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Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re VERIFONE HOLDINGS, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Master File No. 3:07-cv-06140-EMC CLASS ACTION NOTICE OF MOTION AND MOTION FOR (1) FINAL APPROVAL OF CLASS ACTION SETTLEMENT; AND (2) APPROVAL OF THE PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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SECONDARY AUTHORITIES

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on February 6, 2014, at 1:30 p.m., or as soon thereafter as counsel may be heard, at the Phillip Burton Federal Building and United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Edward M. Chen, United States District Judge, Lead Plaintiff National Elevator Industry Pension Fund will respectfully move, pursuant to Federal Rule of Civil Procedure 23(e), for entry of the [Proposed] Order Approving the Settlement and Order of Dismissal with Prejudice, the [Proposed] Judgment and the [Proposed] Order Approving Plan of Allocation of Settlement Proceeds. This motion is based on the attached Memorandum of Points and Authorities in Support of Motion for (1) Final Approval of Class Action Settlement; and (2) Approval of the Plan of Allocation of Settlement Proceeds, the Declaration of Christopher P. Seefer in Support of Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation of Settlement Proceeds, and Application for Award of Attorneys' Fees and Expenses ("Seefer Decl."), the Declaration of Robert O. Betts, Executive Director of the National Elevator Industry Pension Fund ("Betts Decl."), the Declaration of Layn R. Phillips in Support of Lead Plaintiff's Motion for Final Approval of Settlement ("Phillips Decl."), the Declaration of Christopher P. Seefer Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), the Stipulation of Settlement dated as of August 9, 2013, all other pleadings and matters of record, and such additional evidence and testimony as may be presented before or at the hearing.

I. PRELIMINARY STATEMENT

Lead Plaintiff National Elevator Industry Pension Fund ("Lead Plaintiff" or "National Elevator") respectfully submits this memorandum in support of Lead Plaintiff's motion for final approval of settlement of this Litigation for $95,000,000 in cash, and approval of the Plan of Allocation of settlement proceeds. The full terms of the settlement are set forth in the Stipulation of Settlement, dated as of August 9, 2013 (the "Stipulation" or "Settlement"), which was preliminarily approved by the Court on October 16, 2013. *See* Dkt. Nos. 306, 320.[1] Lead Plaintiff and its counsel

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

believe the Settlement is a highly favorable resolution of this complex litigation that fully takes into account the risks faced by Lead Plaintiff and the Class if litigation were to continue. Seefer Decl., ¶¶10-18, 80-107. Indeed, the $95 million recovery appears to be one of the top ten largest securities class action settlements in the Northern District of California and was obtained after the Securities and Exchange Commission ("SEC") declined to bring any fraud charges against the Defendants and failed to obtain any recovery for the Class. As the Lead Plaintiff, who was actively involved in the Litigation and authorized the Settlement, states: "National Elevator believes that the settlement represents a very good recovery that would not have been possible without the diligent efforts of lead counsel who aggressively litigated this case for six years." Betts Decl., ¶5.

This Settlement was only achieved after six years of hard-fought litigation and extensive efforts by Lead Counsel against determined opposition. From the outset, Defendants asserted strong defenses, adamantly denied liability and were firm in their belief that Lead Plaintiff could not prevail on the claims asserted. As detailed in the accompanying Seefer Declaration, Lead Counsel, among other things: (a) conducted a substantial pre-discovery investigation regarding the underlying facts pertinent to the Litigation; (b) filed three amended complaints for violation of the federal securities laws which included evidence developed through counsel's extensive investigation; (c) briefed and opposed Defendants' motions to dismiss the complaints; (d) successfully appealed the dismissal of Lead Plaintiff's Third Amended Complaint to the Ninth Circuit Court of Appeals; (e) conducted merits discovery, including serving multiple third-party subpoenas and reviewing over 300,000 pages of documents produced by Defendants and the SEC; (f) consulted with an expert in damages to assess the potential damages under various analyses; (g) weighed the risks that would exist if the case proceeded through discovery, class certification, summary judgment, and eventually to trial; (h) extensively prepared for and attended two mediations, including an all-day mediation on March 26, 2013, with the Honorable Layn R. Phillips, United States District Judge (Ret.); and (i) participated in extensive settlement negotiations after the March 26, 2013 mediation with the assistance of Judge Phillips.

During settlement negotiations, Lead Counsel made it clear that, while they were prepared to fairly assess the strengths and weaknesses of Lead Plaintiff's case, they would continue to litigate

rather than settle for less than a fair amount. Indeed, Lead Plaintiff refused to settle the case during an October 2009 mediation and continued to litigate the case, including a successful appeal of the District Court's dismissal of the case. Lead Plaintiff then reviewed numerous documents and deposition transcripts produced by Defendants and the SEC, participated in a second mediation on March 26, 2013, continued settlement discussions over the next three months and then agreed to settle the case for an amount recommended by Judge Phillips that is fair, reasonable and adequate. Judge Phillips stated that the settlement negotiations were "extremely hard fought on all sides," that they involved extensive analysis of the parties' positions, and that "the settlement is fair, reasonable and adequate and should be approved by this Court." Phillips Decl., ¶¶5-6. If not for this Settlement, the Settling Parties would have continued to vigorously prosecute and defend the Litigation, with the outcome being far from certain.

Lead Counsel, who are highly experienced in prosecuting securities class actions, have concluded that the $95 million recovery is a highly favorable result that is in the best interest of the Class. This conclusion is based on an analysis of all the relevant factors present in this Litigation, including, *inter alia*: (a) the substantial risk, expense, and uncertainty in continuing the Litigation through completion of discovery, class certification, summary judgment motion(s) after discovery, trial, post-trial motion(s), and appeal(s); (b) the relative strengths and weaknesses of the claims and defenses asserted; (c) an analysis of the evidence obtained to date and the legal and factual issues presented; (d) VeriFone's deteriorating financial condition; (e) past experience in litigating complex actions similar to the present action; (f) the serious disputes between the parties concerning liability and damage issues; and (g) the outstanding result obtained for the Class.[2] The $95 million Settlement ensures that Class Members who have suffered losses and already endured six years of litigation not only will receive a highly favorable recovery but will also realize that recovery in the near future instead of a recovery many years down the road or no recovery at all.

[2] The Court is respectfully referred to the accompanying Seefer Declaration for a more detailed history of the Litigation, the efforts of counsel, and the factors bearing on the reasonableness of the Settlement and Plan of Allocation of settlement proceeds.

For all of the reasons discussed herein, those set forth in the accompanying declarations, and the entire record, it is respectfully submitted that the Settlement should be finally approved by the Court. Moreover, the Plan of Allocation of settlement proceeds that was developed with Lead Counsel's damages expert, reflects an assessment of the damages that may have been recovered had liability been successfully established at trial and is tailored to account for the litigation risks specific during various times of the Class Period. As a result, the Plan of Allocation provides a fair and reasonable basis for allocating the Net Settlement Fund among Class Members and therefore, Lead Plaintiff respectfully submits that the Plan of Allocation should also be approved by the Court.

II. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Class actions readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. It is beyond question that "the public has an overriding interest in securing 'the just, speedy, and inexpensive determination of every action.'" *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006);[3] Fed. R. Civ. P. 1. This is "'particularly true in class action suits.'" *Gong-Chun v. Aetna Inc.*, No. 1:09-cv-01995-SKO, 2012 U.S. Dist. LEXIS 96828, at *38 (E.D. Cal. July 12, 2012) (quoting *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976)); *see also Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). In deciding whether to approve the settlement of a stockholder class action under Federal Rule of Civil Procedure 23(e), the Court must find that the proposed settlement is "fair, adequate and reasonable." *See, e.g.*, *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). The Ninth Circuit has set forth factors which may be considered in evaluating the fairness of a class action settlement:

> Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable. The district court's ultimate

[3] Citations are omitted throughout unless otherwise indicated.

> determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F.2d at 625; *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625.

The District Court must exercise "sound discretion" in approving a settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Torrisi*, 8 F.3d at 1375. However, in exercising this discretion,

> the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Justice, 688 F.2d at 625. The Ninth Circuit defines the limits of the inquiry to be made by the court in the following manner:

> [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Id. (emphasis in original).

Courts have consistently held that the function of a judge in reviewing a settlement is not to rewrite the settlement agreement reached by the parties or to try the case by resolving issues intentionally left unresolved. *See, e.g.*, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. They do not decide the merits of the case or resolve unsettled legal questions."). Therefore, courts have taken

a liberal approach toward approval of class action settlements, recognizing that the settlement process involves the exercise of judgment and that the concept of "reasonableness" can encompass a broad range of results. "'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). "As the Ninth Circuit has noted, 'Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.'" *In re Wells Fargo Loan Processor Overtime Pay Litigation*, No. C-07-1841 (EMC), 2011 U.S. Dist. LEXIS 84541, at *11 (N.D. Cal. Aug. 2, 2011) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir. 1998)).

When examined under the applicable criteria, this Settlement is a highly favorable result for the Class. Lead Plaintiff's counsel believe that there are serious questions as to whether a more favorable monetary result could be attained after summary judgment, trial, and the inevitable post-trial motions and appeals. Seefer Decl., ¶¶10-18, 80-107. The Settlement achieves a substantial and certain recovery for the Class and is superior to the possibility that were the Litigation to proceed to trial, there could be no recovery at all. As discussed below, an analysis of the relevant factors demonstrates that the Settlement merits this Court's final approval.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Settlement Enjoys a Presumption of Reasonableness Because It Is the Product of Arm's-Length Negotiations

"A presumption of correctness is said to 'attach to a class settlement reached in arm's-length negotiations between experienced counsel after meaningful discovery.'" *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *32 (C.D. Cal. June 10, 2005). Further, the Ninth Circuit "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution" in approving a class action settlement. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the parties participated in two mediations with two highly respected mediators, first on October 9, 2009, with the Honorable William J. Cahill (Ret.), and again on March 26, 2013, with the Honorable Layn R. Phillips (Ret.). On October 1, 2009, the parties participated in

mediation with Judge Cahill which was unsuccessful because Lead Plaintiff and its counsel believed any settlement would have been for a portion of the approximately $40 million of the then existing insurance proceeds available to Defendants, which would not provide the Class with fair value for their claims. Therefore, Lead Plaintiff and its counsel chose to continue the Litigation in an effort to realize a more favorable recovery and after several years of additional litigation obtained an outstanding result for the Class. Seefer Decl., ¶¶41-43.

The second mediation with Judge Phillips on March 26, 2013 occurred after Lead Plaintiff had successfully appealed the District Court's dismissal of the case and commenced discovery, including the review of more than 300,000 pages of documents produced by VeriFone and the SEC and numerous transcripts of depositions taken by the SEC during its investigation of VeriFone. Seefer Decl., ¶¶54-79. No agreement was reached on March 26, 2013, but the parties continued to negotiate with the assistance of Judge Phillips over the next three months; and on June 17, 2013, the parties accepted Judge Phillips' recommendation to settle the case for $95 million. *Id.*, ¶75. As Judge Phillips explains, "[t]he mediation process involved extensive analysis of the parties' positions, including the merits of the plaintiffs' securities fraud claims, orders of this Court and the United States Court of Appeals for the Ninth Circuit on VeriFone's motions to dismiss, defendant's potential defenses, the amount of available directors' and officers' liability insurance and defendants' financial condition." *See* Phillips Decl., ¶5. Courts have recognized that "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 U.S. Dist. LEXIS 99066, at *17 (N.D. Cal. Apr. 13, 2007); *see also Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 U.S. Dist. LEXIS 48878, at *25-*26 (N.D. Cal. Apr. 29, 2011).[4]

Lead Counsel have many years of experience in litigating securities class actions and have negotiated hundreds of securities class action settlements that have been approved by courts throughout the country. *See, e.g.*, Robbins Geller Decl., Ex. G; www.rgrdlaw.com. Defendants are

[4] *See In re Delphi Corp. Sec.*, 248 F.R.D. 483, 498 & n.14 (E.D. Mich. 2008) (recognizing "the outstanding work done by Judge Phillips" in settlement negotiations and "the added benefit of the insight and considerable talents of [this] former federal judge who is one of the most prominent and highly skilled mediators of complex actions").

represented by highly capable, experienced lawyers from Sullivan & Cromwell LLP and Morrison & Foerster LLP who zealously represented their clients. The Settlement was reached after arm's-length negotiations by experienced counsel on both sides, each with a well-developed understanding of the strengths and weaknesses of each party's respective claims and defenses. Prior to the mediations, Lead Counsel prepared and submitted detailed mediation statements discussing the strengths of Lead Plaintiff's claims. Defendants also prepared and submitted detailed mediation statements containing their defenses to Lead Plaintiff's claims. During the course of the mediations, the merits of the Settling Parties' respective claims and defenses were fully vetted. Lead Counsel advanced Lead Plaintiff's positions and were prepared to continue to litigate (and did) rather than accept a settlement that was not in the best interest of the Class.

The agreement-in-principle was followed by negotiations regarding the detailed terms of the Settlement, including the scope of releases, the timing of the funding of the Settlement, and the form and content of the Notice to be sent to the Class. These facts establish that the Settlement is the result of hard fought arm's-length negotiations and "not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625.

B. The Settlement Appropriately Balances the Risks of Litigation and the Benefit to the Settlement Class of a Certain Recovery

In assessing whether the Settlement is fair, reasonable, and adequate, "the Court must balance against the continuing risks of litigation (including the strengths and weaknesses of the plaintiff's case), the benefits afforded to members of the Class, and the immediacy and certainty of a substantial recovery." *Johansson-Dohrmann v. CBR Sys.*, No. 12-cv-1115-MMA (BGS), 2013 U.S. Dist. LEXIS 103863, at *11-*12 (S.D. Cal. July 24, 2013) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)). In other words,

> "[t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, 'It has been held proper to take the bird in hand instead of a prospective flock in the bush.'"

Nat'l Rural, 221 F.R.D. at 526.

In the context of approving class action settlements, "[c]ourts experienced with securities fraud litigation, 'routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear.'" *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx), 2013 U.S. Dist. LEXIS 100275, at *19-*20 (C.D. Cal. July 9, 2013) (quoting *In re Flag Telecom Holdings*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *48 (S.D.N.Y. Nov. 8, 2010)).

Although Lead Plaintiff and its counsel believe that the claims have merit, they recognize significant risks and uncertainties in further litigating the Class's claims and that many other similar actions have been prosecuted in the belief that they were meritorious, only to lose on dispositive motions, at trial, during post-trial proceedings, or on appeal. As detailed in the Seefer Declaration, the risks of continued litigation here, when weighed against the substantial and certain recovery for the Class, confirms the reasonableness of the Settlement. Seefer Decl., ¶¶80-107. The Settlement is unquestionably better than other distinct possibilities – little or no recovery for the Class.

1. Continued Litigation Posed Substantial Risks in Establishing Liability

As in every complex case of this kind, Lead Plaintiff faced formidable obstacles to recovery if litigation were to continue. The claims asserted in the Litigation on behalf of the Settlement Class were based on §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§78j(b), 78t(a) and 78t-1, and Rule 10b-5 promulgated by the SEC, 17 C.F.R. §240.10b-5.

The elements of a §10(b) action are well established:

> A private action under §10(b) and Rule 10b-5 must allege and prove all of the elements for primary liability for each defendant. The elements of a securities fraud claim are: (1) to use or employ any manipulative or deceptive device or contrivance [or make any untrue statement of a material fact or omission]; (2) scienter, *i.e.* wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance, often referred to in fraud-on-the-market cases as "transaction causation;" (5) economic loss; and (6) loss causation . . . .

Simpson v. AOL Time Warner Inc., 452 F.3d 1040, 1047 (9th Cir. 2006), *vacated*, *Avis Budget Grp., Inc. v. Cal State Teachers' Ret. Sys.*, 552 U.S. 1162 (2008), and *vacated*, *Simpson v. Homestore.com, Inc.*, 519 F.3d 1041 (9th Cir. 2008). In order to defeat Defendants' certain motions for summary judgment and prevail at trial, Lead Plaintiff would be required "to present evidence sufficient to

support a verdict in its favor on every element of its claim for which it will carry the burden of proof at trial." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989).

Lead Plaintiff alleged that Defendants falsely represented throughout the Class Period that (a) the Company's April 2006 acquisition of Lipman Electronic Engineering Ltd. ("Lipman") would – and did – increase gross margins and earnings in 2007; (b) VeriFone's 1Q07, 2Q07 and 3Q07 financial results were fairly presented in all material respects; (c) Defendants had evaluated the Company's disclosure controls and procedures and concluded they were effective; and (d) the reported increases in 1Q07, 2Q07 and 3Q07 gross margins and earnings were the result of higher-margin wireless revenue, better supply chain efficiencies and better sourcing of strategic components, procurement synergies and other factors.

Lead Plaintiff's counsel believe they could have proven the claims asserted but also recognize that there were substantial risks to proving liability. As explained in the Seefer Declaration, there was a substantial risk that the Court on summary judgment or the jury at trial would find that Defendants did not make any false statements in the early part of the Class Period (August 31, 2006-February 28, 2007) concerning the Lipman merger and the gross margin increases, synergies, and "supply chain efficiencies" derived as a result because VeriFone did not restate its financial results for this period, the statements about the gross margins were protected by the PSLRA's safe-harbor (and thus actionable only if actual knowledge of falsity could be proven) and/or the statements about the Lipman synergies were non-actionable puffery. *See* Seefer Decl., ¶¶90-91; *see also In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) ("Earnings projections identified as forward-looking statements and accompanied by adequate cautionary language fall within the PSLRA safe harbor . . . ."); *In re Aetna Inc. Sec. Litig.*, 34 F. Supp. 2d 935, 947 (E.D. Pa. 1999) ("the description of the integration as 'highly successful,' without more, is a generalized statement that is inactionable as a matter of law because it constitutes mere 'puffery'"). As a result, Lead Plaintiff faced a risk that it would not be able to prove liability with respect to statements prior to March 2007, which would have resulted in a shortening of the Class Period.

Similarly, there was a risk that Class Members who purchased VeriFone securities after December 3, 2007, would not be able to prove reliance because on December 3, 2007, VeriFone

announced that it would be restating its financial results for 1Q07, 2Q07 and 3Q07, and provided a preliminary estimate of the restatement. Seefer Decl., ¶92. While Lead Plaintiff alleged that the whole truth was not disclosed to the market until April 1, 2008, when VeriFone announced that the restatement would be larger than the original estimate, there was still a risk that Class Members who purchased after the December 3, 2007 announcement would not be able to prove reliance because they knew that VeriFone's 1Q07-3Q07 financial results would be restated and that the preliminary estimate of the restatement provided on December 3, 2007 was subject to change. If reliance could not be proven by purchasers of VeriFone securities after December 2, 2007, the Class Period would have been shortened.

The restatement of VeriFone's financial results in 1Q07, 2Q07 and 3Q07 establish that Defendants made materially false and misleading statements between March 1, 2007 and December 2, 2007; but there was a risk that Lead Plaintiff would be unable to prove that Defendants made those materially false and misleading statements knowingly or recklessly. Seefer Decl., ¶¶96-98. In order to prove defendants Bergeron and Zwarenstein acted with the required state of mind, Lead Plaintiff would have to prove they "'knew his or her statements were false, or was consciously reckless as to their truth or falsity.'" *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 702 (9th Cir. 2012). There was a risk that the jury might find that Defendants at most acted negligently, but their conduct did not rise to the level needed to be proved to establish the requisite state of mind. Indeed, proving a defendants' scienter is an inherently challenging task. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008) ("Proving a defendant's state of mind is hard in any circumstances."); *Smith v. Dominion Bridge Corp.*, No. 96-7580, 2007 U.S. Dist. LEXIS 26903, at *17 (E.D. Pa. Apr. 11, 2007) ("Since stockholders normally have 'little more than circumstantial and accretive evidence to establish the requisite scienter,' proving scienter is an 'uncertain and difficult necessity for plaintiffs.'").

Defendants asserted throughout the Litigation that they had no knowledge of the alleged misconduct and pointed to evidence that a jury may find persuasive. At the time the Settlement was reached, Lead Counsel had reviewed over 62,000 documents and files produced by VeriFone in response to Lead Plaintiff's discovery requests, as well as over 4,000 pages of documents produced

by the SEC. The documents produced by the SEC included deposition transcripts of the individual defendants and other critical VeriFone employees, as well as two of VeriFone's independent auditors at Ernst & Young LLP ("E&Y").[5] Seefer Decl., ¶70-71, 96-97.

Lead Counsel's review of the documents and deposition testimony showed that there would be significant risks in establishing Defendants' scienter. Seefer Decl., ¶97. While there was never any dispute that Paul Periolat ("Periolat") made the manual journal entries which caused VeriFone to report false financial results that were subsequently restated, there was evidence that Periolat (and defendants Bergeron and Zwarenstein) believed the manual journal entries were proper. *Id.* No one interviewed by the SEC testified that Periolat (or Bergeron and Zwarenstein) knew the journal entries were improper. *Id.* VeriFone's auditors at E&Y testified that Periolat believed the journal entries were accurate and that Periolat presented the errors to E&Y during the audit process, claiming that no one else was involved in the errors. *Id.* Specifically, an E&Y auditor testified that E&Y reviewed some of the manual journal entries, asked Periolat to explain them, was satisfied with Periolat's responses and that Periolat seemed very on top of inventory and never showed any confusion or hesitation on inventory issues. *Id.*. The E&Y auditor also testified that Periolat did not fault anyone else for the erroneous journal entries during the "mea culpa" call Periolat had with E&Y the Monday after Thanksgiving in 2007 when the errors were confirmed. *Id.*

Moreover, Periolat is not a defendant because he did not make any of the statements alleged to be false and misleading in the complaint. *See Janus Capital Grp., Inc. v. First Derivative Trader*s, ___ U.S. ___, 131 S. Ct. 2296, 2302 (2011) ("For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.").

[5] Lead Counsel reviewed the following transcripts of testimony taken by the SEC as well as 174 exhibits utilized in connection with such testimony: Keith Arden Schaal, Jr., Senior Financial Analyst, Supply Chain Operations; Leslie Baker, Financial Analyst II; Douglas Bergeron, Chief Executive Officer; Brian Dowd, Assistant Controller; David Gilford, Vice President of Financial Planning; Patrick McGivern, Senior Vice President, Global Supply Chain; David Martin, Vice President of Taxes; Sagit Manor, Lipman Corporate Controller; Rachel Tran, Financial Analyst; Betsy Runyan, E&Y Senior Manager; Laura Merkl, Corporate Controller; Barry Zwarenstein, Chief Financial Officer; and Dane Wall, E&Y Partner.

There was a risk that a jury might conclude from the evidence that Defendants did nothing wrong whatsoever or that their conduct, while perhaps grossly negligent, did not rise to the level of fraud. *See In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at *27 (S.D.N.Y. Nov. 7, 2007) (noting that it is difficult to predict whether a jury would find circumstantial evidence sufficient to prove scienter, as opposed to mismanagement). In addition, Lead Plaintiff would be required to present evidence on complex accounting rules violated by VeriFone when it misreported its financial results that were later restated. Lead Plaintiff and Defendants would have retained experts to present this evidence, and there was a risk that a jury would conclude that the complexity of the accounting rules indicated the errors that led to the restatement did not rise to the level of fraud. Indeed, the accounting issues would almost certainly devolve into a "battle of the experts" with an inherently uncertain outcome. Seefer Decl., ¶98; *see Connectivity Sys. Inc. v. Nat'l City Bank*, No. 2:08-cv-1119, 2011 U.S. Dist. LEXIS 7829, at *6 (S.D. Ohio Jan. 26, 2011) ("Acceptance of expert testimony is always far from certain, no matter how qualified the expert, inevitably leading to a 'battle of the experts.' The Settlement Agreement reached by the parties avoids the risks attendant to this 'battle of the experts,' which could result in a ruling against Named Plaintiffs and the Settlement Class.").

Lead Plaintiff was also mindful that the SEC conducted an extensive investigation of the central allegations in this case and declined to bring any fraud-related charges against VeriFone or any of its employees and no charges at all against defendants Bergeron or Zwarenstein.[6] *See Sec. & Exch. Comm'n v. VeriFone Holdings, Inc.*, No. 5:09-cv-04046-RS (N.D. Cal.).

Although Lead Plaintiff believes that it would present sufficient evidence to support its claims, it was aware that Defendants would present counter evidence and other substantial obstacles to obtaining a larger judgment after trial and the exhaustion of appeals. Seefer Decl., ¶¶101-103. Continued litigation involved substantial risks in proving Defendants' liability and a finding by a jury was never assured. Defendants had potentially valid defenses to Lead Plaintiff's claims that

[6] Lead Plaintiff agrees with the Ninth Circuit that this fact was irrelevant in ruling on Defendants' motions to dismiss. *VeriFone*, 704 F.3d at 707 n.5. It was nevertheless relevant to Lead Plaintiff's consideration of whether it would be able to prove its claims. Seefer Decl., ¶100.

posed significant risks to the Class's recovery. *See, e.g.*, *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants). Even if Lead Plaintiff prevailed at summary judgment and thereafter obtained a favorable judgment after trial, the Litigation would be far from over. Seefer Decl., ¶¶102-103.

2. Continued Litigation Posed Substantial Risks in Establishing Damages

Lead Plaintiff also faced the risk that they would not be able to prove damages even if liability were established. As discussed herein and in the Seefer Declaration, there was a risk that the Class Period would be shortened – and damages therefore reduced – or that no class would be certified if there was a change in the law. Seefer Decl., ¶¶89-95, 101.

Though the Court granted class certification for settlement purposes (Dkt. No. 320), there was no assurance that class certification would have been granted during the Litigation. As discussed above, Lead Plaintiff alleges that Defendants made false statements in 2006 concerning the financial benefits of the Lipman merger, but there was a risk that Lead Plaintiff would be unable to prove falsity and scienter with respect to the alleged misstatements prior to March 2007, thereby shortening the Class Period. Similarly, as discussed above, there was a risk that Class Members who purchased VeriFone securities after December 3, 2007 would not be able to prove reliance, thereby shortening the Class Period.

Further, even if Lead Plaintiff's motion was granted, there was no assurance of maintaining class status throughout the Litigation as courts may exercise their discretion to decertify the class at any time. *See* Fed. R. Civ. P. 23(c). Moreover, there was a risk that a change in precedent regarding class certification would make it much more difficult to certify a class. Specifically, the fraud-on-the-market presumption articulated by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) which substantially underpins class certification in securities actions is currently under review by the United States Supreme Court.[7]

[7] On November 15, 2013, the United States Supreme Court granted *certiorari* in *Halliburton Co., et al. v. Erica P. John Fund, Inc.*, No. 13-317, to address the fraud-on-the-market presumption.

Even if the action was certified as a class action, the Class Period was not shortened and there was no change in law that would cause the action to be decertified, there was the risk that Lead Plaintiff would be unable to prove damages. Seefer Decl., ¶101. The determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions. *See, e.g.*, *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) ("even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages"). Here, Defendants dispute Lead Plaintiff's damage estimates including the methodology to arrive at those estimates. The reaction of a jury to such complex expert testimony is highly unpredictable. *See, e.g.*, *Veeco*, 2007 U.S. Dist. LEXIS 85629, at *30 ("The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain."). There was a substantial risk that a jury could find no damages or that damages were only a fraction of the amount Lead Plaintiff contended.

Moreover, even if Lead Plaintiff established significant damages at trial, Defendants would likely insist on a lengthy and adversarial claims process, which could take years and require significant time and expense from all parties, including absent Class Members. Seefer Decl., ¶103. For instance, in *Household*, a large securities class action case filed in 2002 in which Robbins Geller is serving as lead counsel, plaintiffs obtained a jury verdict in their favor on May 7, 2009 after a month-long trial and years of costly and contentious litigation. *Jaffe v. Household Int'l Inc.*, No. 1:02cv05893 (N.D. Ill.) (Dkt. No. 1611). Today, over four years after the jury verdict and over 11 years since the action was initiated, and despite the parties' and the court's diligence, a judgment was just recently entered for $2.4 billion but the claims process is still not complete as counsel continue to litigate objections to claims with losses of more than $650 million, and the appeal has yet to be adjudicated, all of which constitute continuing risk to the class. It is for reasons such as this that securities class actions are sometimes settled and compromised even after a trial and verdict in plaintiffs' favor. *E.g.*, *Sekuk Global Enters. v. Apollo Grp. Inc.*, No. 2:04-cv-02147-JAT (D. Ariz).[8]

[8] *See also* Kevin LaCroix, *After Rare Trial and Lengthy Appeals, Apollo Group Securities Suit Finally Settles for $145 Million*, The D&O Diary (Dec. 5, 2011) (discussing settlement of securities class action for $145 million, despite initial estimates of $277.5 million value, after verdict in plaintiffs' favor, granting of defendants' motion for judgment as a matter of law and subsequent

Further, even if Lead Plaintiff prevailed on liability on any of its claims and the Class was awarded damages, there was the virtual certainty that Defendants would appeal the verdict and award. Seefer Decl., ¶102. The appeals process would have likely spanned several years, during which time the Class would receive no distribution of any damage award. In addition, an appeal of any verdict would carry the risk of reversal, in which case the Class would receive no recovery, even after having prevailed at trial. Therefore, the amount of money the Class would actually recover at the end of the day, even if successful at trial, was very uncertain.

3. Continued Litigation Posed Substantial Risks of Reducing Defendants' Ability to Fund a Settlement or Judgment

Even if Lead Plaintiff was successful in proving all elements of its claims and successfully opposing an appeal, there was a risk that Defendants would not be able to satisfy a judgment because the currently available D&O insurance would likely have been exhausted and because there are questions about VeriFone's future financial condition. Seefer Decl., ¶¶104-107. As set forth in VeriFone's September 6, 2013 Form 10-Q, the Settlement exhausts the Company's approximately $34 million in insurance coverage available in connection with this action, with the remainder of the Settlement being paid by the Company. *Id*. ¶105. Further litigation would have continued to diminish the Company's available insurance, and there is little doubt that, had the case proceeded to trial and any subsequent appeal, such coverage would have been entirely exhausted. *Id*.

In addition, while VeriFone does not appear to be in imminent danger of declaring bankruptcy, it is in a precarious financial condition. *Id*. ¶106. The Ninth Circuit has found that a company's uncertain future financial condition is a factor to be considered in approving a class action settlement. *Torrisi*, 8 F.3d at 1376. Over the last 18 months, VeriFone's stock price has declined by over 50%, and the Company has reported $48.4 million of net losses in the first three quarters of FY13.[9] Seefer Decl., ¶106. Although the Company currently reports that it has $1.3 billion of capital, its tangible capital is just $78.8 million because VeriFone reports $1.2 billion of

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reinstatement of verdict by the Ninth Circuit), *available at* http://www.dandodiary.com/2011/12/articles/securities-litigation/after-rare-trial-and-lengthy-appeals-apollo-group-securities-suit-finally-settles-for-145-million/.

[9] VeriFone's fiscal year ends on October 31.

goodwill, an intangible asset whose value is uncertain. *Id.* In addition, only $309.3 million of the Company's assets as of July 31, 2013 are cash and cash equivalents. *Id.* VeriFone was also recently sued for securities fraud after reporting earnings which were drastically below forecasts, causing the Company's stock to drop 43% and causing hundreds of millions of dollars in losses to a different class of shareholders. *See In re VeriFone Sec. Litig.*, No. 5:13-cv-01038 (N.D. Cal.). *Id.*

Lead Plaintiff believes that the maximum judgment it could expect to receive after trial would be approximately $910 million. Docket No. 309 at 9. The Company's current financial condition and uncertainty about VeriFone's future financial condition indicate there is a risk it could not afford to pay a judgment should Lead Plaintiff prevail at trial. Indeed, there is a risk that VeriFone would declare bankruptcy if Lead Plaintiff obtained a judgment which would result in Lead Plaintiff and the Class obtaining a judgment that they could not collect. Seefer Decl., ¶107. In short, Lead Counsel carefully considered VeriFone's declining fortunes and the risks that less money would be available to fund a settlement or judgment years down the road in determining that a settlement at this time was in the best interests of the Class.

In summary, although Lead Counsel believe that the case is meritorious, they also carefully considered the numerous risks of continued litigation and know from their experience that such risks can render the outcome of a trial extremely uncertain. *See In re Mfrs. Life Ins. Co. Premium Litig.*, No. MDL 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 21, 1998) ("even if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent – there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings").

C. Balancing the Certainty of an Immediate Recovery Against the Expense and Likely Duration of Continued Litigation Favors Settlement

The immediacy and certainty of a recovery is a factor for the Court to consider in determining whether a settlement is fair, adequate, and reasonable. *E.g.*, *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Courts consistently have held that "[t]he expense and possible duration of

the litigation should be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *see also Officers for Justice*, 688 F.2d at 626; *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979); *Bullock v. Adm'r of Estate of Kircher*, 84 F.R.D. 1, 10 (D.N.J. 1979). Here, Lead Plaintiff and Lead Counsel secured a substantial, and certain recovery for the Class that eliminates the possibility that the Class would ultimately receive less or no recovery at all.

Defendants are represented by well-respected and highly capable counsel. Given their relentless challenges to the Class's claims on both procedural and substantive grounds over the past six years, including defending Lead Plaintiff's appeal to the Ninth Circuit, Defendants have demonstrated a commitment to defend the Litigation through and beyond trial, if necessary. If not for this Settlement, the expense and time of continued litigation would have been substantial. As the court noted in *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000), which is applicable here:

> In the absence of a settlement, this matter will likely extend for . . . years longer with significant financial expenditures by both defendants and plaintiffs. This is partly due to the inherently complicated nature of large class actions alleging securities fraud: there are literally thousands of shareholders, and any trial on these claims would rely heavily on the development of a paper trial [sic] through numerous public and private documents.

Id. at 179.

If not for this Settlement, the Settling Parties would have to complete a lengthy discovery program, involving additional document discovery from Defendants and third parties and numerous depositions. There would likely be discovery disputes which would need to be resolved. Briefing and discovery relating to class certification would have to be conducted. Following merits discovery, the parties would have then engaged their respective experts to opine on liability and damages issues, which is very costly and fraught with uncertainty. Following this discovery, the parties would have to complete preparations for summary judgment and trial. The trial itself would have been long, expensive, and uncertain, and no matter the outcome, appeals would be virtually assured. Taking into account the likelihood of appeal, absent this Settlement, the Litigation would have continued for years, despite any efforts of the Court and the parties to speed the process. This

would have caused Class Members to wait years longer for a resolution of their claims and any compensation for their losses. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 837 (W.D. Pa. 1995) ("It is safe to say, in a case of this complexity, the end of that road might be miles and years away.").

Settlement now results in an immediate and certain recovery without the risk, expense and delay of trial and post-trial litigation. *See, e.g.*, *In re Enron Corp. Sec.*, 228 F.R.D. 541, 566 (S.D. Tex. 2005) ("The settlement at this point would save great expense and would give the Plaintiffs hard cash, a bird in the hand."); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

As the Ninth Circuit has made clear, the very essence of a settlement agreement is compromise, "'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624.

> "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation."

Id.; *Ellis*, 87 F.R.D. at 19 (as a *quid pro quo* for not having to undergo the uncertainties and expenses of litigation, the plaintiffs must be willing to moderate the measure of their demands). Accordingly, that the Class potentially could have achieved a greater recovery after trial does not preclude a finding that the Settlement is within a "range of reasonableness" appropriate for approval. *E.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

D. The Amount Offered in Settlement

The determination of a reasonable settlement is not susceptible to a mathematical equation yielding a particularized sum. In fact, a settlement may be acceptable even if it amounts to only a fraction of the potential recovery that might be available at trial. *See Mego*, 213 F.3d at 458.

Here, the $95 million obtained to settle the Litigation – reached after six years of hard-fought litigation – appears to be one of the top ten largest securities class action settlements in the Northern District of California. Indeed, assuming that Lead Plaintiff were able to prove the entirety of its case and recover damages from every stock drop alleged in the Third Amended Complaint, the Settlement

here represents approximately 10.4%-16.4% of Lead Plaintiff's maximum estimated judgment after trial. This rate of recovery is many times larger than the median settlement value of actions with estimated damages between $500 million and $4.9 billion in 2012 (1.1%-1.4%).[10]

E. The Parties Have Engaged in Sufficient Pretrial Discovery and Proceedings to Identify the Strengths and Weaknesses of Their Cases

The stage of the proceedings and the amount of discovery completed is another factor which courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit has held that "'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.'" *Mego*, 213 F.3d at 459. Here, the stage of the proceedings and the amount of discovery completed have provided Lead Plaintiff sufficient information to make an informed decision about settlement.

As described above, the case has been pending for six years. Lead Plaintiff conducted an extensive investigation, including the review of numerous public documents, the interview of numerous former VeriFone employees through its private investigator, a review of the SEC's lawsuit against VeriFone and Periolat and a review of three deposition transcripts obtained from the SEC in response to a FOIA request. Three motions to dismiss were fully briefed, and the District Court's orders dismissing the case provided Lead Plaintiff with that court's views of the deficiencies in the case. In the opinion issued by the Ninth Circuit reversing the District Court's dismissal of the case, the Appellate Court also noted strengths, weaknesses and risks associated with the case.

Lead Plaintiff and its counsel have reviewed over 300,000 pages of documents produced by VeriFone and the SEC and numerous transcripts of depositions taken by the SEC during its investigation of VeriFone. The parties then agreed to mediate and submitted detailed mediation statements, including numerous exhibits obtained through discovery. After submitting the mediation statements to Judge Phillips, the parties engaged in extensive settlement discussions with the

[10] *See* Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2012 Review & Analysis*, at 8, Figure 8 (Cornerstone Research 2013). For a more detailed explanation of the damages in this Litigation, the Court is respectfully referred to Lead Plaintiff's Response to the Court's September 5, 2013 Order Re Supplemental Briefing at 9-13 (Dkt. No. 309).

assistance of Judge Phillips where the strength and weaknesses of the parties' claims and defenses were crystallized and fully explored. Only after months of additional negotiations did the parties agree to resolve the case for the mediator's recommendation of $95 million.

Given the foregoing, there is no question that the parties reached an agreement to settle the Litigation at a point when they had a fully informed understanding of the legal and factual issues involved in the case. *See Mego*, 213 F.3d at 459.

F. The Recommendations of Experienced Counsel Favor Approval of the Settlement

As the Ninth Circuit observed in *Rodriquez*, "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action." 563 F.3d at 965. Courts have recognized that '"'[g]reat weight" is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Nat'l Rural*, 221 F.R.D. at 528. As a court in this District previously recognized, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007). Lead Counsel, who are actively involved and experienced in complex securities class action litigation, have weighed all of the relevant factors and have concluded that the settlement is a highly favorable result that is in the best interest of the Class. As Judge Phillips states: "There is no question in my mind that the settlement reached represents a considered judgment by plaintiffs' counsel, Robbins Geller Rudman & Dowd LLP, who are among the most capable and experienced lawyers in the country and who took on a risky and complicated case, including a successful appeal to the Ninth Circuit, and that the proposed settlement is fair and reasonable." Phillips Decl., ¶6. Where, as here, the settlement is the product of serious, informed, and non-collusive negotiations, "'the trial judge . . . should be hesitant to substitute its own judgment for that of counsel.'" *Nat'l Rural*, 221 F.R.D. at 528. *See also Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988) ("The recommendation of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement.").

Lead Counsel possess significant experience in securities and other complex class action litigation and have negotiated numerous other substantial class action settlements throughout the

country. *See, e.g.*, Seefer Decl., ¶¶110-112. Here, "[t]here is nothing to counter the presumption that Lead Counsel's recommendation is reasonable." *Omnivision*, 559 F. Supp. 2d at 1043. Moreover, Lead Plaintiff, who was actively involved in the Litigation, including its outside counsel's attendance at the mediation sessions, authorized counsel to settle the Litigation and believe that the Settlement represents a highly favorable recovery for the Class. *See* Betts Decl., ¶¶3-5.

G. Reaction of the Settlement Class Supports Approval of the Settlement

Pursuant to this Court's Amended Order Preliminarily Approving Settlement and Providing for Notice (Dkt. No. 320) ("Preliminary Approval Order"), the Court-approved Notice of Proposed Settlement of Class Action (the "Notice") was mailed to potential Class Members who could be identified with reasonable effort and a summary notice was published once in *Investor's Business Daily*, *Globes* and over the *Business Wire*.[11] The Notice advised the Class of the terms of the Settlement and the Plan of Allocation as well as the procedure and deadline for filing objections. As of December 11, 2013, more than 95,000 Notices had been mailed to potential Class Members and nominees. While the objection deadline has not yet passed, to date only one potential objection has been received from Gil Ron, counsel for plaintiff in a suit filed against VeriFone in Israel on behalf of persons who purchased VeriFone stock on the Tel Aviv Stock Exchange between March 7, 2007 and December 2, 2007. *See* Seefer Decl., ¶¶143-149 & Exs. A-I. The case was filed in January 2008 and has been stayed by agreement of the parties until resolution of this suit. *Id.*, ¶143. Mr. Ron contends the settlement is unfair because the class was changed to include persons who purchased VeriFone shares on foreign stock exchanges. *Id.*, ¶¶147-148 & Exs. F, H. In addition, Mr. Ron contends persons who purchased VeriFone stock on the Tel Aviv Stock Exchange are entitled to a preferential allocation of the settlement proceeds because scienter is not an element under Israeli law. *Id.*

Both contentions are incorrect. As Lead Counsel informed Mr. Ron, the Class in this case has never been limited by the exchange on which VeriFone securities were purchased. *Id.*, ¶148 &

[11] *See* ¶¶3-10, 15 of the accompanying Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Proposed Settlement of Class Action and the Proof of Claim and Release Form, B) Publication of the Summary Notice, and C) Internet Posting.

Exs. G, I. Further, in 2010, Lead Counsel explicitly told Mr. Ron that it would not confirm his request that purchasers of VeriFone stock on the Tel Aviv Stock Exchange were not included in this action. *Id.*, ¶144 & Ex. C. Moreover, during a January 13, 2013 hearing before the Israeli Supreme Court, Mr. Ron sought and received assurances from defendants counsel that purchasers of VeriFone stock on the Tel Aviv Stock Exchange ***were included*** in this action. *Id.*, ¶145 & Ex. D. Finally, whether scienter needs to be proven under Israeli law is irrelevant because the Israeli District Court has ruled twice that U.S. law will apply in the Israeli action if the stay is lifted and the case proceeds. *Id.*, ¶145 & Exs. A-B.

Mr. Ron has stated that he would not object to the Settlement if the Plan of Allocation was revised to provide a preferential allocation to persons who purchased VeriFone securities on the Tel Aviv Stock Exchange and if Mr. Ron received attorneys' fees and his expenses. *Id.*, ¶147 & Ex. F. Lead Counsel responded that they were unwilling to revise the Plan of Allocation because the two rulings by the Israeli District Court stating that scienter would have to be proven establish that persons who purchased VeriFone securities on the Tel Aviv Stock Exchange are not entitled to a preferential allocation. *Id.*, ¶148 & Ex. G. In addition, Lead Counsel informed Mr. Ron that they did not believe he was entitled to a fee because he had not performed any work on this case but that Lead Counsel would file any request for a fee he wishes to submit. *Id.*

While not conclusive, "the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness." *Hanlon*, 150 F.3d at 1027. *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) ("such a low level of objection is a 'rare phenomenon'").

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

Assessment of a plan of allocation of settlement proceeds in a class action under Rule 23 of the Federal Rules of Civil Procedure is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Ikon*, 194 F.R.D. at 184; *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978);

accord In re Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 238 (5th Cir. 1982). An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992).

The Plan of Allocation here provides an equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Proof of Claim and Release. The Plan of Allocation was developed by Lead Counsel, with the assistance of Lead Plaintiff's damages experts, and reflects the theories of causation and damages Lead Plaintiff would have presented at trial.

The Plan of Allocation was tailored to account for the litigation risks specific to this action. Specifically, pursuant to the Plan of Allocation, the distribution per share for Class Members who purchased VeriFone securities on or between August 31, 2006 through March 1, 2007 and between December 3, 2007 through April 1, 2008 are reduced by 50% because the claims of those Class Members are harder to prove than the claims of Class Members who purchased between March 2, 2007 through December 2, 2007. *See* Seefer Decl., ¶¶121-124. Lead Plaintiff and Lead Counsel believe the claims of Class Members who purchased between March 2, 2007 through December 2, 2007 were stronger than the claims of other Class Members because these Class Members made their purchases after the Company reported financial results that were subsequently restated and before VeriFone publicly disclosed the need to restate its financial results. *Id.* Thus, unlike Class Members who purchased between August 31, 2006 through March 1, 2007, these Class Members could conclusively prove that they purchased VeriFone securities after the Company had reported materially false and misleading financial results and after Defendants falsely represented those financial results were fairly stated. *Id.* In addition, unlike Class Members who purchased between December 3, 2007 through April 1, 2008, these Class Members did not purchase VeriFone securities after VeriFone publicly disclosed it would be restating its financial results. Therefore, they did not know about the falsely reported financial results when they purchased their VeriFone securities.

Id.[12] The Plan of Allocation will result in a fair distribution of the available proceeds among Class Members who submit valid claims based on the relevant strength and weaknesses of their claims depending on when they purchased VeriFone securities. Therefore, the Plan of Allocation should be approved.

V. CONCLUSION

For all the reasons set forth above, in the declarations submitted, and the entire record in this Litigation, Lead Plaintiff respectfully requests that the Court approve the Settlement and the Plan of Allocation.

DATED: December 16, 2013

Respectfully submitted,

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Lead Counsel for Plaintiffs

[12] The Plan of Allocation does not treat Lead Plaintiff preferentially. To the contrary, Lead Plaintiff will receive a lower recovery under the Plan of Allocation that it would have received if the litigation risks had not been factored into the Plan of Allocation. *Id.*, ¶123.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I authorized the electronic filing of 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 attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 16, 2013.

s/ CHRISTOPHER P. SEEFER

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