IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

IN RE ENDOCHOICE HOLDINGS, INC. SECURITIES LITIGATION	Civil Action File No. 2016 CV 277772 (Consolidated with Civil Action No. 2016 CV 281193) CLASS ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

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Lead plaintiffs and Court-appointed class representatives Jesse Bauer and Kenneth Raczewski ("Plaintiffs"), on behalf of themselves and the members of the certified Class[1], and without opposition from the Defendants[2], hereby bring this unopposed motion for preliminary approval of the Parties' proposed Settlement.

PRELIMINARY STATEMENT

Plaintiffs have reached an $8.5 million, all-cash settlement that represents an excellent result for the Class, and that plainly merits preliminary approval. To put this $8.5 million recovery in context, in a case predicated on alleged misstatements and omissions concerning EndoChoice's FUSE endoscopy system that were contained in the Offering Materials for the Company's June 2015 IPO, the settlement amounts to ***roughly 40% of Endochoice's total gross revenues*** ($22.75 million) from its FUSE business from the first full ***year*** after its IPO. Based on published data, the $8.5 million recovery is also more than ***twice*** as large as the average recovery in comparably sized securities class actions, when measured as a percentage of total investor losses. *See* pp. 15-16. As further discussed below, this excellent outcome was obtained despite the real risk that a far smaller recovery -- or none at all -- would have resulted had the case been litigated through the completion of fact and expert discovery, summary judgment, trial, and likely additional appeals. The conclusion that the Settlement easily merits preliminary approval is further confirmed by the fact

[1] All capitalized terms used herein, unless otherwise defined, have the same meaning as given them in the Stipulation of Settlement, dated January 30, 2020, which is attached to the accompanying Affidavit of William C. Fredericks ("Fredericks Aff.").

[2] Defendants consist of: (i) EndoChoice Holdings, Inc. ("EndoChoice" or the "Company"); (ii) current or former EndoChoice officers and/or directors Mark Gilreath, David Gill, Scott Huennekens, James Balkcom, Jr., Scott Carter, Scott Davis, David Kaufman, and Rurik Vandevenne (the "Individual Defendants" and, collectively with EndoChoice, the "EndoChoice Defendants"); and (iii) J.P. Morgan Securities LLC, Merrill Lynch, Fenner & Smith Inc., William Blair & Company, L.L.C. and Stifel, Nicolaus & Co., Inc. (collectively, the "Underwriter Defendants"). Defendants have advised Plaintiffs that they do not agree with or adopt all positions asserted by Plaintiffs in this filing, but Defendants join in the request for preliminary approval of the Settlement.

that all Parties here have been represented throughout by experienced counsel -- and that the Settlement was reached only after more than three years of litigation and arm's-length negotiations conducted under the auspices of a highly experienced mediator.

Plaintiffs also specifically request that the Court enter the Parties' [Proposed] Order Preliminarily Approving Settlement ("Preliminary Approval Order"), which is attached to the accompanying Motion (and is also Exhibit A to the Parties' Stipulation of Settlement (the "Stipulation")). Exhibits A-1, A-2 and A-3 to the Preliminary Approval Order are the Parties' proposed forms of (1) the individual notice of the Settlement (to be mailed to all Class Members who can be located with reasonable effort) (the "Notice"); (2) the Proof of Claim and Release ("Claim Form") (to be mailed with the Notice); and (3) the summary notice to be published in the national edition of the *Investor's Business Daily* and on the internet via *PR Newswire* (the "Summary Notice" and, collectively with the Notice, the "Notices"). In requesting entry of the Preliminary Approval Order, the Parties request that the Court (a) approve the form and content of the Notice, Summary Notice and related Notice Plan; (b) appoint KCC Class Action Services LLC ("KCC") as Claims Administrator to disseminate the Notices and administer the claims process; and (c) set a date for a final approval hearing (the "Settlement Fairness Hearing") to determine whether to grant *final* approval of the Settlement and Plan of Allocation, and to consider Plaintiffs' Counsel's forthcoming Fee and Expense Application and any objections or "opt-out" requests from Class Members. The Preliminary Approval Order also sets customary deadlines for the submission of "opt-out" requests, objections, and other submissions relating to final approval of the Settlement and Plaintiffs' Counsel's Fee and Expense Application.

STATEMENT OF FACTS[3]

Plaintiffs brought this class action under the federal Securities Act on behalf of those who purchased EndoChoice common stock pursuant or traceable to the Offering Materials for EndoChoice's June 5, 2015 IPO. Plaintiffs allege that the Offering Materials misrepresented the purported strength of EndoChoice's highly touted FUSE business, which manufactured and sold FUSE endoscopy systems (consisting of colonoscopes and associated electronics and imaging monitors for use by gastrointestinal physicians). In particular, Plaintiffs allege that the Offering Materials failed to disclose material adverse facts concerning: (1) the quality and reliability of FUSE, and its undisclosed manufacturing and design defects; (2) the inexperience and limited capabilities of EndoChoice's FUSE sales force; and (3) EndoChoice's lack of sufficient "demo" FUSE units (which were essential to generating increased FUSE sales and to adequately train the Company's sales force).

In the June 2015 IPO, Defendants offered 7,302,500 EndoChoice common shares at $15.00 per share to the public. By early November 2015, however, the price of those shares had fallen to $8.01, and would fall below $5.00 in 2016, as the truth concerning the nature and extent of the previously undisclosed problems with the Company's FUSE business became gradually known.

PROCEDURAL HISTORY

Plaintiffs Raczewski and Bauer each filed class actions against Defendants in the summer of 2016. In November 2016, the Court consolidated the two actions, named Bauer and Raczewski as lead plaintiffs in the resulting consolidated Action, and appointed their respective counsel, Scott+Scott Attorneys at Law LLP ("Scott+Scott") and Levi & Korsinsky, LLP ("Levi

[3] The facts recited in the Statement of Facts, Procedural History, and Negotiation of the Settlement sections that follow are also summarized in the accompanying Fredericks Affidavit.

Korsinsky") as co-lead counsel. Following further extensive factual investigative work by their counsel (which included identifying, locating and interviewing multiple former EndoChoice employees), Plaintiffs filed their Consolidated Complaint ("Complaint") on December 2, 2016.

The subsequent litigation was hard-fought throughout, as Defendants denied (and continue to deny) that they made any materially false or misleading statements, or that they otherwise caused any Class Member to suffer damages. For example, on January 17, 2017, the EndoChoice Defendants and Underwriter Defendants filed separate motions to dismiss the Complaint, together with supporting briefs, affidavits and exhibits. Plaintiffs thereafter filed equally thorough papers in opposition to Defendants' motions in February 2017, and Defendants filed reply papers in March. Following oral argument and review of the Parties' roughly 100 pages of briefing, on May 2, 2017 the Court issued a 16-page Order denying the Defendants' motions to dismiss.

Class certification was also hotly contested. After Plaintiffs moved for class certification in May 2017, and after a four-month period during which the Parties conducted extensive discovery on class certification issues (which included taking the depositions of both Plaintiffs), in November 2017 the EndoChoice and Underwriter Defendants both filed briefs and supporting papers in opposition. In response, in December 2017 Plaintiffs filed comprehensive reply papers in further support of their motion for class certification. Following oral argument in January 2018, on February 14, 2018 the Court issued a 20-page Order (the "February 2018 Order") that granted Plaintiffs' motion for class certification (except that it narrowed the certified class to exclude those who purchased EndoChoice common stock after August 3, 2016).[4]

[4] The resulting certified Class, as reflected in the Stipulation, consists of:

> [A]ll Persons who purchased shares of EndoChoice common stock pursuant or traceable to EndoChoice's Offering Materials on or before August 3, 2016, and who were damaged thereby, but excluding Defendants; the past and current officers and directors of EndoChoice and the Underwriter Defendants; the legal representatives, parents, subsidiaries, heirs, immediate family

In response, Defendants appealed the Court's February 2018 Order. The EndoChoice Defendants filed lengthy briefs in support of their Appeal, which the Underwriter Defendants adopted and incorporated, and Plaintiffs filed an equally comprehensive appellate brief in opposition. Following this full briefing and oral argument by the Parties in December 2018, the Court of Appeals affirmed this Court's February 2018 class certification Order in a published opinion. *See EndoChoice Holdings, Inc. v. Raczewski*, 830 S.E.2d 597 (Ga. Ct. App. June 28, 2019).

After the Action was remitted back to this Court from the Court of Appeals in July 2019 (thereby lifting the prior stay of discovery that had been in effect under O.C.G.A. §9-11-23(g)), Plaintiffs promptly commenced formal merits discovery by serving the EndoChoice Defendants with 64 document requests and 11 interrogatories, and by serving the Underwriter Defendants with 20 document requests and 6 interrogatories. Plaintiffs also negotiated a stipulated Case Management Order (CMO) with Defendants (entered September 24, 2019) which, *inter alia*, set a January 17, 2020 deadline for substantial completion of Defendants' document productions, as well as overall deadlines for the completion of all fact and expert discovery by early June and late August 2020, respectively. The Parties were ultimately able to reach agreement on a 6-page, single-spaced list of electronic search terms to be used to help identify relevant emails and other electronic documents ("ESI") in EndoChoice's possession, but the discovery process remained hard fought. Indeed, the Parties' vigorous litigation of disputed discovery matters included the exchange of dozens of emails and letters relating to Plaintiffs' discovery demands and Defendants'

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members, successors and assigns of any excluded Person; and any entity in which any of the above excluded Persons has or had a controlling equity interest. Also excluded will be any Person that validly requests exclusion from the Class in accordance with the procedures to be established or approved by the Court in connection with the approval of this Stipulation and the Settlement.

objections thereto, as well as the submission of certain unresolved discovery disputes to the Court, with accompanying letter briefing, in November 2019.

NEGOTIATION OF THE SETTLEMENT

In late August 2019, counsel for the EndoChoice Defendants and Class Counsel had preliminary discussions about retaining a mediator and trying to negotiate a settlement. The Parties thereafter agreed in October 2019 to retain a highly experienced mediator of complex litigation and securities class actions, Robert M. Meyer, Esq., of JAMS (the "Mediator"). However, discovery efforts continued unabated, and the CMO's deadlines remained in place.

As part of the mediation process, in November and early December 2019 each side prepared and submitted to the Mediator roughly 50 pages worth of opening and reply mediation briefs (plus voluminous exhibits). These submissions addressed both merits and damages issues, including summaries of analyses prepared by each side's respective damages experts. On December 6, 2019, all Parties participated in a full day, arm's-length and face-to-face private mediation session at JAMS's offices in New York, under the auspices of the Mediator. Fredericks Aff. ¶7.

Despite their best efforts, the Parties were unable to reach an agreement at the December 6 mediation. However, at the end of that mediation session, the Mediator made a "mediator's proposal," which proposed that Defendants settle all securities claims that were or could have been asserted in the Action for $8.5 million in cash. *Id.* Following further post-mediation communications with the Mediator, all Parties accepted the Mediator's proposal and agreed (subject to Court approval) to settle all claims for $8.5 million. On December 11, 2019, the Parties signed a Memorandum of Understanding and notified the Court of their agreement. Over the next six weeks, the Parties negotiated and prepared the customary "long form" class action Stipulation

of Settlement and related exhibits. Having completed that process, Plaintiffs are now pleased to submit the proposed Settlement to the Court for preliminary approval, so that Class Members can be given Notice of its terms (and of their rights to object or "opt-out"), and so that the Court can schedule a final approval hearing (the "Settlement Hearing") pursuant to O.C.G.A. §9-11-23.

SUMMARY OF THE TERMS OF THE SETTLEMENT

A copy of the Stipulation and its exhibits are attached to the accompanying Fredericks Affidavit. In sum, the main terms of the Settlement are as follows:

Monetary Consideration: In consideration for the Class Members' release of the "Released Claims" described below, EndoChoice will cause $8.5 million in cash (the "Settlement Amount") to be timely paid into an escrow account to be established (subject to the jurisdiction of the Court) at the Escrow Agent (Huntington National Bank). Payment shall be made within 30 calendar days of this Court's entry of the Preliminary Approval Order. Stip., ¶¶2-3.

Distribution to Class Members: The resulting Settlement Fund, less costs of notice and administration, taxes on income earned by the fund, any Court-awarded attorneys' fees and expenses (including any awards to the Plaintiffs for their service to the Class) (the "Net Settlement Fund"), will be distributed to Authorized Claimants (*i.e.,* Class Members who file timely and valid Proofs of Claim) in accord with the Plan of Allocation. Stip., ¶¶28-34. The Settlement is non-reversionary, as once it is finally approved (after any appeals or the expiration of the time period during which an appeal could be taken) no Defendant will be able to get back any of the $8.5 million Settlement consideration. *Id.* at ¶8.

Release of Claims: In exchange for the $8.5 million, Plaintiffs and the Class Members will release all of their "Released Claims" against all Defendants and their Related Parties (the "Released Defendants' Parties"). Stip., ¶¶21-23. As is customary, "Released Claims" is defined

to include all claims (including "Unknown Claims") that were or could have been asserted in the Action by Plaintiffs or the Class Members against any of the Released Defendants' Parties, provided that such claims both "(a) arise out of or relate in any way to any of the allegations, acts, transactions, facts, events, matters, occurrences, statements, representations or omissions set forth, alleged or referred to in the Action, or which could have been alleged in the Action," and "(b) arise out of or relate to the purchase, acquisition, holding, disposition or sale of any shares of EndoChoice common stock issued in or pursuant to the IPO." Stip., ¶¶1.30, 1.42.

Attorneys' Fees and Expenses: Plaintiffs' Counsel may apply to the Court for an award of attorneys' fees and reimbursement of their expenses from the Settlement Fund. Each Plaintiff may also apply for an award of up to $15,000 from the Settlement Fund for their service to the Class. Stip., ¶36. The proposed long-form Notice, at 10, further provides that copies of any Fee and Expense Application (and of Plaintiffs' Motion for Final Approval of the Settlement) shall be made available for review at www.EndoChoiceSecuritiesLitigation.com in advance of the deadline for the filing of any objections or opt-out requests.

Procedures for Class Notice: EndoChoice will make available certain customary shareholder information to the Claims Administrator to help identify potential Class Members. Stip. ¶35. The Stipulation further provides for the issuance of the individual long-form Notice and publication of the Summary Notice, as well as the establishment of the above-referenced "settlement website," all under the direction of an experienced Claims Administrator. (Notice at Response to Question 11).

Rights to Object or Opt Out: The Settlement (Stip. ¶19) provides that any Class Member may object or seek to be excluded (*i.e.* "opt out") from the Settlement as set forth in the Preliminary Approval Order (at ¶¶16-19) and the Notice (at Response to Question 19).

ARGUMENT

After weighing the Settlement's benefits to the Class against the risks and uncertainties of further litigation, Plaintiffs and their counsel believe that the proposed Settlement is fair, reasonable, and adequate to the Class, and in the Class's best interest.

I. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

The Parties seek preliminary approval of the proposed settlement pursuant to O.C.G.A. §9-11-23(e). As a matter of public policy and under both Georgia and federal law, settlement is strongly favored to resolve litigation, especially complex class actions. *Triple Eagle Assocs. v. PBK, Inc.,* 307 Ga. App. 17, 17, 704 S.E.2d 189, 191 (2010) ("settlement agreements…are highly favored under the law and will be upheld whenever possible as a means of resolving uncertainties and preventing lawsuits"); *see also In re US Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("[p]ublic policy strongly favors the pretrial settlement of class action lawsuits"); *George v. Acad. Mortgage Corp. (UT)*, 369 F. Supp. 3d 1356, 1367 (N.D. Ga. 2019) ("federal courts have long recognized a strong policy and presumption in favor of class action settlements").

A. The Standards for Preliminary Approval

O.C.G.A. §9-11-23(e) requires that class action settlements are subject to judicial approval. Such approval involves a two-step process where the Court (1) first determines if a proposed settlement merits preliminary approval, and (2) then decides, after notice is given to class members, if final approval is warranted. NEWBERG ON CLASS ACTIONS ("Newberg") §13:10 (5th ed. 2011, December 2019 update); *Ellison v. Southstar Energy Servs. LLC*, 2008-CV-147195, 2012 WL 2050514 (Fulton Super. Ct., Apr. 6, 2012) (Shoob, J.) (courts first grant preliminary

approval, and then, after notice to class members, consider granting final approval); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 985 (11th Cir. 1984); *Agnone v. Camden Cty., Ga.,* 14-CV-00024, 2019 WL 1368634 at *9 (S.D. Ga. Mar. 26, 2019). Plaintiffs now ask the Court to take the first step in the approval process by granting *preliminary* approval.

In assessing preliminary approval, the key issue is whether the proposed Settlement is "within the range" of what might be found fair, reasonable and adequate, such that the Court should give notice of the proposed Settlement to Class Members and schedule a hearing to consider final approval. *See* Newberg, §13:10 n.13; *Agnone*, 2019 WL 1368634 at *9; *see also Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 558 (N.D. Ga. 2007) (citing *Bennett*, 737 F.2d at 986) (class action settlements should be preliminarily approved where they appear to be "fair, reasonable, adequate and free of collusion").

Preliminary approval does not require the Court to make a *final* decision on the proposed Settlement's fairness, reasonableness and adequacy. Rather, that decision is made only at final approval, after the Notices have been issued and Class Members have had an opportunity to object to or opt out from the Settlement. Newberg §13:39; *In re Pool Prods. Distrib. Market Antitrust Litig.*, 310 F.R.D. 300, 314-315 (E.D. La. 2015) ("for preliminary approval of a class action settlement, the standards are not as stringent as those applied to a motion for final approval" and should be granted if there is "no reason to doubt its fairness, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, does not grant excessive compensation to attorneys, and appears to fall within the range of possible approval"); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (to warrant preliminary approval, "the settlement need only be *potentially* fair, as the Court will make a final

determination of its adequacy at the hearing on Final Approval, after [class members have] had a chance to object and/or opt out").

B. Preliminary Approval Should Be Granted

1. The Settlement Merits An Initial Presumption of Fairness Because It Is the Result of Arm's-Length Mediation Process And Negotiations by Informed and Experienced Counsel

As a threshold matter, an initial presumption that a proposed settlement is fair and reasonable attaches where, as here, it is the result of arm's length negotiations conducted under the auspices an experienced mediator. *See In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 661-62 (S.D. Fla. 2011) (citing Manual for Complex Litig. ("MCL") at §30.42 (3d. ed. 1995)); *Fresco v. Auto Data Direct, Inc.*, No. 03-CV-61063, 2007 WL 2330895 at *5 (S.D. Fla. May 14, 2007) (fact that settlement was arrived at after arm's length negotiations under auspices of mediator weighed in favor of preliminary approval); *Pool Prods.*, 310 F.R.D. at 305, 315 (involvement of "respected" mediator supported preliminary approval); *In re Viropharma Inc. Sec. Litig.,* No. CV 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) ("participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties"). *See also, e.g., Flynn v. Sientra, Inc.*, 15-CV-07548, 2017 WL 11139918, at *3 (C.D. Cal. Jan. 23, 2017) (describing the Mediator here, Robert Meyer, Esq. of JAMS, as "skilled and experienced").

Similarly, courts give a strong initial presumption of fairness to settlements that are the result of arm's-length negotiations conducted by experienced counsel. *See, e.g., Greco v. Ginn Development Co., LLC*, 635 Fed. Appx. 628, 632 (11th Cir. 2015) (in approving a settlement, "a district court may also rely upon the judgment of experienced counsel for the parties … absent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel"); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 146 (E.D. La.

2013) ("that a class action settlement is reached after arms' length negotiations by experienced counsel generally gives rise to a presumption that the settlement is fair, reasonable, and adequate"); *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 575 (S.D.N.Y. 2008) ("a class action settlement enjoys a presumption of correctness where it is the product of arm's-length negotiations conducted by experienced, capable counsel"); *see also Peevy v. Brown, et al*, No. 10-CV-180583 at 4 (Fulton Super. Ct., Apr. 5, 2011) (Bonner, J.) (approving settlement in part because it was reached after arm's length negotiation conducted by experienced counsel). Here, it is respectfully submitted that both sides were represented by experienced and capable counsel.[5]

2. The Proposed Settlement is Fair, Reasonable and Adequate under the *Bennett* Factors

Even if the Settlement were not otherwise entitled to a strong initial presumption of fairness, it would also readily merit preliminary approval under the so-called *Bennett* factors that courts in the 11th Circuit routinely consider in preliminarily assessing a proposed settlement is fair, reasonable and adequate. *See e.g. Columbus*, 258 F.R.D. 558-559 (citing *Bennett*, 737 F.2d at 986). The *Bennett* factors are: "(1) the likelihood of success at trial; (2) the range of possible recoveries; (3) the point on or below the range of possible recoveries at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and degree of any opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986. Georgia courts apply broadly similar factors. *See, e.g., Ellison*, 2012 WL 2050514 (in addition to the recommendation of experienced counsel and evidence of arm's length and good faith negotiations, relevant factors include (a) the

[5] Copies of Class Counsel's firm resumes are available at www.scott-scott.com and www.zlk.com; *see also* the Court's February 14, 2018 Order (granting class certification) at 6 ("Plaintiffs' counsel's resumes establish the firms' respective experience litigating securities class actions and demonstrate counsel is qualified, competent and capable of litigating this action on behalf of the Proposed Class").

uncertainty of success at trial, (b) the direct benefits to the class of the settlement, (c) the complexity, expense and duration of litigation, (d) the substance and degree of any opposition to the settlement, and (e) the stage of the litigation). While recognizing that such factors are subject to further review at the later final approval stage, these factors all strongly support granting preliminary approval (and issuing Notice to the Class) at this current stage of the proceedings.

i. Likelihood of Success at Trial

"Securities litigation on the whole is notoriously difficult and unpredictable" and plaintiffs "face tall hurdles in establishing the elements of their claims … and convincing the jury of liability and the amount of damages." *Billiteri v. Sec. Am., Inc.*, No. MDL 1500, 2011 WL 3586217, at *10 (N.D. Tex. Aug. 4, 2011). This Action was no exception.

As a threshold matter, this case involved technical issues concerning the nature and extent of alleged design and manufacture defects with EndoChoice's novel FUSE endoscope and related imaging systems. Whether these allegedly undisclosed defects were materially worse than what would have been expected by investors in a medical device incorporating novel innovations (such as the FUSE) would have necessarily involved complex, dueling expert witness testimony.

Moreover, Defendants argued that the IPO Offering Materials had disclosed that the FUSE system had suffered from at least some problems in the past, and that such disclosures immunized Defendants from liability for "forward-looking representations" or "projections" under the so-called "bespeaks caution" doctrine. While vigorously denying that the Offering Materials suffered from any actionable omissions, Defendants also argued that none of the Offering Materials' affirmative statements that purported to describe the quality of the FUSE product were actionable, on the grounds that they amounted to no more than immaterial "puffery."

In addition, although Plaintiffs alleged that EndoChoice's FUSE product and business suffered from various undisclosed problems as of the June 2015 IPO, Defendants argued that most

of these problems (even if they were material) only emerged *after* the IPO (and that therefore Defendants could not be held liable for "failing to predict" in the Offering Materials that certain problems would arise in the future as later generations of the FUSE product were sold in the post-IPO period). Relatedly, Defendants also argued that certain of their allegedly misleading statements were mere optimistic expressions of "opinion," and hence shielded from liability under the judicially-created "opinion doctrine." Defendants also cited to evidence that, despite the alleged problems in the Company's business, EndoChoice had nonetheless met all of the stated revenue growth expectations that had been included in the Offering Materials, and that to the extent that FUSE's performance ultimately disappointed analysts, that under-performance was due to factors unrelated to the product defects alleged by Plaintiffs.

As for Plaintiffs allegations that the Offering Materials failed to adequately disclose serious weaknesses in EndoChoice's salesforce, Defendants were expected to argue that the Offering Materials adequately disclosed the nature of the challenges that the Company faced in building a sales staff that was capable of generating strong FUSE sales. And in its motion to dismiss opinion, the Court itself had already agreed that the Offering Materials' affirmative statements concerning the alleged quality and experience of EndoChoice's salesforce were inactionable "puffery," thereby potentially diminishing the scope of the alleged wrongful conduct that Plaintiffs could present to a jury.

The Individual EndoChoice Defendants and the Underwriter Defendants also argued that, even if the Offering Materials contained any actionable misstatements or omissions that were material, they would be able to avoid any liability on the grounds that they conducted adequate "due diligence" into the bases for the Offering Materials, and that such due diligence did not put them on notice of any of the alleged disclosure violations claimed by Plaintiffs. And all

Defendants also argued that, even if Plaintiffs could show material omissions in the Offering Materials, SEC regulations still required Plaintiffs to prove that the omission involved a material "event, trend or uncertainty" that was known to the Company's management.

Plaintiffs believed that they would have grounds for defeating Defendants' various arguments and defenses. However, success at summary judgment and at trial would have been inherently uncertain, involving complicated fact issues and persuading a jury to agree with Plaintiffs' and their experts' view of events over the competing views and testimony of the Defendants' fact and expert witnesses (who would have downplayed any alleged problems and argued that, even if they existed to some degree, such problems were not responsible for FUSE's failure to generate hoped-for increases in revenue and profits). In such circumstances, and as further described below, Plaintiffs respectfully submit that the proposed $8.5 million Settlement represents a very significant "bird in the hand" that merits preliminary approval.

ii. Benefit to the Class and the Range of Possible Recoveries

The $8.5 million recovery here represents a concrete and substantial all-cash benefit to the Class. To put the proposed Settlement in context, in a case predicated on alleged misstatements and omissions concerning EndoChoice's FUSE endoscopy system contained in its IPO Offering Materials, the Settlement is roughly equal to 40% of EndoChoice's ***total gross revenues*** (of $22.75 million) from its FUSE business for the entire ***year*** after its IPO.[6] Moreover, if one considers the $8.5 million recovery in terms of the percentage of total investor losses, published data shows that – in securities class actions (as here) that involve total investor ***losses*** in the range of $50 million to $99 million – settlements have historically (for the period 1996-2017) averaged 4.7% of total

[6] *See* EndoChoice 10-Q for 2Q 2016 filed August 3, 2016, at 20.

investor losses.[7] Here, Plaintiffs' expert estimated that total investor losses were roughly $80 million, meaning that the $8.5 million recovery (or roughly ***10.5%*** of total investor losses) is ***more than twice*** the average recovery (as a percentage of total investor losses) than has historically been obtained in comparably-sized securities cases. Of course, investor *losses* are not the same as recoverable *damages* – and accordingly the Settlement here represents a significantly greater recovery if viewed as a percentage of maximum reasonably recoverable damages. For example, Defendants argued that recoverable damages were no more than $21 million at most (and likely less), even if Plaintiffs succeeded in proving liability on all of their claims.

Given that securities claims are notoriously complex and difficult to prove (*see, e.g., Billiteri*, 2011 WL 3586217 at *10), and the very real risk that Plaintiffs and the Class might recover substantially less – or nothing at all – if they litigated this case through trial and (further) appeals, the "benefit to the class" factor strongly supports granting preliminary approval of the proposed $8.5 million Settlement here. *See, e.g., Columbus*, 258 F.R.D. at 559 (complexity of case and contingency of final recovery supported finding that proposed settlement was "within the range of possible recoveries").

iii. The Point on or Below the Range of Possible Recovery at which a Settlement is Fair, Reasonable and Adequate

To determine whether the settlement falls at a point within (or below) the range of possible recovery which is fair, reasonable and adequate, courts look to the potential recovery at trial. *Columbus*, 258 F.R.D. at 559. As noted above, a settlement that recovered only ***half*** of the $8.5 million recovered here would still be better than the average recovery in a comparably sized securities action, when measured as a percentage of total investor losses recovered. *A fortiori,* the

[7] *See* S. Boettrich & S. Starykh, "Recent Trends in Securities Class Action Litigation: 2017 Full Year Review (NERA Economic Consulting, Jan. 29 2018), at 37.

proposed Settlement is not merely "within the range" of approvability, but represents a decidedly excellent result for the Class. *Compare, e.g., Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 345-346 (N.D. Tex. 2011) (approving securities class action settlement representing recovery of 2%-3% of losses); *Pool Prods.*, 310 F.R.D. at 316-317 (approving $600,000 antitrust settlement that represented only 2.6% of maximum possible recovery of roughly $23 million, as it was within "range of reasonable[ness]"). Accordingly, this factor also strongly supports preliminary approval.

iv. Expense, Complexity and Duration of Further Litigation

Courts consistently consider the complexity, expense, and likely duration of further litigation in evaluating a settlement's reasonableness, especially in the securities class action context. *See, e.g.*, *In re AOL Time Warner, Inc.,* No. MDL 1500, 02-CV-5575, 2006 WL 903236 at *8 (S.D.N.Y. Apr. 6, 2006) (securities actions are "notorious" for their complexity, and stressing that their settlement avoids "the difficulty and uncertainty inherent in long, costly trials").

As noted above, this case was both factually and legally complex. Moreover, continued litigation through expert discovery, summary judgment, trial, post-judgment motions and appeals would almost certainly take years before a final judgment (assuming Plaintiffs prevailed) could be obtained for the benefit of the Class. *See, e.g.*, *Billitteri*, 2011 WL 3586217 at *10 (litigation through summary judgment and appeals would take "years"). By contrast, the proposed Settlement ensures a significant recovery now, while eliminating the risk of a lesser recovery (or none at all) after additional years of further complex and expensive litigation. This factor therefore also strongly supports preliminary approval.

v. The Substance and Extent of Opposition to the Settlement

Plaintiffs are unaware of any potential objectors, but note that the extent of the opposition (if any) to a settlement is typically assessed only after preliminary approval has been granted and

notice to Class members has been issued. *Columbus*, 258 F.R.D. at 560. Accordingly, if anything this factor further supports preliminary approval, so that Class members can have the opportunity to weigh in for themselves on whether the Settlement should be finally approved.

vi. The Stage of Proceedings at Which Settlement was Achieved

At the time the Settlement was reached, Class Counsel had a strong understanding of the strengths and weaknesses of the claims at issue, both in terms of the merits and potentially recoverable damages. *See, e.g., McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 430-431 (E.D. Tex. 2002) (preliminary approval warranted where diligent counsel had "pursued [their] case[s] with vigor and determination" and knew "the facts and law relevant to this case" at the time they negotiated the settlement).

For example, as reflected by their highly detailed Complaint, Class Counsel conducted a thorough pre-filing investigation into the facts underlying Plaintiffs' claims. That investigation included, *inter alia,* (1) reviewing all of EndoChoice's public regulatory filings with the SEC, including the drafts of its Offering Materials and its subsequent quarterly and annual financial reports; (2) collecting and reviewing the publicly available transcripts of the conference calls that EndoChoice's senior executives conducted with various Wall Street analysts; (3) collecting and reviewing publicly available news stories about EndoChoice; and (4) assembling and carefully analyzing the numerous (and often highly detailed) reports issued about EndoChoice by multiple Wall Street analysts. In addition, Class Counsel's in-house investigators spent considerable time identifying, locating and interviewing multiple former EndoChoice employees, whose comments were of particular help in framing the issues and in assessing the strengths and weaknesses of Plaintiffs' claims. Accordingly, even though formal fact discovery did not commence until the summer of 2019, by that time Class Counsel already had a strong grasp of the case's strengths and

weaknesses. And as, for example, they obtained the identities of additional former EndoChoice employees in the course of formal merits discovery, Class Counsel, even without deposing them, were able to collect significant additional information from multiple witnesses from confidential interviews they conducted as late as the week before the December mediation.

There can also be no serious dispute that the Parties for both sides also fully understood the relevant legal issues, which were hotly contested throughout. For example, all Parties prepared extensive briefing on (and delivered oral argument to the Court on) the Defendants' two Motions to Dismiss. The Parties' competing positions on class certification were also fully briefed and argued before both this Court and the Court of Appeals (which finally resolved the relevant issues in a published opinion). Moreover, the Parties also had occasion to thoroughly review and re-assess each other's positions as part of the process of exchanging multiple rounds of detailed mediation briefs (and accompanying exhibits) in advance of the full-day, face-to-face mediation session in December 2019 before the Mediator. As part of the mediation process, each side also consulted extensively with their retained experts on damages and loss causation, and exchanged summaries of their respective analyses.

In short, Lead Plaintiffs and their experienced counsel had more than a sufficient understanding of the strengths and weaknesses of the claims before entering into the Settlement, and the "stage of the litigation" factor thus provides further support for granting preliminary approval. *See. e.g., Pool Prods.*, 310 F.R.D. at 315 (settlement favored where litigation had gone on for three years); *Fresco*, 2007 WL 2330895 at *6 (settlement favored where litigation had gone on for four years, parties had engaged in "[v]igorous and contentious motion practice", and counsel unanimously supported the settlement).

vii. Summary

When weighed against the substantial risks of further litigation, and taking into account all other relevant factors, the proposed Settlement falls well within "range of reasonableness" that merits issuance of Notice to the Class, and should be preliminarily approved.

C. The Plan of Allocation Should Also Be Preliminarily Approved

The proposed Plan of Allocation ("POA") for distributing the proceeds of the Net Settlement Fund is included at pp. 12-16 of the proposed Notice (*see* Exhibit A-1 to Preliminary Approval Order), and was prepared with the assistance of Class Counsel's damages expert. The amount of a Class Member's distribution from the Net Settlement Fund under the POA depends on whether and to what extent that that Class Member has a "Recognized Loss" on their EndoChoice transactions. The calculation of "Recognized Loss" depends on several factors, and especially on (a) when the Class Member purchased their EndoChoice shares, and (b) and when they sold them (or if they held them through the end of the Class Period). The POA takes into account the damages that Class Counsel and their expert believe could have been shown at trial.

In short, because the POA is based upon Plaintiffs' theories of the case and reflects the fact that the strength of a given Class Member's claims depends on the timing of their purchases and sales, the POA merits preliminary approval and submission to Class Members for comments (if any). *See, e.g, In re Skilled Healthcare Group, Inc., Sec. Litig.,* No. CV 09-5416-DOC, 2011 WL 280991, *4 (C.D. Cal. Jan. 26, 2011) (plan of allocation approved where it reflected timing of securities transactions and allocated more of settlement to class members with stronger claims on the merits); *In re Am. Bank Note Holographics, Inc. Sec. L*itig., 127 F. Supp. 2d 418, 429-30

(S.D.N.Y. 2001) ("[a]n allocation formula need only have a reasonable, rational basis [to warrant approval], particularly if recommended by experienced and competent class counsel").

D. The Proposed Forms and Method of Providing Notice to the Class Are Appropriate and Satisfy O.C.G.A. §9-11-23(e) and Due Process

O.C.G.A. §9-11-23(e) requires that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Similarly, in federal court, Fed. R. Civ. P 23(e) provides that a class action may only be dismissed or compromised with judicial approval, after issuance of appropriate notice to the Class. Where practicable, individual notice to class members is favored by Georgia courts. *See Ellison*, 2012 WL 2050514 (approving notice procedure under which class members were sent copies of the notice and proof of claim by mail at their last-known addresses); *Clark v. Bway Holding Co., et al*, No. 2010-CV-183869 at 2-3, 5 (Fulton Super. Ct., Nov. 10, 2010) (Bonner, J.) (same)

Here, as in *Ellison,* the Parties propose to deliver individualized notice by first class mail by sending copies of the Notice and the Proof of Claim form (Exhs. A-1 and A-2 to the [Proposed] Preliminary Approval Order), to all Class Members who can be identified with reasonable effort, as well as to brokerage firms and others who regularly act as nominees for beneficial purchasers of stock.

Here, the Parties have drafted the proposed Notice Plan to try to provide the best notice practicable to the Class, and respectfully submit that the forms of Notice and the Summary Notice, annexed as Exhs. A-1 and A-3 to the [Proposed] Preliminary Approval Order, are appropriate in all respects. For example, as required by O.C.G.A. §9-11-23(c)(2), the Notice will inform Class Members of the claims alleged in the Action, of the terms of the Proposed Settlement, and of their rights as Class Members to either (a) opt out or (b) object to the Settlement, Plan of Allocation and/or the proposed award of attorneys' fees and expenses. *Compare Churchill Village, L.L.C. v.*

Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) (applying analogous provisions of Fed. R. Civ. P. 23(c)(2) and finding notice satisfactory where it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard"); *Fresco*, 2007 WL 2330895 at *8 (long form and summary notices adequate where "they concisely and clearly state, in plain, easily understood language, the nature of the action; the definition of the class certified; the class claims, issues, and defenses; that a class member may enter an appearance through counsel if the member so desires; and the binding effect of a class judgment on class members"); *McNamara*, 214 F.R.D. at 432 (notice satisfactory if it "provide[s] potential class members with the information necessary to make an informed decision on whether to opt out of the class").

In conformity with these authorities, the Notice sets forth in plain, easily understandable language (a) the nature of the action and the claims at issue; (b) the definition of the Class; (c) Class Members' rights to be excluded and how to exercise those rights; (c) Class Members' rights to object to the proposed Settlement, Plan of Allocation, the Fee and Expense Application, or any other matter relating to the Settlement; and (d) the time, date, and location of the Settlement Hearing. Indeed, the Notice goes beyond these requirements by also providing, *inter alia*, a statement of (a) the estimated average recovery per damaged share; (b) the estimated average cost per damaged share of requested attorneys' fees and expenses and costs of notice and claims administration; (c) the amount of attorneys' fees and expenses sought; (d) how to contact Class Counsel with any questions; and (e) the reasons for the proposed Settlement and the factors that Plaintiffs considered in reaching it.

In addition, the proposed Summary Notice (Ex. A-3 to the proposed Preliminary Approval Order) will be published in *PR Newswire* and in the print edition of *Investor's Business Daily.*

Publication notice through such vehicles is routinely approved. *See, e.g., In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F.Supp.2d 1178, 1202 (D.N.M. 2012) (approving publication notice through *Investors' Business Daily* and *PR Newswire*); *In re Skilled Healthcare,* 2011 WL 280991, at *1 (same). Moreover, both the individual Notice and Summary Notice will refer Class Members to a dedicated settlement website, www.EndochoiceSecuritiesLitigation.com, where they can access additional information about the case, including important case filings.

In sum, the proposed Notice Plan should be approved. *See, e.g., Pool Prods.*, 310 F.R.D. 317-318 (approving notice by mail and both print- and web-publication sufficient).

E. Appointment of KCC as Claims Administrator

Plaintiffs, having reviewed the bids and considered the experience of three different firms, also request that the Court appoint KCC as Claims Administrator. As such, KCC will be responsible for, *inter alia,* mailing the Notice to Class Members, processing Proofs of Claim, and otherwise administering the Settlement.

II. THE PARTIES' PROPOSED SCHEDULE FOR HOLDING A FINAL FAIRNESS HEARING AND SETTING RELEVANT DEADLINES SHOULD BE APPROVED

If preliminary approval is granted, the Parties request that the final Settlement Fairness Hearing be set on a date falling on or after 100 days from the date of the entry of the Preliminary Approval Order. Such a date would be sufficiently far in the future to allow time for the dissemination of the Notice and for Class Members to decide whether to participate in, opt out of, or raise any objections with regard to the proposed Settlement, while not unduly delaying the Settlement Hearing into the summer.[8]

[8] For example, if the Court were to enter the [Proposed] Preliminary Approval Order by February 21, 2020, Plaintiffs would request that the Court schedule the final Settlement Hearing in late May or early June.

The date of any Settlement Fairness Hearing that is scheduled should be inserted at page 2, ¶2 of the [Proposed] Preliminary Approval Order (if it otherwise meets with the Court's approval). No other dates need be inserted in that Order, as all other dates and deadlines that would be established under the Order can be calculated from either (a) the date of the entry of the Preliminary Approval Order, or (b) the date of the Settlement Fairness Hearing.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter the Parties' [Proposed] Preliminary Approval Order.

DATED: February 4, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT to be filed with the Clerk of Court through the Odyssey eFileGA system and served a true and correct copy of the same by electronic mail upon the following:

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This 4th day of February, 2020.

/s/ David A. Bain
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