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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

In re Hansen Medical, Inc. Shareholder Litigation	Lead Case No. 16-CV-294288 [Consolidated with Case Nos. 16-CV-294554, 16-CV-294858 and 16-CV-294862]
This Document Relates To: ALL ACTIONS	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Judge: Hon. Brian C. Walsh Dept.: 1 Date: July 12, 2019 Time: 9:00 A.M.

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Plaintiffs Melvin Lax, David Simonsen, Joseph Liu, and Howard Huggins on behalf of themselves and each of the Class,[1] (collectively referred to herein as "Plaintiffs") hereby move for final approval of the proposed class action settlement in this consolidated action (the "Consolidated California Action"),[2] which arose out of a cash out merger of Hansen Medical Inc. ("Hansen" or the "Company") to Auris Surgical Robotics, Inc. and Pineco Acquisition Corp. (collectively, "Auris").

Plaintiffs seek entry of the [Proposed] Order and Final Judgment (the "Final Approval Order"), which was attached as Exhibit D to the Stipulation and Agreement of Settlement, Compromise, and Release, a copy of which is also filed contemporaneously with this Motion. The Final Approval Order provides for the: (a) final approval of the settlement set forth in the Stipulation; (b) the entry of the Judgment be entered in all material respects in the form attached to the Stipulation as Exhibit D.

I. INTRODUCTION

After aggressive and protracted litigation efforts since the first-filed action in April 2016, Plaintiffs achieved a Settlement that confers a significant monetary benefit on the Class Members. The Settlement creates a settlement fund in the amount of $7,500,000.00 (the "Settlement Payment"). The Settlement Payment less (i) any and all administrative Costs; (ii) any and all taxes; (iii) any fee and expense Award; and (iv) any other fees, costs or expenses approved by the Court (the "Net Settlement Fund") will be distributed to all Eligible Class Members on a pro rata basis, based on the number of outstanding Hansen shares owned by each such Class Member that was exchanged in the Merger. In Class Counsel's view, the Settlement is an excellent result for the Class. Moreover, Plaintiffs submit that the proposed Settlement is fair, reasonable and adequate to the Class and meets all indicia of fairness that merit the Court's final approval.

[1] Capitalized terms not otherwise defined herein shall have the meaning set forth in the Stipulation and Agreement of Settlement, Compromise, and Release, dated February 5, 2019.

[2] Also encompassed and settled by the Stipulation is the action of *In re Hansen, Inc. Stockholders Litigation*, C.A. No. 12316-VCMR (the "Consolidated Delaware Action").

Plaintiffs believe that the Settlement in the best interest of the class. If brought to trial, this case faced substantial risk, including the availability of potential defenses such as the business judgment rule and exculpation provisions that could potentially prevent findings of liability for breaches of fiduciary duty, and thus preclude any recovery for the class. Based on the knowledge and experience of their counsel, Plaintiffs accepted the terms of the Settlement.

The Class's reaction to the Settlement and the Plan of Allocation has been favorable. In accordance with the Court's order granting preliminary approval, over 3,000 Notices were sent to potential Class Members and their nominees explaining the terms of the Settlement and the Plan of Allocation and the procedure and deadline for objection and exclusion. Smith Decl. ¶¶ 54-57. While the deadline for Class Members to object June 21, 2019 – has not passed, Plaintiffs' Counsel, nor the Settlement administrator, are not aware of a single objection, and no one has requested exclusion from the Class. *Id*. ¶ 57. For the reasons set forth herein, Plaintiffs respectfully request that the Court grant final approval of the Settlement and approve the Plan of Allocation as fair, reasonable, and adequate to Class Members.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[3]

This litigation arises out of the 2016 sale of Hansen to Auris, which was the product of a conflicted and flawed sales process and resulted in Hansen's minority shareholders receiving an inadequate price for their Hansen stock (the "Merger"). *See* Order After Hearing On March 8, 2019, entered March 8, 2019 (the "March 8 Order", filed herewith as Smith Decl., Ex. B), at 2; *see also* Smith Decl. ¶ 9. This flawed Merger process was controlled and choreographed by a group of insider stockholders, who collectively wielded 65.4 percent of the voting power of Hansen (the "Controller Defendants"), and who secured approval of the Merger without obtaining a fully informed, un-coerced majority vote of Hansen's other minority stockholders. March 8 Order at 2; Smith Decl. ¶¶ 10. Plaintiffs alleged that the Controller Defendants exercised control over the

[3] The factual background and procedural history is largely duplicative of Plaintiffs' Memorandum of Points and Authorities in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, which was filed on February 8, 2019. It is included again herein for the convenience of the Court.

negotiations and sales process leading to the Merger's approval, and did so in order to structure the Merger in a way that personally benefitted them above Hansen's other stockholders by agreeing to a lower Merger price in exchange for valuable rollover stock. March 8 Order at 2; Smith Decl. ¶ 11.

In fact, by a decision in the Consolidated Delaware Action, dated June 18, 2018, the Delaware Chancery Court found that Plaintiffs had adequately stated claims that the Controller Defendants constituted a "control group" of Hansen under Delaware law. *In re Hansen Med., Inc. Stockholders Litig.*, No. 12316-VCMR, 2018 Del. Ch. LEXIS 197 (Del. Ch. June 18, 2018)[4]; *see also* March 8 Order at 7 (quoting same); Smith Decl. ¶ 29 (same).

After the Merger was publicly announced, complaints were filed both in California[5] and Delaware[6] state courts challenging the Merger. March 8 Order at 6; Smith Decl. ¶ 12-14. Other shareholders of Hansen served demand letters on Hansen pursuant to Section 220 of the Delaware General Corporation Law, seeking and obtaining books and records concerning the same factual allegations raised in the Actions. Smith Decl. ¶ 12. On May 16, 2016, this Court entered an Order granting the request of Plaintiff Steven-Juhl to dismiss her Related California Action without prejudice, and on June 21, 2016, this Court further entered an Order consolidating the remaining Related California Actions under the instant caption *In re Hansen Medical, Inc. Shareholder Litigation*, Lead Case No. 16CV294288 (the "Consolidated California Action"), and appointing

[4] All internal citations and punctuation have been omitted and all emphasis added, unless otherwise noted.

[5] The related actions filed in the California Court, and their filing dates, are as follows: (i) *Liu v. Hansen Medical, Inc., et al.*, No. 16CV294288, filed on April 25, 2016; (ii) *Stevens-Juhl v. Hansen Medical, Inc., et al.*, No. 16CV294354, filed on April 26, 2016; (iii) *Huggins v. Hansen Medical, Inc., et al.*, No. 16 CV294552, filed on May 2, 2016; (iv) *Lax v. Hansen Medical, Inc., et al.*, No. 16CV294858, filed on May 6, 2016; and (v) *Simonson v. Hansen Medical, Inc., et al.*, No. 16CV294862, filed on May 6, 2016 (the "Related California Actions").

[6] The related actions filed in the Delaware Court, and their filing dates, are as follows: (i) *Windward Venture Partners, LP v. Hansen Medical, Inc., et al.*, C.A. No. 12316, filed on May 10, 2016; and (ii) *Muir v. Hansen Medical, Inc., et al.*, C.A. No. 12490, filed on June 21, 2016 (the "Related Delaware Actions").

Faruqi & Faruqi, LLP, Brodsky & Smith LLC, and Milberg LLP as co-lead counsel for the California Plaintiffs in the Consolidated California Action (collectively, the "California Co-Lead Counsel"). *Id.* ¶ 15.

On July 11, 2016, the Delaware Court entered an Order consolidating the Related Delaware Actions under the caption *In re Hansen, Inc. Stockholders Litigation*, C.A. No. 12316-VCMR (the "Consolidated Delaware Action"), and appointing Wolf Popper LLP as lead counsel for the Delaware Plaintiffs in the Consolidated Delaware Action ("Delaware Lead Counsel"). Smith Decl. ¶ 16. In the instant Consolidated California Action, the plaintiffs sought expedited discovery early on in preparation for an anticipated preliminary injunction motion. *Id.* ¶ 17. Thereafter this Court granted that motion and ordered limited expedited discovery, including production of substantially the same documents that had been provided to the Section 220 shareholders, as well as the deposition of Defendant Christopher P. Lowe, who was at that time Hansen's interim Chief Financial Officer and a member of the Company's Board of Directors. *Id.*

The Delaware Plaintiffs obtained the same documents and participated in the deposition. March 8 Order at 6; Smith Decl. ¶ 19. On July 12, 2016, the California Plaintiffs filed a motion for preliminary injunction in the Consolidated California Action seeking to enjoin the Merger, but that motion was denied. March 8 Order at 6; Smith Decl. ¶ 18, 20. On July 22, 2016, a majority of the Company's stockholders voted to approve the Merger, which closed on July 27, 2016. Smith Decl. ¶ 21. On August 19, 2016, and November 2, 2016, respectively, the plaintiffs in the Consolidated Delaware Action and Consolidated California Action amended their complaints,[7] and Defendants answered both of those amended complaints. Smith Decl. ¶¶ 22-23.

On April 6, 2017, California Co-Lead Counsel, Delaware Lead Counsel, and Defendants' counsel, as well as counsel for Auris, participated in a full-day mediation session (the "Initial Mediation") before Robert A. Meyer of JAMS. Smith Decl. ¶ 24. Before the Initial Mediation, the parties exchanged mediation statements and exhibits, which addressed both liability and

[7]The Section 220 shareholders joined the Consolidated Delaware Action and were included as plaintiffs in the amended complaint in that Action.

damages. *Id.* The Initial Mediation did not lead to resolution of the Actions. *Id.* On June 13 and 14, 2017, the Director Defendants, the Stockholder Defendants, and Auris Surgical Robotics, Inc. each filed motions for judgment on the pleadings in the Consolidated Delaware Action, and on July 7, 2017, Defendants filed their respective opening briefs in support of those motions. Smith Decl. ¶ 25. In lieu of filing oppositions to those motions, the Delaware Plaintiffs stated their intention to further amend their Verified Consolidated Class Action Complaint. *See* March 8 Order at 7; Smith Decl. ¶ 25.

On August 9, 2017, the California Court entered an order staying the Consolidated California Action pending rulings by the Delaware Court on the then-pending motions for judgment on the pleadings in the Consolidated Delaware Action, or any subsequent motion to dismiss a further revised complaint in that action. Smith Decl. ¶ 26. On September 18, 2017, the plaintiffs in the Consolidated Delaware Action filed a Verified Amended Consolidated Class Action Complaint (the "Amended Delaware Complaint"). *Id.* ¶ 27. On September 25, 2017, the Remaining Delaware Defendants filed motions to dismiss the Operative Complaint. *Id.* ¶ 27. On October 24, 2017, the Delaware Plaintiffs filed their brief opposing those motions to dismiss, and on November 3, 2017, the Remaining Delaware Defendants filed their reply briefs in support of their respective motions to dismiss. *Id.* On March 6, 2018, the Delaware Court heard oral argument on those motions. *Id.* On June 18, 2018, following full briefing and oral argument on the motions to dismiss, Vice Chancellor Montgomery-Reeves found in favor of the Plaintiffs, denying the motion to dismiss for each of the Controller Defendants and for each of the Director Defendants, and granting the motion to dismiss for the Auris Defendants. *See* March 8 Order at 7 (summarizing the Delaware Court's decision); *see also* Smith Decl. ¶ 29.

On October 29, 2018, the parties attended a second full-day meditation before Michelle Yoshida of Phillips ADR (the "Second Mediation"). March 8 Order at 8; Smith Decl. ¶ 33. As a result, the parties reached this proposed class action settlement (the "Settlement"). Smith Decl. ¶ 35. In support of the settlement's fairness, California Co-Lead Counsel deposed a representative of Perella Weinberg Partners LP, the financial advisor retained by the Director Defendants in

connection with Merger, on December 11, 2018. *See* March 8 Order at 10; Smith Decl. ¶ 37.

On or about February 5, 2019, the Parties executed the Stipulation and Agreement of Settlement, Compromise and Release. Smith Decl. ¶ 44. On March 5, 2019, this Court issued its tentative ruling with respect to the Preliminary Approval Motion (the "March 5 Ruling"). *Id*. ¶ 51. Plaintiffs filed a supplemental declaration on March 7, 2019 that addressed several issues raised by this Court in its March 5 Ruling, including the Settlement's compliance with California Code of Civil Procedure Section 348 and certain modifications to the Notice. March 8 Order at 17; Smith Decl. ¶ 51. On March 8, 2019, the Court issued the March 8 Order. In that Order, the Court (i) certified the Class for settlement purposes (March 8 Order at 13-16); (ii) approved the long-form notice, the summary notice, and the notice procedures (*id.* at 16-17); and (iii) granted Plaintiffs motion for preliminary approval of the Settlement (*id.* at 18).

III. THE TERMS OF THE SETTLEMENT

In consideration for the Settlement and dismissal with prejudice of the Actions,[8] and the releases provided herein, Defendants agreed to pay the Class the Settlement Payment of $7,500,000.00. Any attorneys' fees, incentive awards, costs, expenses (including notice and administrative expenses) or other Court-approved deductions shall be paid out of — and shall not be in addition to — the Settlement Payment. Smith Decl. ¶ 45. This Net Settlement Amount will be distributed to all Eligible Class Members on a *pro rata* basis, based on the number of outstanding Hansen shares owned by each such Class Member immediately prior to the consummation of the Merger and were exchanged in the Merger. *Id*. ¶ 46. Class Members will not have to submit proofs of claim to receive their payments. *Id*. ¶ 47. There were approximately 6.5 million outstanding shares owned by Eligible Class Members and exchanged in the Merger. *Id*. ¶ 46. Accordingly, the expected payment, assuming the Court approves Plaintiffs' Counsel's request for attorneys' fees in the amount of one third of the Settlement Amount, will be

[8] Including the Consolidated Delaware Actions, as defined in the Stipulation of Settlement.

(continued...)

approximately $.76 per share, but may vary based upon the amount of other Court-approved deductions and costs. *Id.*;[9] *see also* March 8 Order at 10.

As discussed below, Plaintiffs submit that the proposed Settlement is fair, reasonable and adequate to the Class and meets all indicia of fairness that merits the Court's final approval. Smith Decl. ¶ 76.

IV. STANDARDS FOR FINAL APPROVAL OF SETTLEMENT

California Civil Code § 1781(f) requires the approval of the court before dismissal, settlement, or compromise of a class action. The court's role in approving a class action settlement is to determine whether the settlement is fair, reasonable, and adequate. *See Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742 (2009); *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 471 (1986); *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 245 (2001). Trial courts are granted broad discretion in approving settlements in representative lawsuits. *See Rebney v. Wells Fargo Bank*, 220 Cal. App. 4th 1794, 1801 (1996).[10] However, the Trial Court's role is limited to considering the overall fairness, reasonableness, and adequacy of the settlement rather than a determination of the potential outcome of any trial. *See Rebney*, 220 Cal. App. 3d at 1138; *see also Wershba*, 91 Cal. App. 4th at 245; *see generally* March 8 Order at 8-9 (providing section on the legal standard for approving a class action settlement).

California policy favors compromises of litigation, particularly in complex class actions. *See Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1607 (1991) (declining to modify a settlement agreement in light of the strong public policy in favor of setting class action suits) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir.1977)). The evaluation of a class action settlement is

[9] In its March 8 Order, the Court "directed the parties to meet and confer to address how to bring their settlement into compliance with Code of Civil Procedure section 348" by selecting an appropriate recipient for unclaimed funds. *See* March 8 Order, at 12. The parties have selected the Bay Area Legal Aid to be that recipient of any *cy pres* award and the Final Approval Order reflects said selection.

[10] California courts have adopted similar standards for the approval of class action settlements to those developed by federal courts. *See La Sala v. Am. Sav. & Loan Ass'n*, 5 Cal. 3d 864, 872 (1971). Federal authorities are therefore persuasive authority on those standards.

limited to "reach[ing] a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (citation omitted); *see also N. Cnty Contractor's Ass'n v. Touchstone Ins. Servs.*, 27 Ca. App. 4th 1085, 1091 (1994) (noting that the court must merely determine if settlement is in the "ball-park"). "'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citation omitted).

V. THE SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS

A presumption of fairness applies when: "'(1) the settlement [was] reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" *Wershba*, 91 Cal. App. 4th at 245 (citation omitted); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008); *Cho*, 177 Cal. App. 4th at 734. Each of these factors is satisfied here.

First, the Settlement was the product of extensive arm's-length negotiations by counsel, which included the assistance of two different experienced mediators over two full-day mediations first, before Robert Meyer of JAMS, and, ultimately, before Michelle Yoshida of Phillips ADR. Prior to the first day of both mediations, the parties exchanged mediation statements and exhibits explaining their respective positions. Courts have recognized that "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 U.S. Dist. LEXIS 99066, at *17 (N.D. Cal. Apr. 13, 2007). Here, the parties had the assistance of two well-known, and highly competent mediators.

Second, as discussed herein and in the Declaration, the Settlement was negotiated between counsel after nearly three years of litigation, after briefings and the denial of a motion to dismiss in the Chancery Court of Delaware (*In re Hansen Med., Inc. S'holders Litig.*, 2018 Del. Ch. LEXIS

197 (Del. Ch. June 18, 2018)), and after development of the evidentiary record and legal issues sufficient to allow Plaintiffs to make an intelligent and well-informed decision about the propriety of the Settlement. This investigation included depositions of the Company's former Chief Financial Officer and, on a confirmatory basis, a representative of Perella Weinberg Partners LP, the financial advisor retained by the Director Defendants in connection with Merger, and substantial document discovery. These efforts have enabled Plaintiffs' Counsel to assess the strengths and weaknesses of the Class's claims.

Third, Plaintiffs' counsel, collectively and independently, have significant experience in complex class action litigation, and particularly in merger-related class actions, and have negotiated numerous other class action settlements throughout the country. *See* March 8 Order at 16; Smith Decl. at 10 n.6.

Fourth, although the date for filing objections has not passed, Plaintiffs' Counsel are not aware of any objections to the Settlement, nor any Class Member electing to opt out of the Settlement. Accordingly, the Settlement is presumptively fair.

VI. THE SETTLEMENT SATISFIES FACTORS FAVORING APPROVAL

The Settlement satisfies the standards for approval set forth in *Dunk*. When granting final approval of a settlement, California courts consider: (1) the settlement amount; (2) the risks of continued litigation; (3) the stage of proceedings; (4) the complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel; and (6) the reaction of class members. *See Dunk*, 48 Cal. App. 4th at 1801; *see also Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010). Each of these criteria supports final approval of the Settlement.

A. The Amount of the Settlement Favors Final Approval

Under the Settlement, Defendants agreed to make a cash payment of $7.5 million for the benefit of the Class. This Settlement is unquestionably better than the very possible alternative outcome of no recovery for the Class and represents a significant portion of what Plaintiffs'

Counsel believes to be the maximum amount they could have obtained.[11] Even if Plaintiffs were able to successfully prosecute this Action through trial and establish Defendants' liability, there was no guarantee that a jury would have awarded damages in any amount, much less an amount that would exceed the value of the Settlement, and it would have taken years before all appeals were resolved and the Class received any payment. *See Wershba*, 91 Cal. App. 4th at 250 ("Compromise is inherent and necessary in the settlement process . . . even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'") (citation omitted).

Through the Settlement, Class Members have an opportunity to obtain substantial additional consideration for their Hansen stock beyond the $4.00 per share they already received in the Merger. The Net Settlement Fund, assuming the Court approves Plaintiffs' Counsel's request for attorneys' fees in the amount not to exceed one third (after expenses) of the Settlement Fund, will be approximately $0.76 per share. Smith Decl. ¶ 46. This net recovery implies a 19% increase in the consideration the Eligible Class Members will have received in the Merger and represents a fair, reasonable, and adequate result for the Class.[12] *See* March 8 Order at 12 ("[E]ven

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[11] In the March 8 Order, based on the submissions of the Plaintiffs and the deposition testimony, the Court found that "the settlement consideration is fair and reasonable to the [C]lass for purposes of preliminary approval", and quantified how significant this recovery is:

> Based on the testimony of Hansen's interim Chief Financial Officer, plaintiffs estimated their maximum recovery based on the highest of the three valuations of the company provided in the proxy statement: $5.78 per share. ***Under that methodology, the settlement represents a 64 percent recovery to the class.*** In its tentative ruling, the Court noted that the allegations of the Amended Complaint suggest a maximum recovery of $2-4 per share, somewhat higher than the $1.78 per share maximum recovery assumed by plaintiffs based on their findings during discovery. March 8 Order at 11-12 (emphasis added).

[12] *See, e.g., In re Cox Radio, Inc. S'holders Litig.*, C.A. No. 4461-VCP, 2010 Del. Ch. LEXIS 102, at *32 (Del. Ch. May 6, 2010) (finding a price increase to be a material benefit to the settlement class); *Matter of Cablevision Sys. Corp. Shareholders Litig.*, 868 N.Y.S.2d 456, 468 (Sup. Ct.,

(continued...)

if a recovery in the range initially estimated by the Court were possible, a settlement yielding a net recovery of 76 cents per share is well within the range of reasonableness.").

Moreover, the Settlement was only reached after substantial litigation, and is the product of each party's evaluation of the strengths and weaknesses of their respective case and the costs of taking the litigation through the completion of merits and expert discovery, trial, and appeals. *See* Decl. ¶¶ 38-44; *see also* March 8 Order at 11 (assessment of case's strengths and weaknesses provided to the Court). Based on all factors involved, the Settlement is a highly favorable result for the Class. Accordingly, this factor militates in favor of the Court granting final approval. *See Wershba*, 91 Cal. App. 4th at 250 ("A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable.").

B. The Substantial Risks of Continued Litigation

As explained herein, Plaintiffs' case against the Defendants presented unique and substantial risks in terms of establishing both liability and damages

1. Risks in Establishing Liability

Plaintiffs' claims were multifaceted and complex. Ultimately, Plaintiffs' primary theories of liability were that the Company's largest stockholders acted as a control group and put their interests ahead of the Company's minority shareholders. Also, the Board consciously disregarded Hansen's intrinsic value to permit the transaction to be structured in such a way that it personally benefitted that control group. In aid of this goal, the Company's financial projections were knowingly manipulated and misrepresented so that the Transaction would be approved at an unfair price. *See* Smith Decl. ¶ 41. While Plaintiffs and Plaintiffs' Counsel believed in the claims and

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Nassau Co. 2008) (increase in the share price "was clearly a substantial benefit" to the settlement class); *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d 285 (Del. 2002) (holding that an increase in the exchange ratio was beneficial to the settlement class); *Gatz v. Ponsoldt*, CIV.A. 174-CC, 2009 Del. Ch. LEXIS 100 (Del. Ch. June 12, 2009) (concluding the creation of a settlement fund was "an actual benefit to the shareholder class that was allegedly harmed"); *Franklin Balance Sheet Inv. Fund v. Crowley*, CIV.A. 888-VCP, 2007 Del. Ch. LEXIS 133 (Del. Ch. Aug. 30, 2007) (approving settlement where "Plaintiffs and their counsel achieved a significant monetary benefit for the class.").

are reasonably confident that they would have prevailed at summary judgment and even at trial, success was far from certain. Smith Decl. ¶ 42-44.

Defendants argued, and were certainly prepared to further argue, that neither Delaware substantive law nor the facts of this case would support any claim for liability against the Defendants. Plaintiffs faced substantial risks under Delaware law, including the possibility that the decisions of the Hansen Board would be considered under the business judgment rule. To escape business judgment review and have entire fairness review apply instead, Plaintiffs would have been required to show that Hansen's largest stockholders acted as a control group. *See In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016), *recons. granted in part*, 2016 WL 727771 (Del. Ch. Feb. 23, 2016) (ORDER). While Plaintiffs succeeded in alleging that a control group of stockholders existed at the motion to dismiss stage, such a finding is substantially "fact intensive" and might not be upheld at the summary judgment stage when facts outside of the complaint are evaluated. *See In re Nine Sys. Corp. S'holder Litig.*, 2014 WL 4383127, at *24 (Del. Ch. Sept. 4, 2014) ("Proving a control group is . . . a fact-intensive inquiry that requires evidence of more than mere 'parallel interests.'"). Defendants would likely have argued that a post-discovery evidentiary record showed that the purported control group was not, in fact, a group or in a control position, that there was no effort by these individuals to actually band together to reinvest in Auris, and that because of the Company's supposed dire financial situation they were forced to roll over their shares to get a deal done. Smith Decl. ¶¶ 42-43.

While Plaintiffs were prepared to make counterarguments to these positions, the Court or a jury very well might have found Defendants' factual and legal arguments persuasive and dispositive as to liability for Plaintiffs' claims. Thus, a substantial chance existed that the Class could walk away with nothing if this litigation continued.

2. Other Risks Under Delaware Substantial Law

If Plaintiffs were unable to prove that the Transaction should be evaluated under the entire fairness standard, it would have been evaluated under the business judgment rule. During the Action, the Delaware Supreme Court issued a decision that presented another substantial risk

factor. Under *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015), and its recent progeny, where a disinterested and fully informed, uncoerced majority of stockholders approve a transaction, an "irrebuttable" business judgment rule applies. Smith Decl. ¶ 42. In that scenario, all challenges to a merger are extinguished, other than those predicated on waste. If Plaintiffs failed to prove the existence of a control group, then despite Plaintiffs' arguments to the contrary, the stockholder vote on the Transaction might also be found to have been accomplished by a majority of disinterested and uncoerced stockholders. And, of course, Plaintiffs did not plead a waste claim. Thus, if Plaintiffs were unsuccessful in maintaining this action under the entire fairness standard of review, Plaintiffs were going to lose unless they could prove at trial that the stockholder vote was materially misinformed. *Id*. While potentially serious disclosure issues existed in this case, Plaintiffs' arguments were not unassailable.

3. Risks Relating to Damages

A crucial issue in this case related to the value of Hansen at the time of the Transaction. Plaintiffs alleged that Hansen was worth more than the Transaction price, but that Auris reduced its offer price after securing the Controller Defendants' allegiance. Defendants would have argued that the $4.00 per share price was, in fact, entirely fair. Smith Decl. ¶ 43. According to Defendants, the Company CFO's testimony that the highest case was the most reasonable was not correct but was, instead, puffery by an overzealous member of management. *Id*. Instead, according to Defendants, Hansen was in severe financial distress before the Merger, Hansen was shopped to numerous potential bidders, and an independent and disinterested Special Committee negotiated and recommended the transaction, which, according to Defendants, was the best and only viable strategic option available to Hansen. *Id*. As a result, there was a substantial risk that the finder of fact would agree with Defendants' contention that no damages existed, or that damages were substantially less than the Settlement amount. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors

such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) ("even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages"). Thus, Plaintiffs faced the prospect of winning the liability phase at trial, but recovering nothing for the Class. That is precisely what happened in *In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013), where plaintiffs proved directors' breaches of fiduciary duty at trial in connection with a disputed merger, but the Court of Chancery found that the price was fair and damages were zero.

4. Risks Relating to Appeal

Even if Plaintiffs were to prevail at trial, the risks would not end there. *See Co. Premium Litig.*, MDL No. 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 21, 1998) ("even if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement - which is not at all apparent - there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings"). There are many cases in which a successful verdict has been overturned either by motion after trial or an appeal. For example, in *In re Apple Comput. Sec. Litig.*, No. C-84-20148(A)JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an extended trial. Based upon the jury's findings, recoverable damages would have exceeded $100 million. The court, however, overturned the verdict, entered judgment notwithstanding the verdict for the individual defendants, and ordered a new trial with respect to the corporate defendant. *See also Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction under *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011)); *In re BankAtlantic Bancorp, Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011) (granting defendants' motion for judgment as a matter of law and entered judgment for defendants following jury verdict in favor of plaintiffs), *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (finding trial court erred, but defendants nevertheless entitled to judgment as a matter of law based

on lack of loss causation).

* * * *

In sum, the risks posed by continued litigation were substantial, and they would be present at every step of the litigation if it were to continue. Plaintiffs took all of the above risk factors into account in accepting the Settlement, and concluded that it represents an extraordinary outcome for the Class.

C. The Stage of the Proceedings and Available Evidence Gave the Parties Sufficient Information to Negotiate a Fair, Reasonable and Adequate Settlement

This factor focuses on whether the parties had sufficient information to conduct an informed negotiation for a settlement that adequately reflects the merits of the case. When applying this factor, "[t]he question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it." *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009U.S. Dist. LEXIS 19210, at *39-*40 (E.D. La. Mar. 2, 2009). Moreover, the trial court "may legitimately presume that counsel's judgment [that it has the information necessary to evaluate a settlement] . . . is reliable." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195,211 (5th Cir. 1981).

As detailed above and in the Declaration, by the time the parties reached the Settlement, Plaintiffs and their counsel had sufficiently investigated and researched the merits of their claims and the potential defenses to determine that the terms of the Settlement are fair, reasonable, and adequate and in the best interest of the Class. Smith Decl. ¶¶ 38-44. Plaintiffs and Plaintiffs' Counsel actively litigated the merits of this case over three years and engaged in significant factual discovery. Smith Decl. ¶¶ 38-39. Plaintiffs also took the depositions of members of Hansen's senior management and Hansen's financial advisor. Smith Decl. ¶¶ 18, 37. The merits of the parties' respective positions were also extensively debated through settlement discussions, including in two full-day mediations, which further highlighted the legal and factual issues in

dispute. Smith Decl. ¶ 39. The knowledge and insight gained through litigation provided Plaintiffs and Plaintiffs' Counsel with sufficient information to evaluate the strengths and weaknesses of the Class's claims and the Defendants' defenses, as well as whether a larger recovery was likely to be obtained through continued litigation. Smith Decl. ¶ 38.

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

The immediacy and certainty of a recovery is another factor for the Court to balance in determining whether the Settlement is fair, adequate, and reasonable. *See, e.g., Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Courts have held that "[t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *Officers for Justice v. Civil Serv. Comm 'n*, 688 F.2d 615, 626 (9th Cir. 1982). Thus, the benefit of the present settlement must be balanced against the expense of achieving a more favorable result at a trial in the future. *Young v. Katz*, 447 F.2d 431,433 (5th Cir. 1971).

Approval of the Settlement will mean a significant, prompt recovery for the Class. If not for this Settlement, the case would have continued at great cost and substantial duration. Fact and expert discovery would need to be completed, and Plaintiffs would have needed to successfully defeat Defendants' Motion for Summary Judgment. Assuming Plaintiffs were successful and the Action went to trial, a trial would have occupied a number of attorneys for weeks and would have required substantial and costly expert testimony on both sides. Furthermore, a judgment favorable to the Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and further appeals, which could prolong the case for several more years. *See, e.g., Warner Commc'ns*, 618 F. Supp. at 745 (delay from appeals is a factor to be considered). Therefore, delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Class Members to wait many more years for any recovery, further reducing its value. Settlement of this Action ensures an immediate recovery and eliminates the risk of no recovery at all. *See In re Broadwing, Inc. ERISA Litig.*, 252

F.R.D. 369, 373-74 (S.D. Ohio 2006) (explaining "the difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses, and a possible delay in recovery due to the appellate process, provide justifications for this Court's approval of the proposed Settlement").

As the Ninth Circuit has made clear, the very essence of a settlement agreement is compromise that necessitates "'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624 (citations omitted). "'Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.'" *Id.* (citation omitted); *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 19 (N.D. Cal. 1980) ("As a quid pro quo for not having to undergo the uncertainties and expenses of litigation, the plaintiffs must be willing to moderate the measure of their demands."), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Accordingly, the fact that the Class potentially could have achieved a greater recovery after trial does not preclude the Court from finding that the Settlement is within a "range of reasonableness" for approval. *See e..g.*, *Warner Commc'ns*, 618 F. Supp. at 745.

E. The Recommendation of Experienced Counsel Heavily Favors Approval of the Settlement

While a court must independently review a proposed settlement, the judgment of experienced counsel regarding the settlement is entitled to great weight and supports a presumption of fairness. *See Nat 'l Rural*, 221 F.R.D. at 528 ("'Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'") (citation omitted); *Dunk*, 48 Cal. App. 4th at 1802. Indeed, as one court recognized, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007) (citation omitted). As discussed above, Plaintiffs' Counsel are known for their experience and success in complex and class action litigation and fully support the Settlement as in the best interest of the Class. This factor heavily favors this Court's approval of the Settlement.

F. The Reaction of the Class Supports Approval of the Settlement

A court may also consider the reaction of the class in determining whether to approve a settlement. *Dunk*, 48 Cal. App.. 4th at 1801; *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). A "relatively small number" of objections is "an indication of a settlement's fairness." *Brotherton*, 141 F. Supp. 2d at 906 (citing Herbert Newberg & Alba Conte, 2 *Newberg on Class Actions* § 11.48 (3d ed. 1992)); *see also Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 U.S. Dist. LEXIS 97057, at *18 (S.D. Ill. June 6, 2006) (finding nine objections to be a "miniscule" amount). "The fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton*, 141 F. Supp. 2d at 906.

In this case, 3,000 long-form notices were sent to potential Class Members and their nominees, and the Summary Notice was published pursuant to the Court's Order. *See generally* Smith Decl. and *see* Settlement Administrator's Notice Affidavit to be filed prior to the July 12, 2019 Final Approval Hearing. Although the time for objections has not yet expired, to date no Class Member has objected to the Settlement, and not Class Member has requested exclusion from the Class. *Id*. ¶ 7. Thus, the reaction of the Class weighs heavily in favor of approving the Settlement. *See Nat'l Rural*, 221 F.R.D. at 529 (finding the absence of a large number of objections raises a strong presumption that the settlement is fair to the class); *Dunk*, 48 Cal. App. 4th at 1802 (noting that one of the factors leading to a presumption that the settlement is fair, reasonable, and adequate is that "the percentage of objectors is small").

VII. THE PLAN OF ALLOCATION IS A FAIR METHOD OF DISTRIBUTING THE SETTLEMENT PROCEEDS AND SHOULD BE APPROVED

The purpose of a plan of allocation is to provide an equitable basis for the distribution of the settlement fund among eligible class members. *See Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (noting that courts have "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably."); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). Assessment of the plan of allocation is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable, and adequate. *Class Plaintiffs v. Seattle*, 955 F.2d

1268, 1284 (9th Cir. 1992). To meet this standard, an allocation formula must only have a reasonable, rational basis, particularly if recommended by "experienced and competent" plaintiffs' counsel. *White v. NFL*, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993); *In re Am. Bank Note Holographics Sec. Litig.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001). Because they tend to mirror the complaint's allegations, "plans that allocate money depending on the timing of purchases and sales of the securities at issue are common." *In re Datatec Sys. Inc. Sec. Litig.*, No. 704-CV-525 (GEB), 2007 U.S. Dist. LEXIS 87428, at *15 (D.N.J. Nov. 28, 2007).

Here, the Net Settlement Fund will be distributed to all Eligible Class Members on a *pro rata* basis, based on the number of outstanding Hansen shares exchanged pursuant to the Merger by each such Class Member as identified by Hansen's transfer agent and DTC. The objective of this plan is to provide Eligible Class Members with their *pro rata* share of the Net Settlement Fund on a fair basis by automatically providing each with the same recovery per share. Class members will not be required to fill out a proof of claim form. This process will result in fair distribution to the Net Settlement Fund among Class Members as it is consistent with how post-trial damages are calculated and distributed for cases of this nature that proceed through trial. *See, In re Rural/Metro Corp. Stockholders Litigation*, 102 A.3d 205, 224 (Del. Ch. Oct. 10, 2014) (explaining that monetary damages are "'equal to the "fair" or "intrinsic" value of their stock at the time of the merger, less the price per share that they actually received'"). Thus the plan of allocation is appropriate and should be approved.

VIII. CONCLUSION

The substantial and certain monetary recovery that the Settlement will provide to the Class is a highly favorable result, and fair, reasonable, and adequate. The Plan of Allocation is a simple and straightforward method of allocating the net settlement proceeds among Class Members, consistent with how damages would be calculated at trial, and is thereby necessarily fair, reasonable, and adequate. For the foregoing reasons, Plaintiffs respectfully request that the Court approve the Settlement and Plan of Allocation.

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