's electronic filing system.

s/ Kara M. Wolke
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