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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE MAXWELL TECHNOLOGIES
INC., SECURITIES LITIGATION

) Case No.: 3:13-cv-00580-BEN-RBB

) **NOTICE OF LEAD**
) **PLAINTIFF'S UNOPPOSED**
) **MOTION FOR PRELIMINARY**
) **APPROVAL OF CLASS ACTION**
) **SETTLEMENT**
)
)
)

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that Lead Plaintiff respectfully moves the Court
3 for an Order granting preliminary approval of the proposed Settlement of this
4 securities class action, pursuant to Federal Rule of Civil Procedure 23(e). This
5 unopposed motion is based upon the accompanying memorandum of law, the
6 Stipulation of Settlement and the accompanying exhibits attached therewith, as
7 well as all prior proceedings held in this action, and other such matters and
8 arguments as the Court may consider.

9 Dated: October 16, 2014

Respectfully submitted,

10 **BERNSTEIN LITOWITZ BERGER &**
11 **GROSSMANN LLP**

12 By: /s/ Benjamin Galdston

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE MAXWELL TECHNOLOGIES
INC., SECURITIES LITIGATION

) Case No.: 3:13-cv-00580-BEN-RBB

) CLASS ACTION

) **MEMORANDUM OF POINTS
) AND AUTHORITIES IN
) SUPPORT OF LEAD
) PLAINTIFF'S UNOPPOSED
) MOTION FOR PRELIMINARY
) APPROVAL OF CLASS ACTION
) SETTLEMENT**

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1 Lead Plaintiff the Employees' Pension Plan of the City of Clearwater
2 ("Clearwater" or "Lead Plaintiff"), on behalf of all persons or entities who
3 purchased or otherwise acquired shares of Maxwell Technologies, Inc. ("Maxwell"
4 or the "Company") common stock from April 29, 2011 through March 19, 2013,
5 inclusive, and who were allegedly damaged thereby, respectfully submit this
6 memorandum of law in support of its Unopposed Motion for Preliminary Approval
7 of Class Action Settlement.

8 **I. INTRODUCTION**

9 Lead Plaintiff and Defendants¹ (the "Parties") have negotiated, at arms'-
10 length, a proposed Settlement of all claims brought on behalf of all persons and
11 entities who purchased or otherwise acquired the publicly traded common stock of
12 Maxwell during the Settlement Class Period.² Lead Plaintiff is fully informed of
13 the strengths and weaknesses of the Litigation, having had the opportunity to
14 engage in extensive investigation of its claims prior to and during the prosecution
15 of this action and to consult with experienced experts before agreeing to the
16 proposed Settlement. Lead Plaintiff also appreciates the complex and highly
17 uncertain nature of proceeding with the Litigation and eventually trying this action
18 before a jury, and is mindful of the difficulties of proof associated with, and
19 possible defenses to, the securities law violations asserted in the Litigation.
20 Additionally, even if the Settlement Class³ were to prevail at trial, Defendants
21 would likely appeal any favorable judgment, delaying and possibly jeopardizing
22 any recovery.

23 _____
24 ¹ Defendants are Maxwell, David J. Schramm ("Schramm"), Kevin S. Royal
25 ("Royal"), and Van M. Andrews ("Andrews").

26 ² Capitalized terms not defined herein shall have those meanings ascribed to them
27 in the Stipulation of Settlement dated October 6, 2014 (the "Stipulation").

28 ³ The terms Settlement Class and Class are used interchangeably herein.

1 As such, Lead Plaintiff fully endorses and respectfully recommends the
2 proposed Settlement and believes it is in the best interests of the Settlement Class.
3 Lead Plaintiff and Defendants have reached an agreement to settle this class action
4 against Maxwell for payment of \$3,300,000 (Three Million and Three Hundred
5 Thousand Dollars), which represents an excellent recovery for the Settlement
6 Class. The terms of the proposed Settlement are set forth in the executed
7 Stipulation. The Stipulation includes several exhibits, including:

- 8 • Exhibit A, the [Proposed] Order Preliminarily Approving Settlement,
9 Certifying Settlement Class And Providing For Notice Of Settlement
10 (“Preliminary Order”);
- 11 • Exhibit A-1, the Notice Of (I) Pendency Of Class Action,
12 Certification Of Settlement Class, And Proposed Settlement; (II)
13 Settlement Fairness Hearing; And (III) Motion For An Award Of
14 Attorneys’ Fees And Reimbursement Of Litigation Expenses
15 (“Notice”);
- 16 • Exhibit A-2, the Proof Of Claim And Release Form (“Proof of
17 Claim”);
- 18 • Exhibit A-3, the Summary Notice Of (I) Pendency Of Class Action,
19 Certification Of Settlement Class, And Proposed Settlement; (II)
20 Settlement Fairness Hearing; And (III) Motion For An Award Of
21 Attorneys’ Fees And Reimbursement Of Litigation Expenses
22 (“Summary Notice”) for publication; and
- 23 • Exhibit B, the [Proposed] Order And Final Judgment Of Dismissal
24 with Prejudice (“Judgment”).

25 The Parties therefore respectfully request that the Court enter an order:
26 (1) preliminarily certifying a class for settlement purposes; (2) preliminarily
27 approving the proposed settlement; (3) approving the notice to the Class and
28 authorizing the dissemination of notice to Class members; (4) setting dates and
procedures for a fairness hearing on the proposed settlement; (5) setting forth
procedures and deadlines for class members to file objections to the proposed
settlement; and (6) setting forth procedures and deadlines for class members to
request exclusion (opt out) from the class.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 The original purported securities class action complaint was filed in this
3 District on March 13, 2013, alleging violations of Sections 10(b) and 20(a) of the
4 Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 10b-5
5 promulgated thereunder. On October 24, 2013, the Court appointed Clearwater as
6 Lead Plaintiff pursuant to the requirements of the PSLRA and approved Lead
7 Plaintiff’s selection of Lead Counsel and Liaison Counsel. On January 16, 2014,
8 Lead Plaintiff filed its Consolidated Complaint For Violations Of The Federal
9 Securities Laws alleging violations of Sections 10(b) and 20(a) and Rule 10b-5
10 under the Exchange Act. On May 5, 2014, the Court entered an order granting
11 Defendants’ motion to dismiss and providing Lead Plaintiff leave to amend the
12 Complaint within 30 days (the “Order”). On June 4, 2014, Lead Plaintiff filed its
13 Amended Consolidated Complaint For Violations Of The Federal Securities Laws
14 (the “ACC”) [ECF No. 56]. Defendants filed their motions to dismiss the ACC on
15 July 10, 2014, and Lead Plaintiff filed its omnibus brief in opposition to
16 Defendants’ motions on August 18, 2014.

17 After extensive good-faith settlement discussions during the course of the
18 Litigation, counsel for Lead Plaintiff and for Defendants participated in a
19 mediation session with JAMS mediator Jed D. Melnick, Esq., on August 21, 2014.
20 Prior to the mediation, each side submitted comprehensive mediation statements
21 setting forth their respective positions. As a result of negotiations that occurred
22 during and after the mediation, the Parties reached agreement on the settlement
23 terms set forth in the Stipulation.

24 **III. THE SETTLEMENT SHOULD BE PRELIMINARY APPROVED**

25 There is a “strong judicial policy that favors settlements, particularly where
26 complex class action litigation is concerned.” *In re Heritage Bond Litig.*, 02-ML-

1 1475 DT, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005) (citing *Class*
2 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). “[I]t must not be
3 overlooked that voluntary conciliation and settlement are the preferred means of
4 dispute resolution. This is especially true in complex class action litigation”
5 *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (quoting *Officers*
6 *for Justice v. Civil Serv. Comm’n of City & Cnty. of San Francisco*, 688 F.2d 615,
7 625). Fed. R. Civ. P. Rule 23 mandates judicial review of any settlement of the
8 “claims, issues, or defenses of a certified class.” Fed. R. Civ. P. 23(e). “The
9 decision to approve or reject a settlement is committed to the sound discretion of
10 the trial judge because he is ‘exposed to the litigants, and their strategies, positions
11 and proof.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)
12 (quoting *Officers for Justice*, 688 F.2d at 626).

13 However, the court must give “proper deference to the private consensual
14 decision of the parties,” since “the court’s intrusion upon what is otherwise a
15 private consensual agreement negotiated between the parties to a lawsuit must be
16 limited to the extent necessary to reach a reasoned judgment that the agreement is
17 not the product of fraud or overreaching by, or collusion between, the negotiating
18 parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all
19 concerned.” *Hanlon*, 150 F.3d at 1027 (quoting *Officers for Justice*, 688 F.2d at
20 625 (9th Cir. 1982)). “The district court’s role in evaluating a proposed settlement
21 is limited to the extent necessary to reach a reasoned judgment that the agreement
22 is not the product of fraud or collusion between the negotiating parties, and that the
23 settlement is fair as a whole. *See In re TD Ameritrade Account Holder Litig.*, 2011
24 WL 4079226, at *4 (N.D. Cal. Sept. 12, 2011) (citing *Rodriguez v. West Publ’g*
25 *Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

1 Determining whether to approve a proposed class action settlement is
2 generally a two-step process. *See In re Wireless Facilities, Inc. Sec. Litig. II*, 253
3 F.R.D. 607, 610 (S.D. Cal. Sept. 3, 2008) (Stormes, J.) (citing Fed. Judicial Center,
4 Manual for Complex Litig. § 21.632 (4th ed. 2004)). At the preliminary approval
5 stage, the court “should make a preliminary determination that the proposed class
6 satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule
7 23(b).” *Id.* The court then “approves the form and manner of notice and sets a
8 final fairness hearing, where it will make a final determination on the fairness of
9 the class settlement.” *Id.*

10 **A. Preliminary Class Certification Is**
11 **Appropriate And Necessary For Settlement Purposes**

12 One of the Court’s duties in reviewing a proposed settlement of a class
13 action is to determine whether the action may be maintained as a class action under
14 Fed. R. Civ. P. 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).
15 Following arms’-length negotiations, the Parties have agreed to a settlement and
16 certification of a class for settlement purposes. For the Court to certify a class
17 under Fed. R. Civ. P. 23(a), the Court must find that the requirements of
18 numerosity, commonality, typicality and adequacy of representation are met.
19 *Hanlon*, 150 F.3d at 1019. The action must also meet one of the prerequisites of
20 Rule 23(b) to be maintained as a class action. *Eisen v. Carlisle & Jacquelin*, 417
21 U.S. 156, 163 (1974). Lead Plaintiff submits that the Class satisfies each of the
22 requirements as set forth below.

23 **1. The Requirements Of Rule 23(a) Are Met**

24 **i. The Proposed Class Is Sufficiently Numerous**

25 Rule 23(a) requires the plaintiff demonstrate that the class is so numerous
26 that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). During the
27 Settlement Class Period, there were millions of shares of Maxwell that were sold

1 and misleading statements regarding Maxwell’s financial and operating results;
2 whether the stock price was artificially inflated as a result of Defendants’
3 misconduct; and whether members of the Settlement Class have sustained damages
4 and, if so, the appropriate measure of damages. Given that these legal issues are
5 shared by the putative Settlement Class Members and are based on a common core
6 of salient facts, the commonality requirement is met.⁴

7 **iii. Lead Plaintiff’s Claims Are**
8 **Typical Of The Settlement Class’ Claims**

9 The typicality prerequisite of Rule 23(a) is fulfilled if “the claims or
10 defenses of the representative parties are typical of the claims or defenses of the
11 class.” Fed. R. Civ. P. 23(a)(3). Like the commonality requirement, the typicality
12 requirement is “permissive” and requires only that the representative’s claims are
13 “reasonably co-extensive with those of absent class members; they need not be
14 substantially identical.” *Hayes*, 591 F.3d at 1124 (quoting *Hanlon*, 150 F.3d at
15 1020). Consequently, differences in the amount of damages, size or manner of
16 purchase or holding and the nature of the purchase or holding are insufficient to
17 overcome class certification. *See In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 530
18 (N.D. Cal. 2009) (certifying the class and holding that “potential complications
19 regarding the computation of damages” do not defeat class certification”).

20 Lead Plaintiff’s claims are “typical” of other Settlement Class Members’
21 claims because it has similar legal arguments that arise out of the same alleged
22

23
24 ⁴ *See Schaefer v. Overland Express Family of Funds*, 169 F.R.D. 124, 128 (S.D.
25 Cal. 1996) (Brewster, J.) (finding commonality requirement met where class
26 members had “the same basic legal claims (securities fraud) based on the same
27 nucleus of operative fact”); *Wireless*, 253 F.R.D. at 635 (finding “core issue” in a
28 securities litigation to be plaintiffs’ “acquisition of [defendant’s] common stock at
artificially inflated prices.”).

1 course of events.⁵ *Id.* The Ninth Circuit has stated that the test for typicality “is
 2 whether other members have the same or similar injury, whether the action is
 3 based on conduct which is not unique to the named plaintiffs, and whether other
 4 class members have been injured by the same course of conduct.” *Hanon v.*
 5 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Lead Plaintiff alleged that
 6 it was injured, like the other Settlement Class Members, by purchasing and/or
 7 acquiring Maxwell securities at prices that were inflated due to Defendants’
 8 materially false and misleading statements issued during the Settlement Class
 9 Period—misconduct that is not unique to Lead Plaintiff.⁶ Lead Plaintiff also meets
 10 the standard for typicality because “the purpose of the typicality requirement is to
 11 assure that the interest of the named representative aligns with the interests of the
 12 class.” *Hanon*, 976 F.2d at 508. The nature of Lead Plaintiff’s claims is “typical”
 13 since its interests are representative of the interests of the Settlement Class.

14 **iv. Lead Plaintiff Will Fairly And**
 15 **Adequately Protect The Interests Of The Class**

16 The adequacy requirement pursuant to Rule 23(a)(4) is met in this action
 17 because Lead Plaintiff will fairly and adequately protect the interests of the Class.
 18 “To satisfy constitutional due process concerns, absent class members must be
 19 afforded adequate representation before entry of a judgment which binds them.”⁷

20 _____
 21 ⁵ The Supreme Court has recognized that the commonality and typicality analyses
 “tend to merge” but are stated differently. *Gen. Tel. Co. of the Sw. v. Falcon*, 457
 U.S. 147, 157 n. 13 (1982).

22 ⁶ See *In re Micron Techs., Inc. Sec. Litig.*, 247 F.R.D. 627, 632 (D. Idaho 2007)
 23 (finding typicality in securities class action because lead plaintiffs “have the same
 24 claims as all class members; all of them claim to be the victims of artificially high
 Micron stock prices”).

25 ⁷ “A securities class is often composed of numerous individual plaintiffs, each of
 26 whom engaged in relatively small transactions involving only common stock. Such
 a case may require relatively little scrutiny, leading courts sometimes to suggest
 27 that securities classes will be certified as a matter of course.” *In re Countrywide*
Fin. Corp. Sec. Litig., 273 F.R.D. 586, 596 n.20 (C.D. Cal. 2009).

1 *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, (1940)).
2 In addition, the Ninth Circuit has articulated two criterias for determining
3 adequacy: (1) plaintiff is represented by qualified and competent counsel; and (2)
4 plaintiff's interests do not conflict with the interests of the proposed class
5 members. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1185 (9th Cir. 2007) (citing
6 *Hanlon*, 150 F.3d at 1020).

7 Lead Plaintiff is well-suited to serve as Class Representative for settlement
8 purposes because its interests do not conflict with any members of the Settlement
9 Class. A party's interests will only be deemed antagonistic to those of the rest of
10 the class if the conflict is fundamental—going to the specific issues in controversy.
11 1 Newberg & Conte, NEWBERG ON CLASS ACTIONS § 3.25 at 3-319 to 141; §
12 3.26 at 3-143 to 144 (3d ed. 1992). Here, Lead Plaintiff's claims are identical to
13 other Class Members and it is subject to no unique defenses. Accordingly, no
14 conflicts of interests exist between Lead Plaintiff and the Class. In fact, there are
15 no actual or potential adverse interests between the proposed class members and
16 Lead Plaintiff because each class member was allegedly harmed by the exact same
17 conduct in the form of artificially inflated stock prices. *See In re Live Concert*
18 *Antitrust Litig.*, 247 F.R.D. 98, 119-121 (C.D. Cal. 2007) (no conflicts when Lead
19 Plaintiff and Class allegedly harmed by the same artificially inflated ticket prices).

20 Moreover, it is difficult to identify any way in which its interests could be
21 adverse to those of the Class given that the proposed settlement “does not propose
22 different terms for different class members; on the contrary, treatment of each class
23 member is identical.” *Hanlon*, 150 F.3d at 1021 (analyzing *Amchem's* concern
24 over settlement allocation decisions) (citations omitted). Additionally, the
25 Settlement includes narrowly defined claims which are shared by all class
26 members and allow any member to opt out of the settlement class. *Id.* “Given
27

1 these careful precautions and safeguards, no improper conflict of interest exist[s]
2 which would deny absent class members adequate representation.” *Id.*

3 Lead Plaintiff also retained qualified and experienced counsel who are
4 capable of conducting the Litigation in a professional manner. The adequacy of
5 Lead Plaintiff’s counsel “requires the Court to analyze ‘whether Lead Plaintiff’s
6 counsel “[is] able to prosecute the action ‘vigorously through qualified counsel.’”
7 *See Vanwagoner v. Siemens Indus.*, 2014 WL 1922731, at *5 (E.D. Cal. May 13,
8 2014) (citation omitted). Lead Counsel has considerable experience, having
9 successfully prosecuted many securities and complex class actions in courts
10 nationwide. Further, prior to reaching the Settlement, Lead Counsel undertook an
11 extensive investigation, drafted two detailed amended complaints, briefed
12 Defendants’ motions to dismiss, engaged in a formal day-long mediation session,
13 participated in extensive additional negotiation over the terms of the Settlement,
14 and consulted with experts. By the time settlement discussions began, Lead
15 Counsel was clearly informed of the strengths and weaknesses of Lead Plaintiff’s
16 claims and were able to use this knowledge to engage in a rigorous, lengthy
17 negotiation process with Defendants. Therefore, Lead Counsel is comprised of
18 skilled and knowledgeable litigators who are clearly qualified, experienced, and
19 generally able to conduct the proposed litigation.⁸

20 Given the lack of conflict and Lead Plaintiff’s retention of highly
21 experienced and competent counsel, the adequacy requirement is also met.
22 Accordingly, the Rule 23(a) requirements of numerosity, commonality, typicality
23 and adequacy are easily met in this action.

25 ⁸ *Hester v. Vision Airlines, Inc.*, 2009 WL 4893185, at *5 (D. Nev. Dec. 16, 2009)
26 (counsel was adequate based on list of successful class actions representation and
27 lack of dispute from defendant).

1 **2. The Requirements Of Rule 23(b)(3) Are Met**

2 In addition to satisfying the criteria of Rule 23(a), a party seeking class
3 certification must also satisfy one of the three alternative requirements of Rule
4 23(b). Only one of the conditions of Rule 23(b) must be satisfied to merit class
5 certification. Certification of this Litigation under Rule 23(b)(3) is proper.
6 Pursuant to Rule 23(b)(3), the Court must consider: (1) whether issues of law or
7 fact common to class members predominate over questions affecting only
8 individual members; and (2) whether a class action is superior to other available
9 methods for the fair and efficient adjudication of the controversy. *See In re*
10 *Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 590 (N.D. Cal. 2009)

11 **i. Common Questions Of Law And Fact Predominate**

12 As demonstrated above, the Litigation involves both questions of law and
13 fact common to the Class. “The Rule 23(b)(3) predominance inquiry tests whether
14 proposed classes are sufficiently cohesive to warrant adjudication by
15 representation.” *Hanlon*, 150 F.3d at 1022 (quoting *Amchem*, 117 S. Ct. at 2249).
16 “When common questions present a significant aspect of the case and they can be
17 resolved for all members of the class in a single adjudication,” there is clear
18 justification for class treatment. *Local Joint Exec. Bd. of Culinary/Bartender Trust*
19 *Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001)). Lead
20 Plaintiff submits that there are no significant individual issues in this case and
21 rather a common nucleus of facts and potential legal remedies dominate this
22 litigation. Where, as here, Settlement Class Members are subject to the same
23 alleged misrepresentations and omissions, and such alleged misrepresentations
24 were part of a common course of conduct, common questions predominate.⁹

25
26 _____
27 ⁹ *See In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 721 (C.D. Cal. 2002)
(granting motion for class certification where “[t]he predominant questions of law

1 preferred procedure in this case. *Hanlon*, 150 F.3d at 1023 (“In most cases,
2 litigation costs would dwarf potential recovery. In this sense, the proposed class
3 action is paradigmatic.”). Moreover, certification of the class for settlement
4 purposes will allow the Settlement to be administered in an organized and efficient
5 manner. Therefore, certification of the Class for settlement purposes is the
6 superior method for resolving the claims of Lead Plaintiff and the Class.

7 In light of the foregoing, all of the requirements of Rules 23(a) and 23(b)(3)
8 are satisfied, and thus, the Court should certify this Class for settlement purposes.¹⁰

9 **B. The Proposed Settlement Is Fair, Reasonable,**
10 **And Adequate And Within The Range Of Possible Approval**

11 At the final settlement approval hearing, the Court will be asked to decide
12 whether the Settlement in this case is fair, reasonable and adequate under the all
13 the circumstances of the Litigation. Prior to the final settlement hearing, however,
14 Fed. R. Civ. P. 23(e) requires the Court to review the Settlement and make an
15 initial, preliminary determination that it is fair, reasonable and adequate. At this
16 preliminary approval stage, the court may consider and balance any of the factors
17 used for a final determination of fairness, such as: (1) the strength of plaintiffs’
18 case; (2) the risk, expense, complexity, and likely duration of further litigation; (3)
19 the risk of maintaining class action status throughout the trial; (4) the amount
20 offered in settlement; (5) the extent of discovery completed, and the stage of the
21 proceedings; (6) the experience and views of counsel; and (7) the reaction of the
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23 ¹⁰ Additionally, Rule 23(g)(1) states that, “a court that certifies a class must appoint
24 class counsel.” Fed. R. Civ. P. 23(g)(1). Lead Counsel satisfies the requirements of
25 Rule 23(g) and should be appointed as Class Counsel. As discussed above, Saxena
26 White P.A. has fairly and adequately represented the Class, and will continue to do
27 so. Proposed Class Counsel is knowledgeable about the applicable law, is
28 experienced in handling class actions, has performed substantial work in
vigorously pursuing the Class’ claims here, and has committed substantial
resources to representing the Class. *See* Fed. R. Civ. P. 23(g)(1)(B).

1 class members to the proposed settlement. *See Clesceri v. Beach City*
2 *Investigations & Protective Servs.*, 2011 WL 320998, at *8 (C.D. Cal. Jan. 27,
3 2011) (citations omitted). Because some of the factors bearing on the propriety of
4 a settlement cannot be assessed prior to the final approval hearing, “a full fairness
5 analysis is unnecessary at this stage.” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665
6 (E.D. Cal. 2008).

7 These factors are not designed to be exhaustive; rather courts are instructed
8 to evaluate the importance of the applicable factors based upon the unique facts
9 and circumstances presented by the case. *See Officers for Justice*, 688 F.2d at 625.
10 It is the settlement taken as a whole, rather than the individual component parts,
11 that must be examined for overall fairness. *Id.* at 628. For the Court’s initial
12 review, where “settlements are negotiated at arm’s length,” “a presumption of
13 fairness” applies. *See Vanwagoner*, 2014 WL 1922731, at *7 (quoting *Gribble v.*
14 *Cool Transps., Inc.*, 2008 WL 5281665, at *9 (C.D. Cal. Dec. 15, 2008). At the
15 preliminary approval stage, the “Court need only determine whether the proposed
16 settlement appears on its face to be fair” and falls “within the permissible range of
17 possible [judicial] approval.” *Williams v. Costco Wholesale Corp.*, 2010 WL
18 761122, at *5 (S.D. Cal. Mar. 4, 2010) (Gonzalez, J.).

19 **1. The Strength Of Lead Plaintiff’s Case Favors Approval**

20 The Court must consider “whether the decision to settle is a good value for a
21 relatively weak case or a sell-out of an extraordinarily strong case.” *See Clesceri*,
22 2011 WL 320998, at *8 (citing *Livingston v. Toyota Motor Sales USA*, 1995 U.S.
23 Dist. LEXIS 21757, at *30 (N.D. Cal. June 1, 1995)). Lead Plaintiff asserts that
24 they have a strong case against the Defendants for violations of the federal
25 securities laws, as evidenced by the materially false and misleading statements
26 alleged in the ACC, and that such statements caused Lead Plaintiff’s damage by
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1 artificially inflating the stock price during the Class Period, and that the stock price
2 fell when the truth was revealed. It is noted, however, that Lead Plaintiff must
3 demonstrate scienter on the part of Defendants for their claims and face several
4 practical difficulties. Despite Lead Plaintiff's vigorous efforts and significant
5 investment in the Litigation, obstacles will remain throughout the Litigation. The
6 uncertainty created by these circumstances weighs in favor of approving the
7 Settlement. *Id.*

8 **2. The Risk, Expense, Complexity And**
9 **Likely Duration Of Further Litigation Favors Settlement**

10 “In most situations, unless the settlement is clearly inadequate, its
11 acceptance and approval are preferable to lengthy and expensive litigation with
12 uncertain results.” *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221
13 F.R.D. 523, 526 (C.D. Cal. 2004) (citing 4 A Conte & H. Newberg, *Newberg on*
14 *Class Actions*, § 11:50 at 155 (4th ed. 2002)). Lead Plaintiff considered the many
15 costly milestones that remain in the Litigation. Absent settlement now, and
16 assuming that Lead Plaintiff would be successful on the current round of motion to
17 dismiss briefing, the Parties face years litigating this action to final resolution,
18 including discovery, dispositive motions, trial, and likely post-trial appeals.
19 Taking into account the inherent uncertainty and the potential length ahead, further
20 litigation carries a great amount of risk and burden to both parties. *See Harris*,
21 2012 WL 3277278, at *5 (discussing the same reasons for approving settlement).

22 Additionally, Lead Plaintiff's claims involve numerous complex legal and
23 financial issues, including complicated accounting practices such as the application
24 of accounting policies in accordance with Generally Accepted Accounting
25 Principles (“GAAP”). Indeed, no matter how efficiently the Litigation is handled,
26 the Parties would have to spend a considerable sum to see this case to completion,
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1 especially in light of its complexity. Settling this action would avoid those costs.
2 In light of these considerations, settlement is less risky, less expensive and less
3 time-consuming while ensuring a recovery, thus weighing in favor of granting
4 preliminary approval of the settlement. *See City of Seattle*, 955 F.2d at 1291.

5 **3. The Risk Of Maintaining Class Action Status**

6 If the Settlement is not approved, the Class would have to assume the risk
7 that the motions to dismiss could be granted in whole or in part. Even if Lead
8 Plaintiff proceeded past the motion to dismiss stage of the Litigation, Defendants
9 would vehemently challenge class certification for litigation purposes, and
10 settlement eliminates any risk of having to defend a contested motion to certify the
11 Class. A contested class certification motion would be time consuming and costly
12 for all parties.

13 Even if the Class were certified for litigation purposes, there are no
14 guarantees that class action status may remain. Even if Lead Plaintiff was
15 successful at a trial, an appeal is likely. *See Nat'l Rural Telecomms. Coop.*, 221
16 F.R.D. at 527 (“even if [a jury] did reach unanimous verdicts, it is likely that an
17 appeal would have followed.”). Additionally, the Court may decertify a litigation
18 at any time if the class proves to be unmanageable. Lead Plaintiff and the Class
19 cannot completely disregard the possibility that the Court would later decertify the
20 action. Therefore, in light of these risks, this factor weighs in favor of granting
21 preliminary approval. *See City of Seattle*, 955 F.2d at 1291; *Harris*, 2012 WL
22 3277278, at *5 (expense, risk and length of continued litigation weighed in favor
23 of preliminary approval).

24 **4. Amount Offered In Settlement Favors Approval**

25 Under the proposed Settlement, Defendants have agreed to pay \$3,300,000.
26 *See Stipulation at § IV.2.1.* In this case, there is a broad range of potential
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1 recovery if the case were litigated to a conclusion rather than settled. It is possible
2 that Defendants could prevail on one or more of their legal or factual arguments to
3 defeat liability entirely. Given the complexities of the Litigation and the continued
4 risks if the Parties were to proceed to trial, the Settlement represents a reasonable
5 resolution of this action and eliminates the risk that the Settlement Class might not
6 otherwise recover from Defendants. The proposed Settlement will allow the Class
7 to receive a concrete benefit now, not a hypothetical benefit after years of uncertain
8 litigation and a far-from-guaranteed jury verdict. *See In re AOL Time Warner, Inc.*
9 *Sec. & ERISA Litig.*, 2006 WL 903236, at *13 (S.D.N.Y. Apr. 06, 2006)
10 (recognizing that an immediate, substantial and concrete benefit of settlement
11 outweighs possibility of higher recovery after trial).

12 **5. The Stage Of Proceeding Favors Settlement**

13 “In the context of class action settlements, formal discovery is not a
14 necessary ticket to the bargaining table where the parties have sufficient
15 information to make an informed decision about settlement.” *In re Mego Fin.*
16 *Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (internal citations and
17 quotations omitted). Counsel’s knowledge of this case is unquestionably adequate
18 to support the Settlement. As discussed above, the Litigation was vigorously
19 litigated prior to the Settlement being reached. The Parties exchanged extensive
20 briefs in the two motion to dismiss stages and Lead Plaintiff amended its complaint
21 twice after in-depth investigations and examinations of public documents relating
22 to Maxwell’s alleged fraud. Based on their extensive factual investigation, Lead
23 Plaintiff and Counsel have an in-depth knowledge of the factual and legal issues of
24 this case. At this stage of the litigation, the proceedings are sufficiently advanced
25 for Lead Counsel “to conclude that the settlement [is] fair, adequate, and
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1 reasonable, and in the best interests of Lead Plaintiff and the Settlement Class.”
2 *Wireless Facilities*, 253 F.R.D. at 609-10.

3 Courts regularly approve settlements reached, as here, relatively early in
4 litigation. *See, e.g., In re Mego*, 213 F.3d at 459 (finding that even absent
5 extensive formal discovery, class counsel’s significant investigation and research
6 supported settlement approval); *Linney*, 151 F.3d at 1239; *In re Critical Path, Inc.*,
7 No. 01-cv-551, 2002 WL 32627559, at *7 (N.D. Cal. June 18, 2002) (“Through
8 protracted litigation, the settlement class could conceivably extract more, but at a
9 plausible risk of getting nothing”); *see also Glass v. UBS Fin. Servs., Inc.*, No. 07-
10 cv-4068, 2007 WL 221862, at *15-*16 (N.D. Cal. Jan. 26, 2007) (“Class counsel
11 achieved an excellent result for the class members by settling the instant action
12 promptly.”), *aff’d*, 331 F. App’x 452, 457 (9th Cir. 2009) (unpubl.). This factor
13 weighs in favor of preliminary approval.

14 **6. Experience And Views Of Counsel Favors Settlement**

15 The recommendation of experienced counsel in favor of settlement carries a
16 “great deal of weight” in a court’s determination of the reasonableness of a
17 settlement. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D.
18 Cal. 2007) (Jones, J). Lead Counsel has significant experience in securities and
19 other complex class action litigation and has negotiated numerous other substantial
20 class action settlements throughout the country. Lead Counsel has been an integral
21 part of many settlements of this nature, and, in their estimation, this settlement is
22 an excellent result because it provides the Settlement Class with genuine relief
23 under difficult legal and practical circumstances.

24 It is Lead Counsel’s informed opinion that given the risks and uncertainties
25 inherent in this complex securities class action litigation, the proposed settlement is
26 fair, reasonable and adequate and in the best interest of the Settlement Class.
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1 “Based on counsels’ knowledge of the specific facts of this action, experience in
2 settlements such as this, and opinion that the Settlement is fair, reasonable, and
3 adequate,” this factor weighs in favor of granting preliminary approval of the
4 Settlement. *Harris*, 2012 WL 3277278, at *7 (citation omitted).

5 **7. The Reaction Of Class Members Favors Approval**

6 While Lead Plaintiff supports the proposed Settlement, the Class as a whole
7 has not had the opportunity to evaluate the Settlement and submit any possible
8 objections. As such, Lead Plaintiff suggests that evaluation of this factor occur at
9 the final approval stage of the Settlement.

10 **C. The Proposed Notice Fairly Apprises The Settlement Class**
11 **Members Of The Terms Of The Settlement And Of Their Options**

12 “Rule 23(e)(1)(B) requires the court to ‘direct notice in a reasonable manner
13 to all class members who would be bound by a proposed settlement, voluntary
14 dismissal, or compromise’ regardless of whether the class was certified under Rule
15 23(b)(1), (b)(2) , or (b)(3).” *Harris*, 2012 WL 3277278, at *9 (quotation omitted).
16 In order to comport with due process, “notice must be the best practicable,
17 ‘reasonably calculated, under all the circumstances, to apprise interested parties of
18 the pendency of the action and afford them an opportunity to present their
19 objections.’” *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (quoting
20 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).
21 Additionally, “[s]ettlement notices are supposed to present information about a
22 proposed settlement neutrally, simply, and understandably[.]” *W. Publ’g Corp.*,
23 563 F.3d at 962 (internal citations omitted).

24 Subject to the Court’s approval, the Settlement Class Members will be
25 notified of the Fairness Hearing and apprised of their rights relating to the hearing
26 and the Settlement by the short and long form notices. *See* Notice and Summary
27 Notice attached as Exhibits A-1 and A-3 to the Stipulation. The proposed Notice

1 has been carefully drafted to contain all necessary information. All of the
2 information is provided in plain language and in a format that is easily accessible
3 to the reader. The notices clearly advise recipients of their legal rights and
4 obligations, including that they can object to any portion of the Settlement, exclude
5 themselves from the Settlement, or submit an attached Proof of Claim to share in
6 their pro rata portion of the Settlement.¹¹

7 The method by which the Notice is to be disseminated is also appropriate.
8 Under the Stipulation, the Court appointed Claims Administrator will disseminate
9 by first class mail a copy of the Notice and the Proof of Claim, substantially in the
10 forms annexed to the Stipulation of Settlement as Exhibits A-1 and A-2, to all
11 Class Members who can be identified with reasonable effort. The Claims
12 Administrator will also cause the Summary Notice to be published once in
13 *Investor's Business Daily* and posted on *Business Wire*. See Proposed Order
14 Preliminarily Approving Settlement ¶8(c). The Parties agree that this method is
15 the best practicable under these circumstances and meets due process requirements
16 for court approval. Courts routinely find that comparable notice procedures meet
17 the requirements of due process, Rule 23, and the PSLRA.¹²

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21 ¹¹ See, e.g., *Hunt v. Check Recovery Sys., Inc.*, 2007 WL 2220972, at *3 (N.D. Cal.
22 2007) (class notice must “present a fair recital of the subject matter of the suit and
23 to inform all class members of their opportunity to be heard”) (citing *In re Gypsum*
24 *Antitrust Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977)); *Immune*, 497 F. Supp. 2d at
25 1170 (notice providing description of the nature of the action and issues involved
26 in the litigation, concise and clear statement of definition of the class, procedure
27 for requesting appearance at the settlement hearing, procedure for exclusion from
28 the class, binding effect of the class judgment and deadline for filing objections
approved).

¹² See, e.g., *Immune*, 497 F. Supp. 2d at 1170; *In re Portal Software, Inc. Sec.*
Litig., 2007 WL 1991529, at *7 (N.D. Cal. June 30, 2007); *Santos v. Camacho*,
2007 WL 81868, at *7 (D. Guam Jan. 9, 2007).

1 **IV. PROPOSED SCHEDULE**

2 In connection with the Preliminary Approval Order, the Parties are
 3 requesting that the Court establish dates by which notice of the Settlement will be
 4 distributed to Settlement Class members, dates by which shareholders may
 5 comment on the Settlement, and a date on which the Court will hold a final
 6 Settlement Hearing. Lead Counsel respectfully submits the following procedural
 7 schedule for the Court's review and approval, which summarizes the deadlines in
 8 the proposed Preliminary Approval Order:

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Event	Proposed Deadline
Deadline for mailing the Notice and Proof Of Claim to Class Members (“Notice Date”) <i>See Preliminary Approval Order ¶8(a)</i>	14 calendar days after entry of Preliminary Approval Order
Deadline for publishing Summary Notice <i>See Preliminary Approval Order ¶8(c)</i>	14 calendar days after entry of Preliminary Approval Order
Deadline for filing of papers in support of final approval of Settlement, Plan of Allocation, and Lead Counsel’s application for attorneys’ fees and expenses <i>See Preliminary Approval Order ¶19</i>	35 calendar days prior to Settlement Hearing
Deadline for receipt of exclusion requests or objections <i>See Preliminary Approval Order ¶15</i>	21 calendar days prior to Settlement Hearing
Deadline for filing reply papers <i>See Preliminary Approval Order ¶19</i>	7 calendar days prior to the Settlement Hearing
Settlement Hearing <i>See Preliminary Approval Order ¶5</i>	As convenient for the Court’s calendar, but no earlier than 100 days after the filing of this Motion ¹³

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¹³ 28 U.S.C. § 1715 requires Defendants to notify certain federal and state officials of the proposed Settlement within 10 days from the date of filing this Motion. Subsection (d) requires the Court to wait 90 days from the date these officials are served to give final approval to the proposed Settlement. In order to comply with the statute, Lead Counsel respectfully requests that the Court schedule the Fairness Hearing to occur at least 100 days, and no later than 120 days, from the date of this filing, subject to the Court’s convenience.

1 2 3 4 5 6 7 8 9 10 11	Deadline for submitting Proof of Claims <i>See</i> Preliminary Approval Order ¶13	90 calendar days after the Notice Date
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V. **CONCLUSION**

For all of the foregoing reasons, Lead Plaintiff respectfully requests that the Court enter the proposed Preliminary Approval Order, granting: (i) preliminary approval of the Settlement; (ii) provisional certification of the Class for purposes of the Settlement; (iii) provisional appointment of Lead Plaintiff as Class Representative and Saxena White P.A. as Class Counsel; (iv) approval of the form and manner of giving notice of the proposed Settlement to the Class; and (v) a time and date for the Fairness Hearing, to consider final approval of the Settlement and related matters.

Dated: October 16, 2014

Respectfully submitted,
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