UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WILLIAM McGEE and LEE McGEE, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. CONSTANT CONTACT, INC., et al., Defendants.	No. 1:15-cv-13114-MLW CLASS ACTION AMENDED MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, CERTIFICATION OF A CLASS, AND APPROVAL OF NOTICE TO THE CLASS

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I. INTRODUCTION

Pursuant to the Court's October 3, 2019 Order, Court-appointed Lead Plaintiff North Collier Fire Control and Rescue District Firefighter Pension Plan respectfully submits this Amended Memorandum of Law in Support of its Unopposed Motion for Preliminary Approval of Settlement, on the terms set forth in the Stipulation of Settlement dated May 18, 2018 ("Settlement Agreement" or "Settlement"),[1] previously filed. *See* ECF No. 69. The Settlement provides for the payment of $13,000,000 in cash to resolve completely this securities class action against all Defendants.[2]

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff respectfully requests this Court enter the [Proposed] Order Preliminarily Approving Settlement and Providing for Notice (the "Notice Order"): (1) granting preliminary approval of the Settlement; (2) certifying the Class pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure for purposes of effectuating the Settlement; (3) directing that Class Members be given notice of the pendency and settlement of this Litigation; (4) setting a hearing date for the Court to consider final approval of the proposed Settlement, the Plan of Allocation, and Lead Counsel's request for an award of attorneys' fees and expenses ("Settlement Hearing"); and (5) setting a schedule for various events related thereto.

The parties have negotiated at arm's length a settlement of the claims asserted in this Litigation on behalf of all Persons who purchased or otherwise acquired Constant Contact common stock between July 25, 2014 and July 23, 2015, inclusive (the "Class Period"). The Settlement Amount of $13 million in cash represents a significant recovery for Class Members. Although Lead

[1] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.

[2] Defendants are Constant Contact, Inc. ("Constant Contact" or the "Company"), Gail F. Goodman, Harpreet S. Grewal and Jeremiah Sisitsky.

Plaintiff believes in the merits of its case, it recognizes that it would face substantial obstacles in establishing liability and damages should this case proceed to trial, especially in light of the fact that the case has not yet survived a motion to dismiss. Furthermore, even if this case were to proceed to trial, Defendants could appeal any judgment favorable to the Class, putting at risk, or otherwise delaying, any recovery to Class Members.

For the reasons discussed herein, the Settlement is a favorable result for the Class under the totality of the circumstances. Moreover, the Settlement satisfies the governing standards for preliminary approval under Fed. R. Civ. P. 23(e), as recently amended and in this Circuit, and is well within the range of fairness, adequacy, and reasonableness so as to warrant the Court's preliminary approval and authorization for dissemination of notice to Class Members, informing them of their right to object or opt out of the Class, and of the date set for a final Settlement Hearing.

II. BACKGROUND OF THE LITIGATION

This securities class action asserts claims under the Securities Exchange Act of 1934 (the "Exchange Act") on behalf of Persons who purchased or otherwise acquired Constant Contact common stock during the Class Period. The initial complaint in this action was filed on August 7, 2015. On September 21, 2016, the Court appointed Lead Plaintiff and Lead and Liaison Counsel.

Lead Plaintiff alleges that Defendants violated §§10(b) and 20(a) of the Exchange Act by, among other things, issuing false and misleading statements and/or failing to disclose that: (i) the Company's gross customer additions were lower than expected; (ii) the Company was experiencing negative trends in customer conversion rates; (iii) the Company was steering new customers toward the lowest priced packages; and (iv) as a result, the Company's revenues for 2015 would be below expectations.

On December 19, 2016, Lead Plaintiff filed its Amended Class Action Complaint for Violations of the Federal Securities Laws ("Amended Complaint") (ECF No. 34). On February 24, 2017, Defendants filed their motion to dismiss the Amended Complaint. Lead Plaintiff filed its opposition to the motion to dismiss on April 10, 2017, and Defendants filed their reply on May 10, 2017.

In an effort to conserve judicial resources and attempt to settle the Litigation, the Settling Parties engaged the services of Michelle Yoshida, Esq. of Phillips ADR Enterprises, P.C., a nationally recognized mediator. To facilitate a meaningful mediation process, and in light of the fact that no formal discovery had been undertaken because of the PSLRA-mandated discovery stay, Defendants made certain documents available to Lead Counsel in advance of the mediation, on a confidential basis, that pertained to a parallel SEC investigation. The Settling Parties also prepared and exchanged detailed mediation statements and engaged in a full-day in-person mediation session with Ms. Yoshida on March 27, 2018. These efforts culminated with the parties agreeing to settle the Litigation for $13,000,000, subject to the negotiation of the terms of a Stipulation of Settlement and approval by the Court. The parties thereafter engaged in negotiations regarding the final terms of the Settlement and executed the Settlement Agreement on May 18, 2018.

III. BRIEF SUMMARY OF THE PROPOSED SETTLEMENT

A. The Class

Lead Plaintiff and Lead Counsel negotiated the proposed Settlement on behalf of a Class consisting of all Persons who purchased or otherwise acquired Constant Contact common stock between July 25, 2014 and July 23, 2015, inclusive (the "Class").[3]

[3] Excluded from the Class are: Defendants, the officers and directors of Constant Contact during the Class Period, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest. Also

B. Settlement Consideration

As consideration for the Settlement, Constant Contact and its insurers, on behalf of Defendants, have agreed to pay or cause to be paid $13,000,000 in cash into a separate interest-bearing account maintained by the Escrow Agent within fifteen (15) business days of the date of entry of the Notice Order, which is attached as Exhibit A to the Settlement Agreement and is being filed concurrently. This is not a claims-made settlement. Neither Defendants nor their insurers will have a reversionary interest in the Settlement Fund. Settlement Agreement, ¶2.11.

C. Release of Claims

In return for the above consideration, Class Members will release all claims, rights, duties, controversies, obligations, demands, actions, debts, sums of money, suits, contracts, agreements, promises, damages, losses, judgments, liabilities, allegations, arguments and causes of action of every nature and description, whether known or unknown, whether arising under federal, state, local, common, statutory, administrative, or foreign law, or any other law, rule or regulation, at law or in equity, whether class or individual in nature, whether direct or derivative, whether fixed or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, whether matured or unmatured, which arise out of or relate in any way to both: (i) the purchase or acquisition of shares of Constant Contact common stock during the Class Period, and (ii) the acts, facts, statements, or omissions that were or could have been alleged by Lead Plaintiff or any Class Member in the Litigation.

D. Entry of Order and Final Judgment

Upon determination by the Court that the proposed Settlement is fair, reasonable, adequate, and in the best interests of the Class, the parties will ask the Court to enter the [Proposed] Order and

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excluded from the Class is any Class Member that validly and timely requests exclusion in accordance with the requirements set by the Court.

Final Judgment (Exhibit B to the Settlement Agreement). The Order and Final Judgment provides, *inter alia*, that upon the Effective Date, Lead Plaintiff and each of the Class Members who have not timely and validly opted out of the Class are permanently barred and enjoined from the assertion, institution, maintenance, prosecution, or enforcement against Defendants or any Released Persons in any state or federal court or arbitral forum, or in the court of any foreign jurisdiction, of any and all Released Claims (including Unknown Claims), as well as any other claims arising out of, relating to, or in connection with, the defense, settlement, or resolution of the Litigation or the Released Claims.

The Order and Final Judgment likewise provides that upon the Effective Date, each of the Released Persons shall fully, finally and forever release, relinquish and discharge all Released Defendants' Claims against the Lead Plaintiff, each and all of the Class Members and Lead Plaintiff's Counsel (including Unknown Claims).

E. Fee and Expense Application

As detailed in the Settlement Agreement, and as provided for in the Notice, Lead Counsel may submit an application or applications ("Fee and Expense Application") for distributions from the Settlement Fund for: (a) an award of attorneys' fees of 25% of the Settlement Amount; (b) payment of litigation expenses up to $120,000 incurred in connection with prosecuting the Litigation; and (c) interest on such attorneys' fees and expenses at the same rate and for the same periods as earned by the Settlement Fund (until paid). No attorneys or law firms who have not appeared on the pleadings in this Litigation will share in any fee awarded by the Court.

F. Opt-Out Agreement

Lead Plaintiff and Defendants have entered into a Supplemental Agreement which provides that if prior to the Settlement Hearing, the number of valid requests for exclusion that are received

exceeds a certain amount, Constant Contact or its successor shall have the option to terminate the Settlement Agreement. Settlement Agreement, ¶7.3.[4]

IV. CERTIFICATION OF THE CLASS IS APPROPRIATE

Before preliminarily determining whether the proposed Settlement is fair, this Court "must determine whether to certify the class for settlement purposes." *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 101 (D. Mass. 2010). When "'[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.'" *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000) (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997)) (alteration in original). Nevertheless, "[w]hen a settlement class is proposed, it is incumbent on the district court to give heightened scrutiny to the requirements of Rule 23 in order to protect absent class members." *In re Lupron(R) Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005). "This cautionary approach notwithstanding, the law favors class action settlements." *Id.* (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)).

Under the terms of the Settlement Agreement, the parties have agreed – for the purpose of settlement – to certification of the Class. Notwithstanding, "[t]o obtain class certification, the plaintiff must establish the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation and demonstrate that the action may be maintained under Rule 23(b)(1), (2), or (3)." *Hochstadt*, 708 F. Supp. 2d at 102 (citing *Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 38 (1st Cir. 2003)).

[4] The Settling Parties agree to maintain the confidentiality of the Supplemental Agreement, which shall not be filed with the Court unless and until: a dispute arises as to its terms, or as otherwise ordered by the Court. Nor shall it be otherwise disclosed unless ordered by the Court.

Securities class actions are ideally suited for class treatment. *See, e.g.*, *In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 31 (D. Mass. 2008) ("[i]nvestors seeking damages for violations of federal securities are often considered the prototypical class action plaintiffs"); *see also In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 56 (D. Mass. 2010) ("[S]ome types of cases are uniquely well-suited to class adjudication, and '[p]redominance is a test readily met in certain cases alleging consumer or securities fraud.'") (second alteration in original). Here, Lead Plaintiff asserts that the requirements of Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that:

(a) the proposed Class is so numerous that joinder of all members is impracticable as there were millions of shares of Constant Contact common stock outstanding during the Class Period, held by hundreds or thousands of shareholders geographically dispersed across the country;

(b) based on Lead Plaintiff's allegations that Defendants purportedly engaged in uniform misconduct affecting the Class Members, the claims of Lead Plaintiff are typical of the claims of the proposed Class it seeks to represent;

(c) Lead Plaintiff does not have any interests antagonistic to, or in conflict with, the other Members of the Class and it has fairly and adequately represented and protected the interests of the other Class Members as it has retained counsel competent and experienced in class action and securities litigation;

(d) there are questions of law or fact common to the Class which predominate over any questions solely affecting individual Members of the Class, including: (i) whether the federal securities laws were violated by Defendants' acts; (ii) whether Defendants omitted and/or misrepresented material facts; (iii) the method for determining whether the price of Constant Contact common stock was artificially inflated during the Class Period; (iv) the amount of any such alleged

inflation; (v) whether there was any wrongdoing on the part of Defendants; (vi) the extent that various facts alleged by Lead Plaintiff influenced the trading price of Constant Contact common stock during the Class Period; and (vii) whether the facts alleged were material, false or misleading, and otherwise actionable under the federal securities laws; and

(e) given that joinder of all Class Members is impracticable, certifying a Class is superior to all other available methods for the fair and efficient adjudication of this controversy since prosecuting separate actions by or against individual Class Members would create a risk of: (i) inconsistent or varying adjudications with respect to individual Class Members that would establish incompatible standards of conduct for Defendants; and (ii) adjudications with respect to individual Class Members that, as a practical matter, would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. *See* Amended Complaint (ECF No. 34), ¶¶209-214; *see also In re StockerYale, Inc. Sec. Litig.*, No. 1:05cv00177-SM, 2007 WL 2410361, at *1 (D.N.H. Aug. 21, 2007) (concluding requirements of Rules 23(a) and (b)(3) were satisfied for purposes of preliminary settlement approval); *In re Sonus Networks, Inc. Sec. Litig.*, 247 F.R.D. 244, 248 (D. Mass. 2007) ("[I]n a securities class action, a plaintiff can generally demonstrate numerosity on the basis of a large number of shares outstanding and traded."). Accordingly, the Court should certify the Class for settlement purposes.

V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED

As a matter of public policy, settlement is a highly favored means of resolving disputes. *See United States v. Comunidades Unidas Contra la Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000) (noting "the strong public policy in favor of settlements"). This is especially so in the context of complex class action litigation. *See Lupron(R)*, 228 F.R.D. at 88 ("[T]he law favors class action

settlements."); *see also Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) ("[W]e should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved.").

Under Rule 23(e), claims of a certified class may be settled "only with the court's approval." Fed. R. Civ. P. 23(e). The purpose of requiring court approval of a class action settlement is to ensure that the settlement is fair, adequate, and reasonable. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32 (1st Cir. 2009). Pursuant to Rule 23(e)(1), as recently amended, the issue at preliminary approval is whether the Court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Rule 23(e)(2) provides:

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the Court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
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> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account:
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> (i) the costs, risks, and delay of trial and appeal;
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> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
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> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and

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

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

Overlapping the Rule 23(e)(2)(B) (arm's-length negotiation) and Rule 23(e)(2)(C)(i) (adequacy of the settlement based on the costs, risks, and delay of trial and appeal) requirements is the two-level analysis in the First Circuit, which includes an assessment of both the procedure fairness of the settlement negotiations and the substantive adequacy of the settlement itself.

A. The Negotiations Occurred at Arm's Length with the Substantial Assistance of a Highly Experienced Mediator

The Rule 23(e)(2)(B) factor and the first inquiry under the First Circuit's analysis is a procedural one – whether the settlement was reached through good-faith bargaining at arm's length. *Hochstadt*, 708 F. Supp. 2d at 107. In arriving at the Settlement, the parties agreed to utilize the services of Michelle Yoshida, Esq. of Phillips ADR Enterprises, P.C., a well-respected mediator with significant experience in mediating complex litigation, including securities class action litigation. Prior to the mediation, the parties drafted detailed mediation statements, which were provided to Ms. Yoshida and exchanged among the parties. The parties' mediation statements detailed their respective positions, highlighted the factual and legal issues in dispute, cited to supporting documents, and, in the case of the reply statements, responded to arguments presented by their opponents.

At the March 27, 2018 mediation, the parties' positions, including the strengths and weaknesses of their respective claims and defenses, and the implication (or lack thereof) of the Company's settlement with the SEC, were fully explored. Following a full day of negotiations conducted under the auspices of Ms. Yoshida, the parties ultimately reached an agreement-in-principle to resolve the Litigation.

Under these circumstances, it is clear that the Settlement Agreement and Settlement were not the result of fraud, collusion, or abandonment of the interests of the Class, but rather were the result of extensive and informed arm's-length negotiations. *See, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] . . . mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-cv-09405-CAS-FFMx, 2014 WL 439006, at *5 (C.D. Cal. Jan. 30, 2014) ("[W]here the services of a private mediator are engaged, this fact tends to support a finding that the settlement valuation by the parties was not collusive."); *Simmons v. Enter. Holdings, Inc.*, No. 4:10CV00625AGF, 2012 WL 2885919, at *2 (E.D. Mo. July 13, 2012) (finding settlement to be fair, reasonable, and adequate when parties "participated in mediation sessions with an experienced mediator," and settlement agreement "resulted from intensive, serious, and non-collusive arms-length negotiations").

B. The Settlement Is Substantively Adequate

The Rule 23(e)(2)(C)(i) factor (adequacy of relief, taking into account the "costs, risks, and delay of trial and appeal") is also readily satisfied. Here, the Court considers whether there was sufficient investigation and discovery to permit an informed decision on whether to settle the Litigation on the proposed terms. *See Hochstadt*, 708 F. Supp. 2d at 106.

The parties reached a settlement agreement early in the proceedings, a result consistent with the Federal Rules of Civil Procedure. *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005) (noting early resolution of litigation is consistent with Rule 1 which states the Federal Rules of Civil Procedure "'shall be construed and administered to ensure the *just, speedy, and inexpensive determination* of every action'") (citation omitted, emphasis in original). Because of the

stay on discovery imposed by the PSLRA, Lead Plaintiff was unable to conduct formal discovery,[5] but Lead Plaintiff, through its counsel, conducted its own thorough factual investigation in connection with preparing the various complaints in the Litigation. This investigation included, *inter alia*, reviewing and analyzing a vast amount of publicly available information and data concerning the Company and the Individual Defendants and consulting with an expert regarding loss causation and damages issues. Lead Counsel also interviewed witnesses with information concerning Lead Plaintiff's allegations and reviewed the documents made available to it by Defendants' counsel pertaining to the SEC investigation that was pending against Constant Contact.

As a result of these efforts, Lead Plaintiff and Lead Counsel had a comprehensive understanding of the Litigation, including the risks of proceeding with the case, and sufficient information to make a well-informed decision regarding the fairness of the Settlement at this stage of the Litigation. *See, e.g.*, *In re Ocean Power Techs., Inc., Sec. Litig.*, No. 3:14-CV-3799, 2016 WL 6778218, at *17 (D.N.J. Nov. 15, 2016) (approving settlement and noting that, "[a]lthough there has been no formal discovery, Plaintiff's Counsel had ample information to evaluate the prospects for the Class and to assess the fairness of the Settlement"); *Rieckborn v. Velti PLC*, No. 13-cv-03889-WHO, 2015 WL 468329, at *6 (N.D. Cal. Feb. 3, 2015) ("Despite reaching settlement relatively early in the life span of this case, the Settling Parties have shown that their decision to settle was made on the basis of a thorough understanding of the relevant facts and law. This factor weighs in

[5] "In the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citation omitted); *see also Yedlowski v. Roka Bioscience, Inc.*, No. 14-CV-8020-FLW-TJB, 2016 WL 6661336, at *13 (D.N.J. Nov. 10, 2016) ("Courts in this Circuit frequently approve class action settlement[s] despite the absence of formal discovery."); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 363 (S.D.N.Y. 2002) ("'the Court need not find that the parties have engaged in extensive discovery'") (citation omitted) (collecting cases).

favor of approval."); *Eisen*, 2014 WL 439006, at *4 (approving settlement when record established "that all counsel had ample information and opportunity to assess the strengths and weaknesses of their claims and defenses").

C. Experienced Counsel Recommend the Settlement

In this context, "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *13 (S.D.N.Y. Nov. 8, 2010) (internal quotation marks omitted); *see also Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."). Here, throughout the Litigation, Lead Plaintiff had the benefit of the advice of knowledgeable counsel with extensive experience in shareholder class action litigation and securities fraud cases. During the course of prosecuting the Litigation and through the mediation process, Lead Counsel developed a thorough understanding of the merits of the asserted claims and the risks of proceeding through resolution of the motion to dismiss and thereafter.

Defendants' motion to dismiss and mediation materials argued forcefully and persuasively that Lead Plaintiff could not prevail because none of Lead Plaintiff's allegations established a materially false or misleading statement, as each was either a forward-looking statement accompanied by meaningful cautionary language, an inactionable opinion, and/or puffery. ECF No. 44 at 13-15. Defendants further maintained that Lead Plaintiff could not raise a strong inference of scienter (*id.* at 15-19) and that it could not establish loss causation, because neither of Lead Plaintiff's "corrective disclosures" revealed evidence of fraud, and neither was connected to any

allegedly false statement. *Id.* at 20. Although Lead Plaintiff countered each of those arguments in its opposition to the motion to dismiss (ECF No. 48), there was no guarantee that the motion would be denied. Defendants also maintained that the SEC's investigation and conclusions would bolster their arguments that Lead Plaintiff's complaint should be dismissed, with prejudice. When taking these risks into account, Lead Counsel believes in the fairness and reasonableness of the Settlement. This recommendation supports the granting of preliminary approval here.

D. Number of Objections

Notice to the Class has not yet been issued so the number of objections "can only be assessed preliminarily." *Hochstadt*, 708 F. Supp. 2d at 108. At this time, however, there are no known objectors to any aspect of the Settlement. Lead Plaintiff and Lead Counsel believe that the Settlement as provided in the Settlement Agreement is a fair, reasonable, and adequate resolution of the Litigation, and is in the best interests of the Class Members. Specifically, it confers a substantial and immediate benefit upon the Class while eliminating: (i) the uncertainty of future relief after protracted and expensive litigation, including the difficulties of proof of, and possible defenses to, the securities law violations asserted; (ii) the risk that Lead Plaintiff ultimately may not prevail following a trial on the merits; and (iii) the risk that even if Lead Plaintiff is successful following trial (and any appeals to a successful verdict), Defendants would not have sufficient resources to satisfy any judgment.

E. The Remaining Amended Rule 23(e)(2) Factors Are Also Met

1. Lead Plaintiff and Its Counsel Have Adequately Represented the Class

As explained above, Lead Plaintiff and Lead Counsel have adequately represented the Class as required by Rule 23(e)(2)(A) by diligently prosecuting this Litigation on its behalf, including, among other things, drafting the complaints, conducting a thorough investigation despite the

existence of the PSLRA-mandated discovery stay, opposing Defendants' motion to dismiss, obtaining, reviewing and analyzing non-public documents provided in advance of the mediation, and engaging in a mediation. Moreover, Lead Counsel achieved a Settlement of $13 million which will provide significant relief to the Class.

2. The Proposed Method for Distributing Relief Is Effective

As demonstrated below and in the Declaration of Michael Joaquin Regarding Notice and Administration ("Joaquin Decl."), submitted herewith, the method and effectiveness of the proposed notice and claims administration process (Rule 23(e)(2)(C)(ii)) are effective. The notice plan includes direct mail notice to all those who can be identified with reasonable effort supplemented by the publication of the Summary Notice in *The Wall Street Journal* and over the *Business Wire*. In addition, a settlement-specific website will be created where key documents will be posted, including the Settlement Agreement, Notice, Proof of Claim and Release and Notice Order. Joaquin Decl., ¶17. Gilardi estimates that the notice plan will reach approximately 95% of potential Class Members. *Id.*, ¶19.

The claims process is also effective and includes a standard claim form which requests only the information necessary to calculate a claimant's claim amount pursuant to the Plan of Allocation. The Plan of Allocation will govern how Class Members' claims will be calculated and, ultimately, how money will be distributed to Authorized Claimants. The Plan of Allocation is based on the statutory framework for calculating damages under Section 10(b) of the Exchange Act. It is consistent with plans that have been approved and successfully used to allocate recoveries in other securities class actions alleging violations of Section 10(b). A thorough claims process, including how deficiencies are addressed, is also explained in the Joaquin Declaration. *Id.*, ¶¶24-27.

3. Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." As discussed above (at §III.E.), Lead Counsel intends to seek an award of attorneys' fees of 25% of the Settlement Amount and expenses in an amount not to exceed $120,000, plus interest on both amounts. This fee request is in line with other settlements approved in recent cases in this District and the First Circuit. *See, e.g.*, *In re AVEO Pharm., Inc. Sec. Litig.*, No. 1:13-cv-11157-DJC, slip op. at 7 (D. Mass. May 30, 2018) (awarding 30% of $15 million settlement amount, plus expenses); *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 U.S. Dist. LEXIS 19135, at *29 (D.R.I. Feb. 17, 2016) (awarding 30% of $48 million settlement, plus expenses); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 80-82 (D. Mass. 2005) (awarding 33.3% of $67 million settlement fund). In addition, Lead Counsel will request that any award of fees and expenses be paid at the time of award. Settlement Agreement, ¶6.2.

4. The Parties Have No Side Agreements Besides Opt-Outs

Rule 23(e)(2)(C)(iv) requires the disclosure of any side agreement. The Settling Parties have entered into the Supplemental Agreement which is a standard agreement in securities litigation and provides that if Class Members opt out of the Settlement such that the number of shares of Constant Contact common stock represented by such opt outs equals or exceeds a certain amount, Constant Contact or its successor has the option to terminate the Settlement. Settlement Agreement, ¶7.3.

5. Class Members Are Treated Equitably

The final factor, Rule 23(e)(2)(D), looks at whether Class Members are treated equitably. As reflected in the Plan of Allocation (Settlement Agreement, Ex. A-1 at 14-18), which tracks the calculation of damages under the Exchange Act, the Settlement treats Class Members equitably relative to each other, based on the timing of their Constant Contact common stock purchases,

acquisitions and sales, and by providing that each Authorized Claimant shall receive his, her or its *pro rata* share of the Net Settlement Fund based on their recognized losses.

Under these circumstances, the Court should preliminarily approve the proposed Settlement as fair, adequate, and reasonable and instruct that notice of the Settlement be issued to Class Members. *See, e.g., M3 Power*, 270 F.R.D. at 63 ("[T]he only practical way to ascertain the overall level of objection to the proposed settlement is for notice to go forward, and to see how many potential class members choose to opt out of the settlement class or object to its terms at the Final Fairness Hearing.").

VI. THE COURT SHOULD APPROVE THE PROPOSED FORM AND MANNER OF CLASS NOTICE AND THE PROOF OF CLAIM AND RELEASE

Under Rule 23(e)(1), the Court "must direct notice in a reasonable manner to all class members who would be bound" by the proposed Settlement. Fed. R. Civ. P. 23(e)(1). "To satisfy due process, the notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 WL 127728, at *14 (D. Mass. Jan. 8, 2015) (quoting *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996)). Here, the proposed form and manner of the Notice satisfy these requirements.

The Claims Administrator will cause the Notice (Exhibit A-1 to Settlement Agreement) to be mailed to all shareholders of record identified by the Company or its transfer agent, as well as to nominees who hold a Class Member's Constant Contact stock in "street name." A Summary Notice (Exhibit A-3 to Settlement Agreement) also will be published once in the national edition of *The Wall Street Journal* and once over the *Business Wire*. Moreover, the Settlement Agreement and its exhibits will be posted on the Settlement website. This proposed method of giving notice to Class

Members is common in securities class actions and is appropriate because it is "the best notice practicable under the circumstances" and will provide "due and sufficient notice to all persons entitled thereto." *StockerYale*, 2007 WL 2410361, at *2.

Moreover, the content of the Notice describes the general terms of the Settlement, the Fee and Expense Application, and the proposed Plan of Allocation, and provides the date of the Settlement Hearing as well as other details required by the PSLRA. ***Compare*** Notice (Exhibit A-1 to Settlement Agreement), ***with*** 15 U.S.C. §78u-4(a)(7) (disclosure of settlement terms to class members). The information also is provided to Class Members in a format that is accessible and easy to read. The Notice advises Class Members that they have the right to exclude themselves from the Settlement, or to object to any aspect of the Settlement, including the Plan of Allocation and Lead Counsel's Fee and Expense Application. Moreover, if a Class Member has questions about any aspect of the Settlement, the Notice provides recipients with the contact information for the Claims Administrator (including a toll-free telephone number) and Lead Counsel. Accordingly, the proposed Notice provides Class Members with all information required by Rule 23(e), the PSLRA, and due process. *See, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203-04 (D. Me. 2003) (noting "[t]he notice must describe fairly, accurately and neutrally the claims and parties in the litigation, the terms of the proposed settlement, and the options available to individuals entitled to participate, including the right to exclude themselves from the class" and holding a particular notice satisfied applicable requirements when, as here, it "provide[s] class members with sufficient information to make an informed and intelligent decision about whether to file a claim, seek exclusion from the class, or object to the proposed settlement"). Lead Plaintiff therefore respectfully requests that the Court direct that Class Members be given notice of

the pendency of this Litigation and the Settlement in the form and method set forth in the Settlement Agreement.

VII. PROPOSED SCHEDULE OF EVENTS

Provided that the Court grants preliminary approval to the Settlement, Lead Plaintiff respectfully requests the Court set a schedule of events to govern the remaining procedural aspects of the proposed Settlement, subject to the Court's convenience:

EVENT	TIME FOR COMPLIANCE
Deadline for mailing the Notice and Proof of Claim and Release form to Class Members	30 calendar days after the Court enters the Notice Order ("Notice Date")
Deadline for publishing the Summary Notice in *The Wall Street Journal* and over the *Business Wire*	7 calendar days following the Notice Date
Deadline for submitting Proof of Claim and Release forms	120 calendar days following the Notice Date
Deadline for submitting exclusion requests or filing objections	30 calendar days before the Settlement Hearing
Filing of memoranda in support of final approval of the Settlement and Plan of Allocation, and in support of the Fee and Expense Application	60 calendar days before the Settlement Hearing
Filing of reply memoranda in support of final approval of the Settlement and Plan of Allocation, and in support of the Fee and Expense Application	14 calendar days before the Settlement Hearing
Settlement Hearing	Approximately 110 calendar days following execution of the Notice Order

VIII. CONCLUSION

For the foregoing reasons, the Settlement warrants this Court's preliminary approval and Lead Plaintiff respectfully requests this Court enter the Notice Order, set a schedule of events to govern the remaining procedural aspects of the Settlement, and grant such further relief as the Court deems just and reasonable.

DATED: October 18, 2019

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
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s/ Ellen Gusikoff Stewart

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List, and I hereby certify that I have caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Court's Manual Notice List.

/s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WILLIAM McGEE and LEE McGEE, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. CONSTANT CONTACT, INC., et al., Defendants.	No. 1:15-cv-13114-MLW CLASS ACTION DECLARATION OF MICHAEL JOAQUIN REGARDING NOTICE AND ADMINISTRATION

I, MICHAEL JOAQUIN, declare and state as follows:

1. I am a Senior Vice President of Securities at Gilardi & Co. LLC ("Gilardi"), located at 3301 Kerner Boulevard, San Rafael, California 94901. I make this declaration based on personal knowledge, and if called to testify I could and would do so competently.

2. At the request of Lead Counsel Robbins Geller Rudman & Dowd LLP, I am providing this declaration to give the Court and the parties to the above-captioned action further information about the procedures and methods that will be used to provide notice of the proposed Settlement to the investors who make up the Class, and the administration of the claim process.

3. Gilardi was retained by Lead Counsel, subject to Court approval, to provide notice and claims administration services in the above-captioned action. The Class consists of all Persons who purchased or otherwise acquired Constant Contact, Inc. ("Constant Contact") common stock between July 25, 2014 and July 23, 2015, inclusive. Excluded from the Class are: Defendants, the officers and directors of Constant Contact during the Class Period, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest. Also excluded from the Class is any Class Member that validly and timely requests exclusion in accordance with the requirements set by the Court.

4. As background, Gilardi (a subsidiary of Computershare) has implemented successful claims administration programs in more than a thousand securities class actions during our more than three decades as an administrator. Our experience includes many of the largest and most complex settlement administrations of both private litigation matters and of actions brought by government securities regulators. More information on Gilardi's experience can be found on its website at www.gilardi.com.

5. The proposed notice plan in this matter uses procedures that have been designed to provide extremely effective direct mail notification to every investor who is a member of the Class

and who can be identified with reasonable effort. In addition, direct email notification will be provided to hundreds of financial institutions that regularly monitor proposed securities class action settlements. By themselves, the proposed direct mail and email notification will be sufficient to reach an extremely high percentage of the Class. All persons and entities identified as potential Class Members will be sent a complete Notice of Proposed Settlement of Class Action ("Notice") and Proof of Claim and Release form ("Proof of Claim") package (collectively, the "Claim Package"), which will include instructions for claim submission, objecting to any aspect of the Settlement, and requesting exclusion from the Class. The proposed notice plan also calls for publication of a summary version of the Notice (the "Summary Notice") in a national newspaper read by securities investors, as well as placement of the Summary Notice on a national business newswire service. Details of the complete proposed notice plan are outlined below.

6. If Gilardi is appointed by the Court as Claims Administrator, and subject to the Court's approval of the notice plan set forth in the [Proposed] Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"), Gilardi will initially send a copy of the Claim Package by First-Class Mail to all persons and entities identified as potential Class Members by Constant Contact's stock transfer agent. The stock transfer agent will only have the contact information for the small number of investors that hold their securities in their own names. These investors typically make up a very small percentage of a class, as the vast majority of investors hold their securities through a broker, bank, or other financial institution, and do so in what is known colloquially as "street name." Under the system of street name ownership, institutions act as the record holders for investors who are the beneficial owners of the securities. In Gilardi's experience, shareholders who hold their securities in their own name, and are therefore known to the stock transfer agent, typically make up less than 5% of a class in a typical securities settlement.

7. In order to obtain the contact information for investors that hold their securities in street name, Gilardi and other administrators use a procedure designed to obtain that information from the brokers, banks and other institutions (the "Nominee Holders") that actually hold the securities for the benefit of their clients. In the more than 30 years that Gilardi has been notifying class members of actions involving publicly-traded securities, Gilardi has found the majority of potential class members hold their securities in street name and are reached through the Nominee Holders.

8. For this matter, Gilardi will send a Claim Package and appropriate cover letter to each entity included on a proprietary list of approximately 250 Nominee Holders. This list also includes a group of firms and institutions who have requested notification on every case involving publicly-traded securities and is contained in a database created, maintained, and updated as necessary by Gilardi. In Gilardi's experience, the institutions included in this database represent a significant majority of the beneficial holders of the securities in most settlements involving publicly-traded companies.

9. Gilardi will also send a Claim Package and appropriate cover letter to each financial institution registered with the U.S. Securities and Exchange Commission ("SEC") as a potential Nominee Holder. There are approximately 4,500 institutions on that list, which changes from time to time and is, therefore, periodically updated. The cover letter accompanying the Claim Package would notify the Nominee Holders of the pendency of this action as a class action and of the proposed Settlement and inform them of their obligation to either provide to Gilardi the names and addresses of their clients who may be Class Members or request copies of the Claim Package to provide directly to their customers and clients.

10. Gilardi has long-standing relationships with all of the primary Nominee Holders, and they are accustomed to providing us with information regarding their clients from their records

and obtaining reimbursement for doing so. Gilardi will provide several supplemental notification letters to any Nominee Holder who does not respond to the initial request for potential Class Member names and addresses.

11. Gilardi will promptly mail the Claim Package to all potential Class Members identified by Nominee Holders. Gilardi will also send copies of the Claim Package directly to Nominee Holders who indicate that they will directly forward the documents to their customers and clients who may be Class Members.

12. All name and address data obtained by Gilardi will be reviewed to identify and eliminate exact duplicates and incomplete data prior to mailing. Addresses will be checked against the United States Postal Service's National Change of Address database to identify address changes and obtain current mailing addresses where available. Any Claim Packages that are returned as undeliverable mail will be reviewed to determine if an alternative or updated address is available from the Postal Service, and will be re-mailed to the updated or alternative address. In cases where no address is available from the Postal Service, Gilardi will attempt to obtain updated or alternative address information from private databases, and will re-mail the Claim Package if such information is available.

13. Gilardi will supplement the direct mailing program described above by publishing the Summary Notice in *The Wall Street Journal*. The Summary Notice will also be posted with *Business Wire*, an online newswire service, where it will be available for a month. News outlets often use posted notices as the basis for their own stories about litigation settlements involving publicly-traded companies, thereby creating added awareness of the proposed settlement among investors.

14. Gilardi will also cause the Claim Package to be published by the Depository Trust Corporation ("DTC") on the DTC Legal Notice System ("LENS"). LENS enables participating

banks and brokers to review the Claim Package and directly contact the Claims Administrator to obtain copies of the Claim Package for their clients who may be Class Members.

15. The Claim Package will also be provided electronically to approximately 450 institutions that monitor securities class actions for their investor clients and regularly act on their behalf in these matters.

16. Throughout the notification and claims processing period, Gilardi will maintain a toll-free number to accommodate potential Class Members' inquiries.

17. Gilardi will also establish and maintain a settlement-specific website where key documents will be posted, including the Stipulation of Settlement, the Notice and Proof of Claim and the executed Preliminary Approval Order, and any other documents that the parties or the Court require to be posted. The website will also provide summary information regarding the case and Settlement and highlight important dates, including the date of the settlement approval hearing and any changed deadlines. All posted documents will be available for downloading from the website.

18. The Claim Package, settlement website, and key documents will be provided in English, which is the language used for most company SEC filings and proxy materials. In our experience, the typical demographic of most securities-related settlement classes is English-speaking, and as such the costs and extra work associated with translation of documents is generally not required unless there is specific evidence that the majority of the class would only speak another language. In addition, telephone and email support will be available to Class Members in all major languages through Gilardi and its affiliated Computershare partners.

19. Based on our experience, we estimate that the combined direct mail and publication program proposed will provide notice to more than 95% of the investors that are potential Class Members. Because the Notice directs the cooperation of Nominee Holders and provides for the

reimbursement of their costs of doing so, we have experienced and continue to anticipate a high level of compliance from those institutions, many of which have developed regular systems for providing the required information. In addition, the proposed publication will create additional awareness of the Settlement, and we expect to receive a number of additional requests for the Claim Package through the designated toll-free number and via email as a direct result of publication.

20. The procedures proposed here have proven extremely effective at compiling a very comprehensive list of potential class members and providing notice to those potential class members in thousands of securities class action matters prior to this case. Substantially similar notice plans have been approved by numerous courts as being the best notice practicable under the circumstances. Gilardi will, of course, provide a reporting declaration outlining the results of the implemented notice plan and the number of Claim Packages that are ultimately delivered, and will do so prior to, or in conjunction with, Lead Plaintiff's request that the Settlement be finally approved.

21. Because of the street name system under which most securities are held, even Defendant Constant Contact does not know the identity of the vast majority of its shareholders, and it is usually not possible to meaningfully project the total number of class members prior to implementing the notice plan. However, by taking certain information regarding the volume of trading during the proposed class period and comparing that to similar information collected in other cases Gilardi has administered, we are able to estimate the number of potential Class Members that will be identified, within a very broad range.

22. Given Constant Contact's trading history during the relevant period, including information regarding the volume of shares traded and limited information about the number of

trades executed, we estimate that we will mail Claim Packages to approximately 25,000 potential Class Members.

23. Because this matter involves the purchase and sale of securities, which is protected and private financial information held by a large number of different brokerages, custodians and other financial institutions, a claims process is necessary to gather the required information regarding each claimant's purchases, acquisitions, sales, and holdings of Constant Contact common stock during the periods relevant to the proposed Plan of Allocation. This stock transaction information will then be used to evaluate the eligibility of each claim to receive any distribution from the Settlement.

24. There are three typical ways that a claim may be submitted to Gilardi in securities settlements such as this: a claimant may submit a claim form and supporting documents by mail, a claimant may submit a claim form and supporting documents via an interactive service provided on the settlement website, or a financial institution or other third party who has the authority to do so may file claims on behalf of its clients in electronic spreadsheet format. In our experience, the vast majority of claims, typically at least 80%, are filed by institutions or third-party services which submit claims on behalf of their clients who may be class members, removing the burden from those claimants to file on their own behalf.

25. A claim may be determined ineligible for recovery for various reasons related to the overall completeness of the claim and the claimant or transaction information as presented. For example, where the Proof of Claim did not include any purchases or acquisitions of Constant Contact common stock during the Class Period, where calculation of the Proof of Claim under the Plan of Allocation did not result in a net loss, or where the beneficial owner as presented was determined to be insufficient or otherwise ineligible, the claim will be deemed ineligible for recovery and claimants are so advised.

26. In addition to making these determinations, Gilardi also reviews claims for deficiencies related to specific missing or incorrect information which may be resolved with further information; for example, where a claim is missing supporting documentation, lacking a signature, appears to be missing information regarding transactions or holdings, or presents transaction information which does not match the known history of the stock. If those deficiencies can be corrected by an analyst on review, some of these claims may result in a different loss determination and move into eligible status. Furthermore, Gilardi will typically waive deficiencies deemed to be insignificant, which may include, but is not limited to, deficiencies which impact only the portion of the claim which calculates no recognized loss, and partially or undocumented claims, partial or missing signatures, and other immaterial deficiencies where the loss of the claim falls below certain recognized loss amount thresholds.

27. Deficiencies will be addressed during the normal course of the administration and claimants with deficient Proofs of Claim will be provided an opportunity to cure these deficiencies prior to distribution of the settlement proceeds. In addition, rejected claimants will be notified of the rejection of their claim and will be provided an opportunity to furnish additional information which may validate the claim or request more information about the reason why the claim is rejected prior to distribution of the settlement proceeds. Claimants who furnish additional information which remains insufficient or who request further review by the Claims Administrator of their rejected claim and who remain dissatisfied with the determination made by the Claims Administrator will also be given instructions for further appealing adverse determinations to the Court to obtain a final determination for the claim.

28. In our experience, the notice process and claims process outlined above are consistent with those undertaken in other securities settlements of similar size and complexity.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of October, 2019, at San Rafael, California.

MICHAEL JOAQUIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List, and I hereby certify that I have caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Court's Manual Notice List.

/s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART