IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Master Docket No. 09-md-02063-JLK-KMT (MDL Docket No. 2063)

IN RE: OPPENHEIMER ROCHESTER FUNDS GROUP SECURITIES LITIGATION

This document relates to: *In re California Municipal Fund*

09-cv-01484-JLK-KMT (Lowe)
09-cv-01485-JLK-KMT (Rivera)
09-cv-01486-JLK-KMT (Tackmann)
09-cv-01487-JLK-KMT (Milhem)

MOTION FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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INTRODUCTION

Lead Plaintiff Joseph Stockwell ("Plaintiff" or "Mr. Stockwell") moves for final approval of the proposed $50,750,000 settlement (the "Settlement") against all Defendants on the terms and conditions set forth in the Stipulation and Agreement of Settlement, filed on July 10, 2017 at docket number 690 (the "Stipulation"). The Declaration of Alan W. Sparer in Support of Plaintiff's Motion for Final Approval of Class Settlement, Approval of Plan of Allocation, and Award of Attorneys' Fees and Expenses ("Sparer Decl.") is filed concurrently with this motion.

This Settlement is fair, reasonable, and in the best interest of the Class.[1] If approved, it will provide a substantial recovery to Class Members—all persons and entities who purchased A (OPCAX), B (OCABX), or C (OCACX) shares of the Oppenheimer California Municipal Fund (the "Fund") between September 27, 2006 and November 28, 2008 (the "Class Period")—while avoiding the risks and delay associated with a securities class action trial. Plaintiff agreed to the Settlement after having thoroughly investigated the claims through completion of fact and expert discovery and

[1] Pursuant to D.C. COLO. LCivR. 7.1A, Lead Counsel for the Class, Sparer Law Group, Additional Class Counsel, Girard Gibbs LLP, and Liaison Counsel, the Shuman Law Firm, (collectively, "Plaintiff's Counsel") have conferred with Defendants' Counsel, and while Defendants' Counsel consent to the relief sought in this motion, they do not agree to any particular language set forth within it. Defendants agree that the Settlement should be approved and take no position on the request for attorneys' fees and reimbursement of expenses or on the Plan of Allocation. *See* Doc. 690, ¶¶17, 21, 24(s). Unless otherwise defined herein, all capitalized terms shall have the same meaning as set out in the Stipulation.

having evaluated the strengths and weaknesses of the case following the briefing of summary judgment and *Daubert* motions.

The arms-length Settlement was negotiated with the assistance of the Honorable Layn Phillips, who mediated the other Oppenheimer mutual fund class actions brought before this Court. Approval of this Settlement would allow for fair compensation of California Fund investors, and would bring a close to the Oppenheimer MDL over which this Court has presided since 2009. Mr. Stockwell, a sophisticated businessman and lawyer who closely monitored this litigation from the outset and took part in negotiating the Settlement, recommends that it be approved. The recovery to the Class compares favorably to other securities class action settlements generally and to recoveries in Section 11 and 12(a)(2) actions in particular.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation has been pending for more than eight years. The full factual and procedural background, the issues in dispute, the work performed, the discussions that led to the Settlement, and a description of the Settlement itself are set out in the Sparer Declaration at Paragraphs 6-41, as well as in Plaintiff's motion for preliminary approval (Doc. 691-92).

ARGUMENT

I. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE

A. Legal Standard for Final Approval

Approval of a class action settlement is within the sound discretion of the Court and is generally favored. *Fager v. CenturyLink Commc'ns., LLC*, 854 F.3d 1167, 1174-75 (10th Cir. 2016); *Wilkerson v. Martin Marietta Corp*., 171 F.R.D. 273, 284 (D. Colo. 1997) ("settlements are generally favored"); *Diaz v. Romer*, 801 F. Supp. 405, 407 (D. Colo. 1992) ("A consensual resolution of a dispute is always preferred"), *aff'd mem.*, 9 F.3d 116 (10th Cir. 1993). The "presumption in favor of voluntary settlement agreements 'is especially strong in class actions . . . . In addition to the conservation of judicial resources, the parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial.'" *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1007 (D. Colo. 2014) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010)).

"In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate." *Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 324 (10th Cir. 1984); *accord* Fed. R. Civ. P. 23(e)(2). In the Tenth Circuit, courts examine four factors (the "*Jones* factors") to determine whether a proposed class action settlement is fair, reasonable, and adequate: "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery

outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable." *Jones*, 741 F.2d at 324; *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002). Application of these factors here shows that the Settlement is fair, reasonable, and adequate.

B. The Settlement Is Fair, Reasonable, and Adequate

1. The Proposed Settlement Was Fairly Negotiated

Where "the settlement resulted from arm's length negotiations between experienced counsel after significant discovery had occurred, the Court may presume the settlement to be fair, adequate and reasonable." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)); *Tuten*, 41 F. Supp. 3d at 1007 ("arms-length negotiations between experienced counsel" demonstrate "that the Settlement was fairly and honestly negotiated"). That the parties "have 'vigorously advocated their respective positions throughout the pendency of the case'" likewise indicates that the negotiations "have been fair, honest and at arm's length." *Lucas*, 234 F.R.D. at 693 (quoting *Wilkerson*, 171 F.R.D. at 284).

This Settlement is the product of months of arm's-length discussions between experienced and zealous counsel who were well informed of all of the factual and legal issues. The discussion was preceded by years of litigation in which counsel frequently

and vigorously addressed the strengths and weaknesses of each other's case. The mediation that eventually resulted in settlement was supervised by one of the nation's top mediators for securities class actions. The Settlement was reached at an advanced stage of the hard-fought litigation—after the Court presided over the completion of fact and expert discovery, held a two-day evidentiary hearing on class certification, and received briefing on twelve summary judgment and *Daubert* motions. While many legal and factual disputes remain unresolved, all have been examined exhaustively. The advanced stage of the litigation itself evidences that the negotiations were fair and honest. *See Lucas*, 234 F.R.D. at 693; *Wilkerson*, 171 F.R.D. at 284-85 (holding "voluminous discovery" supports a finding that the proposed settlement was fairly negotiated).

The mediation process began with the exchange of opening and reply briefs, followed by a full-day mediation on January 5, 2017 before Judge Phillips, and by months of continued negotiations, culminating in the Memorandum Of Understanding and later the full Stipulation. These negotiations were comprehensive and conducted by experienced and knowledgeable counsel, each side forcefully arguing its case with the benefit of a fully developed record. Sparer Decl. Ex. 2, ¶¶3, 9 (Declaration Of Layn R. Phillips).

The use of an experienced mediator ensured that the negotiations were fair and honest. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (finding a mediator's involvement "helps to ensure that the proceedings were free of collusion and undue

pressure"). Judge Phillips is a highly respected mediator whose participation has repeatedly been cited as a reason to approve a settlement. *See In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 679, 690 (D. Colo. 2014) (approving settlement and noting that the parties "engaged in extensive negotiations and mediation sessions for over a year" in front of "retired United States District Judge Layn R. Phillips, who has extensive experience mediating complex cases"); *IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-CV-00419-MMD, 2012 WL 5199742, at *2 (D. Nev. Oct. 19, 2012) (approving settlement reached after negotiations "that involved the assistance of an experienced and reputable private mediator, retired Judge Phillips"); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (approving settlement reached after "multiple sessions [were] mediated by retired federal Judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases").

The first *Jones* factor militates strongly in favor of final approval of the Settlement.

2. Serious Questions of Law and Fact Exist

The second *Jones* factor considered by courts in the Tenth Circuit is whether "serious questions of law and fact exist placing the ultimate outcome of the litigation in doubt." *Jones*, 741 F.2d at 324. In assessing a settlement, courts ask whether "the parties could reasonably conclude that there are serious questions of law and fact that exist such

that they could significantly impact this case if it were litigated." *Lucas*, 234 F.R.D. at 693-94. Here, it is clear that serious questions of law and fact exist.

Mr. Stockwell and Plaintiff's Counsel believe this is a strong case on the facts and the law. Any rational assessment of the litigation, however, must acknowledge that Plaintiff faces significant risks and uncertainties. No matter how strong a party believes his case to be, there is always the possibility that he will lose at trial. *See, e.g.*, *Wilkerson*, 171 F.R.D. at 285 ("the one constant about litigation, based on my experiences as a trial attorney and now as a judge, is that the ultimate jury result is uncertain, unknown and unpredictable"). This is particularly true with complex securities class actions like this one. *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1242 (D.N.M. 2012) (noting that securities class actions "are very difficult cases to try" because of the "many hurdles—both legal and factual—to overcome, not the least of which are great attorneys on the defense side"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 CM PED, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (noting that "in evaluating the settlement of a securities class action, federal courts . . . 'have long recognized that such litigation is notably difficult and notoriously uncertain'") (citation and internal quotation marks omitted). Plaintiff would confront a daunting set of litigation challenges if he took this case to trial.

(a) Defendants' Challenges to the Misrepresentation Claims Could Succeed

Defendants vigorously contest Plaintiff's claim that the Fund's offering documents

materially misrepresented the Fund's investment objective and the Fund's investments in junk bonds, real estate-related bonds, and use of leverage, primarily through inverse floaters. Defendants maintain that all of the material risks were adequately disclosed and well understood by market participants.

Educating the jury about technical matters always presents a significant challenge. *See In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 625 F. Supp. 2d 1133, 1138 (D. Colo. 2009) ("The accounting issues, the scienter issues, the causation issues, and the damages issues all are complex and problematic. Presenting these issues to a jury would create substantial risks for all parties, including the plaintiffs"). The challenge would be magnified in this case due to the sheer number of technical subjects a jury would have to understand to render a verdict. These subjects include, but are not limited to, the meaning and importance of mutual fund investment objectives, the measurement and management of the risk of investment in bond funds, the appropriate method for rating dirt bonds, the correct method for classifying bonds by industry for purposes of the Fund's concentration limits, and the correct method for calculating leverage for derivative instruments such as inverse floaters. *See, e.g., Smith v. Dominion Bridge Corp.*, No. CIV.A.96 7580, 2007 WL 1101272, at *4 (E.D. Pa. Apr. 11, 2007) (finding that "the alleged misrepresentations relate to securities fraud which would have required a significant amount of expert testimony and would involve educating a jury about financial accounting and federal securities law. Because of the highly technical issues in

the case, the plaintiff could not be certain of the outcome of a factual determination by a jury").

At the same time, Plaintiff would have to counter Defendants' assertion that the offering documents adequately disclosed the extent and risk of the Fund's investments, and that industry participants understood that the Fund was riskier than its peers. While Plaintiff disputes that Defendants adequately disclosed the Fund's risks, jurors could be swayed by Defendants' argument that industry publications such as *Morningstar* indicated that the Fund could be more volatile than other California municipal bond funds and that at least *some* risks were disclosed. Such contradictory evidence could cause the jury to return a defense verdict or greatly reduce the recovery to the Class.

(b) Defendants Could Successfully Reduce Damages

Even if Plaintiff were to win a verdict at trial, there is no guarantee that he would obtain a favorable award of damages. In this case, as in most complex securities class actions, damages calculations are complicated and the subject of competing expert testimony. How a jury would respond to Plaintiff's damage proof is difficult to predict. *See In re Thornburg Mortg., Inc., Sec. Litig.*, 912 F. Supp. 2d at 1242 (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 (S.D.N.Y 1985)) ("Damages in this case, as is common in securities class actions, would likely have been reduced to a 'battle of the experts,' and 'it is virtually impossible to predict with any certainty which testimony would be credited'").

The uncertainty as to damages is particularly acute here, as Defendants have

advanced several arguments that could reduce or even eliminate any classwide recovery. *First*, Defendants argue that the applicable one-year statute of limitations bars claims relating to the Fund's investment objective for purchases prior to February 2, 2008. Doc. 633 at 2. They point to publicly available facts regarding the Fund's historical volatility and statements by investment analysts they say demonstrate that investors knew or should have known by that point that the Fund was riskier than its peers. *Id*. at 26-43. While Plaintiff has marshalled significant evidence showing that reasonable investors could not have discovered the misrepresentations and omissions at issue (*see* Doc. 658), if Defendants persuade a jury that the statute of limitations bars a significant portion of the Class's claims, it will greatly reduce the recovery, even if Plaintiff wins on liability.

Second, Plaintiff faces additional risk on loss causation. Defendants claim that the Fund's NAV fell because of a "once in a 100-year panic" rather than misstatements or omissions in the Fund's offering documents. Doc. 652 at 4, 25. This Court has warned that "[t]he issue of loss causation is a seminal one in this litigation," and "Plaintiffs will have to address certain analytical and evidentiary impediments to proving that losses suffered during the relevant class period were actually caused by the misrepresentations and omissions alleged rather than the credit market downturn …." *In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, 838 F. Supp. 2d 1148, 1154, 1177 (D. Colo. 2012). The Fund's NAV experienced greater declines than its peers, and Plaintiff believes he could show that Defendants' failure to adhere to the Fund's stated investment objective

proximately caused the Fund's losses. Even so, "the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL No. 1500, 02 Civ 5575 (SWK), 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006).

Third, Plaintiff would need to overcome Defendants' arguments that the Fund at least partially disclosed the investments at issue and that published reports at least partially disclosed the overall risks of the Fund. Defendants claim that the Fund's NAV fell because of the materialization of specifically disclosed risks in the Fund's public filings. *See* Doc. 652 at 28-29. Defendants accordingly argue that some of the losses stemmed from causes other than the alleged misrepresentations. *See* 15 U.S.C. § 77k(e).

Fourth, a jury could materially reduce the award if it credited Defendants' argument that the only enforceable restrictions on the Fund's holdings were the "investment limitations" stated in the offering documents. The Fund was prohibited from investing more than 25% of its assets in junk bonds, and had similar limits for real estate-related bonds and inverse floaters. Defendants argue that they could only be liable for losses to the extent the Fund exceeded these limits. Plaintiff advances compelling counterarguments, including that Defendants misrepresented the Funds' actual holdings and thereby concealed the extent of the risk to which the Fund was exposed and the losses it could incur. A jury sympathetic to Defendants' position, however, could award

lower damages. *See In re Oppenheimer Rochester Funds*, 838 F. Supp. 2d at 1169 (suggesting that certain of Defendants' investment-limit arguments may be "well taken").

(c) The Court Could Resolve One or More Pending Summary Judgment or *Daubert* Motions Against the Class

Plaintiff faces the obvious risk of an adverse decision in any one of the important motions currently pending. In addition to Defendants' statute of limitations partial summary adjudication motion, the Trustee Defendants and Massachusetts Mutual Life Insurance Company each moved for summary judgment. Docs. 612, 632. Defendants also moved under *Daubert* to exclude all or part of the opinions of Plaintiff's experts Steven W. Kohlhagen, H. Gifford Fong, and Neil G. Budnick. Doc. 619, Doc. 623. While Plaintiff believes all of these motions lack merit, if the Court were to grant any of them, it may impair Plaintiff's ability to establish the elements of his claims. *See, e.g., Desert Orchid Partners, L.L.C. v. Transaction Sys. Architects, Inc.*, No. 8:02CV553, 2007 WL 703515, at *2 (D. Neb. Mar. 2, 2007) ("Proof of both liability and damages in securities cases is complex and difficult and generally requires a significant amount of expert accounting or statistical evidence").

(d) Remand for Trial Would Create Risks

Finally, in the absence of a settlement, Plaintiff's claims eventually would be remanded to the Northern District of California. Upon remand, Plaintiff would likely have to ward off Defendants' attempts to revisit this Court's rulings. Defendants could be expected to move to decertify the Class and renew their *Daubert* arguments as motions

in limine in the hope that the new judge would be more receptive to their arguments or a change in the law would strengthen their case. In other words, even if Plaintiff prevailed on all of Defendants' pending motions, there remains the risk that each would be re-litigated on remand to the Northern District of California with a different result.

These risks and unresolved issues demonstrate that sufficiently serious questions of fact and law exist to support approval of the Settlement.

3. The Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief

The third *Jones* factor is "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation." *Jones*, 741 F.2d at 324; *see In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 625 F. Supp. 2d at 1138 (approving securities class action settlement and noting that immediate recovery outweighed the possibility of future relief). "In this respect, 'It has been held proper "to take the bird in the hand instead of a prospective flock in the bush."'" *Oppenlander v. Standard Oil Co. (Ind.)*, 64 F.R.D. 597, 624 (D. Colo. 1974) (citations omitted).

In evaluating this factor, the recovery is to be weighed "not against the net worth of the defendant, but against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation." *Gottlieb v. Wiles*, 11 F.3d 1104, 1015 (10th Cir. 1993), *overruled in part on other ground*, *Devlin v. Scardellatti*, 536 U.S. 1 (2002). If this case does not settle, the parties face the expense, risk, and delay of trying a complex securities class action and

then litigating likely post-trial appeals. *See In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 691 (D. Colo. 2014) (approving settlement in securities class action "[g]iven the uncertainty of plaintiffs' likelihood of success on the merits and the prospects of prolonged litigation, which would likely continue well beyond any judgment in plaintiffs' favor"); *In re Alloy, Inc. Sec. Litig.*, No. 03 Civ. 1597 (WHP), 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (approving settlement in complex securities class action where issues "were likely to be litigated aggressively, at substantial expense to all parties").

Given the risks of continued litigation, the benefits from settling this case now far outweigh the possibility of a greater recovery later. Sparer Decl. ¶¶56-57. In deciding to enter into the Settlement, the value of a sizeable immediate settlement was balanced against the prospects of prevailing on the pending summary judgment and *Daubert* motions, returning to the transferee court where Defendants would likely seek to relitigate this Court's rulings, briefing pre-trial motions, preparing for trial, trying the case, and litigating post-trial appeals. *Id.*

Against these risks, the proposed $50.75 million Settlement outweighs the uncertain prospect of an eventual greater recovery after trial and appeals. The Settlement value significantly exceeds what is typically considered fair, reasonable, and adequate. Plaintiff's damages expert, Candace Preston, has calculated Class damages under Section 11 of the Securities Act of 1933 ("'33 Act") to be approximately $381.9 million. *Id.* ¶58. She calculated damages by applying the first in first out ("FIFO") method of

accounting to each purchase and sale of Fund shares acquired during the Class Period. *Id*. Preston then adjusted her calculation to account for the fact that Oppenheimer collected only aggregate transaction data, combining the purchases and sales of multiple class members, for its "omnibus accounts." *Id*. Finally, she eliminated purely market driven losses by benchmarking the damages against an index consisting of other California municipal bond funds whose investment objective included capital preservation. *Id*. Other than these adjustments, the estimated recovery is not discounted to account for the defenses Defendants have raised or the likelihood of prevailing at trial.

The $50.75 million Settlement is an excellent result for the Class. Plaintiff's Counsel estimate, based on calculations performed by Plaintiff's damages expert, that the Settlement represents 13.3% of the estimated $381.9 million Section 11 damages the Class could obtain at trial. *Id.* ¶60. While Defendants have previously argued that the Plaintiff at one point claimed higher maximum damages were possible, under either damages estimate, the $50.75 million Settlement represents a favorable recovery rate for a securities class action settlement. A March 2017 Cornerstone Research report found that the median settlement in securities class actions of this size was approximately 3.0% in 2016 and 1.9% between 2006 and 2015. From 1996 to 2016, the median settlement in all Section 11 or 12(a)(2) securities class actions was 7.4% of estimated damages.[2]

[2] Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review & Analysis*, Cornerstone Research, at 8, 11 (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2016-Review-and-Analysis.

Courts have likewise concluded that a 13.3% recovery of estimated damages is at the high end of settlements. *In re Cendant Corp. Litig.*, 264 F.3d 201, 241 & n.22 (3d Cir. 2001) (concluding that approved settlement recoveries in securities class actions typically range from 1.6% to 14% of claimed damages); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (finding that a recovery representing 6.25% of damages was "at the higher end of the range of reasonableness of recovery in class actions securities litigations"). A certain and immediate $50.75 million recovery is substantially better for the Class than the mere possibility of recovery after a difficult, lengthy, and expensive trial.

4. The Parties Believe That the Settlement Is Fair and Reasonable

The final *Jones* factor is the parties' view of the settlement. *Jones*, 741 F.2d at 324; *Gottlieb*, 11 F.3d at 1014. Plaintiff strongly supports the Settlement. Sparer Decl. Ex. 3, ¶20 (Declaration Of Lead Plaintiff Joseph Stockwell In Support Of Motion For Final Approval Of Class Settlement And Motion For Award Of Attorneys' Fees And Expenses ("Stockwell Decl.")). Plaintiff's Counsel—based on their thorough knowledge of the facts, strengths, and weaknesses of the case—strongly believe that the Settlement is a fair and reasonable compromise. Sparer Decl. ¶62. Given their experience and success in prosecuting class actions (*id.* ¶62 & Ex. 4, Attachment C; *id.*, Ex. 5, Attachment C; *id.*, Ex. 6, Attachment C (firm resumes)), Plaintiff's Counsel's judgment

is entitled to substantial weight: "[T]he recommendation of a settlement by experienced plaintiffs counsel is entitled to great weight." *Wilkerson*, 171 F.R.D. at 288-89 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Luevano v. Campbell*, 93 F.R.D. 68, 88 (D.D.C. 1981)); *Lucas*, 234 F.R.D. at 695, (quoting *Marcus v. Kansas Dept. of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002) ("'Counsels' judgment as to the fairness of the agreement is entitled to considerable weight'").

Class Members' reaction to date to the Settlement further supports approval of the Settlement. *See In re Crocs*, 306 F.R.D. at 691 (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)) ("The reaction of the class members further supports the conclusion that the Settlement Agreement is fair"). More than 54,000 copies of the Notice had been mailed to potential Class Members and their financial intermediaries, and the Summary Notice had been published in Investor's Business Daily and over PR Newswire. Sparer Decl. ¶63. While the deadline set by the Court for members of the Class to object to the Settlement has not yet passed, there have been no objections to the Settlement as of this filing. *Id.*

In sum, the arm's-length negotiations by experienced counsel under the auspices of a well-regarded mediator, the serious risks of litigating the case through trial, the benefits of the substantial and immediate recovery to the Class, and counsel's informed support for the Settlement demonstrate that it is fair, reasonable, and adequate and should be given final approval.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

The Plan of Allocation, contained in the Notice sent to Class Members, also merits approval. Sparer Decl. ¶¶64-67 & Ex. 1 (Declaration Of Alexander Villanova Of Claims Administrator Epiq ("Epiq Decl.") Ex. B). The Plan of Allocation was developed with the assistance of damages expert Candace Preston to equitably apportion the Settlement proceeds among Class Members. Sparer Decl. ¶64. Under the Stipulation, the $50.75 million in cash and accrued interest, less attorneys' fees and any costs awarded by the Court, notice and administration expenses, compensation to the Plaintiff for lost income, and taxes payable from the Settlement Fund (the "Net Settlement Fund"), are to be distributed to Authorized Claimants in accordance with the Plan of Allocation. Doc. 690, ¶3(b).

"Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to the approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Crocs*, 306 F.R.D. at 692 (quoting *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000) (internal quotation marks omitted)). "'An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *Lucas*, 234 F.R.D. at 695 (quoting *In re Am. Bank Note Holographics Sec. Litig.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001)).

The Plan of Allocation in this case aims to proportionally compensate Class Members based on the extent of their losses on Fund shares purchased during the Class Period. "'As a general rule, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable.'" *In re Crocs*, 306 F.R.D. at 692 (quoting *Law v. NCAA*, 108 F. Supp. 2d at 1196). Modeled on the damages provisions of Section 11 of the '33 Act, the Plan of Allocation calculates each Class Member's losses based on the difference between the purchase price of shares bought during the Class Period and the price at which they were sold. Sparer Decl. ¶65 & Ex. 1 (Epiq Decl. Ex. B at 6-7). For shares sold after the first complaint was filed on February 9, 2009, but before December 1, 2014—the last date for which Defendants produced transaction data—the loss is calculated as the lesser of: (1) the difference between the purchase price and the actual sales price, or (2) the difference between the purchase price and the sales price on February 9, 2009. For shares retained until December 1, 2014, the loss is calculated as the difference between the purchase price and the price at which the shares could have been sold on December 1, 2014. *Id.* Profits from sales of shares are not offset against losses; nor are dividends included in the net loss or gain calculation. *Id.* ¶66. Each Class Member will receive a payout based on the ratio of that Class Member's losses to the total losses of the Class.[3] *Id.*

[3] Certain practical considerations for distributing the recovery in a cost-effective manner have also been adopted. For example, the Plan of Allocation sets $10.00 as the minimum payout for eligible recoveries. Sparer Decl. Ex. 1 (Epiq Decl. Ex. B at 7). This routine

The Notice mailed to potential Class Members and nominees described the Plan of Allocation in detail. To date, there have been no objections to the Plan of Allocation. Sparer Decl. ¶67. Plaintiff and Plaintiff's Counsel believe that this method of allocation has a rational basis and is fair and equitable, and therefore warrants the Court's approval.

III. NOTICE TO THE CLASS COMPLIED WITH DUE PROCESS

Notice to the Class of the Settlement satisfies the requirements of Federal Rule of Civil Procedure 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 132-33 (S.D.N.Y. 2008) (notice need not be perfect or received by every class member, but must be reasonable under the circumstances). "The standard for the settlement notice under Rule 23(e) is that it must 'fairly apprise' the class members of the terms of the proposed settlement and of their options." *Gottlieb*, 11 F.3d at 1013. The notice program employed here readily meets this standard.

The Court-appointed Claims Administrator, Epiq, carried out the notice program under the supervision of Class Counsel. In accordance with the Preliminary Approval Order (Doc. 695), during the week ending September 1, 2017, Epiq mailed over 54,000 copies of the Notice to potential Class Members and their financial intermediaries and on September 2, 2017, published the Court-approved Summary Notice in the *Investor's*

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practice was also utilized in connection with the earlier Rochester Municipal Fund settlements. *See, e.g.*, Doc. 520, Doc. 492-1 at 23-42 (AMT-Free Notice).

Business Daily and over PRNewswire. Sparer Decl. Ex. 1, ¶21 (Epiq Decl.). Where Defendants or their financial intermediaries had supplied sufficient data to Epiq, the Notice included a completed Record of Fund Transactions ("ROFT") setting out the investor's calculated recognized loss, and a Dispute Form for disputing or correcting the ROFT. Investors who have no objection to the data provided need take no further action to receive a settlement check in due course. Where transaction data for an individual investor is incomplete or insufficient to calculate losses, a Proof of Claim form, setting out the process for submitting transaction data to become eligible for a payment, was provided. *Id*. ¶¶13-16 Epiq also established a website (identified in the Notice and Summary Notice) where potential Class Members can review and obtain Settlement-related information and key case documents. *Id*. ¶¶27-28

Plaintiff's method of giving notice, previously approved by the Court in connection with the earlier Rochester Municipal fund settlements, satisfies Rule 23 because it directs notice in a "reasonable manner to all class members who would be bound by the propos[ed judgment]." Fed. R. Civ. P. 23(e)(1); *see also Horton v. Leading Edge Mktg. Inc.*, No. 04-CV-00212-PSF-CBS, 2007 WL 2472046, at *5 (D. Colo. Aug. 28, 2007) (approving similar notice regimen).

The Notice informs Class Members of the terms of the Settlement, the Plan of Allocation, the nature of the settled claims, the estimated gross and net per share recovery, the status of the litigation, the amount of attorneys' fees and costs to be

requested, the date, time, and place of final fairness hearing, and the procedure by which Class Members may comment on, object to, or request exclusion from the Settlement. *In re Qwest Comm'ns Int'l, Inc. Sec. Litig.*, 625 F. Supp. 2d 1133, 1137 (D. Colo. 2009) (quoting *In re Nissan Motor Corp Antitrust Litig.*, 552 F2d 1088, 1104 (5th Cir. 1977)) ("a notice of a class action and a proposed settlement generally must contain 'an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member'"). Plaintiff's adherence to this well-established procedure protects the rights of absent Class Members. *See id.*

Class Members who may wish to object to the Settlement have received fair notice. While the October 18, 2017 deadline for objecting to any aspect of the Settlement has not yet passed, so far there have been no objections. *See* Sparer Decl. ¶72. Plaintiff will address any later-received objections on reply.

CONCLUSION

For the reasons stated herein, Plaintiff respectfully submits that the proposed Settlement merits final approval by this Court, and the proposed Plan of Allocation should be approved.

Dated: October 3, 2017

/s/ Alan W. Sparer

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION** was filed with this Court on October 3, 2017 through the CM/ECF system and will be sent electronically to all registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants.

/s/ Alan W. Sparer

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Exhibit A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Civil Action No. **09-cv-1186-JLK-KMT**

IN RE: CORE BOND FUND

ORDER APPROVING CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

THIS MATTER having come before the Court for a hearing on September 30, 2011, on the Motion for Final Approval of Proposed Class Settlement, Approval of Distribution Plan, and Award of Attorneys' Fees and Expenses; Lead Counsel Labaton Sucharow LLP and Hagens Berman Sobol Shapiro LLP ("Class Counsel") having requested an award of attorneys' fees and reimbursement of litigation expenses, as well as reimbursement of Lead Plaintiff's lost wages and expenses; and the Court having considered all papers filed and proceedings conducted herein, and otherwise being fully informed in the premises and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation and Agreement of Settlement, dated May 19, 2011 (the "Stipulation").

2. This Court has jurisdiction to enter this Order awarding attorneys' fees and expenses and over the subject matter of the Consolidated Class Action Complaint and all Parties to the consolidated Action including all Class Members.

3. Class Counsel, on behalf of all plaintiffs' counsel, are entitled to a fee paid out of the common fund created for the benefit of the Class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). In class action suits where a fund is recovered and fees are awarded therefrom by the court, the Supreme Court has indicated that computing fees as a percentage of the common fund recovered is the proper approach. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The Tenth Circuit recognizes the propriety of the percentage-of-the fund method when awarding fees. *See Gottlieb v. Barry*, 43 F.3d 474, 484 (10th Cir. 1994).

4. Notice of Class Counsel's request for attorneys' fees and reimbursement of expenses was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the request for attorneys' fees and expenses met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and Section 27 of the Securities Act of 1933, 15 U.S.C. §77z-1(a)(7), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

5. Class Counsel have moved for an award of attorneys' fees of 18.5% of the Settlement Fund, or $8,787,500, plus interest at the same rate as that earned by the Settlement Fund. Class Counsel's fee and expense application has the support of Lead Plaintiff.

6. This Court concludes that the percentage-of-recovery method is appropriate for awarding attorneys' fees in this Action and hereby adopts said method for purposes of this Action.

7. The Court finds that a fee award of 18.5% of the Settlement Fund is consistent with awards made within this District and in similar cases. *See, e.g., In re Spectranetics Corp. Sec. Litig.*, No. 08-02048 (D. Colo. April 4, 2011) (Blackburn, J.) (fee equal to 28% of recovery); *In re Rhythms Sec. Litig.*, No. 02-35 (D. Colo. April 3, 2009) (Kane, J.) (fee equal to 30% of settlement fund).

8. Accordingly, the Court hereby awards attorneys' fees of 18.5% of the Settlement Fund, or $8,787,500, plus interest at the same rate as that earned by the Settlement Fund. The Court finds the fee award to be fair and reasonable. Said fees shall be allocated among plaintiff's counsel in a manner in which Class Counsel believe reflects each counsel's contribution to the prosecution and resolution of the Action.

9. In making this award of attorneys' fees and expenses, the Court has analyzed the factors considered within the Tenth Circuit as set forth in *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-455 (10th Cir. 1988) *(citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). In evaluating these factors, the Court finds that:

a) Class Counsel have conferred a substantial benefit to the Class.

b) Class Counsel faced several novel and difficult legal and factual issues relating, in part, to the inherent complexities of a mutual-fund case as well as legal hurdles posed by Defendants' defenses of truthful disclosures to the factual intricacies of the investments at issue. Furthermore, Class Counsel faced the considerable risk of no recovery given the possibility that the claims would be dismissed in whole or in part for failure to adequately plead loss causation pursuant to the recent ruling in *In re State Street Bank*, 2011 U.S. Dist. LEXIS 35857, at *35, 2011 WL 1206070, at *10. Despite

the novelty and difficulty of the issues raised, Class Counsel secured an excellent result for the Class.

c) Class Counsel are very experienced and skilled practitioners in the securities litigation field, and have considerable experience and capabilities as class action specialists and with claims involving mutual funds. Their efforts in efficiently and expeditiously bringing the Action to a successful conclusion against the Defendants conferred a substantial benefit to the Class.

d) Class Counsel have expended considerable time and labor over the course of the Action investigating, analyzing and prosecuting the claims. This is evidenced by the Class Counsel's practice before the Court and Class Counsel's representations that they have: thoroughly investigated the claims asserted, including a review of all relevant public information, and engaged in extensive research of the applicable law with respect to the claims and defenses asserted by Defendants; filed a detailed and particularized consolidated class action complaint; pursued a Freedom of Information Act request with the Oregon Department of Justice and the Oregon Treasurer; requested, reviewed and analyzed almost 80,000 pages of key documents produced by Defendants, despite the PSLRA stay of discovery; retained and consulted with portfolio experts concerning a complete forensic analysis of the Fund portfolio as well as analysis of key documents produced by Defendants; vigorously defended motions to dismiss; retained and consulted with damages experts in order to analyze Fund transaction data and documents produced by Defendants; engaged in extensive settlement negotiations with Defendants, including three formal in-person mediation sessions before Judge Phillips; worked with wholly

independent counsel to resolve the allocation issues between the Actions, culminating in an allocation mediation session before Judge Phillips; and advocated for a substantial settlement for the Class. Counsel's total lodestar is reported to be $2,066,437.20, based upon 4,275.54 hours of work through July 28, 2011. Additional work was done in preparation for the hearing and Counsel anticipates that more work will be done with respect to the administration and distribution of the Settlement.

e) The services provided by Class Counsel appear to have been successful and efficient, resulting in a very significant recovery for the Class without the substantial expense, risk and delay of continued litigation and trial. Such efficiency and effectiveness supports the requested fee percentage.

f) There have been no objections to the fee and expense application.

10. Class Counsel have also requested reimbursement of litigation expenses in the amount of $412,997.43, plus interest at the same rate as that earned by the Settlement Fund, and an award of $54,900 to Lead Plaintiff Dr. C. Phillip Pattison for reimbursement of lost wages and expenses pursuant to the PSLRA related to his active participation in this Action. Such a request for lost wages is reasonable under the circumstances of this case. *See e.g., In re Marsh & McLennan Co. Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 120953, at *61, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009).

11. Having reviewed the expense information submitted by Class Counsel, the Court hereby approves the requested amount of litigation expenses and awards Class Counsel expenses of $412,997.43, plus interest at the same rate as that earned by the Settlement Fund.

12. The Court hereby awards Lead Plaintiff Dr. C. Phillip Pattison the amount of $54,900 in lost wages and expenses, to be paid upon entry of this Order.

13. The awarded attorneys' fees and expenses of Class Counsel shall be paid within ten (10) calendar days of entry of this Order and entry of the Final Judgment, subject to the terms, conditions and obligations of the Stipulation, which terms, conditions and obligations are incorporated herein.

14. Exclusive jurisdiction is hereby retained over the Parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Order.

15. Any appeal or any challenge affecting this Court's approval of the attorneys' fees and expense application shall in no way disturb or affect the finality of the Judgment.

16. In the event that the Settlement is terminated or does not become Final in accordance with the terms of the Stipulation, this Order shall be rendered null and void to the extent provided by the Stipulation and shall be vacated in accordance with the Stipulation.

17. There is no just reason for delay in the entry of this Order, and immediate entry by the Clerk of the Court is expressly directed.

IT IS SO ORDERED.

DATED: September 30, 2011

THE HONORABLE JOHN L. KANE
UNITED STATES DISTRICT JUDGE

Exhibit A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **02-cv-35-JLK-CBS** (consolidated with 02-K-46, 02-K-64, 02-K-78, 02-K-137, 02-K-145, 02-K-146, 02-K-152, 02-K-161, 02-K-168, 02-K-304, and 02-K-351)

IN RE RHYTHMS SECURITIES LITIGATION

This Document Relates to: All Actions

ORDER AND FINAL JUDGMENT

On this **3d** day of **April, 2009**, a hearing having been held before this Court to determine: whether the terms and conditions of the Stipulation and Agreement of Settlement dated November 26, 2008 (the "Stipulation") are fair, reasonable, and adequate for the settlement of all claims asserted by the Class against the Defendants in the Complaint now pending in this Court under the above caption, including the release of the Defendants and the Released Parties, and should be approved; whether judgment should be entered dismissing the Complaint in its entirety, on the merits and with prejudice; whether to approve the Plan of Allocation as a fair and reasonable method to allocate the settlement proceeds among the members of the Class; and whether and in what amount to award Plaintiffs' Counsel fees and reimbursement of expenses and to reimburse Class Representative John Brown's reasonable costs and expenses (including lost wages) directly related to his representation of the Class.

The Court having considered all matters submitted to it at the hearing and otherwise; and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to all persons or entities reasonably identifiable, who purchased the common stock of Rhythms NetConnections, Inc. ("Rhythms") between January 6, 2000 and April 2, 2001, inclusive (the "Class Period"), as shown by the records of Rhythms' transfer agent and the

records compiled by the Claims Administrator in connection with its previous mailing of a Notice of Pendency of Class Action, at the respective addresses set forth in such records, except those persons or entities excluded from the definition of the Class or who previously excluded themselves from the Class, and that a summary notice of the hearing substantially in the form approved by the Court was published in the national edition of *The Wall Street Journal* and transmitted over *Business Wire* pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested; and all capitalized terms used herein having the meanings as set forth and defined in the Stipulation,

IT IS NOW, THEREFORE, ORDERED THAT:

1. The Court has jurisdiction over the subject matter of the Action, the Class Representative, all Class Members, and the Defendants.

2. The Court, having previously found that this Action meets the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure for certification as a class action, and having previously directed notice of the pendency of this Action as a class action be given to the members of the Class and such notice having been given, now finds again and finally confirms that the prerequisites for a class action under Federal Rules of Civil Procedure 23 (a) and (b)(3) have been satisfied in that: i) the number of Class Members is so numerous that joinder of all members thereof is impracticable; ii) there are questions of law and fact common to the Class; iii) the claims of the Class Representative are typical of the claims of the Class he seeks to represent; iv) the Class Representative and Plaintiffs' Co-Lead Counsel have and will fairly and adequately represent the interests of the Class; v) the questions of law and fact

common to the members of the Class predominate over any questions affecting only individual members of the Class; and vi) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finally certifies this action as a class action on behalf of all persons who purchased the common stock of Rhythms NetConnections, Inc. between January 6, 2000 and April 2, 2001, inclusive. Excluded from the Class are Defendants, the officers and directors of Rhythms at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which any excluded person has or had a controlling interest. Also excluded from the Class are the persons and/or entities who previously excluded themselves from the Class by filing a request for exclusion in response to the Notice of Pendency, as listed on Exhibit 1 annexed hereto.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finally certifies John Brown as Class Representative.

5. Notice of the proposed Settlement of this Action was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the pendency of the action as a class action and of the terms and conditions of the proposed Settlement met the requirements of Rule 23 of the Federal Rules of Civil Procedure, Section 21D(a)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(7) as amended by the Private Securities Litigation Reform Act of 1995, due process, and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and

sufficient notice to all persons and entities entitled thereto. Plaintiffs' Co-Lead Counsel has filed with the Court proof of mailing of the Notice and Proof of Claim and proof of publication of the Publication Notice.

6. The Settlement is approved as fair, reasonable, and adequate, and the Class Members and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

7. The Complaint, which the Court finds was filed on a good faith basis in accordance with the Private Securities Litigation Reform Act and Rule 11 of the Federal Rules of Civil Procedure based upon all publicly available information, is hereby dismissed with prejudice in its entirety and without costs, except those costs provided for in the Stipulation.

8. The Lead Plaintiff and all the other Class Members on behalf of themselves, their heirs, executors, administrators, predecessors, successors and assigns, and any other person claiming (now or in the future) to have acted through or on behalf of them, shall hereby be deemed to have, and by operation of this order shall have, fully, finally, and forever, released, relinquished, settled and discharged the Released Parties from the Settled Claims, and are forever enjoined from instituting, commencing, or prosecuting any Settled Claim against any of the Released Parties directly, indirectly or in any other capacity, whether or not such Class Members execute and deliver a Proof of Claim and Release. The Lead Plaintiff has expressly waived, and all other Class Members are deemed to have waived, any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542.

9. The Defendants, on behalf of themselves, their heirs, executors, administrators, predecessors, successors and assigns, and the other Released Parties, shall hereby be deemed to have, and by operation of this order shall have, released and forever discharged each and every of the Settled Defendants' Claims, and shall forever be enjoined from prosecuting the Settled Defendants' Claims against Lead Plaintiff, all other Class Members and their counsel. The Defendants have expressly waived, and all other Released Parties are deemed to have waived, any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542.

10. All persons and/or entities whose names appear on Exhibit 1 hereto are hereby excluded from the Class, not bound by this Order and Final Judgment, and may not make any claim or receive any benefit from the Settlement. Said excluded persons and entities may not pursue any Settled Claims on behalf of those who are bound by this Order and Final Judgment.

11. Neither this Order and Final Judgment, the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered or received against any of the Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged by any of the plaintiffs or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or the

deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of any of the Defendants;

(b) offered or received against any of the Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any of the Defendant;

(c) offered or received against any of the Defendants as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the Defendants, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; provided, however, that any of the Defendants may refer to it to effectuate the liability protection granted them hereunder;

(d) construed against any of the Defendants as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; or

(e) construed as or received in evidence as an admission, concession or presumption against the Class Representative or any of the other Class Members that any of their claims are without merit, or that any defenses asserted by any of the Defendants have any merit, or that damages recoverable under the Complaint would not have exceeded the Gross Settlement Fund.

12. The Plan of Allocation is approved as fair and reasonable, and Plaintiffs' Counsel and the Claims Administrator are directed to administer the Stipulation in accordance with its terms and provisions. The Court further declares that any appeal of the approval of the Plan of Allocation, award of attorneys' fees, or awards of costs to Plaintiffs' Counsel and/or the Class Representative shall not prevent the Settlement from becoming effective.

13. The provisions of this Order and Final Judgment constitute a full and complete adjudication of the matters considered and adjudged herein, and the Court determines that there is no just reason for delay in the entry of judgment. The Clerk is hereby directed to immediately enter this Order and Final Judgment.

14. The Court finds that all parties and their counsel have complied with each requirement of Rule 11 of the Federal Rules of Civil Procedure as to all proceedings herein.

15. Plaintiffs' Counsel are hereby awarded **30 %** of the Gross Settlement Fund, which sum the Court finds to be fair and reasonable, and **$ 2,000,772.15** in reimbursement of expenses, which expenses shall be paid to Plaintiffs' Co-Lead Counsel from the Gross Settlement Fund with interest from the date such Settlement Fund was funded to the date of payment at the same net rate that the Settlement Fund earns. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a fashion which, in the opinion of Plaintiffs' Co-Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution of the Action.

16. Class Representative John Brown is hereby awarded **$ 135,084.00.** This award is for reimbursement of the Class Representative's reasonable costs and expenses (including lost wages) directly related to his representation of the Class. Such payment shall come from the Gross Settlement Fund.

17. In making this award of attorneys' fees and reimbursement of expenses to be paid from the Gross Settlement Fund, the Court has considered and found that:

(a) the settlement has created a fund of $17.5 million in cash that is already on deposit, plus interest thereon, and that numerous Class Members who submit acceptable Proofs of Claim will benefit from the Settlement created by Plaintiffs' Counsel;

(b) Over 81,500 copies of the Notice were disseminated to putative Class Members indicating that Plaintiffs' Counsel were moving for attorneys' fees in the amount of up to 30% of the Gross Settlement Fund and for reimbursement of expenses in an amount of approximately $2.6 million. No objections were filed against the terms of the proposed Settlement or the ceiling on the fees and expenses requested by Plaintiffs' Counsel and the reimbursement of Class Representative John Brown's reasonable costs and expenses (including lost wages) directly related to his representation of the Class, as described in the Notice;

(c) Plaintiffs' Counsel have conducted the litigation with diligence and achieved the Settlement after years of hard-fought litigation and protracted, arms-length negotiations and with the assistance of a mediator;

(d) The action involves complex factual and legal issues and was actively prosecuted over six years and, in the absence of a settlement, would involve further lengthy proceedings with uncertain resolution of the complex factual and legal issues;

(e) Had Plaintiffs' Counsel not achieved the Settlement there would remain a significant risk that the Class may have recovered less or nothing from the Defendants;

(f) Plaintiffs' Counsel have devoted over 27,700 hours, with a lodestar value of $13,352,568.55, to achieve the Settlement; and

(g) The amount of attorneys' fees awarded and expenses reimbursed from the Settlement Fund are fair and reasonable and consistent with awards in similar cases.

18. Exclusive jurisdiction is hereby retained over the parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Order and Final Judgment, and including any application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the members of the Class.

19. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

Dated: April 3, 2009

s/John L. Kane
SENIOR U.S. DISTRICT JUDGE

EXHIBIT 1

List of Persons and Entities Excluded from the Class in the *In re Rhythms Securities Litigation*

The following persons and entities have properly excluded themselves from the Class in the *In re Rhythms Securities Litigation*:

(1) Elliot K. Fishman, M.D.	(2) Teresa Green
(3) Michael A. Cantrell	(4) Martin Eder
(5) Richard V. Caulfield	(6) Joseph A. Wheelock Jr.
(7) Louie-Chan Associates LLC Larry Lowe, Trustee	

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