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 MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, APPROVAL OF THE PLAN OF ALLOCATION, AND CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES

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STATUTES, RULES AND REGULATIONS

Court-appointed Lead Plaintiff, North Collier Fire Control and Rescue District Firefighter Pension Plan ("North Collier" or "Lead Plaintiff"), by and through counsel, submits this memorandum of law in support of its motion pursuant to Federal Rule of Civil Procedure 23(e), requesting that the Court (i) approve the proposed Settlement, which the Court preliminarily approved on November 26, 2019 (the "Notice Order") (ECF No. 97); (ii) approve the proposed Plan of Allocation; (iii) find that notice to the Class satisfied due process; (iv) grant certification of the Class for settlement purposes; and (v) enter the proposed Order and Final Judgment.[1]

I. INTRODUCTION

As set forth herein and in the Astley Decl., the $13,000,000.00 all-cash Settlement represents an excellent result for the Class. Indeed, the Settlement was reached by experienced and knowledgeable counsel only after, *inter alia*, an extensive investigation by Lead Counsel, the filing of the Amended Class Action Complaint (the "Amended Complaint") (ECF No. 34), full briefing regarding Defendants' motion to dismiss, document review in advance of mediation, and arm's-length settlement negotiations conducted by a highly experienced, nationally-recognized mediator, Michelle Yoshida, Esq. of Phillips ADR.

It is also Lead Counsel's informed opinion that in light of the significant risks and the delay, expense, and uncertainty of pursuing the Litigation through trial and any post-trial appeals, the Settlement is a certain and reasonable result for the Class. The benefit that the proposed Settlement will provide to the Class weighs in favor of final approval when considered against the

[1] Unless otherwise defined herein, all capitalized terms are defined in the Stipulation of Settlement dated May 18, 2018 (the "Stipulation") (ECF No. 69) and the Declaration of Stephen R. Astley in Support of (A) Lead Plaintiff's Motion for Final Approval of Settlement and Approval of Plan of Allocation, and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses, Charges and Costs ("Astley Decl."), submitted herewith.

risks that, absent the Settlement, the Class might recover less (or nothing at all) if the Litigation continued to be litigated through class certification, summary judgment, trial, and any post-trial appeals that would likely follow – a process that could last many additional years. While Lead Plaintiff believes that it has meritorious responses to each of Defendants' arguments against liability and damages, the proposed Settlement, if approved, will enable the Class to be compensated now for damages without incurring the risk of further litigation. Indeed, Lead Counsel estimate that the recovery here is approximately 14% of the estimated $93.5 million in maximum recoverable damages, far exceeding the median results for PSLRA class action settlements as published in a report by Cornerstone Research. *See* Astley Decl., ¶7 & Ex. B at 6, Fig. 5. Accordingly, Lead Counsel, with extensive experience in prosecuting shareholder class actions and other complex litigation, believes that the proposed Settlement satisfies each of the applicable Rule 23(e)(2) factors, is fair, reasonable, and adequate under the First Circuit's standards for approval, and in the best interests of the Class. Likewise, the Plan of Allocation, is based on the out-of-pocket measure of damages (*i.e.*, the difference between what Class Members paid for their Constant Contact, Inc. ("Constant Contact" or the "Company") common stock during the Class Period and what they would have paid had the misstatement not been made or omissions withheld), which Lead Counsel developed with the assistance of a damages consultant, and which is a fair, reasonable, and adequate method for distributing the Net Settlement Fund to Class Members and it too should be approved.

The fairness of the Settlement is further evidenced by the fact that, to date, no members of the Class have objected to it, and only three have sought exclusion from the Class. Pursuant to the Court's Notice Order, copies of the Notice have been sent to 20,822 potential Class Members and nominees since December 26, 2019, and a Summary Notice was published in *The Wall Street*

Journal and transmitted over the *Business Wire*, a national newswire service, on December 24, 2019.[2] Additionally, Settlement-related documents were posted on the Settlement-specific website at www.ConstantContactSecuritiesLitigation.com. *Id.*, ¶14.[3] The deadline for Class Members to object to the Settlement and Plan of Allocation expires on April 24, 2020. Lead Counsel will address any timely objections in a reply memorandum due no later than May 13, 2020.

II. HISTORY AND BACKGROUND OF THE LITIGATION

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Astley Decl. for a detailed discussion of the factual background and procedural history of the Litigation, the efforts undertaken by Lead Plaintiff and Lead Counsel during the course of the Litigation, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement.

III. ARGUMENT

A. Applicable Standards Favor Approval of Class Action Settlements

In determining whether to approve the Settlement, the Court should be guided by the "'strong public policy in favor of settlements'" over continued litigation, particularly complex actions. *See, e.g.*, *United States v. Davis*, 261 F.3d 1, 27 (1st Cir. 2001);[4] *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000) (same). To grant final approval of a class action settlement, the court must find that the settlement is "fair,

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[2] *See* accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), on behalf of the Court-appointed Claims Administrator for the Settlement, Gilardi & Co. LLC ("Gilardi"), ¶¶4-12.

[3] The briefs and declarations in support of the motions to approve the Settlement, Plan of Allocation and attorneys' fees and expenses will be posted to the website once they are filed.

[4] Citations are omitted and emphasis is added throughout, unless otherwise noted.

reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010) (same).

Rule 23(e)(2), as recently amended, provides that:

> (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:
>
> (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
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> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

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

While the First Circuit has not espoused any single test for determining whether a proposed settlement is fair, reasonable, and adequate,[5] courts within this Circuit commonly reference factors identified by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

[5] *See, e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005) ("the First Circuit has not established a formal protocol for assessing the fairness of a settlement"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003) ("There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement.").

See Lupron, 228 F.R.D. at 93. Courts in this Circuit have further distilled the *Grinnell* factors into a more concise list, examining the

> (1) risk, complexity, expense and duration of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations.

In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 259-60 (D.N.H. 2007).

Moreover, in evaluating whether a settlement is fair, reasonable, and adequate, courts are to balance the benefits of settlement against the risks of continued litigation. *Voss*, 592 F.3d at 251. "[T]he court cannot, and should not, use as a benchmark the highest award that could be made to the plaintiff[s] after full and successful litigation of the claim[s]." *Rolland v. Cellucci*, 191 F.R.D. 3, 14-15 (D. Mass. 2000). As the First Circuit has observed:

> any settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion.

Greenspun v. Bogan, 492 F.2d 375, 381 (1st Cir. 1974); *see also Compact Disc*, 216 F.R.D. at 211 ("I am not to prejudge the merits of the case . . . and I am not to second-guess the settlement; I am only to determine if the parties' conclusion is reasonable."); *Lupron*, 228 F.R.D. at 97 (the court should not "hypothesize about larger amounts that might have been recovered"). The factors set forth in Rule 23(e)(2) are applied in tandem with the applicable First Circuit approval factors and "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) Advisory Committee's Notes to 2018 Amendments. In this case, an examination of the foregoing factors firmly demonstrates that the Settlement satisfies both Rule 23(e)(2) and the applicable First Circuit factors, is fair, reasonable, and adequate to the Class, and should be approved by the Court.

B. The Proposed Settlement Merits Final Approval

1. The Settlement Satisfies the Requirements of Rule 23(e)(2)

As explained in the 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 (the "Preliminary Approval Memorandum") (ECF No. 76) at 3-6, and as acknowledged by the Preliminary Approval Order, Lead Plaintiff has met all of the requirements imposed by Rule 23(e)(2).[6] Courts analyzing the recently amended Rule 23(e)(2) factors have noted that a plaintiff's satisfaction of these factors at final approval is virtually assured where, as here, little has changed between preliminary and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg. Sales Practices & Prods. Liab. Litig.*, No. 17-md-02777-EMC, 2019 U.S. Dist. LEXIS 75205, at *29 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"); *Snyder v. Ocwen Loan Servicing, LLC*, No. 14 8461, 2019 U.S. Dist. LEXIS 80926, at *14 (N.D. Ill. May 14, 2019) (noting in analyzing Rule 23(e)(2) that "[s]ignificant portions of the Court's analysis remain materially unchanged from the previous order [granting preliminary approval]").

a. Lead Plaintiff and Lead Counsel Adequately Represented the Class

Lead Plaintiff and Lead Counsel have adequately represented the Class as required by Fed. R. Civ. P. 23(e)(2)(A). They have diligently prosecuted this Litigation on the Class' behalf.

[6] At the November 22, 2019 hearing, the Court noted that "class counsel have more than adequately represented [t]he Class" *See* Transcript of Motion Hearing on Preliminary Approval held November 22, 2019 (ECF No. 99) at 83:13-14; that "[t]he proposed settlement was negotiated at arm's length" (*id.* at 84:10-11); that although there was no formal discovery, "there was at least minimally adequate information that properly informed decisions could be made" (*id.* at 84:13-16); and that "given the fact that the stock bounced back, given the complexity of this litigation, securities litigation or class action litigation generally, I think [t]he Class should have the opportunity to consider whether this is a reasonable settlement." (*id.* at 84:16-21).

Among other things, Lead Counsel conducted a thorough pre-filing investigation, drafted the Amended Complaint, opposed Defendants' motion to dismiss, obtained, reviewed, and analyzed non-public documents in connection with the mediation, engaged in a mediation, and achieved a Settlement of $13 million, which will provide a significant recovery to the Class. Lead Plaintiff actively and faithfully oversaw the prosecution of the case over the course of the Litigation in accordance with its duties as a Lead Plaintiff. *See* Affidavit of Michelle Delaney ("Delaney Aff.") (ECF No. 86-1), ¶¶12-14, 16. Lead Plaintiff and Lead Counsel stood ready to, and at all times did, advocate for the best interests of the Class.

2. The Settlement Was Reached After Significant Investigation and Is the Product of Arm's-Length Negotiations Among Experienced Counsel

Rule 23(e)(2)(B) is clearly satisfied. Where, as here, the settling parties have bargained at arm's length, "'there is a presumption in favor of the settlement.'" *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009) (quoting *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)); *see also Roberts v. TJX Cos.*, No. 13-cv-13142-ADB, 2016 U.S. Dist. LEXIS 136987, at *20 (D. Mass. Sept. 30, 2016) (where "the parties' Settlement is the product of arms-length negotiation by competent counsel, . . . it is entitled to a presumption of reasonableness"). Moreover, where, as here, the settlement was reached with the assistance of an experienced mediator, there is "a presumption that the settlement achieved meets the requirements of due process." *In re Penthouse Exec. Club Comp. Litig.*, No. 10 Civ. 1145 (KMW), 2013 U.S. Dist. LEXIS 63065, at *8 (S.D.N.Y. Apr. 30, 2013) ("[t]he assistance of [an] experienced mediator . . . reinforces that the Settlement Agreement is non-collusive").

At the time of the Settlement, all parties were in an excellent position to evaluate the strengths and weaknesses of their respective claims and defenses. As described more fully in the Astley Decl., Lead Counsel conducted a detailed investigation prior to and during the prosecution of this Litigation. In advance of the mediation, Defendants produced to Lead Counsel non-public documents related to the ongoing U.S. Securities and Exchange Commission ("SEC") investigation of the Company. The Settling Parties' settlement negotiations included the exchange of comprehensive mediation statements which detailed their respective positions, and a formal all-day mediation session under the guidance of Ms. Yoshida. At that mediation, the parties' positions, and the implication (or lack thereof) of the Company's potential settlement with the SEC, were fully explored. This accumulation of information permitted Lead Plaintiff and Lead Counsel to be well-informed about the strengths and weaknesses of the case, resulting in a significant recovery of $13,000,000.00 for the Class. Thus, the proposed Settlement is procedurally fair and entitled to a presumption of reasonableness. *See Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("[S]ettlement negotiations . . . conducted at arms' length . . . support 'a strong initial presumption' of the Settlement's substantive fairness.").

Moreover, the judgment of experienced and well-informed class counsel should be afforded great weight by the Court. *Rolland*, 191 F.R.D. at 10 ("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."); *Bussie*, 50 F. Supp. 2d at 77 ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that they believe the settlement provides to the Class relief that is fair, reasonable and adequate."). Lead Counsel is a national shareholder's

rights law firm with significant experience in PSLRA securities litigation, as well as other shareholder and complex litigation. Astley Decl., ¶100.

3. The Risk, Complexity, and Expense of Continued Litigation Favors Final Approval

The Settlement is also substantively fair. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). While Lead Plaintiff believes that the claims asserted against Defendants have merit, it recognizes that there were significant risks as to whether Lead Plaintiff would ultimately be able to prove liability and establish damages on its claims. *See In re StockerYale, Inc. Sec. Litig.*, No. 1:05cv00177-SM, 2007 U.S. Dist. LEXIS 94004, at *8 (D.N.H. Dec. 18, 2007) (this factor "captures the probable costs, in both time and money, of continued litigation"). Securities class actions are "notorious[ly] complex[]" and "[t]he difficulty of establishing liability is a common risk of securities litigation." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 17588, at *39 (S.D.N.Y. Apr. 6, 2006). The Settlement provides an immediate benefit to the Class that when balanced against the potential costs and risks associated with continued litigation, supports a finding that the Settlement is fair, reasonable, and adequate. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 74 (D. Mass. 2005) ("'Although fully litigating the claims through trial could possibly result in a higher recovery, the settlement represents a necessary compromise between inherent risks of doing so and a guaranteed cash recovery.'").

Defendants have vigorously contested their liability and have denied and continue to deny each and every claim and allegation of wrongdoing alleged by Lead Plaintiff. Specifically, Defendants have argued that Lead Plaintiff has not alleged any material misstatements or omissions that Defendants had a duty to disclose; that any allegedly forward-looking misstatements were corporate puffery and/or opinion, and were accompanied by adequate cautionary language; Lead Plaintiff had not sufficiently alleged scienter; and that Lead Plaintiff

could not establish loss causation or damages. Astley Decl., ¶¶56-64. Although Lead Plaintiff believes that the pending motion to dismiss would be denied, and that following discovery it would avoid dismissal of the Litigation at summary judgment, there remained significant hurdles to recovery, at trial and any post-trial appeals. *See, e.g.*, *StockerYale*, 2007 U.S. Dist. LEXIS 94004, at *10 (this factor supported settlement where the defendants had defenses to liability and loss causation that "could result in no liability and zero recovery for the class").

4. Comparing the Proposed Settlement to the Likely Result of Continued Litigation Weighs in Favor of Final Approval

This factor requires the Court to consider the reasonableness of the settlement fund in light of the possible recovery in the litigation and risks of further litigation. The issue is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. Thus, the court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "'is not susceptible of a mathematical equation yielding a particularized sum.'" *In re PaineWebber P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. Mar. 20, 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *accord Relafen*, 231 F.R.D. at 73 ("'A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes.'"). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, the $13,000,000.00 cash Settlement is well within the range of reasonableness under the circumstances so as to warrant final approval of the Settlement. The Company's 2018 settlement with the SEC for similar allegations was $8 million. Notably, the $8 million Settlement was a combined resolution that also resolved the SEC's claims against Endurance, which had

acquired Constant Contact after the end of the Class Period. Lead Counsel obtained a greater result – 60% greater in fact. Moreover, the $13 million Settlement represents approximately 14% of the likely maximum recoverable damages, which exceeds the median settlement value for securities fraud cases on both a dollar and percentage basis. *See* Astley Decl., ¶¶6-7. Further, according to a study performed by Cornerstone Research, the median ratio of settlement to investor losses between 2010 and 2019 was 4.6%. *Id*. The percentage recovery here is several multiples of that reported median.

Thus, under the circumstances here, the Settlement achieved here represents an excellent result for the Class and is reasonable in light of the best possible recovery, especially when compared to the overall range of recovery involving securities class action settlements of this size. *See, e.g.*, *KBC Asset Mgmt. NV v. Aegerion Pharm., Inc.*, No. 1:14-cv-10105-MLW, Order and Final Judgment (D. Mass. Nov. 30, 2017) (ECF No. 170) (approving 2.63% recovery); *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 U.S. Dist. LEXIS 19135, at *18 (D.R.I. Feb. 17, 2016) (approving a 5.33% recovery).

5. Lead Plaintiff Had Sufficient Information to Make Informed Decisions About Settling this Case

This factor questions "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012). "The threshold necessary to render the decisions of counsel sufficiently well informed, . . . is not an overly burdensome one to achieve – indeed, formal discovery need not have necessarily been undertaken yet by the parties." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012); *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474

(D.P.R. 2011) (even where formal discovery had not occurred, counsel's investigation and informal discovery provided "sufficient information to make a well informed decision").

Prior to filing, Lead Counsel conducted a thorough review of Constant Contact's press releases, public statements, SEC filings, and securities analysts' reports and advisories about the Company and reviewed other publicly available information relating to Constant Contact. In addition, Lead Counsel, with the assistance of investigators, identified, located and interviewed individuals, including former Constant Contact employees, who had information concerning Lead Plaintiff's allegations. Astley Decl., ¶5. Lead Counsel researched the applicable law with respect to the claims asserted and the potential defenses thereto and prepared the Amended Complaint and opposition to Defendants' motion to dismiss. In advance of the mediation, Defendants produced to Lead Counsel non-public documents relating to a parallel SEC investigation. Finally, the parties exchanged detailed evidentiary-based mediation statements and follow-up submissions and engaged in negotiations under the guidance of an experienced mediator. *See id*., ¶¶37-44. Thus, Lead Plaintiff and Lead Counsel engaged in sufficient investigation to thoroughly understand the claims, merits, and weaknesses of the Litigation before agreeing to the Settlement.

6. The Favorable Reaction of the Class to Date Supports Final Approval

To date, no objections have been filed, and only three exclusion requests were submitted. *See id*., ¶73. Such a favorable reaction of the Class to the Settlement also supports its approval. While not dispositive, "[t]he number of requests for exclusion from the settlement, as well as the number and substance of objections filed. . . . constitutes strong evidence of fairness of proposed settlement and supports judicial approval." *Bussie*, 50 F. Supp. 2d at 77. Moreover, Lead Plaintiff fully supports the Settlement. Delaney Aff., ¶14. *See StockerYale*, 2007 U.S. Dist. LEXIS 94004,

at *9 ("The Court finds it significant that the Lead Plaintiffs are fully in support of the settlement.").

Pursuant to the Notice Order, beginning on December 26, 2019, the Claims Administrator caused a total of over 20,800 Notice packets to be mailed to potential Class Members, including brokers and other nominees. *See* Murray Decl., ¶¶5-11. The Claims Administrator also caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over the *Business Wire* on December 24, 2019. *Id.*, ¶12. As noted, no objections have been received and only three requests for exclusion from the Settlement have been submitted. The Class Members' positive reaction to the Settlement supports final approval.

C. The Plan of Allocation of Settlement Proceeds Should Be Approved

A plan of allocation of settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See Tyco*, 535 F. Supp. 2d at 262 ("Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate."). A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *City of Providence v. Aéropostale, Inc.*, No. 1:11 Civ. 07132 (CM) (GWG), 2014 U.S. Dist. LEXIS 64517, at *29 (S.D.N.Y. May 9, 2014) ("A plan of allocation 'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'"), *aff'd sub nom., Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable, and the plan "'need not necessarily treat all class members equally.'" *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at *78 (N.D. Tex. Nov. 8, 2005). A reasonable plan of allocation "'may consider the relative strength and values of different categories of claims.'" *IMAX*, 283 F.R.D. at 192; *see In re Cabletron Sys.*

Sec. Litig., 239 F.R.D. 30, 35 (D.N.H. 2006) (approving a plan of allocation that took into consideration "the strengths and weaknesses of the claims of the various types of class members").

Here, the Plan of Allocation was developed by Lead Counsel in consultation with their damages consultant and it calculates a recognized loss based on the amount of the alleged inflation in Constant Contact common stock at various times during the Class Period allocable to the alleged fraud, and also takes into account the PSLRA-mandated 90-day lookback. Astley Decl., ¶¶75-79. Lead Counsel believes the proposed Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members and that the Plan of Allocation treats Class Members equitably relative to each, and by providing that each Authorized Claimant shall receive a *pro rata* share of the Net Settlement Fund based on recognized losses. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Further, Lead Counsel's opinion is entitled to "considerable weight" by the Court in deciding whether to approve the plan. *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) ("When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel."); *see also In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.").

Further, to date, no objections to the Plan of Allocation have been filed, suggesting that the Class also finds the Plan of Allocation to be fair, reasonable, and adequate. Similar plans have repeatedly been approved by courts within this Circuit, including this Court. *See*, *e.g.*, *KBC Asset Mgmt. NV v. Aegerion Pharm., Inc.*, No. 1:14-cv-10105-MLW, Order Approving Plan of Allocation (D. Mass. Nov. 30, 2017) (ECF No. 168); *see also Cabletron*, 239 F.R.D. at 35 (approving a plan where claimants would "receive a pro rata share of the Net Settlement Fund").

D. Notice to the Class Satisfied the Requirements of Rule 23, Complies With Due Process, and Is Reasonable

The Notice provided to the Class satisfied the requirements of Fed. R. Civ. P. 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The Notice also satisfied Fed. R. Civ. P. 23(e)(1), which requires that notice of a settlement be directed "in a reasonable manner to all class members who would be bound" by the settlement (Fed. R. Civ. P. 23(e)(1)(B)), and that the notice "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Bogan*, 492 F.2d at 382.

Both the substance of the Court-approved Notice and the method of dissemination to potential members of the Class satisfy these standards. The Notice program was carried out by a nationally-recognized claims administrator, Gilardi. The Notice contains the information required by Fed. R. Civ. P. 23(c)(2)(B), including: (i) an explanation of the nature of the Litigation and claims asserted; (ii) the definition of the Class; (iii) a description of the claims, issues, and defenses in the Litigation and the key terms of the Settlement, including the consideration amount and the releases to be given; (iv) the Plan of Allocation; (v) the Settling Parties' reasons for proposing the Settlement; (vi) a description of the attorneys' fees and expenses that will be sought; (vii) an explanation of Class Members' right to enter an appearance through an attorney and to request exclusion from the Class and to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses, as well as the time and manner for requesting exclusion and filing objections; and (viii) notice of the binding effect of a judgment on Class Members. The Notice also provides instructions for submitting a Proof of Claim in order to be eligible to receive a

distribution from the Net Settlement Fund, relevant deadlines, and contact information, including a dedicated toll-free telephone hotline and link to the Settlement website.

In accordance with the Court's Notice Order, Gilardi has mailed 20,822 copies of the Notice by first-class mail to potential members of the Class and their nominees. *See* Murray Decl., ¶11. In addition, Gilardi caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over the *Business Wire* on December 24, 2019. *Id.*, ¶12. Copies of the Notice, Proof of Claim, Notice Order, and Stipulation were made available on the Settlement website maintained by Gilardi, www.ConstantContactSecuritiesLitigation.com. *Id.*, ¶14. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in a widely circulated business publication, transmitted over a newswire, and set forth on a dedicated website, constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *StockerYale*, 2007 U.S. Dist. LEXIS 94004, at *7-*8 (finding that due process was satisfied where notice mailed by first class mail to all class members who could be identified with reasonable effort and summary notice was published once in *Investor's Business Daily* and over *PR Newswire*); *Cabletron*, 239 F.R.D. at 35-36 (combination of individually mailed notice packets, published notice in *The Wall Street Journal*, a dedicated website, and a dedicated phone hotline met the notice standard).

E. Class Certification for Purposes of the Proposed Settlement Is Appropriate

The Court's Notice Order preliminarily certified for settlement purposes the following Class: "[A]ll Persons who purchased or otherwise acquired Constant Contact common stock between July 24, 2014 and July 23, 2015, inclusive."[7] Notice Order, ¶2. If all of Rule 23's

[7] 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,

requirements are met, a class may be certified for purposes of a settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Relafen*, 231 F.R.D. at 68. "[T]he district court may take the proposed settlement into consideration when examining the question of certification" and, when determining whether to certify a class for settlement purposes only, "'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.'" *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 418 (S.D. Tex. 1999) (quoting *Amchem*, 521 U.S. at 620-21). Here, Rule 23's requirements are easily satisfied; thus, certification of the Class should be granted.

1. The Class Is Sufficiently Numerous

A class is sufficiently numerous when joinder of all members is "impracticable." Fed. R. Civ. P. 23(a)(1). There is no fixed number of class members which either compels or precludes certification, but courts have found that classes consisting of as few as 40 members are generally sufficient to establish numerosity. *See McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 307 (D. Mass. 2004) (finding that a 51-person class was above the "critical mass of 40" members). District courts "'may draw reasonable inferences from the facts presented to find the requisite numerosity.'" *In re Volkswagen & Audi Warranty Extension Litig.*, 273 F.R.D. 349, 352 (D. Mass. 2011). There were millions of shares of Constant Contact stock outstanding and traded during the Class Period by thousands of Class Members. Over 20,800 individual Notices were sent to potential Class Members throughout the world. *See* Murray Decl., ¶11. Thus, the numerosity requirement is easily satisfied.

successors or assigns, and any entity in which Defendants have or had a controlling interest." Notice Order, ¶2.

2. Common Questions of Law or Fact Exist

The commonality requirement of Rule 23(a)(2) is satisfied when common questions of law or fact are present. *See Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003). It is not necessary that all issues of fact and law be common. *Volkswagen*, 273 F.R.D. at 352; *Relafen*, 231 F.R.D. at 69. In fact, only a single common question of fact or law is necessary to meet this requirement. *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 131 (D.P.R. 2010). Indeed, where, as here, a class of investors purchase stock at allegedly artificially-inflated prices as a result of similar misrepresentations and omissions by defendants, cases are regularly certified. *See, e.g.*, *Blackie v. Barrack*, 524 F.2d 891, 904-05 (9th Cir. 1975).

3. Lead Plaintiff's Claims Are Typical of Those of the Class

Under Rule 23(a)(3), claims are typical where "'named plaintiffs' claims arise from the same course of conduct that gave rise to the claims of the absent [class] members.'" *Rodrigues v. Members Mortg. Co., Inc.*, 226 F.R.D. 147, 151 (D. Mass. 2005); *see also Volkswagen*, 273 F.R.D. at 352; *Payne*, 216 F.R.D. at 26. "For purposes of demonstrating typicality, '[a] sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *Relafen*, 231 F.R.D. at 69. In this case, the typicality requirement is met. There is no conflict or antagonism between Lead Plaintiff's interests and those of the Class. Like all the Class Members, Lead Plaintiff purchased Constant Contact common stock during the Class Period. Thus, Lead Plaintiff was affected in the same ways as the other members of the Class, satisfying the typicality requirement of Rule 23(a)(3).

4. Lead Plaintiff Is an Adequate Class Representative

Under Rule 23(a)(4), a plaintiff must also "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy "'requires that Plaintiff demonstrate that [its] interests will not conflict with those of class members and that [its] counsel is qualified, experienced and able to vigorously conduct the proposed litigation.'" *Rodrigues*, 226 F.R.D. at 151. The adequacy test is met here. Lead Plaintiff's interests do not conflict with the Class Members' interests and is typical of the claims of the Class. Substantial common questions of fact and law exist and Lead Plaintiff's interests are aligned with those of the Class. Lead Plaintiff also retained experienced, specialized counsel to prosecute this case and participated in all aspects of this Litigation. Delaney Aff., ¶¶11-12. Lead Counsel possess extensive experience in the area of shareholder litigation. *See* Declaration of Stephen R. Astley Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Fee Decl."), Ex. F, filed herewith. Thus, Lead Plaintiff and its counsel have adequately represented the Class and have fulfilled the requirements of Rule 23(a)(4).

5. The Proposed Class Satisfies Rule 23(b)(3)

Rule 23(b)(3) authorizes certification where, in addition to the prerequisites of Rule 23(a), common questions of law or fact predominate over any individual questions and a class action is superior to other available means of adjudication. *Amchem*, 521 U.S. at 591-94; *Volkswagen*, 273 F.R.D. at 353. This case easily meets Rule 23(b)(3)'s requirements.

a. Common Questions of Law and Fact Predominate Over Individual Questions

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "The Rule 23(b)(3) predominance inquiry is satisfied 'unless it is clear that individual issues will overwhelm

the common questions and render the class action valueless.'" *Volkswagen*, 273 F.R.D. at 353. "Predominance is a test readily met in certain cases alleging . . . securities fraud." *Amchem*, 521 U.S. at 625. The First Circuit does not require an "entire universe" of common issues, but does require a "sufficient constellation" of them. *Relafen*, 231 F.R.D. at 70. There are numerous questions of law and fact that are common to the Class, such as whether Defendants' statements during the Class Period were materially false or misleading or omitted material information. These questions predominate over individual questions because the Defendants' alleged conduct affected all Class Members in the same manner – by artificially inflating the price of Constant Contact common stock and damaging them once the truth was revealed.

b. Superiority Is Satisfied

The requirement of superiority "ensures that resolution by class action will achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Relafen*, 231 F.R.D. at 70 (citing *Amchem*, 521 U.S. at 615). As further explained in *Amchem*, "[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." 521 U.S. at 620. While no management problems were foreseen here, any such problems that may have existed or arisen are eliminated by the Settlement. In sum, because each element of Rule 23 is satisfied, a class action is the superior method of adjudicating Class Members' claims in this case.

IV. CONCLUSION

Based on the foregoing, Lead Plaintiff respectfully requests that the Court (i) grant final approval of the proposed Settlement; (ii) approve the proposed Plan of Allocation; (iii) find that

notice to the Class satisfied due process; (iv) certify the proposed Class for purposes of the Settlement; and (v) enter the proposed Order and Final Judgment.

DATED: March 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 30, 2020, 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