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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SANDI ROPER, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. SITO MOBILE LTD., JERRY HUG, and KURT STREAMS, Defendants.	Case No.: 2:17-cv-01106-ES-MAH CLASS ACTION **LEAD PLAINTIFFS' BRIEF IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**

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I. INTRODUCTION

Lead Plaintiffs Red Oak Fund, LP, Red Oak Long Fund LP, Red Oak Institutional Founders Long Fund, and Pinnacle Opportunities Fund, LP, (collectively, "Plaintiffs") respectfully submit this memorandum in support of their unopposed motion for an order preliminarily approving the proposed settlement ("Settlement") of this class action securities fraud lawsuit. The Settlement, embodied in the Stipulation of Settlement ("Stipulation") filed contemporaneously herewith as Docket No. 84, represents a favorable outcome for the Class in an otherwise unfavorable situation.[1] Simply put, although Plaintiffs faced a number of significant obstacles following the Court's holding on Defendants' motion to dismiss, Plaintiffs were still able to secure a settlement that restores a considerable amount of compensation back to the Class. But for this Settlement, the Class would not be receiving anything to offset the damages it sustained.

The Stipulation provides Class Members with a benefit of $1,250,000 to be paid by Defendants in exchange for a full release of all claims relating to this Action. Considering the obstacles faced by Plaintiffs and the real risk that Defendants may have obtained a victory either at summary judgment or trial, Plaintiffs and Lead Counsel believe that the Settlement is a positive outcome for the Class and should be approved.

II. SUMMARY OF LITIGATION AND SETTLEMENT NEGOTIATIONS

A. Plaintiffs' Claims and Allegations

This Action arises from alleged materially misrepresentations contained in SITO Mobile's public filings, including press releases, conference call transcripts, and SEC filings. Plaintiffs alleged that Defendants violated the Securities Act of 1933, 15 U.S.C. §77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C.

[1] Unless otherwise stated, capitalized terms have the same meaning as in the Stipulation.

§78a *et seq*.

SITO Mobile operates within the advertising industry as a self-described "mobile location-based media platform," providing customer advertisements on consumer mobile phones at particular times and places when the advertisements are likely to be most effective. During election cycles, political spending dramatically affects the advertising industry. Industry experts call it "political crowd out," which means that with a surge in political advertising demand and a constant supply of advertising opportunities, the price of advertising spots rises to such levels that non-political businesses will avoid the inflated prices.

Plaintiffs alleged in this action that Defendants omitted material information concerning the then-current (and highly negative) impact of the 2016 presidential election on SITO Mobile's operations and revenue during the third- and fourth-quarters of fiscal year-2016. Compared to the prior year, SITO Mobile's media placement revenue slowed dramatically between the second- and third- quarter and then declined during the fourth- quarter. On November 14, 2016, SITO Mobile reported its earnings for the third-quarter of fiscal-year 2016, attributing weaker demand to "seasonality" and not to the 2016 election. Investors noticed the slowing demand, and the price of SITO Mobile common stock declined by 26% (from $5.34 to $3.94). Six weeks later, on January 3, 2017, Defendants announced SITO Mobile's preliminary financial results for the fourth-quarter of fiscal-year 2016 and confirmed that SITO Mobile's revenue had been negatively and materially impacted by the 2016 election. The reaction from Investors was swift and dramatic. SITO Mobile's stock price further dropped another 32% (from $3.69 to $2.50) on unusually heavy trading volume. Plaintiffs alleged that investors who purchased SITO Mobile stock and relied upon Defendants' false statements incurred significant damages.

B. Procedural History and Class Counsel's Investigation

The initial complaint in this Litigation was filed on February 17, 2017. ECF No. 1. In response, Lead Counsel commenced a comprehensive investigation into SITO Mobile's operations including a thorough investigation and review of documents including but not limited to: relevant filings made by SITO Mobile with the United States Securities and Exchange Commission; public documents, conference calls, and press releases; and research analysts' reports concerning the Company. Apton Decl. ¶3.

On April 18, 2017, Plaintiffs filed their motion for appointment as Lead Plaintiffs. ECF No. 11. After full briefing on Plaintiffs' unopposed motion, the Court appointed Plaintiffs as Lead Plaintiffs and approved Plaintiffs' selection of Lead Counsel on May 5, 2017. ECF No. 17.

On June 22, 2017, Lead Plaintiffs filed the Amended Complaint against Defendants. ECF No. 18. Two motions to dismiss the Amended Complaint were filed on September 1, 2017 that challenged the sufficiency of the complaint under Fed. R. Civ. P. 12(b)(6). ECF No. 28, 29. After due consideration of the parties' written submissions and oral arguments, dismissed without prejudice Counts I and II in their entirety. ECF No. 62. Count III, the court dismissed without prejudice "with respect to the alleged August 15, 2016, and September 16, 2016 statements or omissions and with respect to Defendants Betsy J. Bernard, Jonathan E. Sandelman, Peter D. Holden, Joseph A. Beatty, Richard O'Connell, Jr., and Brent Rosenthal." *Id.* Count IV, the court dismissed without prejudice "with respect to Defendants Betsy J. Bernard, Jonathan E. Sandelman, Peter D. Holden, Joseph A. Beatty, Richard O'Connell, Jr., and Brent Rosenthal." *Id.* The Court denied the remainder of the motions to dismiss. *Id.* As claims against Defendants SITO Mobile, and Individual Defendants Jerry Hug and Kurt Streams remained for violations of Section 10(b) of the Exchange Act and SEC Rule 10b-5 (Count III) and violation of

Section 20(a) of the Exchange Act (Count IV), discovery commenced.

Following the Court's holding on Defendants' motions to dismiss, the parties engaged in mediation before Michelle Yoshida. Mediation took place on April 30, 2019, and while the mediation was unsuccessful, the parties continued to take steps towards resolution of the matter. Apton Decl. ¶¶11-13.

While participating in mediation, Plaintiffs recognized that sufficient challenges and uncertainties existed in the claim as alleged such that settlement consistent with the terms stated below was in the interest of the class. Plaintiffs considered the fact that in the two years this matter has been pending, the Court had dismissed: (i) all '33 Act claims relating to the public offering; (ii) all '34 Act claims relating to statements made on two of the three challenged dates; and (iii) all claims against the non-management Board members. Additionally, significant hurdles remained to adequately prove scienter, which would have proved fatal to the viability of any claim, that increased the risk of loss at the summary judgment or trial stage of the litigation. Finally, real questions remain to SITO Mobile's solvency to make any payments to the Class, even if Plaintiffs prevailed in the litigation. Apton Decl. ¶¶16-17.

III. THE PROPOSED TERMS OF SETTLEMENT

A. The Class Definition

The Settlement Class is defined as all Persons who purchased or otherwise acquired SITO common stock between August 15, 2016 and January 2, 2017, inclusive. The Class excludes Defendants and certain related individuals and entities, as well as any Class Member that validly and timely requests exclusion pursuant to the terms provided by the Court.

B. Monetary Consideration and Plan of Allocation

Plaintiffs are securing a total benefit for the Class of $1,250,000 to be paid by or on behalf of Defendants. The Plan of Allocation is based on the amended

complaint. It provides compensation to those Class Members that sustained losses in response to the decline in the price of SITO Mobile's common stock that occurred on November 14, 2016 and January 3, 2017. All Class Members will receive the same distribution depending on the number of shares of SITO Mobile's common stock held on these days. The Plan of Allocation will be applied uniformly to all Class Members that submit valid and timely claims. The Plan of Allocation is described in full in the Notice. *See* Stipulation at Exhibit A-1.

C. Release Provisions

In exchange for the monetary consideration described above, Plaintiffs are releasing SITO Mobile (and other Released Persons) from all claims arising from SITO Mobile's common stock. Specifically, the Stipulation defines the term "Released Claims" as follows:

> means any and all claims and causes of action of every nature and description, including Unknown Claims, debts, demands, disputes, rights, suits, matters, damages, obligations or liabilities of any kind, nature, and/or character whatsoever (including, but not limited to, any claims for damages, interest, attorneys' fees, expert or consulting fees, and any and all other costs, expenses or liabilities whatsoever), whether known or unknown, whether under federal, state, local, statutory, common law, foreign law, or any other law, rule or regulation, whether fixed or contingent or absolute, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, concealed or hidden, asserted or that might have been asserted, by Lead Plaintiffs or the Class Members, or any of them, against the Released Persons based upon, arising out of, or related to (a) the purchase or acquisition of SITO common stock during the Class Period and any of the facts, transactions, events, occurrences, disclosures, statements, acts, omissions, or failures to act which were or could have been alleged in or embraced or otherwise referred to or encompassed by the Litigation, regardless of upon what legal theory based, including, without limitation, claims for negligence, gross negligence, recklessness, fraud, breach of duty of care and/or loyalty or violations of common law, administrative rule or regulation, tort,

> contract, equity, or otherwise of any federal statutes, rules, regulations or common law, or the law of any foreign jurisdiction; or (b) that Defendants improperly defended or settled the Litigation, the Released Claims, or both.

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

A. The Settlement Approval Process

Rule 23(e) provides a two-step process for approving class action settlements.[2] First, if a proposed settlement would bind class members, then the court should evaluate the proposed settlement to determine whether giving notice to class members would be justified. FED. R. CIV. P. 23(e)(1). Second, once notice is given, the court should only approve the proposed settlement upon a finding that it is fair, reasonable, and adequate. FED. R. CIV. P. 23(e)(2).

Under Rule 23(e)(1), notice to class members should be directed if, based upon the parties' showing, it appears likely that the court will be able to approve the settlement under Rule 23(e)(2) and certify the class for the purposes of settlement. In the context of determining whether approval is likely to occur, Rule 23(e)(2) instructs the court to consider whether: "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate . . . ; and (D) the proposal treats class members equitably relative to each other." "An initial 'presumption of fairness for the settlement is established if the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *In re Cendant Corp. Litig.*, 264 F.3d 201, 232

[2] Plaintiffs' argument in this section takes into account the amendments to Rule 23, effective December 1, 2018, as well as the *Guidance on new Rule 23 class action settlement provisions*, 102 JUDICATURE, no. 3, Winter 2018, at 15-21.

n. 18 (3d Cir. 2001); *see also In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016).

B. The Proposed Settlement Meets the Requirements for Preliminary Approval under Rule 23(e)(2).

1. Plaintiffs and Levi & Korsinsky Adequately Represented the Class.

This was a difficult case to litigate from start to finish. Factually, Plaintiffs were faced with the immediate issue of obtaining evidence to substantiate their theory of liability without the benefit of discovery and the reality that any favorable documents were non-public and under the control of Defendants. To overcome this obstacle, Plaintiffs engaged in a comprehensive investigation to support their claims against Defendants. Apton Decl. ¶3. These efforts ultimately resulted in the filing of the amended complaint that survived Defendants' motion to dismiss (albeit partially). *Id.* at ¶¶8-9.

But for Levi & Korsinsky's investigation and representation through the motion to dismiss stage, Plaintiffs would not have been able to secure the Settlement that is currently before the Court. Their efforts and the result they generated prove that Plaintiffs and Levi & Korsinsky adequately represented the Class. This factor weighs in favor of granting preliminary approval and directing notice under Rule 23(e).

2. The Proposal Was Negotiated at Arm's Length

The parties reached the proposed Settlement after mediation and subsequent negotiations over the course of several weeks. These negotiations only took place and were finalized after Lead Counsel conducted a substantial review of the file, including the Court's order on Defendants' motion to dismiss and considering how it impacted Plaintiffs' theory of liability. *See also* Manual for Complex Litigation, Third, § 30.42 (West 1995)) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations

between experienced, capable counsel after meaningful discovery.").

As a means to ensure the fairness and adequacy of the Settlement, Lead Counsel engaged in a good faith mediation with Defendants after considering the significant hurdles they faced in terms of proving liability and damages. Apton Decl. at ¶10. Subsequently, Plaintiffs and Lead Counsel believe that the Settlement is fair and reasonable to the Class and should be approved by the Court. *Id*. at ¶18. This fact further supports the motion for preliminary approval and directing notice to the Class. *See, e.g.*, *Alves v. Main*, No. CIV.A. 01-789 DMC, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd*, 559 F. App'x 151 (3d Cir. 2014) ("courts in this Circuit traditionally 'attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class.'"); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997) *aff'd*, 148 F.3d 283 (3d Cir. 1998) ("[T]he Court credits the judgment of Plaintiffs' Counsel, all of whom are active, respected, and accomplished in this type of litigation."); *see also Riedel v. Acqua Ancien Bath New York LLC*, 14 Civ. 7238 (JCF), 2016 WL 3144375, at *7 (S.D.N.Y May 19, 2016) (document exchange reflects ability of counsel to evaluate strengths and weaknesses of claims).

3. The Relief Provided for the Class Is Adequate.

Rule 23(e) identifies four factors for the court to consider when determining whether the relief provided under a proposed settlement is adequate: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). The proposed Settlement meets these criteria and is therefore adequate:

(a) <u>The costs, risks, and delay of trial and appeal.</u>

A settlement is favored where "continuing litigation through trial would have

required additional discovery, extensive pretrial motions addressing complex factual and legal questions and ultimately a complicated, lengthy trial." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 536 (3d Cir. 2004). Courts have noted that "[s]ecurities fraud class actions are notably complex, lengthy, and expensive cases to litigate." *In re Par Pharm. Sec. Litig.*, No. 06 Civ 3226, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013). While Plaintiffs believed that their claims were initially strong, the Court's order on the motion to dismiss created significant obstacles in terms of proving the theory of their case. Litigation of the claims alleged in this case raised a number of complex questions that required substantial efforts by Plaintiffs and Lead Counsel. As discussed below, Plaintiffs would have had to overcome numerous hurdles to achieve a litigated verdict against SITO Mobile. Even assuming that the sustained claims survived a motion for summary judgment, a jury trial would have required a substantial amount of factual and expert testimony. *See, e.g., In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 332 (E.D.N.Y. 2010) ("The proof on many disputed issues – which involve complex financial concepts – would likely have included a battle of experts, leaving the trier of fact with difficult questions to resolve."); *In re Am. Bank Note Holographics, Inc. Sec. Litig*., 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("In such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants."). Whatever the outcome at trial, it was virtually certain that an appeal would have been taken. All of the foregoing would have posed considerable expense to the parties, and would have delayed any potential recovery for several years, if one was even achieved.

Here, Plaintiffs faced significant hurdles that resulted from the Court's ruling partially granting Defendants' motion to dismiss. First, the Court dismissed Plaintiffs' Securities Act claims and left intact Plaintiffs' Exchange Act claims, which are harder to prove at trial. Second, the Court severely limited Defendants'

alleged misrepresentations, because the Court held that Plaintiffs failed to show that Defendants were aware of the "political crowd out" effect for many of the alleged misrepresentations. This holding significantly impacted Plaintiffs' theory of liability. Apton Decl. ¶¶8-9.

The risk of obtaining and maintaining class certification through trial also supports approval of the Settlement. Plaintiffs had not yet moved for class certification at the time of the Settlement and, absent the Settlement there would have been a contested motion for class certification. While Lead Counsel believe that the requirements for Rule 23 were satisfied in this case and would vigorously argue for class certification, class-certification discovery would have been conducted and Defendants, without doubt, would have opposed the motion. The process would have added time and expense to the proceedings, and the outcome of such a contested motion was far from certain. Moreover, even if the class was certified for other than settlement purposes, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential*, 148 F.3d at 321; *see also In re Rent-Way Secs. Litig.*, 305 F. Supp. 2d 491, 506-07 (W.D. Pa. 2003) ("[A]s in any class action, there remains some risk of decertification in the event the Propose[d] Settlement is not approved. While this may not be a particularly weighty factor, on balance it somewhat favors approve of the proposed Settlement.").

Lead Counsel believes that this is a favorable outcome for the class as it secures an immediate benefit in light of the expected difficulties in proving liability based on the discovery reviewed to date. The "fact that [defendants] could afford to pay more does not mean that [they are] obligated to pay any more than what the [] class members are entitled to under the theories of liability that existed at the time the settlement was reached." *Warfarin*, 391 F.3d at 538; see *also In re Schering-Plough Corp. Sec. Litig.*, No. 01 Civ. 0829, 2009 WL 5218066, at *5 (D.N.J. Dec.

31, 2009) ("pushing for more in the face of risks and delay would not be in the interests of the class"). Here, while Defendants arguably could afford to pay more, Plaintiffs respectfully submit that this should not be viewed with much significance in light of the other factors supporting approval of the Settlement. Thus, whereas here, there is a real and substantial risk that Plaintiffs would not prevail on the merits, a recovery is fair and reasonable to the class. *See Alves*, 2012 WL 6043272, at *21 (finding settlement approval was warranted as the recovery provides immediate benefits and "continued litigation involves considerable risk that the Plaintiffs would lose the merits of the case").

(b) The effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.

Plaintiffs retained Analytics Consulting, LLC ("Analytics") to serve as the Claims Administrator. Analytics has been in the claims administration business for 49 years. *See* Declaration of Richard W. Simmons, dated August 2, 2019, ¶3. In total, they have been involved in a number of significant settlements responsible for disbursing millions of dollars to shareholder claimants. *Id*. at ¶¶3-4.

Analytics distributes funds in accordance with the following process. Notice is provided to potential class member by mailing notice to a company's shareholders of record, including recipients consisting of brokers and various investment advisors as a standard operating procedure. *Id*. at ¶¶5-7. These recipients manage accounts on behalf of thousands of retail investors who then forward the notice to potential class members. *Id*. at ¶5. Analytics also provides notice via an electronic press release through a service. *Id*. at ¶6.

Class members then respond to the notice by submitting completed claim forms. The Claims Administrator receives these claims forms either by mail or electronically and, once the claims deadline passes, begins to vet each claim. The

Claims Administrator reviews the claims to make sure they are authorized, i.e., validly submitted in accordance with the class definition, completed correctly, properly signed, and include all necessary supporting documentation. Claimants who submit deficient claims are then notified and given an opportunity to cure the deficiency. *Id*. at ¶¶8-13. Once the claims have been vetted, the Claims Administrator will calculate the *pro rata* distribution from the settlement fund and distribute the funds via check after court approval. Payees are usually given 90 or 180 days to negotiate the checks. Payees who do not negotiate their checks in that period of time are given an additional opportunity to receive their distribution, either in the form of a new check or by wire if feasible. *Id*. at ¶14.

Analytics as well as almost all securities claims administrators routinely follows the aforementioned process. *Id*. at ¶15. Analytics will be able to administer the settlement fund in this case without issue.

(c) The proposed award of attorney's fees, including timing of payment.

Lead Counsel intends to seek an award of attorneys' fees of $300,000 (which is less than 25% of the monetary benefits obtained under the Settlement including the payment of Notice and Administration Expenses). The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 33% of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903-04 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring). At less than 25%, the requested fee is equal to the percentage fee awards granted in many other

comparable securities class actions within the Third Circuit.[3] Moreover, Lead Counsel will not be paid any fees until after the Court has entered the Judgment.

Lead Counsel respectfully submits that at this stage of the approval proceedings, the fact that the intended fee request will be in line with Third Circuit precedent supports Plaintiffs' request for preliminary approval. When Lead Counsel formally moves for an award of attorneys' fees, it will submit additional evidence in support of its request.

(d) Any agreement required to be identified under Rule 23(e)(3).

Aside from the Stipulation, the parties have entered into the Supplemental Agreement. The Supplemental Agreement, as described in the Stipulation, provides SITO Mobile with the right to terminate the Settlement if a certain number of Class Members (or certain percentage of damaged ADRs) exceeds a threshold. *See* Stipulation at ¶7.3. The Supplemental Agreement is "confidential" as is customarily the case. *See Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 150292, at *23 (N.D. Cal. Sep. 4, 2018) (allowing confidential filing of supplemental agreement in order to "'avoid the risk that one or more shareholders might use this knowledge to insist on a higher payout for themselves by threatening to break up the Settlement.'").

[3] *See, e.g., See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) ("Courts within the Third Circuit often award fees of 25% to 33% of the recovery."); *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, No. 03- CV-4372 (DMC), 2009 WL 4730185, at *8 (D.N.J. 2009) (same); *Milliron v. T-Mobile USA, Inc*., No. 08-4149, 2009 WL 3345762 (D.N.J. Sept. 14, 2009) (awarding 33% of settlement); *In re Schering-Plough Corp. ENHANCE ERISA Litig.*, No. 08-1432 (DMC) (JAD), 2012 WL 1964451, at *6-7 (D.N.J. May 31, 2012) (awarding 33.3% of settlement); *Ins. Brokerage Antitrust Litig.*, 297 F.R.D. at 154-56 (awarding 33% of settlement).

4. The Settlement Treats Class Members Equitably.

The Settlement does, in fact, treat Class Members equitably. This is because the proposed Plan of Allocation treats all claimants uniformly. "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (citation omitted). As described in the Notice (Stipulation, Exhibit A-1), the Plan of Allocation has a rational basis and was formulated by Lead Counsel ensuring its fairness and reliability. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165, 2007 WL 4115809, at *13 (S.D.N.Y. Nov. 7, 2007); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007) (granting final approval of settlement as "The Plan of Allocation is rational and consistent with Lead Plaintiffs' theory of the case."). Under the proposed Plan of Allocation, each Authorized Claimant will receive a *pro rata* share of the Net Settlement Amount, with that share to be determined by the ratio that the claimant's allowed claim bears to the total allowed claims of all claimants. *See* Apton Decl. ¶¶19-20. The Plan of Allocation is based upon the premise that Settlement Class Members sustained damages by purchasing SITO Mobile common stock at artificially inflated prices and seeks to compensate them in accordance with the devaluation that SITO Mobile common stock experienced when the corrective disclosure entered into the public sphere. *Id*. The Plan of Allocation relies on the corrective disclosure listed in the Amended Complaint, which is common in securities class actions. *Datatec Sys.*, 2007 WL 4225828, at *5.

The Plan of Allocation is substantially similar to other plans of allocation that have been approved and successfully implemented in other securities class action settlements, including within this Circuit. *See In re Ocean Power Techs., Inc.*, No. 3:14-CV-3799, 2016 U.S. Dist. LEXIS 158222, at *73 (D.N.J. Nov. 15, 2016) ("pro

rata distributions are consistently upheld, and there is no requirement that a plan of allocation 'differentiat[e] within a class based on the strength or weakness of the theories of recovery'") (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011)); *see also In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) (deeming plan of allocation where "claimants are to be reimbursed on a *pro rata* basis for their recognized losses based largely on when they bought and sold their shares of [company] stock" as "even handed"). In assessing a proposed plan of allocation, the Court may give great weight to the opinion of informed counsel. *See, e.g., Chavarria v. N.Y. Airport Serv., LLC*, 875 F. Supp. 2d 164, 175 (E.D.N.Y. 2012) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. That is, 'as a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.'"). Accordingly, given Lead Counsel's opinion concerning the Plan of Allocation, this factor weighs in favor of granting preliminary approval.

V. PROVISIONAL CERTIFICATION OF THE SETTLEMENT UNDER RULE 23 IS APPROPRIATE

As instructed by Rule 23(e), notice to class members should be directed if it appears likely that the court will be able to certify the class for the purposes of settlement. FED. R. CIV. P. 23(e). Conditional certification of a class for settlement purposes are allowable under Rule 23. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 794 (3d Cir. 1995). Before a class may be certified, the following requirements of Rule 23(a) must be satisfied: (a) the class is so numerous that joinder of all class members is impracticable; (b) there are questions of law or fact common to the class; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23. For the reasons stated below, certification would be appropriate and, therefore, the Court should proceed with authorizing notice.

A. The Class Members Are So Numerous that Joinder Is Impracticable

Rule 23(a)(1) requires that a class action must be advanced on behalf of a number of individuals so large that the joinder of all members is impractical. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). "[N]umerosity is presumed at a level of 40 members . . . ." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). While the precise number of Class Members is unknown, the number certainly exceeds any number considered practical for joinder. As alleged, SITO Mobile's common stock was actively traded on NASDAQ Capital Market. During the Class Period, there were over 18.7 million shares being traded. Indeed, courts routinely hold that Rule 23(a)'s numerosity requirement is satisfied under similar facts. *See In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 200 (E.D. Pa. 2008*), aff'd sub nom. In re DVI, Inc. Sec. Litig.*, 639 F.3d 623 (3d Cir. 2011) (finding numerosity where stock traded on NYSE).

B. Common Questions of Law or Fact Exist

In order to maintain a class action, there must be "questions of law or fact common to the class . . . ." Fed. R. Civ. P. 23(a)(2) (emphasis added). Rule 23(a)(2) merely requires that a plaintiff demonstrate common questions of law or fact that are susceptible to class-wide proof. 2 W. Rubenstein, Newberg on Class Actions § 4:50, 196-97 (5th ed. 2012). Identicality of all facts and legal questions is not necessary – commonality will be demonstrated where the named plaintiff demonstrates just one common question. *Id*. (citations omitted).

This case presents numerous common questions of both law and fact for Settlement purposes, which include: (i) whether the federal securities laws were violated by Defendant's acts; (ii) whether Defendants made material

misrepresentations and omissions concerning SITO Mobile's revenue; (iii) whether Defendant acted with the requisite state of mind in misrepresenting or failing to disclose material facts; (iv) whether the corrective disclosures of the prior misrepresentations and omissions caused artificial inflation of the market price of SITO Mobile's common stock, and if so, how much; and whether the Settlement Class Members have sustained damages and, if so, the appropriate measure thereof.

C. Plaintiffs' Claims are Typical of Those of the Class

Rule 23(a)(3) requires that the claims of the named plaintiff are typical of the class's claims. The heart of the inquiry is whether the representative's claims and the class claims are interrelated so that class treatment is economical. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). Here, Plaintiffs' claims are similar to the claims of the other Settlement Class Members for Settlement purposes. Defendants' alleged course of conduct uniformly affected all Settlement Class Members, as they each allegedly suffered economic injury when the truth about the company's misstatements was revealed. Thus, the typicality requirement of Rule 23(a)(3) is met.

D. Plaintiffs Are Adequate Representatives of the Class

The purpose of the adequacy requirement is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997). The adequacy inquiry also tests the qualifications of counsel to represent a class. *See Viropharma*, 2016 WL 312108, at *7.

There are no apparent conflicts of interest between Plaintiffs and the absent Class Members for Settlement purposes. Indeed, Plaintiffs have been committed to the vigorous prosecution of this action from the outset and has reached a resolution that they believe is in the best interests of the Class. Plaintiffs have shown that they are more than an adequate representative by, among other things producing

documents to Defendants, reviewing the amended complaint, and retaining and overseeing experienced counsel throughout the Litigation.

E. The Requirements of Rule 23(b)(3) Are Also Satisfied

The class must satisfy the requirements of Rule 23(b)(1), (2), or (3). In this case, Plaintiffs and Defendants have agreed to request conditional certification under Rule 23(b)(3), "the customary vehicle for damage actions." *In re Community Bank of Northern Virginia*, 418 F.3d 277, 302 (3d Cir. 2005). Rule 23(b)(3) requires that Plaintiffs show that common questions of law and fact predominate over individual inquiries, and that resolution of the dispute via a class action is a superior method of adjudication. Rule 23(b)(3)'s predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 594 (1997). This case meets these requirements.

1. Common Legal and Factual Question Predominate

"Predominance is a test readily met in certain cases alleging . . . securities fraud . . . ." *Amchem*, 521 U.S. at 625. In this securities action, Defendants' alleged liability arises from its conduct with respect to statements made about SITO Mobile's revenue. Whether Defendants' publicly disseminated releases and statements during the Class Period omitted and/or misrepresented material facts and the Defendants' scienter predominate over any individual issue that theoretically might arise for Settlement purposes. *See Viropharma*, 2016 WL 312108, at *7 (finding common questions "dominate the Class, including whether Defendants' statements to the investing public during the Class Period caused the price of ViroPharma's securities during the Class Period to artificially inflate.").

2. A Class Action is the Superior Means to Adjudicate Plaintiffs' and Class Members' Claims

The second prong of Rule 23(b)(3) is essentially satisfied by the proposed

Settlement itself. As 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 (citing FED. R. CIV. P. 23(b)(3)(D)). Thus, any manageability problems that may have existed here—and Plaintiffs know of none—are eliminated by the Settlement. *See In re ViroPharma Inc. Sec. Litig.*, No. 12-2714, 2016 U.S. Dist. LEXIS 8626, at *23 (E.D. Pa. Jan. 25, 2016) (finding class action superior as all class members were "complaining of the same behavior by Defendants" and "[t]he alternative would produce individual suits throughout the country, redundantly wasting judicial resources to litigate the same claims over and over).

VI. THE PROPOSED NATURE AND METHOD OF CLASS NOTICE ARE CONSTITUTIONALLY SOUND AND APPROPRIATE

Preliminary approval of the proposed Settlement permits notice to be given to the Settlement Class Members of a hearing on final settlement approval, at which they and the settling parties may be heard with respect to final approval. *See Manual for Complex Litigation*, Third, § 23.14 (West ed. 1995). Here, the parties propose that notice be given by U.S. mail. *See* Stipulation at Exhibit A, ¶6. In addition, the Stipulation provides for publication of a summary notice, which will be published one time over a national business newswire. *See id.*

The proposed form of mailed notice (Exhibit A-1 to the Stipulation), provides the following details of the Stipulation to prospective Settlement Class Members in a fair, concise and neutral way: (1) the existence of and their rights with respect to the class action, including the requirement for timely opting out of the Class; and (2) the Settlement with Defendants and their rights with respect to the Settlement. The proposed form of Summary Notice (Exhibit A-3 to the Stipulation), provides essential information about the litigation and the Settlement, including an address

for potential class members to write in order to obtain the full long form of notice.

The means and forms of notice proposed here constitute valid and sufficient notice to the Class, the best notice practicable under the circumstances, and comply fully with the requirements of the Private Securities Litigation Reform Act of 1995, Rule 23 and due process. *See e.g.*, *Schering-Plough*, 2009 WL 5218066, at *1, 6 (finding that a settlement notice with a mailing to all class members who could be identified with reasonable effort and publication of a summary notice and over the *PR Newswire*, satisfied the requirements of Rule 23 and due process).

VII. PROPOSED SCHEDULE

Plaintiffs respectfully request the Court to schedule the dates set forth below and enter them in the [Proposed] Preliminary Approval Order, including:

Last day to complete mailing of Notices and Claim Forms.	At least 60 days before deadline for objections
Last day for filing and serving papers in support of final approval of the proposed Settlement, and the Fee and Expense Application .	At least 42 days before Fairness Hearing
Last day for Settlement Class Members to submit comments in support of, or in opposition to, the proposed Settlement, and the applications for Fee and Expense Awards.	At least 35 days before Fairness Hearing
Last day for potential Settlement Class Members to request exclusion from the Class.	At least 35 days before Fairness Hearing
Last day for filing and serving papers in response to objections to the proposed Settlement, and the Fee and Expense Application.	At least 14 days before Fairness Hearing
Fairness Hearing	At least 110 days following Preliminary Approval Date

VIII. CONCLUSION

The proposed Settlement is presumptively fair and presents no obvious deficiencies. Accordingly, the Court should grant preliminary approval of the proposed Settlement and enter an order substantially in the form of the accompanying [Proposed] Preliminary Approval Order.

Dated August 6, 2019

Respectfully submitted,

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