UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT

GOVERNMENT OF GUAM RETIREMENT FUND, *et al.*, Plaintiff, vs. INVACARE CORPORATION, *et al.*, Defendants.	Case No. 1:13CV1165 JUDGE CHRISTOPHER A. BOYKO Date: November 19, 2015 Time: 2:00 p.m. ET Courtroom: 15B

LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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4 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 11.41 (4th ed.
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NERA, "Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review, *available at* www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115 .pdf. 8

I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Government of Guam Retirement Fund ("Guam," "GGRF" or "Lead Plaintiff") respectfully submits this memorandum of law in support of its motion for final approval of the class action Settlement, and approval of the proposed plan for allocating the Net Settlement Fund.[1]

The Settlement provides for payment of $11 million in cash by or on behalf of Defendants Invacare Corporation ("Invacare"), Gerald B. Blouch, and A. Malachi Mixon, III (collectively, "Defendants"), for the benefit of the Settlement Class.[2] The Settlement is the product of Lead Plaintiff's extensive investigation in preparation of the operative complaint, and vigorous prosecution of the litigation on behalf of the Settlement Class, including defeating Defendants' motion to dismiss and motion for judgment on the pleadings, serving and responding to discovery requests, reviewing and analyzing documents, filing a motion for class certification supported by an expert declaration, and mediation and further negotiations before an experienced and nationally-recognized mediator, Jed D. Melnick, Esq. of JAMS.

Based on his involvement in the negotiations, review and analysis of the parties' mediation submissions and in-person presentations during the mediation, extensive communications with the parties, and assessment of the risks inherent in this litigation, Mr. Melnick made a double-blind

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[1] Lead Plaintiff respectfully refers the Court to the accompanying declaration of Benjamin Galdston in support of final approval of the proposed class action Settlement ("Galdston Decl.") for a detailed description of the case and the Settlement. Unless otherwise stated or defined, all capitalized terms used herein shall have the meanings provided in the Stipulation and Agreement of Settlement dated June 2, 2015 (ECF No. 73, the "Stipulation" or the "Stip.").

[2] As certified by the Court in the August 10, 2015 Order Preliminarily Approving Proposed Settlement and Providing for Notice (ECF No. 79, the "Preliminary Approval Order"), the "Settlement Class" consists of all persons and entities who or which purchased or otherwise acquired the publicly traded common stock of Invacare between February 27, 2009, and December 7, 2011, inclusive (the "Settlement Class Period"), and were allegedly damaged thereby. Defendants and their certain related persons and entities are excluded from the definition of the Settlement Class. Also excluded are any persons and entities who or which exclude themselves by submitting a request for exclusion that is accepted by the Court.

"Mediator's Recommendation" to settle the claims for $11 million in cash, which the parties separately accepted. *See* Declaration of Mediator Jed D. Melnick, Esq. in Support of Final Approval of Class Action Settlement ("Mediator Decl." or "Melnick Decl.")), submitted herewith as Exhibit 5 to the Galdston Decl.

The terms of the Settlement are set forth in the Stipulation, ECF No. 73. In the Court's Preliminary Approval Order, the Court preliminarily approved the Settlement, certified the Settlement Class for purposes of the Settlement, and directed notice be distributed to potential members of the Settlement Class. On or about August 7, 2015, Defendants caused the $11 million Settlement Amount to be deposited into an escrow account for the benefit of the Settlement Class.[3]

While Lead Plaintiff and Lead Counsel believe that the Settlement Class has strong claims, they recognize that they would have faced significant risks in establishing all the elements of their claims. Indeed, the issues of scienter, falsity, materiality, loss causation, and damages were highly contested throughout the litigation, and would continue to be contested. The $11 million cash Settlement eliminates these risks and provides a certain and immediate cash recovery for the Settlement Class. In light of the obstacles to recovery, and the substantial time and expense that continued litigation would require, Lead Plaintiff and Lead Counsel believe that the Settlement is a very good result for the Settlement Class, and provides a fair and reasonable resolution of the claims. *See* Declaration of the Government of Guam Retirement Fund in Support of Final Approval of Class Action Settlement and Plan of Allocation and an Award of Attorneys' Fees and Reimbursement of Expenses ("Guam Decl."), attached as Exhibit 1 to Galdston Decl.

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[3] Galdston Decl. ¶6. The Court's Preliminary Approval Order approved of The Huntington National Bank ("Huntington") as the Escrow Agent. Preliminary Approval Order, ECF No. 79, ¶22. As previously explained in Lead Plaintiff's Memorandum of Law in Support of Motion for Preliminary Approval of Class Action Settlement (ECF No. 72, "Preliminary Approval Brief"), Lead Counsel has negotiated competitive and favorable terms with Huntington, and Huntington has confirmed that its trust department, which is based in Columbus, Ohio, will be maintaining and investing the funds for the Escrow Account for this Action. Huntington has successfully served as the escrow agent for numerous other class action settlements, including, for example, *In re Lehman Brothers Equity/Debt Securities Litigation*, 09-MD-2017 (S.D.N.Y.).

Lead Plaintiff also requests that the Court approve the proposed Plan of Allocation for the Settlement proceeds. The Plan of Allocation will govern how Settlement Class Members' claims will be calculated and, ultimately, how money will be distributed to valid claimants. The Plan of Allocation was prepared with the assistance of Lead Plaintiff's damages consultant and is based on the expert's event study analysis estimating the amount of artificial inflation in the prices of Invacare common stock during the Settlement Class Period. *See* Declaration of Bjorn I. Steinholt, CFA in Support of the Proposed Plan of Allocation ("Steinholt Decl."), attached as Exhibit 3 to the Galdston Decl. It is substantively the same as plans that have been approved and successfully used to allocate recoveries in other securities class actions. The Plan of Allocation is fair, reasonable and adequate and should be approved.

II. ARGUMENT

A. The Standards For Judicial Approval Of Class Action Settlements

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. The Sixth Circuit has recognized "the federal policy favoring settlement of class actions." *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.,* ("*UAW*"), 497 F.3d 615, 632 (6th Cir. 2007) (citation omitted). "[T]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." 4 Alba Conte & Herbert Newberg, Newberg on Class Actions § 11.41 (4th ed. 2002). Complex litigation, such as this, is "notoriously difficult and unpredictable." *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992).

"Being a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1008 (S.D. Ohio 2001). "Absent evidence of fraud or collusion, such settlements are not to be trifled with." *Granada Invs.*, 962 F.2d at 1205. In particular, "[t]he law generally favors and encourages settlement of class actions." *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 246 (S.D. Ohio 1991).

Pursuant to Rule 23(e), a court should approve a class action settlement if it is fair, adequate, and reasonable, and in the best interest of the class. *See UAW*, 497 F.3d at 631; *Telectronics,* 137 F. Supp. 2d at 1008; *Brotherton v. Cleveland,* 141 F. Supp. 2d 894, 903 (S.D. Ohio 2001). "[W]hile courts have discretion in determining whether to approve a proposed settlement, they should be hesitant to engage in a trial on the merits or to substitute their judgment for that of the parties who negotiated the proposed settlement." *In re Nationwide Fin. Servs. Litig.*, 2009 WL 8747486, at *2 (S.D. Ohio Aug. 19, 2009) (citing *Leonhardt v. ArvinMeritor, Inc*., 581 F. Supp. 2d 818, 831 (E.D. Mich. 2008)). "Thus, in determining the reasonableness and adequacy of a proposed settlement, the Court should ascertain whether the settlement is within a "'range of reasonableness,' . . . and in the end, the Court's determinations are no more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Id.* (quoting *Leonhardt,* 581 F. Supp. 2d at 831 and *Officers for Justice v. The Civil Serv. Comm'n of San Francisco,* 688 F.2d 615, 625 (9th Cir. 1982)).

To determine whether a proposed settlement meets the standard for final approval, courts in the Sixth Circuit look to the following factors: (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the risk of collusion; (4) the stage of the proceedings and the amount of discovery completed; (5) the judgment of experienced trial counsel; (6) the nature of the negotiations; (7) the objections raised by the class members; and (8) the public interest. *See UAW*, 497 F.3d at 631; *Teletronics*, 137 F. Supp. 2d at 1008. While Sixth Circuit courts do not always articulate these factors using this language, the above list includes the factors commonly recognized as relevant. The Court, moreover, "may choose to consider only those factors that are relevant to the settlement and may weigh particular factors according to the demands of the case." *IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 594-95 (E.D. Mich. 2006) (citing *UAW v. Ford,* 2006 WL 1984363, at *22 (E.D. Mich. July 13, 2006) (citing *Granada*, 962 F.2d at 1205-06)).

As discussed below, these factors strongly favor approval of the Settlement.

B. A Review Of The Sixth Circuit Factors Establishes That The Settlement Should Be Approved

1. The Likelihood Of Success On The Merits Supports The Settlement

One key factor that courts consider in assessing approval of a class action settlement is the plaintiff's likelihood of success on the merits, balanced against the relief offered in the settlement. *UAW,* 497 F.3d at 631 (citing *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981)).

Here, Lead Plaintiff's claims, while supported, faced considerable factual and legal challenges. Lead Plaintiff's claims are brought under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and U.S. Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5. Lead Plaintiff alleges that Defendants made numerous false and misleading statements, misrepresentations and omissions during the Settlement Class Period regarding Invacare's purported compliance with the U.S. Food, Drug, and Cosmetic Act ("FDCA"), related regulations and guidelines issued by the U.S. Food and Drug Administration ("FDA"), and current Good Manufacturing Practices ("CGMP") concerning design and manufacture of the Company's best-selling products, including manual and powered wheelchairs, homecare bed systems, and other medical devices.

If this case proceeds to trial, there is considerable risk of an unfavorable jury verdict. Lead Plaintiff would bear the burden of proving falsity, materiality, reliance, scienter, loss causation, and damages. *See In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999); *see also In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[S]ecurities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA."). Each of these issues would be vigorously contested, and would involve a "battle of the experts" from each side. The reaction of a jury to such expert testimony is highly unpredictable.

Indeed, the issues of liability, loss causation, and damages were highly contested throughout the litigation, and would continue to be contested. For example, Defendants would continue to argue that many of the alleged misstatements are only general, aspiration statements concerning Invacare's legal compliance that are contained in general risk disclosures, including

statements regarding Invacare's belief that it was compliant. Defendants would continue to argue that other misstatements are in the realm of soft information and puffery, for example, that regulatory compliance was a "high priority" and that Invacare was "currently addressing" the FDA's concerns. Although the Court denied Defendants' motion to dismiss on this basis, Defendants would continue to press this argument beyond the pleading stage. Galdston Decl. ¶61. Likewise, Defendants would continue to argue that the alleged misstatements were not material – an argument that the Court expressly reserved for the trier of fact. ECF No. 45.

Defendants would also continue to argue, and attempt to convince a jury, that they honestly believed they were addressing the FDA's concerns, and thus the element of scienter is lacking. Defendants would contend that many of the alleged misstatements constitute inactionable statements of Defendants' opinions and beliefs, including statements that Invacare "has established numerous policies and procedures that the company believes are sufficient to ensure" compliance with FDA regulations, as well as statements that Invacare "was working with the FDA" to address the agency's concerns, "had a good, active dialogue with the FDA," and was "happy with our progress" on compliance. It may be difficult for Lead Plaintiff to prove at trial, or produce sufficient evidence at the summary judgment phase, that Invacare did not implement the corrective actions Defendants said they did and that Defendants did not honestly believe they were "working with" the FDA and "addressing" the FDA's concerns based on the information that was provided to them. Defendants would likely emphasize that, as alleged in the Complaint, Invacare hired outside compliance experts and incurred $6 million in regulatory and compliance costs, in support of their purported scienter defense. Galdston Decl. ¶62.

Even assuming that Lead Plaintiff prevailed at trial in establishing material untrue statements and omissions that were made with scienter, Defendants would continue to argue that loss causation was not established. During the course of the litigation, Defendants contended that the alleged revelations were simply confirmatory of information that was already known to investors, and thus, not actionable, and that the FDA's decision to issue a Warning Letter and to sue for an injunction against Invacare constituted an independent, intervening cause of any alleged

loss. Although the Court sustained the allegations at the pleading stage, Defendants would continue to press the argument at the summary judgment, trial, and appeal stages. *Id.* ¶63.

Had any of these arguments been accepted in whole or part, it could have eliminated or, at minimum, dramatically limited any potential recovery for the Settlement Class. Further, Lead Plaintiff would have had to prevail at several stages – motions for class certification and summary judgment, trial, and if it prevailed on those, on the appeals that were likely to follow. *Id.* ¶64. The Settlement eliminates the above litigation risks and guarantees the Settlement Class a favorable and immediate cash recovery of $11 million, as opposed to the risk of potentially no recovery after further litigation, trial, and exhausting appellate rights.

Some courts also consider "the range of reasonableness of the settlement fund in light of the best possible recovery." *See Ohio Pub. Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1, 6 (N.D. Ohio Apr. 27, 1982) (quoting the Second Circuit factors required by *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)). The courts recognize, however, that "[t]he determination of a reasonable settlement 'is not susceptible of a mathematical equation yielding a particularized sum,' but turns on whether the settlement falls within a range of reasonableness." *Chavarria v. N.Y. Airport Serv., LLC*, 875 F. Supp. 2d 164, 174 (E.D.N.Y. 2012) (citation omitted). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. "In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Chavarria*, 875 F. Supp. 2d at 175 (citation omitted).

The Settlement here is well within the range of reasonableness in light of the best possible recovery and the substantial risks presented by this litigation. Lead Counsel engaged a consultant to assist in estimating potentially recoverable damages. Estimating aggregate damages can be challenging due to, among other things, assumptions that must be made regarding trading activity. Here, such estimate of potential maximum recoverable damages, assuming Lead Plaintiff prevailed on all claims as to each and every alleged misstatement against all Defendants and before taking

into account Defendants' causation arguments and other defenses, was at most approximately $118 million. However, damages may be reduced or eliminated if the jury accepted any of Defendants' arguments, including finding that a portion or all of the losses are attributable to causes other than the alleged misstatements or omissions, or that certain statements are not actionable, or that other elements are not met. For example, if Defendants prevailed on loss causation arguments, the recoverable damages could be reduced to under $6 million, or eliminated altogether.[4]

2. The Complexity, Expense, And Likely Duration Of The Litigation Supports The Settlement

The complexity, expense, and likely duration of the litigation is another factor considered in determining the fairness of a settlement. *Telectronics,* 137 F. Supp. 2d at 1013. Litigation of the claims in this case raises many complex issues, as is evidenced by the 132-page Complaint (plus exhibits); the voluminous briefing and exhibits dedicated to addressing Defendants' motion to dismiss, with additional briefing on Defendants' motion for judgment on the pleadings; and the Court's 17-page Opinion And Order denying Defendants' motion to dismiss and additional 8-page Opinion And Order denying Defendants' motion for judgment on the pleadings.

The litigation also raises a number of complex questions that required – and would continue to require – substantial efforts by all counsel, and the Court, including through complicated analysis of the factual record and the assistance of sophisticated expert testimony. Lead Plaintiff would have had to overcome numerous hurdles in order to achieve a litigated verdict in this Action.

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[4] Galdston Decl. ¶66. Even before accounting for Defendants' causation arguments and other defenses, the recovery of approximately 10% of the maximum recoverable damages is significantly higher than the 2.2% median settlement recovery as a percentage of estimated damages in securities class actions in 2014, as recently reported by Cornerstone Research. *See* Cornerstone Research, "Securities Class Action Settlements: 2014 Review and Analysis," at p. 8, Figure 7, *available at* www. cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf; *see also* NERA, "Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review, at p. 32, Figure 27 (reporting a 0.7% median settlement value as a percentage of investor losses in 2014), *available at* www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf.

Even assuming that Lead Plaintiff's claims were certified for litigation purposes, and survived summary judgment, a jury trial would have required a substantial amount of factual and expert testimony. Whatever the outcome at trial, it is virtually certain that an appeal would be taken. All of the foregoing posed considerable expense to the parties, and would have delayed the Settlement Class' potential recovery for several more years, assuming that Lead Plaintiff was ultimately successful on the claims. Accordingly, the complexity, expense, and likely duration of the litigation support approval of the Settlement as fair and reasonable.

3. The Risk Of Collusion, Nature Of Negotiations, And Judgment Of Counsel Support The Settlement

Additional factors the Sixth Circuit has directed courts to consider in evaluating class action settlements are whether the settlement is the product of arm's-length negotiations, the risk of collusion, and the judgment of experienced counsel. Without evidence to the contrary, the court may presume that settlement negotiations were conducted in good faith and that the resulting agreements were reached without collusion. *See Telectronics*, 137 F. Supp. 2d at 1016 (citing, among other sources, Herbert Newberg & Alba Contes, Newberg on Class Actions § 11.51 (3d ed. 1992) ("Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.")).

Here, Lead Plaintiff is represented by counsel with extensive experience litigating these types of claims; the Settlement was the result of intense, arm's-length negotiations; and the parties understood the strengths and weaknesses of the claims and defenses before the Settlement was reached. *See* Plaintiffs' Counsel's biographies, attached to Galdston Decl. as Exhibits 4A-4 and 4B-3; *see also Pub. Emps'. Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.*, 277 F.R.D. 97, 110 (S.D.N.Y. 2011) ("It is also beyond serious dispute that class counsel – Bernstein Litowitz Berger & Grossmann LLP – is qualified and capable of prosecuting this action."). Lead Counsel's opinion that the proposed settlement is fair to the Settlement Class "is entitled to considerable weight." *Bert v. AK Steel Corp.*, 2008 WL 4693747, at *3 (S.D. Ohio Oct. 23, 2008); *In re Inter–Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 351 (N.D. Ohio 2001) (recognizing that when a

"settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair").

Jed Melnick, Esq., an experienced mediator who oversaw the mediation and made the double-blind recommendation that the parties settle the Action for $11 million, states that the Settlement is the product of "significant disputed issues and hard-fought, arm's-length negotiations," and "represents a well-reasoned and sound resolution of the complicated and uncertain legal claims brought against Defendants." Melnick Decl. ¶¶2, 7. "The participation of an independent mediator in settlement negotiations virtually insurers that the negotiations were conducted at arm's length and without collusion between the parties." *AK Steel Corp.*, 2008 WL 4693747, at *2; *see also In re Par Pharms. Sec. Litig.*, Case No. 06-3226 (ES), slip op. (D.N.J. July 29, 2013) (granting final approval of settlement resulting from mediation with Jed Melnick); *In re Am. Apparel, Inc. Shareholder Litig.*, Case No. CV 10-06352 MMM, slip op., at *8 (C.D. Cal. July 28, 2014) (finding that fact that settlement was reached with the assistance of experienced mediator, Jed Melnick, supported final approval; granting final approval of settlement following Mr. Melnick's mediator's recommendation); *In re MRV Commc'ns, Inc. Derivative Litig.*, 2013 WL 2897874, at *5 (C.D. Cal. June 6, 2013) (approving settlement mediated by Mr. Melnick, finding that there was "every indication that the negotiations and mediation were conducted at arm's length and were in no way collusive").

4. The Stage Of The Proceedings And Amount Of Discovery Completed Support The Settlement

The stage of the proceedings and the extent of discovery is another factor which is considered in determining the fairness of the settlement. *Telectronics*, 137 F. Supp. 2d at 1015; *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 502 (E.D. Mich. 2000). Under this factor, the relevant inquiry is whether the plaintiff has obtained a sufficient understanding of the case to gauge the strengths and weaknesses of the claims and the adequacy of the settlement. *See Nationwide,* 2009 WL 8747486, at *5-6. The parties need not have engaged in extensive discovery as long as they have engaged in sufficient investigation of the facts to enable an intelligent appraisal of the

settlement. *See id.* at *5 ("[A]lthough the parties were able to negotiate the Settlement at a relatively early stage of the proceedings, all of the parties had a 'clear view of the strengths and weaknesses of their cases.'") (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985)).

Here, the successful resolution of the Action occurred after two years of litigation. As set forth in greater detail in the Galdston Declaration, Lead Counsel extensively developed the record by, among other things:

- Performing an in-depth review and analysis of (i) Invacare's public filings with the SEC; (ii) publicly available filings and reports by government law enforcement and regulatory agencies relating to investigations and legal actions concerning Invacare, including in the action captioned *United States v. Invacare Corp.*, No. 1:12-cv-03086 (DAP) (N.D. Ohio); (iii) documents and information disclosed in other litigation naming Invacare and/or its directors as defendants or nominal defendants; (iv) research reports by securities and financial analysts regarding Invacare; (v) transcripts of Invacare investor conference calls; (vi) press releases and media reports; (vii) economic analyses of the historical movement, pricing and trading data for publicly traded Invacare common stock; (viii) consultation with relevant experts; and (ix) other publicly available material and data, *see* Galdston Decl. Section II.F.1;

- Conducting a thorough investigation identifying and interviewing potential percipient witnesses, including the nine witnesses with direct knowledge as alleged in the Complaint, as well as other corroborating witnesses, *id.*;

- Drafting the detailed Complaint, including 132 pages of allegations plus 144 pages of supporting exhibits, based on Lead Counsel's extensive factual investigation and legal research into the applicable claims, *id.* Sections II.C and II.F.1;

- Preparing extensive briefing in response to Defendants' motion to dismiss, *id.* Section II.C;

- Preparing additional extensive briefing in response to Defendants' motion for judgment on the pleadings, *id.* Section II.D;

- Serving and responding to discovery, filing a motion to compel discovery, and obtaining and reviewing a substantial amount of documents, *id.* Section II.F.2;

- Drafting Lead Plaintiff's motion for class certification, supported by an expert report, *id.* Section II.G; and

- Drafting Lead Plaintiff's mediation statement, preparing for and participating in the mediation process, including a full-day mediation session held before an experienced mediator. *Id.* Section III.A.

Thus, at the time the Settlement was reached, Lead Plaintiff had obtained sufficient information to be able to intelligently assess the strengths and weaknesses of the case and appraise the settlement proposal. As a result, Lead Plaintiff had a well-informed basis for its belief that the Settlement – proposed by a well-respected and experienced mediator – is a favorable resolution for the Settlement Class, and this factor strongly supports approval of the Settlement.

5. The Reaction Of The Settlement Class Supports The Settlement

"In considering a class action settlement, the Court should also look to the reaction of the class members." *Nationwide,* 2009 WL 8747486, at *7 (citing *Olden v. Gardner*, 294 F. App'x 210, 217 (6th Cir. 2008) (unpubl.)). "The lack of significant objections is powerful evidence of the fairness of a proposed settlement." *Id.* (citing *Brotherton*, 141 F. Supp. at 906 ("[A] relatively small number of class members who object is an indication of a settlement's fairness.") (citing 2 Herbert Newberg & Alba Conte, Newberg on Class Actions, § 11.48 (3d ed.1992)); *In re Art Materials Antitrust Litig.*, 100 F.R.D. 367, 372 (N.D. Ohio 1983) (noting that the overwhelming approval of a proposed settlement by the class members "is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement")).

Pursuant to the Court's Preliminary Approval Order, the Court-approved Claims Administrator, Garden City Group, LLC ("GCG"), began mailing copies of the Court-approved Notice to potential members of the Settlement Class and their nominees on August 24, 2015 (the

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"Notice Date").[5] *See* Declaration of Jennifer M. Keough Re Notice Dissemination and Publication ("Keough Decl."), attached as Exhibit 2 to Galdston Decl.[6]

As of October 7, 2015, 21,712 copies of the Notice had been disseminated to potential Settlement Class Members and their nominees. *Id.* ¶10. In addition, the Summary Notice was published in the *Investor's Business Daily* and over the *PR Newswire* on August 27, 2015, *id.* ¶11, and the Notice and related settlement documents are available on the website specifically created for the Settlement, as well as Lead Counsel's website, *id.* ¶13. Galdston Decl. ¶69.

The Notice sets out the essential terms of the Settlement and informs potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the October 29, 2015 deadline set by the Court for Settlement Class Members to opt out or object to the Settlement has not yet passed, to date, Lead Counsel has received no objections to any aspect of the Settlement, and only two requests for exclusion, from two individuals who provide little, or no, indication that they would otherwise be Settlement Class Members.[7] If any objections are received, they will be addressed in Lead Plaintiff's reply papers to be filed on November 12, 2015.

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[5] The Court's Preliminary Approval Order approved of GCG as the Claims Administrator. Preliminary Approval Order, ECF No. 79, ¶7. As previously explained in Lead Plaintiff's Preliminary Approval Brief (ECF No. 72), Lead Counsel negotiated competitive and favorable terms with GCG, and GCG has confirmed that it will utilize the operations of its Ohio facility for this Action. GCG has successfully administered numerous complex securities class action settlements, including recently in *Plumbers' & Pipefitters' Local #562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I,* Case No. 08-cv-1713 (PKC) (E.D.N.Y.); and *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.,* Case No. 08-cv-10841 (JSR) (S.D.N.Y.), and in class actions within this District, such as *Hayman v. PricewaterhouseCoopers LLP,* Case No. 01-cv-1078 (N.D. Ohio).

[6] A copy of the Court-approved Notice disseminated to potential Settlement Class Members is attached as Exhibit A to the Keough Declaration, and incorporates the changes requested by the Court at the July 23, 2015 hearing. *See* ECF No. 78-2.

[7] Galdston Decl. ¶70 (explaining the two exclusion requests that were received after execution of the Claims Administrator's Declaration). After the October 29, 2015 deadline for submitting exclusion requests passes, Lead Plaintiff will submit to the Court, with its reply papers, the parties'

The recommendation of Lead Plaintiff, a sophisticated institutional investor, also strongly supports the fairness of the Settlement. Lead Plaintiff took an active role in supervising the litigation and the mediation process, as envisioned by the PSLRA, and Lead Plaintiff endorses the Settlement. *See* Guam Decl., attached as Exhibit 1 to Galdston Decl. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig*., 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (citation omitted).

6. The Public Interest Favors Settlement

The Supreme Court has emphasized that private securities actions, such as the instant Action, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

Here, the Settlement furthers that public policy by providing a substantial recovery to a large Settlement Class of shareholders. *See UAW*, 497 F.3d at 632 (recognizing "the federal policy favoring settlement of class actions") (citation omitted). Moreover, the Settlement promotes judicial efficiency. It resolves at once the claims of the entire Settlement Class of aggrieved shareholders, and ends this protracted and contentious litigation, avoiding further years of litigation in this Court or in the Court of Appeals.[8]

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agreed-upon form of proposed Judgment, including a list of those persons and entities seeking exclusion, for the Court's consideration.

[8] Some courts consider an additional factor where appropriate, the ability of the defendant to withstand a greater judgment. *See, e.g., Gordon v. Dadante,* 2008 WL 1805787, at *13 n.12 (N.D. Ohio Apr. 18, 2008) (citing the factors identified by the Third Circuit in granting final approval of class action settlements, including "the ability of the defendants to withstand a greater judgment")

C. The Plan Of Allocation Is Fair, Reasonable, And Adequate

The Notice contains the Plan of Allocation of settlement proceeds, detailing how the Settlement proceeds are to be divided among claiming Settlement Class Members. "Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole; the distribution plan must be fair, reasonable and adequate." *Griffin v. Flagstar Bancorp, Inc.*, 2013 WL 6511860, at *7 (E.D. Mich. Dec. 12, 2013) (quoting *Ikon Solutions*, 194 F.R.D. at 184; *In re Cardizem CD Antitrust Litig.,* 218 F.R.D. 508, 531 (E.D. Mich. 2003) (approving a plan as fair and reasonable that adopted a *pro rata* method for calculating each class member's share of the settlement fund)). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Am. Banknote Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002).

Because they tend to mirror the complaint's allegations in securities class actions, "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.*, 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007); *see also In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) (deeming plan of allocation where "claimants are to be reimbursed on a *pro rata* basis for their recognized losses

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(citing *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975)). However, those courts hold that, although the defendant may have been able to pay a judgment in excess of the settlement amount, "defendants' ability to withstand a higher judgment . . . standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001); *Parker v. Time Warner Entm't Co. L.P.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) ("The fact that a defendant is able to pay more [than] it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate".); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) ("the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair"). Here, there could be no guarantee as to the financial capability of Defendants to withstand a substantially larger judgment several years in the future at the conclusion of trial and any appeals. In any event, the fact that Defendants may have the ability to pay a greater judgment is outweighed here by the other strong considerations favoring the Settlement, most notably, the risks to the Settlement Class of establishing liability and damages and the reasonableness of the Settlement Amount in light of those risks.

based largely on when they bought and sold their shares of General Instrument stock" as "even handed").

Here, the proposed Plan of Allocation distributes the settlement proceeds on a *pro rata* basis, calculating a Claimant's relative loss proximately caused by Defendants' alleged false and misleading statements and material omissions, based on factors such as when and at what prices the Claimant purchased and sold their Invacare common stock. As explained in the Galdston Declaration and the Steinholt Declaration (Exhibit 3 to the Galdston Declaration), Lead Plaintiff engaged Caliber Advisers, Inc. to assist in developing a plan to allocate the Settlement proceeds among Claimants.

In developing the Plan of Allocation, Lead Plaintiff's expert calculated the amount of estimated alleged artificial inflation in the per share closing price of Invacare common stock which allegedly was proximately caused by Defendants' alleged false and misleading statements and material omissions. In calculating the estimated alleged artificial inflation caused by Defendants' alleged misrepresentations and omissions, Lead Plaintiff's expert considered the fraud-related price declines in Invacare's common stock price following the three alleged corrective disclosures that, according to Lead Plaintiff's allegations, revealed (at least partially) the alleged truth to the market. In doing so, Lead Plaintiff's expert performed an event study, a widely accepted methodology used to isolate the company-specific portion of a price decline after controlling for market and industry factors, and to determine whether a decline is statistically significant. *See* Steinholt Decl., Exhibit 3 to Galdston Decl.

The Plan of Allocation was detailed in the Notice. In response to over 20,000 Notices, there have been no objections, further supporting its approval.

D. Notice To The Settlement Class Satisfied The Requirements Of Rule 23, Due Process, And The PSLRA

The Notice provided to the Settlement Class satisfied the requirements of Rule 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). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable." Fed. R. Civ. P. 23(e)(1).

As noted above, in accordance with the Court's Preliminary Approval Order, as of October 7, 2015, the Claims Administrator has sent 21,712 copies of the Notice to potential Settlement Class Members and their nominees. *See* Keough Decl. ¶10. The Claims Administrator utilized several resources of data to reasonably identify Settlement Class Members. For example, pursuant to paragraph 7(a) of the Preliminary Approval Order and paragraph 19 of the Stipulation, Invacare was required to provide to GCG its lists of registered holders (consisting of names and addresses) of publicly traded common stock of Invacare who purchased during the Settlement Class Period. Invacare's counsel provided such information to Lead Counsel, who forwarded it to GCG, on July 24, 2015. Keough Decl. ¶3.

In addition, GCG sent the Notice to entities identified on a proprietary list maintained by GCG of the largest and most common U.S. banks, brokerage firms, and nominees. *Id.* ¶6. The Notice requires nominees, within seven days, to either (i) request additional copies of the Notice to send to the beneficial owner of the securities, or (ii) provide to GCG the names and addresses of such persons.

Lead Plaintiff also caused the Summary Notice to be published in the *Investor's Business Daily* and over the *PR Newswire*, and copies of the Notice were made available on a dedicated website maintained by the Claims Administrator and on Lead Counsel's website. *Id.* ¶¶11, 13; Galdston Decl. ¶69.

This combination of individual mail to all members of the Settlement Class who could be identified with reasonable effort, supplemented by notice in appropriate, widely-circulated publications, and set forth on Internet websites, was "the best notice . . . practicable under the circumstances" and satisfies the requirements of due process, Rule 23, and the PSLRA. Fed. R. Civ. P. 23(c)(2)(B); *see Fidel v. Farley,* 534 F.3d 508, 513 (6th Cir. 2008) (confirming that similar notice program comported with due process and Fed. R. Civ. P. 23).

In addition, as discussed in connection with the July 23, 2015 hearing on preliminary approval of the Settlement, Defendants have informed the Court that on June 11, 2015, Defendants had timely and properly served the Class Action Fairness Act ("CAFA") notice upon the United States Attorney General and the Attorneys General for all fifty states, the District of Columbia, American Samoa, Guam and Puerto Rico. ECF No. 80.

E. Certification Of The Settlement Class Remains Warranted

Following a preliminary approval hearing on July 23, 2015, the Court's August 10, 2015 Preliminary Approval Order granted Lead Plaintiff's motion for preliminary approval of the Settlement and preliminarily certified the Settlement Class for settlement purposes only, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. ECF Nos. 77, 79. Nothing has changed to alter the propriety of certification for settlement purposes and, for all the reasons stated in Lead Plaintiff's previously-filed memorandum of law in support of its motion for class certification and supporting expert report (ECF Nos. 67-68), in Lead Plaintiff's Preliminary Approval Brief (ECF No. 72), and the findings stated on the record at the Court's July 23, 2015 hearing, and in the Court's Preliminary Approval Order, Lead Plaintiff requests that the Court grant final certification of the Settlement Class pursuant to Rules 23(a) and (b)(3).

III. CONCLUSION

Lead Plaintiff respectfully requests that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate. Particularly in the circumstances present here – where Lead Plaintiff faced significant risks in establishing its claims and any ultimate recovery through a jury verdict would be years into the future – the $11 million certain and immediate recovery is an excellent result for the Settlement Class.

Dated: October 15, 2015

Respectfully submitted,

/s/ Benjamin Galdston

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