Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

FACTUM OF THE UNDERWRITERS
(Opposing CannTrust's Motion for Plan Filing and Meeting Order, returnable March 19, 2021)

March 18, 2021

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PART I – INTRODUCTION

1. The Underwriters[1] file this factum in opposition to the motion of CannTrust Holdings Inc. and related companies (collectively, "**CannTrust**") for an order accepting CannTrust's filing of its plan of compromise, arrangement and reorganization (the "**Plan**") and authorizing and directing CannTrust to call, hold and conduct meetings of their creditors to vote on its Plan (the "**Plan Filing Order**").

2. Courts have consistently refused to be engaged by a debtor as a means to dispense with necessary negotiations and to ignore the legitimate rights and interests of the debtors' creditors. It is not the role of the court to excuse a debtor from the work of hard bargaining. The CCAA[2] is a tool to effect compromises and arrangements, not unilateral confiscations. It is a tool intended to balance interests, not disregard them.

3. Courts have also consistently declared that they will not facilitate wasted time and resources in the pursuit of a plan that is fundamentally deficient. While motions for a plan filing order are often uncontroversial – being largely administrative and procedural steps – courts have held that a plan filing order should not be granted in any of three circumstances:

(a) where the plan has no reasonable chance of being sanctioned by the court at a later date because of its being unlawful and/or fundamentally unfair;

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[1] Merrill Lynch Canada Inc., Merrill Lynch Pierce, Fenner & Smith, Inc., Citigroup Global Markets Canada Inc., Citigroup Global Markets Inc., Credit Suisse Securities (Canada) Inc., Credit Suisse Securities (USA) LLC, RBC Dominion Securities Inc., Jefferies LLC, Canaccord Genuity LLC (collectively, the "**Underwriters**").
[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

(b) where creditors affected by the Plan are denied their right to vote on the plan; and/or

(c) where the plan is rushed and negotiations between affected parties have not properly been concluded, thereby leaving significant issues unaddressed.

All three of these circumstances exist in the present case, though any one of them would be grounds to refuse the filing of CannTrust's Plan.

4. As discussed below, the chief objections to the motion are as follows:

Plan Deficiency	**Grounds**
1. It is apparent that the Amended Plan is incapable of being sanctioned at a later date.	• The Plan by its terms contravenes the CCAA, including: ○ It does not pay unsecured claims in full before paying equity claims – CCAA s. 6(8) expressly prohibits the court from approving such a Plan. ○ The Plan attempts an unlawful end-run around D&O claims that CCAA s. 5.1(2) provides cannot be released (*i.e.*, the Plan provides a permanent injunction that has the same effect as a release). ○ The Plan ignores CCAA s. 19(2) re: claims that cannot be released. ○ The Plan disregards the Underwriters' provable claim as provided in CCAA s. 32(7). • The Plan treats equity claimants in four fundamentally different ways: (i) some equity claimants (*i.e.*, shareholders / plaintiffs) recover virtually all available value of the company; (ii) some equity claimants (*i.e.*, CannTrust intercompany claims) are unaffected by the Plan and not compromised or released; (iii) some equity claimants (*i.e.*, favoured D&Os) get full releases in exchange for giving up their claims; and (iv) some equity claims (*i.e.*, non-settling co-defendants, including the Underwriters) get no recovery, no vote, are denied the benefit of any releases and have their claims unilaterally confiscated and released.

Plan Deficiency	**Grounds**
	• The law requires that all creditors of a particular class must receive the same or substantially the same treatment. The Plan by its terms is unlawful in that it contravenes: (i) the CCAA, (ii) the *pari passu* principle (held by our courts to be the most important principle of insolvency law in Canada) and (iii) restrictions against preferences. • The Plan by its terms does not provide non-settling co-defendants with standard rights that are required in such cases in all Canadian and U.S. class action proceedings (*e.g.*, document preservation, access to evidence / witnesses of settling defendants, etc.). • The conditions precedent to the Plan require the Court to issue orders, the substance of which are not within the jurisdiction of the Court to grant (including to re-write by court order the provisions of the Underwriting Agreement (defined below)). • The Plan denies the Underwriters procedural fairness in respect of a determination of its claims, as discussed in point 2 below.
2. The Amended Plan denies affected creditors the right to vote.	• The Plan ignores that the Underwriters filed a Proof of Claim alleging unsecured claims – those claims have not been disallowed and no determination of the claims has been made. The Underwriters have been denied due process; namely, the right to respond to any disallowance of their claims, to adjudicate same, and to vote their allowed claims. • CannTrust has not adhered to the Claims Procedure Order (defined below). • The Underwriters are entitled: (i) to vote and to recover on their unsecured claims in priority to the shareholders' equity claims; and (ii) to vote and be treated comparably with the favoured equity claimants in respect of *pari passu* equity claims.

Plan Deficiency	**Grounds**
3. The Amended Plan is rushed and an ongoing negotiation tactic.	• There has been a failure to settle with any party other than the plaintiffs (*i.e.*, a bilateral settlement, whereas the stated objectives of these proceedings and of the mediation is a multi-party global resolution of claims). • The springing release mechanism built into the Plan to coerce and encourage further settlements between now and the meeting date attests to ongoing negotiations, as does CannTrust's further filing of an amended Plan that is still clearly incomplete and under negotiation. • CannTrust has failed to meet its obligation under the Underwriting Agreement not to settle the Securities Litigation without also providing the Underwriters with a full, unconditional release in respect of that litigation (which is separate and distinct from CannTrust's indemnity obligations). • The Plan is proceeding prior to a determination of the Underwriters' claims and the claims of other non-settling co-defendants. CannTrust has not even resolved the shareholder claims it purports to be settling – those claims have yet to be proven and valued. • The company acknowledges that it has achieved all of its business objectives in filing for CCAA protection and is now operating, with revenue that is growing exponentially. The company has no material secured or unsecured claims except for litigation claims that are stayed. It is sitting on a pile of cash to be distributed and there is no urgency to allocate that cash among equity claimants or to make an immediate distribution.

5. This Court should insist – as judges such as Justices Morawetz, Newbould, Farley, Blair and Tysoe have done previously in comparable circumstances – that CannTrust engage in renewed good faith negotiations that allow the parties to exhaust reasonable avenues that lead to the multi-party, global settlement of claims that CannTrust has paid only lip-service to.

Accordingly, the Underwriters respectfully request that this Court dismiss CannTrust's motion for its Plan Filing Order.

PART II – THE FACTS

A. The Underwriters' Relationship with CannTrust

6. The Underwriters are financial institutions engaged in investment banking and other capital markets activities who agreed pursuant to an Underwriting Agreement dated May 1, 2019 (the "**Underwriting Agreement**"), to purchase and facilitate the sale of common shares of CannTrust Holdings Inc., which were offered to the public in May 2019 (the "**Offering**").[3]

7. Pursuant to the terms of the Underwriting Agreement, CannTrust agreed:

   (a) to <u>indemnify the Underwriters</u> for all losses related to allegations of untrue statements included in the prospectus in respect of the Offering;[4] and

   (b) that it would not settle or compromise any litigation or other claim against it in respect of which indemnification or contribution could be sought by the Underwriters, without the Underwriters' consent or <u>including an unconditional release in favour of the Underwriters</u> (the "**Settlement Covenant**").[5]

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[3] Underwriting Agreement, Exhibit A to the Affidavit of Shoshana Israel, sworn March 11, 2021 (the "**Israel Affidavit**"), Responding Motion Record of the Underwriters, dated March 11, 2021 ("**Underwriters' Record**"), Tab 1, p 1.
[4] Underwriting Agreement, s 7(a), Exhibit A to the Israel Affidavit, Underwriters' Record, p 32.
[5] Underwriting Agreement, s 7(d), Exhibit A to the Israel Affidavit, Underwriters' Record, p 32.

CannTrust has acknowledged the validity and enforceability of these rights, by paying Underwriter defence cost pre-CCAA and as admitted by Mr, Guyatt.[6] Mr. Guyatt also admitted that the company did not ask for the Underwriters' consent.[7]

B. CannTrust's alleged dishonesty results in the Underwriters' Claims

8. CannTrust's alleged conduct is well documented, including in the materials filed by CannTrust in the within proceedings.[8] As a result, numerous lawsuits were commenced against CannTrust, including 8 putative class actions in Canada and 5 putative class actions in the United States (the "**Securities Litigation**").[9] Three of those lawsuits against CannTrust – one in Ontario and two in the United States – name the Underwriters as defendants (none of the claims in these lawsuits have been proven or are admitted by the Underwriters) (collectively, the "**Underwriter Litigation**").[10]

9. The Underwriters maintain, in addition to the specific legal arguments they make in defence of these claims, that their robust due diligence is a complete defence to the claims asserted against them both in Canada and the United States.

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[6] Transcript of the Cross-Examination of Greg Guyatt, held March 17, 2021 ("**Guyatt Transcript**"), pp. 115 and 116.
[7] Guyatt Transcript, p 124.
[8] Affidavit of Greg Guyatt, sworn March 5, 2021, para 5, ("**Guyatt Affidavit**"), Motion Record of the Applicants, dated March 5, 2021 ("**Applicants' Record**"), Tab 2, p 11.
[9] Guyatt Affidavit, para 35, Applicants' Record, p 28.
[10] *Hrusa et al. v. CannTrust Holdings Inc. et al.*, Court File No. CV-19-00623567-00CP (ON SC); *Owens v. CannTrust Holdings Inc. et al.*, Court File No. 19CV352374 (California Superior Court, Santa Clara County); *In re CannTrust Holdings Inc. Securities Litigation*, 1:19-cv-06396-JPO.

10. In accordance with the claims procedure order granted by this Court on May 8, 2020 (the "**Claims Procedure Order**"), the Underwriters submitted proofs of claim dated June 22, 2020 – approximately 9 months ago – for amounts of CAD$302,923.92 and USD$230,356,274.61 for, among other things (collectively, the "**Underwriters' Claims**"):

(a) claims for contractual, statutory and common law rights of indemnity, contribution, set-off and liability arising from the Underwriters' commercial relations with CannTrust, including pursuant to the indemnity provisions of the Underwriting Agreement;

(b) breach of contract and negligent misrepresentation in connection with the Offering of CannTrust Holdings Inc. common shares and the Underwriting Agreement; and

(c) amounts incurred in respect of lawyers' fees and disbursements arising from the Underwriter Litigation.[11]

11. To be clear, the Underwriters' Claims include unsecured claims that are not "equity claims" as defined in the CCAA, including claims in respect of post-filing breach by CannTrust of the Settlement Covenant (which claim is separate and distinct from the Underwriters' indemnity claims) and claims on account of past and future out-of-pocket defence costs.

12. CannTrust has denied the Underwriters procedural fairness with respect to a determination of these claims. Without limitation, no notice of disallowance, in full or in part,

[11] Underwriters' Proofs of Claim, submitted June 22, 2020, Schedule "A", ss 11 and 12, Exhibits D and E to the Israel Affidavit, Underwriters' Record, pp 67-68 and 111-112.

has been provided to the Underwriters. CannTrust has wholly disregarded and ignored the Underwriters' Claims.

13. The most recent version of the Plan has now purported to treat certain defence costs as unsecured claims that are Unaffected Claims (as defined in the Plan) but effectively re-writes the Underwriting Agreement (which Mr. Guyatt has admitted is valid and enforceable[12]), including to limit such claims – contrary to the Underwriting Agreement – to defence costs that are only payable: (i) upon the conclusion of the Underwriter Litigation (rather than periodic payments); and (ii) if the Underwriters are "successful" in defending the litigation.

C. CannTrust's Plan completely disregards the Underwriters' interests

14. Even as amended, CannTrust's Plan demonstrates a complete disregard for the Underwriters' rights and interests. Pursuant to its terms, the Plan would <u>extinguish or fundamentally alter the Underwriters' Claims in their entirety, without consideration and without a right to vote</u>.[13]

15. Furthermore, CannTrust's Plan does not provide for a release of any part of the claims made against the Underwriters in the Underwriter Litigation, to which the Underwriters are entitled under the Underwriting Agreement. Instead, this important agreement has been flipped on its head, such that the consent of the "RSA Parties" (which includes the plaintiffs to the

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[12] Guyatt Transcript, p 115 and 116.
[13] Amended Plan, ss 3.2 and 3.8, Exhibit A to the affidavit of Greg Guyatt, sworn March 13, 2021 (the "**Supplementary Guyatt Affidavit**"), Supplementary Motion Record of the Applicants, dated March 13, 2021 ("**Supplementary Record**"), Tab 1, pp 24, 27.

Underwriter Litigation) is required to approve the Underwriters' being added to the Plan and obtaining any benefits thereunder.

16. Finally, the Plan fails to include many of the terms typically included in multi-party litigation settlements. In recognition of the deficiencies in their Plan, CannTrust filed a Supplementary Motion Record with an amended CCAA Plan, ostensibly to reflect feedback received from stakeholders since the motion record was served.[14] While the amendments attempt to correct certain of these deficiencies, many remain. The absence of these terms would unduly prejudice the Underwriters, as well as the other non-settling defendants.

PART III – THE ISSUES

17. The issues before this Court for determination are whether CannTrust's motion should be dismissed because:

(a) there is no reasonable basis upon which this Court may find that the Plan is capable of being sanctioned by this Court at a later date by reason of it being unlawful and fundamentally unfair;

(b) the Plan denies the Underwriters, whose claims are affected by the Plan, their right to vote and due process and to receive consideration in respect of the release of their rights and interests; and/or

(c) the Plan is rushed and otherwise part of an ongoing negotiation that ought to be concluded prior to proceeding with a plan.

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[14] Supplementary Guyatt Affidavit, para 5, Supplementary Record, p 2.

18. The Underwriters submit that each of these issues is sufficient for the Court to dismiss CannTrust's motion.

PART IV – THE LAW

A. The Plan cannot be sanctioned by this Court in its current form because it is unlawful and fundamentally unfair

19. CannTrust's Plan cannot be sanctioned in its current form. Among its myriad fundamental deficiencies, it fails to comply with the CCAA and is fundamentally flawed. There is no reasonable chance that the Plan will successfully be sanctioned at an eventual sanction hearing, and allowing CannTrust to call and hold creditor meetings would only result in a waste of time and money for all stakeholders and postpone an inevitable result.

20. Justice Farley recognized that it is "fruitless to proceed with a plan that is doomed to failure at a further stage."[15] This principle is regularly applied by the courts, and has been affirmed by the Ontario Court of Appeal.[16] More recently, Regional Senior Justice Morawetz (as he then was) held in *Target Canada Co., Re*, that it is imperative for courts to refuse to permit a debtor to waste time and money calling creditor meetings and chasing a doomed plan.[17] His analysis necessarily required him to look ahead to the sanction hearing to assess whether there was a reasonable prospect that *Target Canada*'s plan might pass the scrutiny of the sanction test: if the Plan does not have a reasonable chance of success, it is inappropriate to allow it to be filed and for creditor meetings to be called to vote on it.[18]

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[15] *Inducon Development Corp., Re*, [1992] 8 C.B.R. (3d) 306 (Ont. Gen. Div.), para 16.
[16] *Stelco Inc., Re*, 15 C.B.R. (5th) 288 (Ont. C.A.), 2005 CarswellOnt 6283, para 22.
[17] *Target Canada Co., Re*, 2016 ONSC 316, para 68-69, 84 ("***Target Canada***").
[18] *Target Canada Co., Re*, 2016 ONSC 316, para 68-69, 84.

21. In *Target Canada*, the court dismissed the debtors' motion to file the plan with reference to three factors from the sanction test that would subsequently follow:

i. whether all materials filed and procedures carried out were authorized by the CCAA;

ii. whether there has been strict compliance with all statutory requirements; and

iii. whether the Plan is fair and reasonable.[19]

22. CannTrust's Plan fails on all three counts and cannot be sanctioned in its current form.

(i) Procedures not carried out

23. First, as considered in depth in section B below, CannTrust has denied the Underwriters any semblance of due process in adjudicating their claims, including claims the Underwriters assert are unsecured claims. Seeking court orders in CCAA proceedings and then not adhering to those orders was a central concern for the court in the *Target Canada* case. CannTrust sought the Claims Procedure Order – which provides for an adjudicative mechanism for the timely determination of disputed claims – but has not adhered to that order, instead ignoring and unilaterally dismissing the Underwriters' Proofs of Claims.

(ii) CannTrust's Plan does not comply with the CCAA

24. Second, CannTrust's Plan does not comply with the express statutory requirements of the CCAA, including in that: (i) it purports to release directors of certain claims in contravention of section 5.1(2); and (ii) it attempts to make a payment on account of certain equity claims before the satisfaction of all unsecured claims contrary to section 6(8).

[19] *Target Canada Co., Re,* 2016 ONSC 316, para 70.

25. Section 5.1(2) of the CCAA precludes CannTrust from compromising any claims against its directors that relate to contractual rights of one or more creditors, or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct.[20] CannTrust's Plan explicitly compromises such claims, stating that "all Persons will be permanently and forever barred, estopped, stayed and enjoined" from taking virtually any action whatsoever in respect of Securities-Related Section 5.1(2) Claims, to the extent provided in this Court's sanction order[21] ("Securities-Related Section 5.1(2) Claims" is defined as certain settlement-related claims "not permitted by section 5.1(2) of the CCAA to be compromised").[22] This unlawful end-run makes a mockery of the CCAA prohibition against such an outcome.

26. Additionally, section 6(8) speaks directly to the courts and prohibits them from sanctioning any compromise or arrangement that provides for a payment on account of an equity claim unless that compromise or arrangement also provides that all claims that are not equity claims be paid in full before the equity claim is paid.[23] In other words, the CCAA *mandates* that equity claims rank in subordinate priority to all other creditors when distributions are made from a debtor's estate, and the court has no authority to permit otherwise.

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[20] CCAA, s 5.1(2).
[21] Amended Plan, s 7.3(3), Exhibit A to the Supplementary Guyatt Affidavit, Supplementary Record, p 38.
[22] Amended Plan, s 1.1, Exhibit A to the Supplementary Guyatt Affidavit, Supplementary Record, p 19.
[23] CCAA, s 6(8).

27. The Securities Litigation plaintiffs' claims are indisputably equity claims.[24] However, at least some of the Underwriters' Claims are unsecured claims. This includes:

(a) claims on account of defence costs, which were recognized by Justice Morawetz in his decision in *Sino-Forest Corporation (Re)* and by the Ontario Court of Appeal in respect of the same decision[25] (and which the amended Plan now purports to limit improperly, restricting both the timing and circumstances in which such defence costs are Unaffected Claims); and

(b) claims for CannTrust's rejection of the Settlement Covenant (which occurred only after the CCAA proceedings commenced – CCAA Section 32(7) provides that: "[i]f an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation <u>is considered to have a provable claim</u>" [emphasis added]).[26]

28. To pay the plaintiffs' equity claims in priority to the Underwriters' general unsecured claims – and to do so without permitting the Underwriters to vote such claims – contravenes CCAA section 6(8). Even without consideration of the Underwriters' Claims, the Plan does not even provide for payment of 100% of the unsecured claims already admitted by CannTrust – contrary to CCAA s. 6(8).

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[24] See sub-definitions (d) of "equity claim" and (a) of "equity interest," CCAA, s 2(1); see also *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, para 71, aff'd 2012 ONCA 816.
[25] *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, para 97, aff'd 2012 ONCA 816.
[26] CCAA, s 32(7).

29. Section 19(2) of the CCAA also provides that a plan may "may not deal with" various enumerated types of claims, including in subsection (c) "any claim arising out of fraud".[27] The Plan is silent or unclear at best with respect to such claims as held by the Underwriters. To the extent the Plan does not clearly preserve such claims as Unaffected Claims, it is further contrary to the CCAA and incapable of being sanctioned.

(iii) CannTrust's Plan is fundamentally unfair

30. Third, CannTrust's Plan is fundamentally unfair. In addition to being unlawful as highlighted above, the Plan: (i) violates the *pari passu* principle in its vastly different treatment of equity claims (and alleged equity claims); and (ii) fails to provide certain of the customary protections ordinarily granted – and in fact, required by law to be granted – to non-settling co-defendants in class action settlements.

31. The *pari passu* principle is the core principle underlying insolvency law. Justice Newbould held in *Re Nortel Networks Corporation et al.* that "[i]t is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment."[28] And in affirming Justice Newbould's *Nortel* decision, the Ontario Court of Appeal observed that "the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world."[29]

32. CannTrust's Plan turns a blind eye to this critical principle. At worst, the Underwriters' Claims are equity claims that rank equally with the claims of the plaintiffs. Instead of providing

[27] CCAA, s 19(2).
[28] *Re Nortel Networks Corporation et al*, 2014 ONSC 4777, para 12.
[29] *Nortel Networks Corporation (Re)*, 2015 ONCA 681, para 23.

like treatment for these like claims, CannTrust's Plan groups equity claims into four irreconcilable categories: (i) equity claims that recover nearly all of the available value in the company (*i.e.*, the plaintiffs' claims), with no compromise of any kind by such plaintiffs of their claims against non-settling co-defendants; (ii) equity claims that are unaffected by the Plan and preserved (*i.e.*, CannTrust's intercompany claims); (iii) equity claims (*i.e.*, those of favoured directors and officers of CannTrust) that are released under the Plan but in exchange for which full releases are granted for no other consideration; and (iv) equity claims of non-settling co-defendants (including the Underwriters) that receive no consideration, are permitted no vote and are completely released.[30]

33. The *pari passu* principle requires the ratable payment of the Underwriters' equity claims and the plaintiffs' equity claims. CannTrust's Plan, which contemplates settlement only of those plaintiffs' claims <u>to the exclusion of all others</u> flowing from the Securities Litigation, blatantly offends this principle.

34. Further, the law clearly precludes the granting of any preference by an insolvent person.[31] The law of preferences precludes an insolvent person from making payment to some claimants that it prefers while refusing to make like payment to other claimants having *pari passu* claims that it does not prefer. The Plan undisputedly provides several categories of unlawful preferences to the plaintiffs, favoured D&Os and to the CannTrust companies themselves in

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[30] See, respectively, Guyatt Affidavit, paras: (i) 73-75; (ii) 84(d); (iii) 78-79; (iv) 76-77, Applicants' Record, pp 40-44.
[31] Without limitation, CCAA section 36.1(1) provides that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* (which include prohibitions on preferences) apply, with any modifications that the circumstances require, in respect of a compromise or arrangement under the CCAA.

respect of their equity claims. Among the many conditions precedent to the Plan that are unlawful or otherwise incapable of being satisfied is a condition precedent that this Court grant an Order declaring that the Plan does not effect or approve a preference.[32]

35. Additionally, CannTrust's Plan is fundamentally unfair because it unduly prejudices the non-settling defendants to the class actions by failing to include the typical terms included in multi-party litigation settlement agreements. CannTrust has mitigated this somewhat by filing an amended Plan that now contemplates certain judgment reduction provisions, but: (i) these provisions are conditional and poorly drafted / too narrow in scope; and (ii) are not accompanied by other provisions required by law.

36. It is well-settled law in multi-party litigation that when one defendant wishes to settle but the litigation will otherwise continue as against other defendants, the settlement agreement will include a "Pierringer Order"[33] and, for US claims, the equivalent order under US law known as "judgment reduction" provisions.[34] As stated by the Ontario Court of Appeal, "the purpose of a Pierringer Order is to facilitate a settlement between a plaintiff and a defendant who wishes to settle (a settling defendant), while maintaining a level playing field for the remaining (non-

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[32] See Amended Plan, section 8.2(q), Exhibit A to the Supplementary Guyatt Affidavit, Supplementary Record, p 42.
[33] *Bedard v Amin*, 2010 ABCA 3, para. 13, citing *Laudon v Roberts*, 2009 ONCA 383, and *Ashcroft v Dhaliwal*, 2008 BCCA 352.
[34] See, *e.g.*, *Rieckborn v Velti PLC*, No. 13-CV-03889-WHO, 2015 WL 468329, at *20 (N.D. Cal. Feb. 3, 2015), attached as Schedule C hereto, (holding that all claims pending against the nonsettling defendants, including underwriters, must be reduced according to the judgment reduction method set out in Section 78u–4(f)(7)(B) of the Private Securities Litigation Reform Act of 1995, which requires the reduction be the greater of (i) an amount that corresponds to the percentage of responsibility of the settling party; or (ii)the amount paid to the plaintiff by that settling party).

settling) defendant against whom the plaintiff wishes to proceed to trial."[35] Pierringer Orders typically achieve this "level playing field" through certain essential provisions that, in addition to judgment reduction provisions, provide that the settling defendant agrees to make documents and witnesses available for the action against the non-settling defendants.[36]

37. The inclusion of such provisions, as well as robust discovery rights against the settling parties, has been accepted in CCAA proceedings involving the partial settlement of multi-party securities class action proceedings.[37]

38. The failure to provide for a complete Pierringer Order and its US equivalent provisions in CannTrust's Plan is manifestly unfair to the Underwriters and other non-settling defendants. CannTrust is likely to have documents and witnesses that are central to the Plaintiffs' allegations and the Underwriters' defences, but the Plan contains no requirements for CannTrust to make this crucial evidence and witnesses available to the non-settling parties (and, indeed, bars same).

(iv) Conclusion re: Plan cannot be sanctioned

39. It is clear that CannTrust's Plan cannot be sanctioned in its current form. It is unlawful, it is grossly unfair and it will have been carried to the sanction hearing upon procedures that do not comply with the CCAA and the orders made in these proceedings to date. As Justice Morawetz did in *Target Canada*, this Court should refuse to advance a plan that is ultimately doomed to fail, lest CannTrust and its stakeholders waste time and money chasing an unattainable result.

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[35] *Endean v St. Joseph's General Hospital*, 2019 ONCA 181, para. 52, citing *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37.
[36] *Endean v St. Joseph's General Hospital*, 2019 ONCA 181, para. 52; *Allianz v Canada (Attorney General)*, 2017 ONSC 4484, para 37.
[37] See, *e.g.*, the plan endorsed by Justice Morawetz in *Sino-Forest Corporation, Re*, Plan Sanction Order dated December 10, 2012 (Court File No: CV-12-9667-00CL).

B. The Plan denies the Underwriters their right to vote and any semblance of procedural fairness in discarding their claims

40. It is further apparent that the Plan should not be permitted to be filed given that the Underwriters are affected creditors that are, nonetheless, denied due process (including the right to have their claims determined and to vote). While it is not appropriate on this Plan filing motion to expressly or implicitly adjudicate the Underwriters' Claims, it is clear that such claims have *prima facie* merit and that a proper adjudication is warranted prior to the filing of a Plan.

41. CannTrust's effort to obscure its Plan's treatment of the Underwriters and other creditors has created a drafting nightmare. By definition, the Underwriters appear to be a Co-Defendant and a Creditor, and yet the Underwriters' Claims are neither Affected Claims (despite being released) nor Unaffected Claims (with the exception – given the revised Plan – of certain claims for defence costs), each as defined. Despite not having Affected Claims, the Underwriters' Claims are defined to be Claims, Equity Claims, Securities-Related Indemnity Claims, Released Claims, Released CannTrust Claims and Released Securities-Related Claims (and therefore affected in myriad ways based on the usage of those terms throughout the Plan). While the Underwriters' Claims are apparently not Securities Claims, Securities-Released Claims or Non-Released CannTrust Claims, they appear to be caught by the term Securities-Related Matters. The Underwriters' Claims are not Securities-Related Claims as against CannTrust, but they are Securities-Related Claims as against Co-Defendants (and released in the former case but not the latter). It is not clear whether CannTrust believes the Underwriters' Claims include a Restructuring Claim (*i.e.*, based on its post-filing claims for CannTrust's rejection of the Settlement Covenant). Finally, it appears that CannTrust intends that the Underwriters' Claims

not be General Unsecured Claims by defining that to exclude Securities-Related Indemnity Claims – again, even though no adjudication of the Underwriters' Claims has occurred.

42. Convoluted drafting aside, it is readily apparent that the Underwriters and the Underwriters' Claims are wholly, centrally, and purposively – and not merely incidentally – affected by the Plan. The Plan does not balance interests and it does not reflect a compromise or arrangement negotiated with creditors – it is a naked confiscation and disregard of the rights and interests of the Underwriters. And one which is purported to be forced on the Underwriters by CannTrust's shareholders (i.e., equity claimants that rank at best *pari passu* with the Underwriters), having agreed to vote to approve a Plan in which they get everything and give nothing up, and the non-settling co-defendants lose everything and get nothing for it.

43. To allow CannTrust to call meetings of creditors while denying the Underwriters the vote they are entitled to cast in those meetings – either on their general unsecured claims or their equity claims, if any – would be an affront to the fundamental protections of due process that underpin the public's confidence in CCAA proceedings.

44. It is uncontroversial that a court will refuse a debtor's request for a meeting of creditors when affected creditors are denied their right to vote at the meeting. The Court in *Doman Industries Ltd., Re*, recognized this when Justice Tysoe refused to grant a meeting order, holding that "[i]t would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that <u>it purports to bind parties who were not given the opportunity to vote on it</u>" (emphasis added).[38]

[38] *Doman Industries Ltd., Re*, 2003 BCSC 376, para 9.

45. The CCAA permits equity claims to be denied a vote as a class. And for good reason: where a debtor's secured and unsecured creditors are impaired, equity claimants should not have undue leverage to block a plan otherwise acceptable to the requisite majorities of priority creditors. CannTrust has few secured and unsecured creditors, making for an unusual scenario in which it alleges insolvency and yet has substantial value to distribute to its shareholders. In such cases, the CCAA does *not* permit some equity claims to be voted and recover a distribution while other *pari passu* equity claims do not vote and do not recover a distribution (and yet still other equity claims, including intercompany claims as between the CannTrust entities, are treated as unaffected and preserved, while yet other equity claims are released but in exchange for broad releases in favour of such claimants).[39] Like claims must be treated as like, both by the letter of the CCAA and its caselaw.[40]

46. From the inception of these proceedings, CannTrust has recognized that what is called for is a global resolution of securities-related litigation claims, not a piecemeal and bilateral resolution of favoured equity claims and a disregard of the rights and interests of other claimants.

47. To date, the only communication that the Underwriters' have received in respect of their claims are emails from the Monitor summarily stating that the Underwriters' Claims allegedly constitute "Excluded Equity Claims" under the terms of the Claims Procedure Order and are therefore unaffected by it.[41] CannTrust's materials in this motion provide no explanation or

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[39] CCAA, s 22.1.
[40] CCAA, s 22(2); see also *Sadler Mfg. Co. Ltd. v Golt*, [1955] 35 C.B.R. 67, para 6; *Re Nortel Networks Corporation et al*, 2014 ONSC 4777, para 12; *Indalex Limited (Re)*, [2009] O.J. No. 3165 at para 16.
[41] Israel Affidavit, para 5, Underwriters' Record, p 2.

justification as to why the Underwriters' claims are ignored, other than an unhelpful statement by its affiant that they "will not be adjudicated."[42]

48. As a matter of both fairness and lawfulness, CannTrust cannot be allowed to proceed with its creditor meetings without first adjudicating the Underwriters' Claims and without amending the Plan (*i.e.*, either make the Underwriters a truly unaffected creditor, or affecting the Underwriters and treating them the same as similarly-situated claimants, including with respect to both the right to vote and to receive consideration under the Plan).

C. The Plan is rushed and was filed before concluding negotiations

49. Finally, a plan will be refused for filing when it is rushed and where critical negotiations are continuing or otherwise ought to continue.

50. CannTrust brings its Plan before this Court in the midst of ongoing, incomplete negotiations. In its current form, the Plan unjustifiably discards the goal – endorsed in these proceedings by CannTrust and by this Court – of working in good faith toward a global settlement of all claims in respect of the Securities Litigation. This goal is instead replaced with an abusive attempt to "strong-arm" the Underwriters and other non-settling co-defendants, and an invitation that this Court and its CCAA process be used as a mechanism to ignore the rights and interests of non-settling co-defendants.

51. This is not a situation in which a debtor remains engaged in ancillary negotiations over nuanced drafting or minor amendments to its plan; the issues outstanding are fundamental and

[42] Guyatt Affidavit, para 27(g), Applicants' Record, p 26.

substantial. Nor is this a situation in which the non-settling defendants have refused to negotiate; they remain ready and willing to engage with CannTrust.

52. If an insolvent debtor may escape insolvency without doing the "heaving lifting" required, it will of course do so. In such circumstances, the courts have consistently refused to ignore the legitimate rights and interests of creditors and have insisted that the insolvent debtor must return to negotiate a true compromise or arrangement, one that genuinely balances interests.

53. CannTrust's situation mirrors that of *Crystallex International Corp., Re*, where Justice Newbould for this Court dismissed a creditor's motion to file a plan and call creditor meetings because the plan was premature, brought for a tactical advantage in ongoing negotiations and, as a result, failed to consider a broad range of outstanding issues.[43] Included in that range of issues were unresolved claims for indemnity brought against the debtor.[44]

54. The plan in *Crystallex* was also brought in the context of negotiations between parties whose positions were not so far apart as to be insurmountable.[45] There was evidence that the parties were still willing to negotiate, and it was not appropriate to call a meeting for a plan before "all avenues for a resolution with the debtor [had] been exhausted."[46] As is the situation between the Underwriters, CannTrust and the Securities Litigation plaintiffs, the plan in *Crystallex* "[put] the cart before the horse" in those outstanding negotiations.[47]

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[43] *Crystallex International Corp., Re*, 2013 ONSC 823, paras 9-13 ("***Crystallex***").
[44] *Crystallex International Corp., Re*, 2013 ONSC 823, para 11.
[45] *Crystallex International Corp., Re*, 2013 ONSC 823, para 16.
[46] *Crystallex International Corp., Re*, 2013 ONSC 823, paras 10 and 16.
[47] *Crystallex International Corp., Re*, 2013 ONSC 823, para 9.

55. This premature and inappropriate timing of CannTrust's Plan is further illustrated by CannTrust's failure to consider the Settlement Covenant, which unequivocally precludes CannTrust from entering into a settlement (effected through a CCAA plan or otherwise) in respect of any indemnifiable claims, including the Securities Litigation, without also granting to the Underwriters an unconditional release from all liability arising out of such litigation.

56. Indeed, approval of a proposed settlement of securities litigation in *Menegon v Philip Services Corp.* was refused by Justice Blair for this Court on exactly this basis: that the underwriters in that case would have lost the "bargaining chip" of their similar contractual right to be released from claims against them.[48] Justice Blair, quite correctly, did not scuttle negotiations or an ultimate settlement in *Menegon*; rather, he did two things. First, he recognized that a bilateral settlement between plaintiffs and insolvent debtor fundamentally affected the rights and interests of a third party (*i.e.*, the underwriters), and that the interest of the underwriters ought not to be unilaterally impaired in this manner. Second, he sent the insolvent debtor and plaintiffs back to the negotiating table to seek out a proper (*i.e.*, global) settlement that included and did not ignore the underwriters.

57. The approach of Justice Blair is the same approach embraced by Regional Senior Justice Morawetz (as he was then) in *Target Canada* and in *Sino-Forest*[49], and by Justice Newbould in *Crystallex*. In each case the court: (i) refused to issue an order permitting the *bona fide* rights and interests of creditors to be ignored; and (ii) refused to draft the bargain for the parties,

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[48] *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080, 1999 CarswellOnt 3240, para 31 ("***Menegon***").

[49] *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2015 ONSC 4004, para 44 ("***Sino-Forest***").

requiring instead that they return to the bargaining table in good faith to work out their own compromise or arrangement.

58. Further, any urgency suggested by CannTrust is illusory. CannTrust, by its own admission, has achieved each of its business restructuring objectives in the within CCAA proceedings.[50] It is apparently an otherwise healthy company, having "made a successful return to the recreational and medical cannabis markets," resulting in revenue generation and a "stronger, more efficient business which [CannTrust] believes will be highly competitive in the Canadian cannabis market."[51] And it is sitting on cash "in excess of the $50m needed to fund the proposed settlement."[52] CannTrust has met all of its cashflow forecasts to date, its daily sales are projected to more than double to $464,000 per day in May[53] [redacted].[54] On cross-examination, Mr. Guyatt admitted that CannTrust will not necessarily resort to liquidation if the Plan is not filed or approved, and that if the Plan is not approved the company would be able to use the cash earmarked for settlement to run the company and defend the litigation.[55] The Securities Litigation is stayed, and CannTrust has few secured or unsecured creditors. Simply put, CannTrust's own materials all but concede a lack of urgency to allocate and distribute settlement monies amongst equity claimants.

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[50] Guyatt Affidavit, para 17, Applicants' Record, p 23.
[51] Affidavit of Greg Guyatt, sworn January 20, 2021, paras 30 and 41, attached as Exhibit G to the Guyatt Affidavit, Applicants' Record, pp 222-224.
[52] Guyatt Affidavit, para 11, Applicants' Record, p 21.
[53] CannTrust Cash Flow Forecast, Appendix "O" to the Eighth Report of the Monitor, dated March 15, 2021, page E212 of the Caselines Index.
[54] [redacted], Confidential Exhibit B to the supplementary affidavit of Shoshana Israel, sworn March 16, 2021.
[55] Guyatt Affidavit, pp 100-104.

59. Finally, CannTrust's Plan reflects that negotiations remain ongoing through its mechanism for subsequently adding "Additional Settlement Parties". Given the significant of the outstanding issues with its creditors and the willingness of those creditors to continue to negotiate, CannTrust ought not file a Plan first and pursue further negotiations second, but rather the other way around. Those negotiations ought to be exhausted prior to the filing of a Plan and the calling of a meeting of creditors, and the Plan tailored to address – and not just ignore – the rights and interests of the parties.

60. It is clear that CannTrust's Plan has been "drafted without due regard to all applicable circumstances,"[56] and, for the same reasons cited by Justice Newbould in *Crystallex*, Justice Blair in *Menegon* and Regional Senior Justice Morawetz (as he was then) in *Target Canada* and *Sino-Forest*, should be sent back to the parties for renewed negotiations.

PART V – RELIEF REQUESTED

61. The Underwriters respectfully request that this Court dismiss CannTrust's motion for the Plan Filing Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David Bish / John Fabello / Gillian Dingle
Craig Gilchrist / Mike Noel

Lawyers for the Underwriters

[56] *Crystallex International Corp., Re*, 2013 ONSC 823, para 9.

SCHEDULE A – LIST OF AUTHORITIES

1. *Inducon Development Corp., Re*, [1992] 8 C.B.R. (3d) 306 (Ont. Gen. Div.)
2. *Stelco Inc., Re*, 15 C.B.R. (5th) 288 (Ont. C.A.), 2005 CarswellOnt 6283
3. *Target Canada Co., Re*, 2016 ONSC 316
4. *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, aff'd 2012 ONCA 816
5. *Re Nortel Networks Corporation et al*, 2014 ONSC 4777
6. *Nortel Networks Corporation (Re)*, 2015 ONCA 681
7. *Bedard v Amin*, 2010 ABCA 3
8. *Laudon v Roberts*, 2009 ONCA 383
9. *Ashcroft v Dhaliwal*, 2008 BCCA 352
10. *Rieckborn v Velti PLC*, No. 13-CV-03889-WHO, 2015 WL 468329 (N.D. Cal. Feb. 3, 2015), attached hereto as Schedule C
11. *Endean v St. Joseph's General Hospital*, 2019 ONCA 181
12. *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37
13. *Allianz v Canada (Attorney General)*, 2017 ONSC 4484, para 37.
14. *Sino-Forest Corporation*, *Re*, Plan Sanction Order dated December 10, 2012 (Court File No: CV-12-9667-00CL) (Ont. S.C.J. (Commercial List))
15. *Doman Industries Ltd.*, *Re*, 2003 BCSC 376
16. *Sadler Mfg. Co. Ltd. v Golt*, [1955] 35 C.B.R. 67 (Qc. Sup. Ct.)
17. *Indalex Limited (Re)*, [2009] O.J. No. 3165 (Ont. S.C.J. (Commercial List))
18. *Crystallex International Corp.*, *Re*, 2013 ONSC 823
19. *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 (Ont. S.C.J. (Commercial List)), 1999 CarswellOnt 3240
20. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2015 ONSC 4004

SCHEDULE B – TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Interpretation

Definitions

2 (1) In this Act,

[…]

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

> **(a)** a dividend or similar payment,
>
> **(b)** a return of capital,
>
> **(c)** a redemption or retraction obligation,
>
> **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

equity interest means

> **(a)** in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
>
> **(b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

PART I – COMPROMISES AND ARRANGEMENTS

Claims against directors – compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

> **(a)** relate to contractual rights of one or more creditors; or
>
> **(b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

[…]

Payment — equity claims

6 (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[…]

PART III – GENERAL

Claims

[…]

Exception

19 (2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

[…]

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

[…]

Agreements

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

[…]

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

[…]

Preferences and Transfers at Undervalue

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to “date of the bankruptcy” is to be read as a reference to “day on which proceedings commence under this Act”;

(b) to “trustee” is to be read as a reference to “monitor”; and

(c) to “bankrupt”, “insolvent person” or “debtor” is to be read as a reference to “debtor company”.

SCHEDULE C – *Rieckborn v Velti PLC*, No. 13-CV-03889-WHO, 2015 WL 468329 (N.D. Cal. Feb. 3, 2015)

2015 WL 468329
United States District Court, N.D. California.

Anika R. RIECKBORN, et al., Plaintiffs,
v.
VELTI PLC, et al., Defendants.

Case No. 13–cv–03889–WHO
|
Signed February 3, 2015

Attorneys and Law Firms

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Boris Feldman, Brock Dahl, Cynthia A. Dy, Diane Marie Walters, Luke Anthony Liss, Wilson Sonsini Goodrich & Rosati a Professional Corporation, Palo Alto, CA, for Defendants.

ORDER REGARDING MOTION FOR FINAL APPROVAL OF PARTIAL SETTLEMENT AND MOTION FOR ATTORNEY'S FEES

Re: Dkt. Nos. 170, 171

WILLIAM H. ORRICK, District Judge

INTRODUCTION

***1** These motions of plaintiffs Bobby Yadegar / Ygar Capital LLC, St. Paul Teachers' Retirement Association, Newport News Employees' Retirement Fund, and Oklahoma Firefighters Pension and Retirement System (collectively, "plaintiffs") for final approval of a partial class action settlement and for an award of attorney's fees and costs raise important issues in addition to the fairness, reasonableness, and adequacy of the monetary value of the settlement. Should individuals named as defendants but never served be released? Is it appropriate to decide now what judgment reduction methodology will apply to a future judgment against the nonsettling defendants? If so, are the nonsettling defendants entitled to a proportionate fault reduction (or, more specifically, a Section 78u–4(f)(7)(B) reduction) on all Securities Act claims, as they assert they are?

The settlement creates a fund of $9.5 million to be distributed among a class consisting of all persons who purchased or otherwise acquired Velti plc ("Velti") securities between January 27, 2011 and August 20, 2013. In light of Velti's bankruptcy and the limited financial resources of the individual defendants, I find that the settlement is fair, reasonable, and adequate, and that plaintiffs' counsel's requested award for fees and costs is appropriate. I also answer all of the questions above in the affirmative, holding that the release of the unserved defendants is appropriate under the circumstances of this case, and that fairness dictates that I decide now that the nonsettling defendants are entitled to a Section 78u–4(f)(7)(B) reduction on all Securities Act claims pending against them. Accordingly, I will GRANT plaintiffs' motions for final approval and for attorney's fees and enter the Proposed Judgment submitted by plaintiffs subject to the modifications addressed in Section II of the Discussion.

BACKGROUND

I. ALLEGATIONS IN THE CONSOLIDATED COMPLAINT

According to the Consolidated Complaint, Velti is a provider of "mobile marketing and advertising technology and solutions" for businesses around the world. Consolidated Complaint ¶ 4 (Dkt. No. 105) ("Compl."). It entered contracts pursuant to which it provided services but did not get paid until after its work was done and the customer invoiced. *Id.* Between the completion of work and the receipt of payment, the amount due represented an account receivable. *Id.* Throughout the relevant period, it regularly reported as revenue amounts due on contracts before the receivable was actually paid, thereby creating an appearance of healthy revenue and earnings growth. Compl. ¶ 5.

Because Velti operated heavily in Greece, it was particularly affected by the Greek economic crisis through increasing numbers of unpaid invoices. Compl. ¶¶ 6–7. It continued to report robust revenue growth, however. *Id.* It misrepresented its "day sales outstanding" ("DSO")—a measure of the number of days it takes to collect a receivable—as significantly lower than it actually was. Compl. ¶¶ 8–9. It violated Generally Accepted Accounting Principles ("GAAP") in doing so. It also represented that it was diversifying its customer base beyond Greece, but in fact it was as dependent on the Greek market as ever. Compl. ¶ 8.

***2** On May 16, 2012, shortly before Velti's first quarter 2012 earnings call, a stock market research firm published a report stating that Velti underreported its DSO. Compl. ¶ 10. Velti's securities declined in value over the next several days. *Id.* On May 22, 2012, it confirmed the report and changed its method of calculating its reported DSO. Compl. ¶ 11. Its reported DSO more than doubled as a result, from an already high 116 days to an "incredible" 272 days. *Id.* On November 14, 2012, it announced that due to its continued inability to timely collect receivables from certain of its customers in Greece, the Balkans, and various North African and Middle Eastern countries, it was transitioning its business away from those regions and into the United States and Western Europe. Compl. ¶ 12. It subsequently represented that only 10 percent of its revenue came from Greece or the Balkans. Compl. ¶ 13.

On August 20, 2013, Velti announced its 2013 second quarter financial results and revealed that it had decided to write off approximately $111 million of its receivables. Compl. ¶ 15. It disclosed that some of its receivables had been due since before 2012 and that, despite its representation that only 10 percent of its receivables were from Greece and the Balkans, the true proportion was about 66 percent. *Id.* In response to the news, Velti shares declined $0.66 per share, or 66 percent, to close on August 21, 2013 at $0.34 per share. Compl. ¶ 16.

Plaintiffs allege four different partial corrective disclosures during the class period. These occurred on May 16, 2012, November 15–16, 2012, January 31, 2012, and August 20, 2013. Dkt. No. 136 at 2–4; Dkt. No. 136–2 at 5 n.5.

Velti's accounting firm, defendant Baker Tilly Virchow Krause LLP ("Baker Tilly"), opined on the financial statements contained in Velti's initial public offering on January 28, 2011 and its secondary public offering on June 14, 2011. Velti's underwriters were Jefferies LLC, RBC Capital Markets, LLC, Needham & Company, LLC, and Canaccord Genuity Inc. (the "Underwriters"). Baker Tilly and the Underwriters are accused of failing to exercise the reasonable care necessary to ensure that Velti's DSO and financials conformed with GAAP. Compl. ¶ 18.

II. FILING OF THIS ACTION AND PARTIAL SETTLEMENT

Between August 22, 2013 and October 4, 2013, four securities class actions were filed in this district in connection with the collapse of Velti's stock value. On December 30, 2013, the cases were consolidated. On January 24, 2014, a fifth action was filed and also consolidated.

The Consolidated Complaint identifies three groups of defendants: (1) Velti and four of its officers/directors—Wilson W. Cheung, Nicholas P. Negroponte, Jeffrey G. Ross, and Winnie W. Tso (collectively with Velti, the "Settling Defendants"); (2) five other Velti officers/directors—Jerry Goldstein, David C. Hobley, Chris Kaskavelis, David W. Mann, and Alex Moukas (the "Overseas Defendants"); and (3) Baker Tilly and the Underwriters (collectively, the "Nonsettling Defendants"). Dkt. No. 105. It asserts five causes of action: (1) violations of Section 11 of the Securities Act of 1933 ("Securities Act") against all defendants; (2) violations of Section 12(a)(2) of the Securities Act against Velti, Goldstein, Hobley, Kaskavelis, Mann, Moukas, Negroponte, and the Underwriters; (3) violations of Section 15 of the Securities Act against all of the individual defendants; (4) violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b–5 against Velti, Cheung, Kaskavelis, Moukas, Ross, Tso, and Baker Tilley; and (5) violations of Section 20(a) of the Exchange Act against Cheung, Kaskavelis, Moukas, Ross, and Tso. *Id.*

Plaintiffs' counsel have undertaken extensive multinational efforts to serve the Overseas Defendants but have been unable to do so. By performing a "skip trace" and other computerized research, it was determined that Goldstein lived in Greece, Hobley in either England or Ireland, and Mann in England. Dingman Decl. ¶ 2 (Dkt. No. 136–3). A process server attempted to serve Kaskavelis and Moukas at Velti's offices in San Francisco on October 22, 2013. *Id.* Velti's legal department informed the server that Kaskavelis and Moukas did not work at that location and declined to provide additional information concerning their whereabouts. *Id.* Servers twice attempted to serve Moukas at a potential address in California; they were told that Moukas had not been seen at that location for months and that he had moved back to Greece. *Id.* ¶¶ 2, 4. Another potential address for Kaskavelis and Moukas was located in New York City. *Id.* ¶ 5. Servers twice attempted to complete service there. *Id.* One doorman at the location stated that he had never heard of Kaskavelis; another doorman told the server that he could not recall the last time he had seen Moukas. *Id.* Another attempt to serve Kaskavelis at a potential address in Massachusetts also failed. *Id.* ¶ 6. In early 2014, plaintiffs' counsel retained an international agency for the purpose of serving the Overseas Defendants in Europe but were still unable to complete service. Mickow Decl. ¶¶ 1–5 (Dkt. No. 136–4).

***3** When Velti's United States-based operations filed for Chapter 11 bankruptcy on November 4, 2013, the parties began discussing settlement. [1] Plaintiffs' counsel, Velti, and some of the individual defendants mediated before the Honorable Layn Phillips on March 14, 2014. The mediation failed, but the parties continued to communicate with Judge Phillips. At some point after the Consolidated Complaint was filed on April 22, 2014, plaintiffs and the Settling Defendants (the "Settling Parties") agreed to this partial settlement.

The Settling Parties executed a Stipulation and Agreement of Partial Settlement ("Settlement Agreement") on May 23, 2014. Dkt. No. 170–2. The Settlement Agreement creates a settlement fund of $9,500,000 to be distributed among class members who submit a valid, timely claim form. Settlement Agreement ¶ 3.1; Weiser Decl. ¶ 51 (Dkt. No. 170–1). The settlement fund is financed exclusively through Velti's insurance policies. *See, e.g.,* Weiser Decl. ¶ 42. These policies have been rapidly diminishing following Velti's bankruptcy. *See, e.g.,* Weiser Decl. ¶¶ 5, 38. Participating class members will recover according to the "Plan of Distribution," which makes eligible for recovery all class members who have a net loss arising out of all transactions involving Velti securities purchased pursuant to, or traceable to, either of Velti's public offerings or on the open market during the class period. Weiser Decl. ¶ 52.

In addition to creating the settlement fund, the Settlement Agreement includes a provision requiring the Settling Defendants to aid plaintiffs in the continued prosecution of their claims against the Nonsettling Defendants. Settlement Agreement ¶ 3.2. The Settlement Agreement and Proposed Judgment also include a bar order—which purports to bar certain claims against the Settling Defendants and other "Released Persons"—and judgment reduction provisions—which describe the manner in which any future judgment against the Nonsettling Defendants will be reduced.

Plaintiffs filed their motion for preliminary approval on May 23, 2014. Dkt. No. 109. On August 19, 2014, I granted it. Dkt. No. 147. As instructed by the preliminary approval order, the settlement administrator mailed 43,110 class notices to potential class members, and notice of the settlement was published in the national edition of *Investor's Business Daily* and over the *Business* Wire. Mot. 25; Weiser Decl. ¶¶ 50–51. The settlement administrator set up a website, www.veltisecuritieslitigation.com, which allowed visitors to view the Settlement Agreement, class notice, and Plan of Distribution, to submit questions, and to file a claim online. Bravata Decl. ¶ 7 (Dkt. No. 181). By the December 2, 2014 deadline, eight potential class members had submitted objections and five had opted out. *See* Reply 1; Bravata Decl. ¶ 10 (Dkt. No. 181). Three of the objections were subsequently withdrawn. Dkt. No. 196.

Plaintiffs filed their motion for final approval and motion for attorney's fees on November 6, 2014. Dkt. Nos. 170, 171. As at preliminary approval, the Nonsettling Defendants filed extensive objections, primarily regarding the Proposed Judgment's bar order and judgment reduction provisions. *See* Dkt. Nos. 176, 178. The final approval hearing was held on January 14, 2015.

LEGAL STANDARD

I. CLASS ACTION SETTLEMENT APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure requires a court to determine whether a proposed settlement is fair, reasonable, and adequate. Fed.R.Civ.P. 23(e). To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Vill., L.L.C. v. Gen. Elec.,* 361 F.3d 566, 575 (9th Cir. 2004); *In re Bluetooth Headset Products Liab. Litig.,* 654 F.3d 935, 946 (9th Cir. 2011) (quoting same). "This list is not exclusive and different factors may predominate in different factual contexts." *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1376 (9th Cir. 1993). In certain cases, one factor alone may prove determinative in finding sufficient grounds for approval. *See id.*

***4** Settlements that occur before formal class certification require a higher standard of fairness. *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 458 (9th Cir. 2000). In reviewing such settlements, in addition to considering the above factors, the court must also ensure that "the settlement is not the product of collusion among the negotiating parties." *Bluetooth,* 654 F.3d at 946–47 (internal quotation marks and citations omitted). Signs of collusion include: (1) "when counsel receive a disproportionate distribution of the settlement;" (2) when the parties negotiate an arrangement under which defendants agree not to oppose an attorneys' fee award up to a certain amount separate from the class's actual recovery, as such arrangements carry "the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class;" and (3) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* at 947.

While considering all these interests, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco,* 688 F.2d 615, 625 (9th Cir. 1982). "Finally, it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation." *Id.*

II. ATTORNEY'S FEE AWARD

Federal Rule of Civil Procedure 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). Attorney's fees provisions included in proposed class action agreements must be "fundamentally fair, adequate and reasonable." *Staton v. Boeing Co.,* 327 F.3d 938, 964 (9th Cir. 2003). In "common fund cases," a court has discretion to award attorneys' fees either as a percentage of such common fund or by using the lodestar method. *Id.* at 967–68. "The percentage method means that the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee." *Hanlon,* 150 F.3d at 1029. Even when applying the percentage method, the court should use the lodestar method as a cross-check to determine the fairness of the fee award. *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1050 (9th Cir. 2002).

DISCUSSION

I. FINAL APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT

A. Strength of Plaintiffs' Case and Risk, Expense, Complexity, and Likely Duration of Further Litigation

In determining whether the settlement is fair, reasonable, and adequate, I must balance the risks of continued litigation, including the strengths and weaknesses of plaintiffs' case, against the benefits afforded to class members, including the immediacy and certainty of recovery. *See Larsen v. Trader Joe's Co.,* No. 11–cv–05188–WHO, 2014 WL 3404531, at *4 (N.D.Cal. July 11, 2014); *LaGarde v. Support.com, Inc.,* No. 12–cv–00609–JSC, 2013 WL 1283325, at *4 (N.D.Cal. Mar. 26, 2013). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 526 (C.D.Cal.2004) (internal quotation marks omitted).

Plaintiffs contend that their claims have significant merit but acknowledge a number of risks and uncertainties should they proceed towards summary judgment and trial. Mot. 10–15. The Settling Defendants have adamantly denied liability and have asserted from the outset that they possess absolute defenses to all of plaintiffs' claims. The Settling Defendants' basic position is that Velti's collapse was due to a confluence of events beyond their control, and that Velti relied on its advisors—namely Baker Tilly—in assessing whether their receivables were properly managed and reported. Plaintiffs state that while they believe they could prevail over this defense, success is by no means guaranteed given the inherent unpredictability of complex securities litigation. Mot. 10–11.

***5** Further, even if plaintiffs were able to establish liability against the Settling Defendants, they would also have to show loss causation and damages. Plaintiffs assert that the Supreme Court's decision in *Dura Pharm., Inc. v. Broudo,* 544 U.S.

336 (2005), has made proving loss causation more difficult and point to a number of cases rejecting securities claims for failure to satisfy this element. Mot. 12. Proving damages would also entail substantial uncertainty, as it would depend in large part on which, if any, of the four alleged partial corrective disclosures plaintiffs are ultimately able to rely. *See* Mulholland Decl. ¶ 9 (Dkt. No. 136–2). According to plaintiffs, damages could range from anywhere between $34 million and $287 million depending on this issue. *See id.* The Settling Defendants, meanwhile, maintain that damages are as low as $28 million. *See* Dkt. No. 136 at 4 n.9.

Plaintiffs assert that the international aspects of this case create additional risks. Discovery would likely be a significant obstacle if the litigation were to continue, as a large portion of the documents and witnesses necessary to prosecute plaintiffs' claims are located in Greece, and foreign privacy laws would hinder their ability to obtain and review the evidence necessary to prove their claims. Service on the Settling Defendants (for the purpose of obtaining discovery or enforcing judgment) would be problematic as well, as some of them live abroad. Finally, plaintiffs note that any judgment would likely be appealed, and that barring settlement, "there is no question that this case would be litigated for years, ... costing millions of additional dollars, with the possibility that the end result would not be better for the class, and might even be worse." Mot. 15.

Plaintiffs have shown through their briefing and attached declarations that further litigation is likely to be costly and time-intensive, with no guarantee of a more beneficial outcome for class members as a result. Accordingly, it is reasonable for plaintiffs to decide that the guarantee of an immediate recovery outweighs the uncertainties of pursuing a possibly more favorable outcome by continuing to litigate. These first two factors weigh in favor of approval.

B. Risk of Maintaining Class Action Status Throughout the Trial

Plaintiffs have defined the class period to run from January 27, 2011, to August 20, 2013, a period which spans four alleged corrective disclosures. Plaintiffs acknowledge that this class period could be shortened if I were to find that certain disclosures were not in fact corrective. *See* Dkt. No. 136 at 7–8. For example, defendants have argued that the disclosure on May 16, 2012 sufficiently revealed Velti's accounting practices such that the class period should end on this date. *Id.* at 8. If this argument prevailed, the amount of damages possibly recoverable by the class would shrink dramatically. I agree with plaintiffs that the class period is likely to be a heavily litigated matter in this action, and that the class period's end date will control to a large extent the class's potentially recoverable damages. This factor favors approval.

C. Amount Offered in Settlement

Assessing the fairness, adequacy, and reasonableness of the amount offered in settlement is not a matter of applying a "particular formula." *Rodriguez v. W. Publ'g Corp.,* 563 F.3d 948, 965 (9th Cir. 2009). "[U]ltimately, [it] is nothing more than an amalgam of delicate balancing, gross approximations, and rough justice." *Id.*

Under the circumstances, I find that the $9.5 million offered in settlement is reasonable. Velti's United States-based operations filed for bankruptcy on November 4, 2013; its European operations did the same less than a year after. As plaintiffs observe, these bankruptcy filings "immediately placed Velti's assets within the confines of bankruptcy proceedings ... and effectively started the clock on when plaintiffs could ensure any recovery for the settlement class." Reply 4. Plaintiffs state that the personal assets of the individual defendants who are settling have also been diligently reviewed and are likewise extremely limited. Mot. 15; Weiser Decl. ¶ 42. The fact that some of these individuals live abroad adds risk and complexity to enforcing any judgment against them. Mot. 15. The upshot is that even if plaintiffs were able to secure a judgment against the Settling Defendants, it is not at all clear that plaintiffs would be able to collect it.

***6** In *Torrisi v. Tucson Elec. Power Co.,* the Ninth Circuit found that the defendant's precarious financial condition "predominate[d] to make clear that the district court acted within its discretion" in approving a securities class action settlement. 8 F.3d at 1375–76. At the time of the settlement, the defendant was negotiating with its creditors to restructure its debt, and an involuntary bankruptcy petition had been filed against it. *Id.* at 1376. The defendant had reached an agreement with certain of its creditors, and there was evidence that other creditors would likely have refused to assent if the settlement had failed. *Id.* The Ninth Circuit observed that this could have resulted in "a bankruptcy organization which would have left little if anything for class members." *Id.*

While I do not find that the Settling Defendants' financial condition is dispositive to the Rule 23(e) inquiry, I do find that it highlights the reasonableness of the settlement amount. Plaintiffs here "have agreed to accept a smaller certain award rather than seek the full recovery but risk getting nothing." *Omnivision,* 559 F.Supp.2d at 1042. Given that Velti is bankrupt, available insurance funds are dwindling, and there is no evidence to indicate that the individual defendants would be able to provide a more than de minimis recovery for the class, this decision was reasonable. This factor favors approval.

D. Extent of Discovery Completed and Stage of the Proceedings

This factor evaluates whether "the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship,* 151 F.3d 1234, 1239 (9th Cir. 1998). The parties agreed to this settlement before formal discovery or any significant motion practice in this case. "However, in the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table." *Mego,* 213 F.3d at 459 (internal quotation marks omitted). Even where the parties decide to settle relatively early in the course of the litigation, the key inquiry remains whether they had sufficient information to make an informed decision about doing so. *Id.*

Plaintiffs state that the settlement was reached only after plaintiffs' counsel (i) conducted an extensive investigation into the underlying facts; (b) thoroughly researched relevant law; (c) prepared and filed the 130–page Consolidated Complaint; (d) prepared an in depth mediation statement; and (e) consulted with economic experts regarding loss causation and damages. Weiser Decl. ¶ 6. Plaintiffs also submit a declaration from Judge Phillips stating that in preparation for the mediation, the Settling Parties provided to him and exchanged amongst themselves mediation briefs discussing in detail the factual and procedural background and disputed issues in this action. Phillips Decl. ¶ 7 (Dkt. No. 136–1). Judge Phillips adds that:

> [i]t is apparent from the submissions and presentations made by counsel for Lead Plaintiff before and during the mediation session, as well as from my numerous discussions with them, that they performed a thorough examination of the merits of the claims in this action. It is also my opinion that counsel for Lead Plaintiff performed substantial work and effort in preparing their case for mediation and in presenting their claims in such a way to produce a valuable settlement for the class.
>
> Phillips Decl. ¶ 13.

Despite reaching settlement relatively early in the life span of this case, the Settling Parties have shown that their decision to settle was made on the basis of a thorough understanding of the relevant facts and law. This factor weighs in favor of approval.

E. Experience and Views of Counsel

The Ninth Circuit recognizes that "parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez,* 563 F.3d at 967 (internal modifications omitted). "A district court is entitled to give consideration to the opinion of competent counsel that the settlement is fair, reasonable, and adequate." *Ching v. Siemens Indus., Inc.,* No. 11–cv–04838–MEJ, 2014 WL 2926210, at *5 (N.D. Cal. June 27, 2014) (internal quotation marks and modifications omitted).

***7** The experience and views of plaintiffs' counsel here provide further support for approval. Plaintiffs' counsel have extensive experience in securities and other complex class action litigation. *See* Weiser Decl. Exs. D–F (Dkt. Nos. 170–5, 170–6, 170–7, 170–8). They recommend the settlement and attest that it is a strong result for the class given the substantial risks in continuing the action. *See, e.g.,* Weiser Decl. ¶ 5. Likewise, Judge Phillips states in his declaration that "[b]ased on my knowledge of the issues in dispute, my review of the substantial factual and legal materials presented before and during the mediation, the rigor of the negotiations, the relative strengths and weaknesses of the parties' positions, and the benefits achieved by the partial settlement, I believe that the terms of the $9.5 million partial settlement represent a well-reasoned and sound resolution of highly uncertain litigation and that the result is fair, adequate, reasonable and in the best interests of the class." Phillips Decl. ¶ 12.

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Omnivision,* 559 F.Supp.2d at 1043. The record here does not rebut this presumption. This factor favors approval.

F. Reaction of Class Members

"[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Larsen,* 2014 WL 3404531, at *5 (internal quotation marks omitted). "A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it." *Id.* (internal quotation marks omitted).

Here, the settlement administrator mailed 43,110 class notices to potential class members, and notice of the settlement was published in the national edition of *Investor's Business Daily* and over the *Business Wire.* Mot. 25; Weiser Decl. ¶¶ 50–51. The settlement administrator also set up a website, www.veltisecuritieslitigation.com, which allowed visitors to view the Settlement Agreement, the class notice, and Plan of Distribution, to submit questions, and to file a claim online. Bravata Decl. ¶ 7. By the December 2, 2014 deadline, only eight potential class members had objected and only five had opted out. *See* Reply 1; Bravata Decl. ¶ 10. Three of the objectors—AYM Aggressive Value Fund, Park West Investors Master Fund Limited, and Park West Partners International, Limited—appeared at the final approval hearing but subsequently withdrew their objections. *See* Dkt. No. 196. No other class members appeared at the hearing. This lack of objection from potential class members supports a finding that the settlement is favorable to the class and merits approval. *Cf.* *Churchill,* 361 F.3d at 577 (affirming approval of settlement with 45 objectors out of 90,000 notified class members).

Further, the five objections that were submitted (and not withdrawn) do not undermine the fairness, reasonableness, or adequacy of the settlement. Four of the objections express dissatisfaction with the fact that some class members will receive a greater recovery than others because of the timing of their purchases and sales of Velti securities. I will address those objections below in my discussion of the Plan of Distribution. The fifth objection is a handwritten objection with a Brayton, South Carolina address and an illegible signature filed on December 1, 2014. Dkt. No. 180. The three-sentence objection calls the settlement "mere tokenism" and declares that "settlements of this nature ... are slaps on [the] wrist." *Id.*

Plaintiffs more than adequately address this objection. *See* Reply 4–5. Plaintiffs point to the various factors that make $9.5 million settlement at this time a strong result for the class: Velti is bankrupt and is currently in liquidation proceedings in both the United States and Europe. The personal assets of the Individual Defendants involved in the settlement are likewise extremely limited and are not sufficient to support a meaningful recovery for the class. Velti's insurance policies are the only plausible method of compensating class members, and these polices are rapidly diminishing as a result of Velti's bankruptcy. On top of the risks and uncertainties that are part and parcel of all complex class action litigation, discovery and service were likely to be major obstacles in this case. Finally, plaintiffs emphasize that this litigation is not over, and that the class may be able to recover additional funds from the Nonsettling Defendants. Plaintiffs contend that for all these reasons, the $9.5 million partial settlement is not "mere tokenism." Rather, it is a solid recovery in the face of myriad issues "any one of which ... could reduce shareholders' recovery to nothing." Reply 4.

***8** Plaintiffs observations regarding the Settling Defendants' precarious financial condition and the risks of continued litigation are well-taken. The Brayton, South Carolina objection is OVERRULED.

G. Absence of Collusion

Because this settlement was reached prior to certification of the class, I must examine the settlement for evidence of collusion with a higher level of scrutiny. *Bluetooth,* 654 F.3d at 946. In conducting such an examination, courts must be "particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* Signs of collusion include, but are not limited to: (1) a disproportionate distribution of the settlement fund to counsel; (2) negotiation of a "clear sailing provision" according to which defendants agree not to oppose an attorney's fee award up to a certain amount; and (3) an arrangement for funds not awarded to revert to defendants rather than to be added to the settlement fund. *Id.* at 947.

The first *Bluetooth* factor weighs against a finding of collusion. Plaintiffs' counsel move for an award of $2,375,000 in fees, or 25 percent of the settlement fund. Fees Mot. 2. In addition, plaintiffs' counsel request $219,469.67 in expenses and up to $500,000 in settlement administration costs. [2] Subtracting these amounts from the settlement fund, the class will be left with at least $6,405,530.33—more than double what plaintiffs' counsel and the settlement administrator will receive. This proportion does not indicate collusion. The second *Bluetooth* factor also weighs against such a finding, because the Settlement Agreement does not contain a clear sailing provision. As to the third factor, the Settlement Agreement provides that unclaimed funds will be redistributed to participating class members until the balance remaining in the fund is de minimis. Settlement Agreement ¶ 7.6. These remaining funds will then be donated to a cy pres beneficiary. *Id.* Under no circumstances does the Settlement Agreement provide for unclaimed funds to revert to Velti or the other Settling Defendants, or to Velti's insurance providers. The *Bluetooth* factors do not indicate collusion.

H. Plan of Distribution

"Approval of a plan of allocation of settlement proceeds in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate. It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits." *Omnivision,* 2007 WL 4293467, at *7 (internal quotation marks, citations, and modifications omitted); *see also, In re Oracle Sec. Litig.,* No. 90–cv–00931–VRW, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable."). "[C]ourts recognize that an allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Vinh Nguyen v. Radient Pharm. Corp.,* No. 11–cv–00406, 2014 WL 1802293, at *5 (C.D.Cal. May 6, 2014) (internal quotation marks and modifications omitted); *see also, Maley v. Del Global Technologies Corp.,* 186 F.Supp.2d 358, 367 (S.D.N.Y.2002).

***9** The Plan of Distribution proposed by plaintiffs satisfies these criteria. The plan is structured around the four alleged partial corrective disclosures on May 16, 2012, November 15–16, 2012, January 31, 2013, and August 20, 2013. *See* Weiser Decl. ¶ 54. The plan divides class members into five groups based on when they purchased their Velti shares in relation to these dates. *Id.* Within each group, class members receive different recoveries according to when they sold their shares. *Id.* Generally, class members who purchased Velti shares earlier and held them longer are entitled to a greater recovery than class members who acquired shares towards the end of the class period. *See id.* Plaintiffs' counsel explained at the final approval hearing that favoring the earlier purchasers is reasonable because each corrective disclosure successively dissipated more and more of the inflated value of Velti securities. Under this theory, class members who purchased Velti shares towards the start of the class period (during the highest point of inflation) and held them until the end of the class period (through all four partial corrective disclosures) suffered the greatest injury. Plaintiffs state that the Plan of Distribution was prepared in consultation with experts and will result in a fair and equitable distribution. Mot. 20; Weiser Decl. ¶ 53.

As noted above, four of the five objections to the settlement concern the Plan of Distribution. None of these objections indicates that the Plan of Distribution is unfair, unreasonable, or inadequate. The objections are as follows:

• Robert Hull submitted an objection on October 20, 2014. Dkt. No. 169. He bought 2,000 Velti shares on June 29, 2012 and sold 2,000 shares on July 17, 2012. Hull states that he lost $2,616.65, but under the Plan of Distribution, he will receive nothing. Hull writes: "The rule that excludes my loss is arbitrary and unfair."

• Thomas Fast submitted an objection on October 21, 2014. *Yadegar v. Velti plc,* No. 1400372–WHO (N.D.Cal. Oct. 27, 2014) (Dkt. No. 11). He accuses the Plan of Distribution of being "highly biased" towards persons who purchased Velti shares towards the beginning of the class period. He asks the Court to "shift a significant portion of the settlement amount to those most affected by the fraud," i.e., persons who purchased Velti shares towards the end, or even after, the proposed class period.

• Kevin Rowe submitted an objection on November 11, 2014. Dkt. No. 173. Rowe made numerous transactions involving Velti securities during the class period. He argues that in place of the proposed plan of distribution, "all investors who suffered significant losses in Velti during the class period should be compensated equally based on loss."

• Patrick Drewes submitted an objection on November 25, 2014. Dkt. No. 174. Drewes purchased 12,575 Velti shares in February 2013. He critiques the proposed distribution plan as structured so that "those who invested early and heavily ... receive a majority" of the recovery.

The Hull objection fails because Hull did not hold his Velti shares through an alleged corrective disclosure. Hull states that he bought 2,000 Velti shares on June 29, 2012 and sold

2,000 shares on July 17, 2012. Dkt. No. 169. Plaintiffs do not allege that any corrective disclosures occurred during that period. This means that Hull's only potential losses would be the result of "in and out" trades—i.e., trades of Velti stock that occurred in between corrective disclosures. Given the difficulty, under *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336 (2005), [3] of proving loss based on such trades, it is not unfair or unreasonable to exclude them from the Plan of Distribution. *See* *Vinh Nguyen,* 2014 WL 1802293, at *5–8 (rejecting argument that distribution plan was unfair because it excluded in-and-out traders where the objector "points to almost no evidence in the record suggesting that the in-and-out traders had any reasonable chance of proving [loss]"). The Hull objection is OVERRULED.

***10** The Fast, Rowe, and Drewes objections make two distinct arguments: first, that all class members should recover an equal percentage of their losses; and second, that the Plan of Distribution too heavily favors class members that purchased early in the class period. Neither argument is persuasive. First, governing law recognizes that shareholders are damaged differently according to when they purchased and sold their shares in relation to the corrective disclosures. *See* *Dura,* 544 U.S. at 342–46; *see also,* *Vinh Nguyen,* 2014 WL 1802293, at *5 ("A settlement in a securities class action case can be reasonable if it fairly treats class members by awarding a pro rata share to every authorized claimant, but also sensibly makes interclass distinctions based upon, inter alia, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue."). It is reasonable to design a distribution plan based on this principle. Second, while the Plan of Distribution does favor early purchasers, neither Fast nor Drewes shows that doing so is unreasonable. It is certainly possible that a fair and reasonable distribution plan could be created that would award a greater recovery to late purchasers. But plaintiffs have provided an explanation of their chosen allocation that is reasonable and that corresponds to the allegations in the Consolidated Complaint. The objectors have not demonstrated that this explanation is unsound. The Fast, Rowe, and Drewe objections are OVERRULED.

II. NONSETTLING DEFENDANTS' OBJECTIONS

"There is ... a recognized exception to the general principle barring objections by nonsettling defendants to permit a nonsettling defendant to object where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." *Waller v. Fin. Corp. of Am.,* 828 F.2d 579, 583 (9th Cir. 1987); *see also,* *Eichenholtz v. Brennan,* 52 F.3d 478, 482 (3d Cir. 1995). "[A] nonsettling defendant has standing to object to a partial settlement which purports to strip it of a legal claim or cause of action, an action for indemnity or contribution for example." *Waller,* 828 F.2d at 583. The Nonsettling Defendants object to the settlement on several grounds. I address each in turn.

A. Bar Order

The Nonsettling Defendants contend that the Proposed Judgment's bar order "reach[es] far beyond [that] allowed by the PSLRA." Underwriters Opp. 13. As part of the PSLRA, Congress enacted 15 U.S.C. § 78u–4(f)(7)(A), "which makes the entry of a bar order against future claims for contribution mandatory upon a court's approval of a settlement in a [qualifying] case." *In re Heritage Bond Litig.,* 546 F.3d 667, 677 (9th Cir. 2008). Section 78u–4(f)(7)(A) states:

> (7) Settlement discharge
>
> (A) In general
>
> A covered person who settles any private action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action:
>
> (i) by any person against the settling covered person; and
>
> (ii) by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the settling covered person. 18

15 U.S.C. § 78u–4(f)(7)(A). A "covered person" is defined as either "(i) a defendant in any private action arising under [the Exchange Act];" or "(ii) a defendant in any private action arising under [Section 11 of the Securities Act], who is an outside director of the issuer of the securities that are the subject of the action." 15 U.S.C. § 78u–4(f)(10)(C).

The relevant bar order in the Proposed Judgment provides:

> Upon the Effective Date, all Persons, including, but not limited to, Plaintiffs, on behalf of themselves and

> the Settlement Class, Settlement Class Members (i.e. those who have not timely opted out of, or timely requested exclusion from, the Settlement Class), and the Nonsettling Defendants, shall be enjoined and barred from commencing or continuing any claim, cross-claim, third-party claim, claim over, or action in any forum against the Released Persons, seeking, as damages, indemnity, contribution, or otherwise, the recovery of all or part of any liability or settlement which such persons (i) paid, (ii) were obligated to pay or agreed to pay, or (iii) may become obligated to pay to the Settlement Class, as a result of such persons' liability for or participation in any acts, facts, statements or omissions that were or could have been alleged in the Action.
>
> ***11** Accordingly, to the full extent provided by [Section 78u–4(f)(7)(A)], the Court hereby bars all barred claims against the Released Persons as provided herein and in the Settlement Agreement.

Proposed Judgment ¶¶ 12–13. The corresponding language in the Settlement Agreement is virtually identical. *See* Settlement Agreement ¶ 5.5. [4]

The Nonsettling Defendants raise three specific issues with the bar order: (1) it purports to release the Overseas Defendants and other persons who are not parties to the settlement agreement; (2) it purports to release independent claims; and (3) it is not mutual.

1. Release of Overseas Defendants

Baker Tilly criticizes the bar order because it defines "Released Persons" to include Velti and all nine Velti directors and officers named as defendants in this case. *See* Settlement Agreement ¶¶ 1.19–1.20. [5] Only four of those directors and officers are parties to the Settlement Agreement, however. The other five directors and officers—i.e., the Overseas Defendants—have not been served in this action and did not sign the Settlement Agreement. Baker Tilly points to Section 78u–4(f)(7)(A), which refers to "covered person[s] who settl[e]" and "settling covered person[s]," and argues that nonsettling persons, whether or not they qualify as covered, may not be released by a bar order. Baker Tilly Opp. 14–15.

***12** The Underwriters similarly argue that the bar order is overly broad because it extends to the Overseas Defendants and other persons affiliated with Velti, each of whom "have contractual and indemnity obligations to the [Underwriters]." Underwriters Opp. 14. The Underwriters assert that "none of these [individuals] is contributing anything to the settlement," and that there is thus no justification for barring contribution or indemnification claims against them. *Id.* Moreover, because the settlement agreement does not "bar or otherwise affect any claim of right to indemnification between Velti and any present or former officer or director of Velti," the settlement would effectively allow Velti to preference indemnification of its directors and officers over indemnification of other entities, such as the Underwriters. Underwriters Opp. 13–15. [6]

The Settling Defendants respond that courts routinely grant bar orders that extend to both settling defendants and other affiliated persons, including affiliated nonparties. *See* Settling Defendants Response 5–7 ("Response"). The Settling Defendants cite several cases that support this point. *See, e.g., Menkes v. Stolt–Nielsen S.A.,* 270 F.R.D. 80, 101–03 (D.Conn.2010) (preliminarily approving settlement of Exchange Act claims where "Released Parties" was defined to include the defendants, and among others, the defendants' respective "past or present advisors, affiliates, agents, assigns, attorneys, ... consultants, ... present and former employees, [and] any entity in which any defendant has a controlling interest"); *In re PNC Fin. Servs. Grp., Inc.,* 440 F. Supp.2d 421, 438, 452 (W.D.Pa.2006) (finally approving partial settlement of Exchange Act claims where bar order extended to "various affiliates, employees and others associated with the settling entities" and nonsettling defendants would "enjoy the benefit of a corresponding judgment reduction for the elimination of its contribution claims against any released party"); *see also, Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 109 (2d Cir. 2005) ("[C]lass action settlements have in the past released claims against nonparties where, as here, the claims against the nonparty being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled.") (citing cases).

***13** The Settling Defendants emphasize that the settlement will be funded by the officers' and directors' liability insurance carriers on behalf of Velti and all officers and directors named in the action. Response 7. Further, the Settlement Agreement provides for mutual releases between all Released Persons and plaintiffs. Settlement Agreement ¶¶ 5.1–5.2, 5.4. The Settling Defendants assert that the payment by the insurance carriers and the mutual releases "constitute consideration" for the release of the Overseas Defendants. Response 7.

Neither the Nonsettling Defendants nor the Settling Defendants offer convincing authority regarding the breadth of the Proposed Judgment's bar order. The Nonsettling Defendants do not cite any case law in support of their position. Baker Tilly's reliance on the fact that Section 78u–4(f)(7)(A) explicitly extends to "covered person[s] who settl[e]" and "settling covered person[s]" is not compelling given that the statute does not limit bar orders to such parties or provide that the contribution bar described therein is to be the only type of bar order. *Cf. In re HealthSouth Corp. Sec. Litig.,* 572 F.3d 854, 859 (11th Cir. 2009) (holding that Section 78u–4(f)(7)(A) does not preclude a bar order containing an indemnification provision, as there is no "language in the statute suggesting that the contribution bar is exclusive"); *In re Rite Aid Corp. Sec. Litig.,* 146 F.Supp.2d 706, 726 (E.D.Pa.2001) ("[Section 78u–4(f)(7)(A)] does not include any explicit language stating that the order therein described is the *only* bar order that we may entertain.") (emphasis in original). In other words, Section 78u–4(f)(7)(A) is not the exclusive authority for issuance of a bar order—the Ninth Circuit "acknowledge[s] the authority of a district court under federal common law to issue bar orders barring future claims for contribution and indemnity as part of its approval of a proposed settlement in a class action securities fraud case, once it has found that the settlement satisfies the requirements of Rule 23." *Heritage Bond,* 546 F.3d at 676. As to the Settling Defendants, while they do cite cases involving the release of nonparties, none of the cases they cite involves the release of named (but not served) nonsettling defendants, which is the situation here.

In *In re Consol. Pinnacle W. Sec. Litig. / Resolution Trust Corp. Merabank Litig.,* 51 F.3d 194, 197 (9th Cir. 1995), the Ninth Circuit held that the district court did not abuse its discretion in applying a bar order to a nonparty to a partial settlement agreement where the district court had found the nonparty "to be a critical participant and contributor to the overall settlement." *Id.* at 197. Relying on *Pinnacle,* the court in *Rite Aid* held that nonparty insurers were properly included in a partial settlement's bar order where the insurers had "not only contributed to the settlement, but their contribution will go to reduce, dollar for dollar, any judgment against the [nonsettling defendants]." 146 F.Supp.2d at 732. The insurers were thus "critical participant[s] and contributor[s] to the overall settlement" and were "properly included in the bar order despite their nonparty status." *Id.* (internal quotation marks omitted). At least two other courts have looked to the "critical participant and contributor" language from *Pinnacle* in assessing the inclusion of nonparties in bar orders. *See PNC,* 440 F.Supp.2d at 453 (approving bar order that extended to nonparties where "each of the released parties contributed to the settlement in a manner that was essential to the partial settlement agreement and is properly designated as a released party"); *In re Lloyd's Am. Trust Fund Litig.,* No. 96–cv–01262, 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002) ("[C]ourts recognize that it is appropriate for a class action settlement to include a limited release of a nonparty ... where that nonparty has contributed substantially to making the settlement possible.").

***14** The inclusion of nonparties affiliated with Velti in the bar order is unremarkable. The Settling Defendants are correct that nonparties affiliated with settling defendants are routinely included in bar orders, even in cases governed by the PSLRA. *See, e.g., Menkes,* 270 F.R.D. at 101–03; *PNC,* 440 F.Supp.2d at 452. The inclusion of the Overseas Defendants is more unique. However, Baker Tilly and the Underwriters have not produced any authority stating that a nonsettling defendant cannot be included in a bar order in a partial settlement, or indicating that the Overseas Defendants are not properly considered critical participants and contributors given the circumstances of this case. It is undisputed that the settlement fund will be financed by insurance providers on behalf of Velti and all directors and officers named in the action. These insurers would have little incentive to settle if they could not get a complete release of each of their insureds—otherwise, they would face the likelihood of more litigation. Further, while the Overseas Defendants have not personally contributed to the fund, the insurers have contributed on their behalf—in precisely the same way the insurers have contributed on behalf of the Settling Defendants. The upshot is that the class will be compensated for the release of the Overseas Defendants. The Nonsettling Defendants will be compensated as well in that, as discussed in more detail below, the Overseas Defendants' proportionate fault will be factored into the reduction of any future judgment against the Nonsettling Defendants. Finally, the fact that the Overseas Defendants have not been served in this action (and there is no indication that they would be served with further time and effort) weakens any distinction between them and other released persons affiliated with Velti. The Overseas Defendants may remain "Released Persons."

2. Independent Claims

Baker Tilly objects that the bar order in the Proposed Judgment "might be interpreted as barring independent claims by Baker Tilly." Baker Tilly Opp. 16. "[A] bar order issued in a partial settlement of a securities fraud class action case cannot bar independent claims." *Heritage Bond,* 546 F.3d at 676. "[S]uch bar orders may only bar claims for contribution and indemnity and claims where the injury is the nonsettling defendant's liability to the plaintiff." *Id.* at 680. Baker Tilly asks that the following sentence be added to Proposed Judgment ¶ 12 to "ensure that there is no doubt" about the bar order's scope: "Nothing in this paragraph shall preclude any Nonsettling Defendant from bringing or asserting against a Released Person any claims that seek recovery for amounts other than amounts the Released Person (i) paid, (ii) was obligated to pay or agreed to pay, or (iii) may become obligated to pay to the Settlement Class." Baker Tilly Opp. 16.

The Settling Defendants agree that the bar order may not extend to Baker Tilly's independent claims but contend that Proposed Judgment ¶ 12 unambiguously does not. Proposed Judgment ¶ 12 states:

> Upon the Effective Date, all Persons, including, but not limited to, Plaintiffs, on behalf of themselves and the Settlement Class, Settlement Class Members (i.e. those who have not timely opted out of, or timely requested exclusion from, the Settlement Class), and the Nonsettling Defendants, shall be enjoined and barred from commencing or continuing any claim, cross-claim, third-party claim, claim over, or action in any forum against the Released Persons, seeking, as damages, indemnity, contribution, or otherwise, the recovery of all or part of any liability or settlement which such persons (i) paid, (ii) were obligated to pay or agreed to pay, or (iii) may become obligated to pay to the Settlement Class, as a result of such persons' liability for or participation in any acts, facts, statements or omissions that were or could have been alleged in the Action.
>
> Proposed Judgment ¶ 12.

This language is plainly distinguishable from the language in the overly broad bar orders at issue in *Heritage,* which precluded the nonsettling defendants from bringing against the settling defendants any future claims "arising out of or related to ... any of the transactions or occurrences alleged." 546 F.3d at 670. Proposed Judgment ¶ 12 does not release independent claims. The additional sentence requested by Baker Tilly is not necessary.

3. Mutuality

The Nonsettling Defendants assert that the bar order "must be mutual," meaning that any party who is protected against claims of contribution and indemnification must also be prohibited from asserting such claims. Baker Tilly Opp. 14. The bar order in the Proposed Judgment prohibits contribution and indemnification claims "against the Released Persons." Proposed Judgment ¶¶ 12–13. The bar order does not, however, prohibit such claims by the Released Persons against others. *See id.* The Nonsettling Defendants contend that the bar order must do so. They note that Section 78u–4(f)(7)(A) plainly requires that its mandatory contribution bar be mutual. *See* 15 U.S.C. § 78u–4(f)(7)(A) ("The order shall bar all future claims for contribution arising out of the action; (i) by any person against the settling covered person; and (ii) by the settling covered person against any person."). The Settling Defendants concede that the bar order should be mutual and state that if I determine that additional language is necessary to clarify this issue, they would not object to including such language. [7] Response 3, 7. I agree with the parties and find that additional language is necessary to clarify that the bar order prohibits claims both against and by the Released Persons. As there is no dispute on this issue, I will edit the Proposed Judgment accordingly.

B. Judgment Reduction Methodology

***15** Under 15 U.S.C. § 78u–4(f)(7)(B), also enacted by the PSLRA, where a "covered person" settles before a final verdict or judgment, the subsequent verdict or judgment is reduced by the greater of: "(i) an amount that corresponds to the percentage of responsibility of that covered person; or (ii) the amount paid to the plaintiff by that covered person." 15 U.S.C. § 78u–4(f)(7)(B). As stated above, a "covered person" is either "(i) a defendant in any private action arising under [the Exchange Act];" or "(ii) a defendant in any private action arising under [Section 11], who is an outside director of the issuer of the securities that are the subject of the action." 15 U.S.C. § 78u–4(f)(10)(C). Section 78u–4(f)(7)(B) serves the purpose of "ensuring that a nonsettling party [is not] exposed to liability for more than its percentage of responsibility for plaintiffs' damages." *In re Initial Pub. Offering Sec. Litig.,* 226 F.R.D. 186, 204 (S.D.N.Y.2005).

The judgment reduction provisions in the Settlement Agreement state in relevant part:

> 5.6. With respect to the ... Exchange Act claims only: Pursuant to 15 U.S.C. § 78u–4(f)(7)(B) and pursuant to federal common law, in the event Plaintiffs or the Settlement Class shall obtain a verdict or judgment against any of the Nonsettling Defendants in the Action, the verdict or judgment shall be reduced by the greater of (i) an amount that corresponds to the percentage of responsibility of the Released Persons, or (ii) the amount paid on behalf of the Released Persons in this Partial Settlement.
>
> 5.7. With respect to the Securities Act claims only: Any person or entity so barred and enjoined pursuant to ¶ 5.5 shall be entitled to appropriate judgment reduction in accordance with applicable statutory or common law rule to the extent permitted under the Securities Act for the claims alleged herein.
>
> Settlement Agreement ¶¶ 5.6–5.7.

The judgment reduction provision in the Proposed Judgment states:

> Any final verdict or judgment obtained by or on behalf of Plaintiffs or the Settlement Class against any Person, other than the Released Persons, relating to the Released Claims, shall be reduced in accordance with applicable law.
>
> Proposed Judgment ¶ 14.

The parties agree that Section 78u–4(f)(7)(B) will govern the Nonsettling Defendants' judgment reduction based on claims settled by "covered persons," meaning all Exchange Act claims, plus Section 11 claims settled by outside directors. The parties disagree over what formula will govern the Nonsettling Defendants' setoff based on Securities Act claims other than Section 11 claims settled by outside directors (i.e., "uncovered" Securities Act claims). [8] The parties further dispute whether Proposed Judgment ¶ 14 as currently drafted adequately defines that formula.

Plaintiffs assert that by stating that any future judgment will be "reduced in accordance with applicable law," the provision is sufficiently definite, and that the Nonsettling Defendants are only entitled to a pro tanto reduction on uncovered Securities Act claims. The Nonsettling Defendants contend that the provision is unacceptably vague, and that they are entitled to a Section 78u–4(f)(7)(B) reduction on all Securities Act claims. [9] I find that in the circumstances of this case, the Nonsettling Defendants are right.

1. The judgment reduction provision must state with more clarity how Securities Act claims will be reduced.

***16** In arguing that Proposed Judgment ¶ 14 in unacceptably vague as written, the Nonsettling Defendants rely on *In re Jiffy Lube Sec. Litig.,* 927 F.2d 155 (4th Cir. 1991). There, the district court approved a settlement of Exchange Act claims which provided that the nonsettling defendant's judgment reduction would be "based on controlling legal principles in effect at the time." *Id.* at 160. The Fourth Circuit reversed, reasoning that the failure to determine a specific judgment reduction method at the time of settlement prejudiced the nonsettling defendant. *Id.* at 160–62. The court observed that the setoff formula "determines to a large extent the manner in which a defense should be made at trial." *Id.* at 161. For example, the settling defendants' extent of fault compared to the nonsettling defendant's "is either highly relevant (under the proportionate rule), minimally important (under the pro rata rule), or not important at all (under the pro tanto rule)." *Id.* (internal quotation marks omitted). A nonsettling defendant "is entitled to know what the law of the case is in advance of trial, not on the eve, after discovery is concluded and witnesses have been prepared." *Id.* Further, the failure to designate a setoff formula "exposes [the nonsettling defendant] to the risk of receiving inadequate credit for the contribution bar imposed on it." *Id.* The court noted that while "there is certainly some risk involved under any of the [judgment reduction] methods the [district court] might have chosen, ... choosing a method at least allows the parties to know what the nature of that risk is." *Id.*

The Second Circuit has applied *Jiffy Lube* on at least two occasions in determining whether a partial settlement provided a sufficiently definite description of the judgment reduction method. *See* *Denney v. Deutsche Bank AG,* 443 F.3d 253, 274–75 (2d Cir. 2006) (vacating approval of partial settlement with judgment reduction provision which "simply provides that nonsettling parties shall be 'sufficiently' compensated, without specifying how such compensation shall be calculated"); *Gerber v. MTC Elec. Technologies Co.,* 329 F.3d 297, 304–05 (2d Cir. 2003); *see* *also,* *Fluck v. Blevins,* 969 F.Supp. 1231, 1238 (D.Or.1997) (citing *Jiffy Lube* and stating that "ordinarily it is best to decide [the setoff formula] before approving the settlement and entering the bar order").

Plaintiffs respond that courts have not uniformly followed *Jiffy Lube*. Rather, a number of courts have held that so long as the settlement "acknowledges that the applicable judgment reduction method will apply," the court need not select a particular approach when approving the settlement. Reply 11 n.13. Plaintiffs point to *In re Atmel Corp. Derivative Litig.,* No. 06–cv–04592–JF, 2010 WL 9525643 (N.D.Cal. Mar. 31, 2010), the only case from this district cited by either party which addresses whether a specific judgment reduction method must be identified at the time of settlement approval. In *Atmel,* the court declined to require a detailed description of the setoff formula in a partial settlement of a shareholder derivative action. *Id.* at *7–8. The court acknowledged *Jiffy Lube* but approved the settlement with only the following language regarding judgment reduction: "The approval for this Settlement and this bar order shall not be construed as precluding the Nonsettling Defendant from enforcing any judgment reduction, credit, or setoff right otherwise available to him under the PSLRA or other applicable law." *Id.* at *8. In so holding, the court relied in part on *In re Phenylpropanolamine Products Liab. Litig.,* 227 F.R.D. 553 (W.D.Wash.2004), in which the court approved a partial settlement and entered a final judgment stating: "[T]he approval for this Settlement and this bar order shall not be construed as precluding a nonsettling defendant from enforcing any judgment reduction, credit, or setoff right otherwise available ... under applicable state law." *Id.* at 568.

Plaintiffs cite two additional cases approving partial settlements without requiring more specificity regarding the setoff calculation than that applicable law will apply. *See In re IndyMac Mortgage–Backed Securities Litigation,* No. 09–cv–04583 (S.D.N.Y. Dec. 18, 2012) (Dkt. No. 410) (entering final judgment for partial settlement of Securities Act claims with judgment reduction provision stating that nonsettling defendants "shall be entitled to appropriate judgment reduction in accordance with applicable statutory or common law rule to the extent permitted under the Securities Act for the claims alleged herein," the exact same language at issue here); *In re Enron Corp. Sec., Derivative & ERISA Litig.,* No. 01–cv–03624, 2008 WL 2566867, at *8–9 (S.D. Tex. June 24, 2008) (approving partial settlement of Exchange Act and state law claims despite nonsettling defendants' objection that guarantee of "appropriate judgment reduction" was not sufficiently definite).

***17** Neither the Nonsettling Defendants nor plaintiffs present convincing authority in support of their position. The Nonsettling Defendants do not cite a single case from this circuit holding that the setoff formula must be specifically defined at the time of settlement approval. Meanwhile, the cases cited by plaintiffs are distinguishable on their facts: *Amtel* and *Enron* involved Exchange Act claims, not Securities Act claims that were not plainly governed by Section 78u–4(f)(7)(B). *Phenylpropanolamine* did not involve securities fraud claims at all. *IndyMac* did involve a partial settlement of Securities Act claims beyond the plain scope of Section 78u–4(f)(7)(B), but the nonsettling defendants in that case did not object to the setoff provision in the final judgment. *See* No. 09–cv–04583, Dkt. No. 400 at 2 ("[N]ot a single objection has been filed to any aspect of the proposed settlement.").

In the absence of clear authority to the contrary, I find the Nonsettling Defendants' position more persuasive. This is not a case where the only claims at issue are Exchange Act claims and it is plain what "applicable law" will apply in the event that a judgment reduction becomes necessary. Nor is this a case where the Nonsettling Defendants' only grievance is that the setoff formula does not "predict the future—i.e., ... tell [them] precisely the value of [the] credit against their future liability." *Initial Pub. Offering,* 226 F.R.D. at 203. Rather, as discussed in more detail below, there is considerable ambiguity regarding what setoff formula applies to uncovered Securities Act claims. The parties' respective arguments reflect this ambiguity: the Nonsettling Defendants assert that they are entitled to a Section 78u–4(f)(7)(B) reduction on all Securities Act claims, while plaintiffs contend that only a pro tanto reduction should apply. Given that the settlement releases Velti and all Velti officers/directors named in the action, and that the amount offered in settlement is severely constricted by Velti's bankruptcy and the officers/directors limited financial resources, the difference between a Section 78u–4(f)(7)(B) reduction and a pro tanto reduction may well be significant. In these circumstances, a judgment reduction provision that merely refers to "applicable law" without additional clarification will "inflict unfairness" on the Nonsettling Defendants. *See* *Denney,* 443 F.3d at 274. They are entitled to know the nature of their risk now, not on the eve of trial. *See* *Jiffy Lube,* 927 F.2d at 161.

Accordingly, I will consider what judgment reduction method is appropriate here.

2. The Nonsettling Defendants are entitled to a Section 78u–4(f)(7)(B) reduction on all Securities Act claims.

The Nonsettling Defendants argue that the Section 78u–4(f)(7)(B) formula should apply to Exchange Act claims and all Securities Act claims, including uncovered Securities Act claims. *See* Baker Tilly Opp. 6–14. I agree.

In *Franklin v. Kaypro Corp.,* 884 F.2d 1222 (9th Cir. 1989), the Ninth Circuit held that where a partial settlement of Section 11 claims is approved and a contribution bar is entered, any subsequent judgment against a nonsettling defendant must be reduced by the settling defendants' percentage of liability. *Id.* at 1231. The court found this to be the superior method of judgment reduction because it satisfies three goals: "the statutory goal of punishing each wrongdoer, the equitable goal of limiting liability to relative culpability, and the policy goal of encouraging settlement." *Id.* at 1231. In its conclusion, the court noted the tension between the principle of contribution and the goal of encouraging settlement of securities actions, and emphasized that "the most efficacious and equitable method of resolving this tension is by adopting a rule allowing only proportional liability if a contribution bar is entered as part of a pretrial partial settlement." *Id.*; *see also, Eichenholtz v. Brennan,* 52 F.3d 478, 487 (3d Cir. 1995) (citing *Kaypro* in holding that under the "proportionate fault rule" the district court "did not abuse its discretion in imposing the bar order with the proportionate judgment reduction provision").

***18** The Nonsettling Defendants contend that the proportionate fault rule articulated in *Kaypro* and *Eichenholtz* continues to apply despite the passage of the PSLRA. For example, in *Neuberger v. Shapiro,* 110 F.Supp.2d 373, 381–82 (E.D.Pa.2000), the court approved a partial settlement of Section 11 claims upon finding that the bar order provided that, "in the event that a judgment is entered against nonsettling defendants, the amount of the award will be reduced by either the amount of settlement or by [the settling defendant's] proportionate fault, whichever is greater." *Id.* at 382. The court noted that the settling defendant was not a "covered person" under the PSLRA but, citing *Eichenholtz,* stated that "the rule in this Circuit allows contribution bar orders in federal securities cases where the jury in the nonsettling defendants' trial will assess the relative culpability of both settling and nonsettling defendants, and the nonsettling defendants will pay a commensurate percentage of the judgment." *Id.* at 382.

Plaintiffs respond that under the plain language of Section 78u–4(f)(7)(B), proportional liability reductions do not apply to Securities Act claims except Section 11 claims against outside directors. Reply 9. According to plaintiffs, "by refusing to apply [Section 78u–4(f)(7)(B)] to Securities Act claims" settled by persons other than outside directors, the PSLRA clarified that judgment reductions based on such claims need not be based on proportionate fault. Reply 10. Plaintiffs rely on *In re WorldCom, Inc. Sec. Litig.,* No. 02–cv–03288, 2005 WL 591189 (S.D.N.Y. Mar. 14, 2005), in which the court rejected a nonsettling defendant's objection to the following judgment reduction provision in a partial settlement of Section 11 claims:

> The Nonsettling Entities/Individuals shall be entitled to judgment credit in an amount that is the greater of the amount allocated in the Settlement to claims for which a Nonsettling Entity/Individual may be found liable for common damages or, for each such claim, the proportionate share of the [Settling] Defendants' fault as proven at trial.
>
> *Id.* at *3.

Although this setoff formula was essentially identical to that provided by Section 78u–4(f)(7)(B), the nonsettling defendant objected that because other defendants potentially proceeding to trial were insolvent, it could "end up paying much of the judgment for which [the insolvent defendants] are deemed responsible in addition to its own share." *Id.* at *3. The nonsettling defendant requested a modification of the formula to address this perceived unfairness. *Id.* The court declined to order one, observing that the nonsettling defendant was

> effectively arguing that traditional principles of joint and several liability are unfair. It is indisputable, however, that joint and several liability is prescribed by Section 11 for all defendants except outside directors ... When Congress passed the [PSLRA], replacing the former scheme of joint

> and several liability for Exchange Act violators and outside directors facing Section 11 claims with proportionate liability in most circumstances, it could easily have done the same with respect to all Section 11 defendants. Congress chose not to do so.

Id. at *8 (footnotes omitted). The court went on to state that while the settling defendants were not "covered persons" under the PSLRA, "[b]ecause the determination to be made here is ultimately an equitable one, the PSLRA may be accorded persuasive weight." *Id.* at *9. Finding that the judgment reduction provision in the settlement was "virtually the same" as that provided by Section 78u–4(f)(7)(B), the court concluded that it was adequate. *Id.*

The Nonsettling Defendants have the better of these arguments. *Kaypro* is extremely persuasive here, if not controlling. *Kaypro* directly addresses what setoff formula should apply to Section 11 claims and squarely holds that "the most efficacious and equitable" approach is to limit the nonsettling defendant's future liability to its proportionate fault. [10] *See* 884 F.2d at 1231. *Kaypro* also lays out several problems with the pro tanto approach urged by plaintiffs, including that it encourages collusion and generally requires good faith hearings at the time of settlement approval. *Id.* at 1230. Such hearings "bo[g] down the settlement process" and "negat[e] many of the benefits of settlement." *Id.* (internal quotation marks omitted). Plaintiffs contend that *Kaypro* is no longer good law, but plaintiffs do not explain why the case's reasoning is less applicable after passage of the PSLRA than it was before given that the PSLRA did not modify joint and several liability under Section 11 except to remove outside directors from its scope. *See* *In re WorldCom, Inc. Sec. Litig.,* No. 02–03288, 2005 WL 335201, at *11–12 (S.D.N.Y. Feb. 14, 2005); *In re Cendant Corp. Sec. Litig.,* 139 F.Supp.2d 585, 590–91 (D.N.J.2001). Nor did the PSLRA address any of the drawbacks to the pro tanto approach identified by the Ninth Circuit in *Kaypro*. Moreover, as the Nonsettling Defendants point out, several courts, including the Ninth Circuit, have indicated that the PSLRA did not by implication overrule all existing federal common law regarding the 1933 and 1934 Acts. *See, e.g., Heritage,* 546 F.3d at 677–78; *HealthSouth,* 572 F.3d at 859–61; *Neuberger,* 110 F.Supp.2d at 381–82. *Neuberger* illustrates this point: the court applied the *Kaypro*/*Eichenholtz* proportionate fault rule—a creation of federal common law—even though the case was governed by the PSLRA. *See* 110 F.Supp.2d at 381–82. [11]

***19** Plaintiffs have not produced a single case holding that different setoff formulas should apply to Exchange Act and Securities Act claims pending in the same action, and I am not aware of any. *WorldCom* does not support plaintiffs' position given that the settlement in that case provided that the Section 78u–4(f)(7)(B) formula would apply to uncovered Securities Act claims. *See* 2005 WL 591189 at *3. The court did decline to impose a judgment reduction on Securities Act claims that went beyond the method prescribed by Section 78u–4(f)(7)(B). But that is not what the Nonsettling Defendants are asking for here. Indeed, if anything, *WorldCom* supports applying the Section 78u–4(f)(7)(B) formula in this case because the court accorded the PSLRA "persuasive weight" even though it found that the Act did not apply. *Id.* at *9. Likewise, in *Fluck v. Bevins,* also cited by plaintiffs, the court decided to "follow [Section 78u–4(f)(7)(B)] for the purposes of crediting any settlements reached in this action," even though the court determined that the PSLRA did not govern the case. 969 F.Supp. at 1238; *see also,* *Gerber v. MTC Elec. Technologies Co.,* 329 F.3d 297, 309 (2d Cir. 2003) ("While ... we conclude that the PSLRA does not control the outcome of this pre-PSLRA case, the congressional determination that a mutual bar order was the better approach may have some bearing on the district court's resolution of this issue."). In short, the cases cited by plaintiffs do not provide grounds for limiting the Nonsettling Defendants to a pro tanto reduction on uncovered Securities Act claims; the cases provide further support for applying the Section 78u–4(f)(7)(B) formula.

This approach is also the most fair. "In essence, the choice between pro tanto and proportional rules is a choice as to which party should bear the risk of a bad settlement, settling plaintiff or nonsettling defendant." *In re Sunrise Sec. Litig.,* 698 F.Supp. 1256, 1259 (E.D.Pa.1988). Given that the settling plaintiff's level of control over the settlement outcome is, in most cases, exponentially greater than the nonsettling defendant's, it is appropriate to place this risk on the plaintiff, who then has a "financial incentive to make sure that each defendant pays his respective share of damages." *Id.* at 1258. Further, under the Section 78u–4(7)(B) method, a nonsettling defendant is not exposed to paying more than if all parties had gone to trial. [12] *See* *Franklin,* 884 F.2d at 1231.

***20** As Ninth Circuit precedent, the PSLRA's "persuasive weight," *WorldCom,* 2005 WL 591189 at *9, and fairness all weigh in favor applying the Section 78u–4(f)(7)(B) formula, and plaintiffs have not offered persuasive authority to the contrary, I find that this is the better approach. [13] The Settlement Agreement states that Securities Act claims will be reduced "in accordance with applicable statutory or common law rule to the extent permitted under the Securities Act for the claims alleged herein." Settlement Agreement ¶ 5.7. The judgment reduction provision in the Proposed Judgment similarly provides that any subsequent judgment against the Nonsettling Defendants "shall be reduced in accordance with applicable law." Proposed Judgment ¶ 14. I will revise Proposed Judgment ¶ 14 to clarify that applicable law in this case requires that all claims pending against the Nonsettling Defendants be reduced according to the judgment reduction method set out in Section 78u–4(f)(7)(B).

C. Appealability

The Nonsettling Defendants ask that the final judgment include an express certification under Federal Rule of Civil Procedure 54(b) so that the judgment will be appealable before all claims in the action have been resolved. Underwriters Opp. 18 n.5; Baker Tilly Opp. 17. Rule 54(b) provides that

> [w]hen an action presents more than one claim for relief —whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.
>
> Fed.R.Civ.P. 54(b).

Plaintiffs assert that the Proposed Judgment is sufficient to satisfy Rule 54(b) in that it provides for an "immediate entry of this Final Judgment by the Clerk of the Court." Proposed Judgment ¶ 23. Plaintiffs offer no authority for this assertion, and it is not clear that it is correct. *See* *Noel v. Hall,* 568 F.3d 743, 747 (9th Cir. 2009) (district court properly entered final judgment under Rule 54(b) where court "expressly determined that there was no just reason for delay"); *see also,* *Nat'l Ass'n of Home Builders v. Norton,* 325 F.3d 1165, 1167–68 (9th Cir. 2003). Moreover, given the substantial difference of opinion on this issue, "[p]rudence might dictate use of what some view as the talismanic words of Rule 54(b), as at least a nod to the wisdom of the adage, 'an ounce of prevention....' " *Kelly v. Lee's Old Fashioned Hamburgers, Inc.,* 908 F.2d 1218, 1220 n.2 (5th Cir. 1990). I will revise Proposed Judgment ¶ 23 to read: "Pursuant to Rule 54(b), the Court finds that there is no just reason for delay and direct the Clerk of the Court to immediately enter this Final Judgment."

***21** In sum, the *Churchill* factors support approval, the *Bluetooth* factors do not indicate collusion, and the Plan of Distribution is fair, reasonable, and adequate. I find that the settlement is the product of arms-length mediation between experienced and professional counsel. *See, e.g.,* Phillips Decl. ¶¶ 9–14. The motion for final approval is GRANTED. I will enter the Proposed Judgment submitted by plaintiffs in accordance with the discussion above.

III. ATTORNEY'S FEES AND COSTS

Plaintiffs' counsel seek an award of $2,375,000 in attorney's fees, or 25 percent of the $9,500,000 settlement fund. Fees Mot. 2. In addition, plaintiffs' counsel request $219,469.67 in expenses. Fees Mot. 4. Plaintiffs' counsel collectively spent 3,434.55 hours on this case. Fees Mot. 18. The resulting lodestar is $1,914,221.25, meaning that plaintiffs' counsel are asking for a multiplier of approximately 1.25. *Id.* Plaintiffs' counsel do not seek an incentive award for the class representatives.

A. Fees

In common fund cases such as this one, the benchmark fee award is 25 percent of the settlement fund. *Vizcaino,* 290 F.3d at 1047. This benchmark percentage is a starting point and "should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990). The court's selection of the benchmark percentage or any other calculation must be supported by findings that take into account the particular circumstances of the case, such as (1) the result achieved, (2) the risk involved, (3) the skill required and the quality of work by counsel, (4) market rates, and (5) the contingent nature of the fee. *Vizcaino,* 290 F.3d at 1048–50. Even when determining the fee award based on a percentage of the common fund, the court should use the lodestar method to crosscheck that amount. *Covillo v. Specialtys Cafe,* No. 11–cv–05940–DMR, 2014 WL 954516, at *6 (N.D.Cal. Mar. 6, 2014). The lodestar crosscheck need not entail either "mathematical precision [or] bean counting ... [Courts] may rely on summaries submitted by the attorneys and need not review actual billing records." *Id.*

The circumstances of this case support the 25 percent of the settlement fund requested by plaintiffs' counsel. As discussed above, the result achieved for the class is favorable considering the Settling Defendants' precarious financial condition, the complications of prosecuting claims against persons living abroad, and the vulnerable points in plaintiffs' case. These same factors highlight the considerable risk involved in litigating this action on a contingent fee basis, and the skill required to perform such work. A fee award of 25 percent of the common fund is the benchmark identified by the Ninth Circuit and is squarely within the range of awards generally approved by district courts in this circuit. *See, e.g., Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 491 (E.D.Cal.2010) ("The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark."). Finally, no class member objected to the proposed fee award.

A lodestar crosscheck confirms that the requested fee award is acceptable. Plaintiffs' counsel dedicated a combined total of 3,434.55 hours to litigating this case, for which they accrued $1,914,221.25 in attorney's fees based on their hourly rates. *See* Weiser Decl. Exs. D–F. While significant motion practice has not yet begun, plaintiffs' counsel have shown that in prosecuting plaintiffs' claims, they conducted an extensive investigation into the underlying facts, thoroughly researched relevant law, prepared and filed the 130–page Consolidated Complaint, analyzed the Settling Defendants' financial condition, prepared a detailed mediation statement, consulted with economic experts regarding loss causation and damages, participated in the mediation session with Judge Phillips, and continued thereafter to negotiate with the Settling Defendants' to reach this settlement. *See, e.g.,* Fee Mot. 3; Weiser Decl. ¶ 6. The hourly rates that plaintiffs' counsel request are those they currently charge for both contingent and noncontingent work and are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *See* Fee Mot. 19; Weiser Decl. Exs. D–F; *Blum v. Stenson,* 465 U.S. 886, 895 n.11 (1984).

***22** In sum, plaintiffs' counsel's lodestar is based on a reasonable expenditure of attorney time charged at reasonable hourly rates. Given the complexity of this case and the risks involved in litigating it, as well as the skill and experience necessary to properly do so, the lodestar supports awarding plaintiffs' counsel 25 percent of the settlement fund and a 1.25 multiplier. *See Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir. 1975); *Vizcaino,* 290 F.3d at 1051 (affirming district court's application of a 3.65 multiplier based on complexity of case and risks involved, among other factors).

B. Costs

Plaintiffs' counsel may recover reasonable costs. Fed.R.Civ.P. 23(h); *see also, Vincent v. Reser,* No. 11–cv–03572–CRB, 2013 WL 621865, at *5 (N.D.Cal. Feb. 19, 2013) ("Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class."). Plaintiffs' counsel request $219,469.67 in expenses. Mot. 20–22. A significant portion of this amount was spent on experts, consultants, and investigators who aided plaintiffs' counsel in investigating and evaluating plaintiffs' claims. Mot. 21. Other significant portions went to computerized factual and legal research and to travel expenses. Mot. 21–22. The class notice informed potential class members that plaintiffs' counsel would seek $225,000 in costs, to be deducted from the settlement fund. Bravata Decl. Ex. A (Dkt. No. 181). No class member objected to this figure. Because plaintiffs' counsel's costs are reasonable and do not exceed the amount stated in the class notice, plaintiff's counsel are entitled to recover them.

The motion for attorney's fees is GRANTED.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for final approval and for attorney's fees, Dkt. Nos. 170 and 171, are

GRANTED. I will enter the Proposed Judgment subject to the modifications described above.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2015 WL 468329, Fed. Sec. L. Rep. P 98,364

Footnotes

1 Velti's European-based operations subsequently filed for bankruptcy on August 18, 2014 in the Royal Court of Jersey. *See* Dkt. No. 150.

2 At the final approval hearing, plaintiffs' counsel agreed to cap payment for settlement administration costs at $500,000. His expectation is that costs will not reach that amount. I will add language to the Proposed Judgment to reflect this cap.

3 "In *Dura,* the Supreme Court held that a person who misrepresents the financial condition of a corporation in order to sell stock is only liable to a relying purchaser for the loss the purchaser sustains when the facts 'become generally known' and 'as a result' share value depreciates." *In re Oracle Corp. Sec. Litig.,* 627 F.3d 376, 392 (9th Cir. 2010).

4 Paragraph 5.5 of the Settlement Agreement states:

> "As provided by applicable laws, all Persons, including, but not limited to, Plaintiffs, on behalf of themselves and the Settlement Class, and the Nonsettling Defendants, shall be enjoined and barred from commencing or continuing any claim, cross-claim, third-party claim, claim over, or action in any forum against the Released Persons, seeking, as damages, indemnity, contribution, or otherwise, the recovery of all or part of any liability or settlement which such persons (i) paid, (ii) were obligated to pay or agreed to pay, or (iii) may become obligated to pay to the Settlement Class, as a result of such persons' liability for or participation in any acts, facts, statements or omissions that were or could have been alleged in the Action."

Settlement Agreement ¶ 5.5.

5 The Settlement Agreement defines "Released Persons" as "each and all of the Released Defendants in their individual and corporate capacities and each and all of their Related Persons." Settlement Agreement ¶ 1.20. The "Released Defendants" are the Settling Defendants plus the Overseas Defendants. *Id.* ¶ 1.19. "Related Persons" means:

> with respect to the Released Defendants, each and all of their respective present or former parents, subsidiaries, affiliates, successors and assigns and each and all of their respective present or former officers, directors, employees, employers, attorneys, accountants (except for Baker Tilly), financial advisors, commercial bank lenders, insurers (including Released Defendants' insurers and those insurers' respective businesses, affiliates, subsidiaries, parents and affiliated corporations, divisions, predecessors, shareholders partners, joint venturers, principals, insurers, reinsurers, successors and assigns, and their respective past and present employees, officers, directors, attorneys, accountants, auditors, agents and representatives), reinsurers, investment bankers, representatives, general and limited partners and partnerships, heirs, executors, administrators, successors, affiliates, agents, spouses, associates and assigns of each of them or any trust of which any Released Defendant and/or their Related Persons is the settlor or which is for the benefit of any Released Defendant and/or their Related Persons and/or

member(s) of his or her family and any entity in which any such Released Defendant and/or their Related Persons has a controlling interest. The Nonsettling Defendants are specifically excluded from the definition of Related Persons.

Id. ¶ 1.17.

6 The Underwriters also argue that the bar order is not broad enough, in that it does not provide them with an "unconditional release." Underwriters Opp. 12. They state that Velti and Negroponte are both parties to the underwriting agreements and specifically agreed therein that they would not, without the consent of the Underwriters, enter a settlement in which "any indemnified party is or could have been a party and indemnity was or could have been sought hereunder by such indemnified party, unless such settlement ... includes an unconditional release of such indemnified party from all liability on claims that are the subject matter of such ... suit." *Id.* Velti states that it would be willing to add language to the bar order clarifying that the order does not extend to "claims asserted in the Velti plc liquidation proceedings for alleged breach of the underwriting agreements." Response 1, 8–9. Negroponte does not make the same offer. According to the Settling Defendants, the relevant provisions in the underwriting agreements do not apply to Negroponte in the circumstances of this case, and in any event the Underwriters have not sought indemnification from him. *See* Response 8. Given that the Underwriters do not cite any authority stating that they must be provided an "unconditional release" in these circumstances, or that their nonrelease warrants rejection of the settlement, I find that the exception Velti has offered to add adequately addresses this issue. As the Settling Defendants have agreed to this modification of the bar order, I will revise the Proposed Judgment accordingly.

7 At the final approval hearing, counsel for the Settling Defendants reiterated that they do not object to a mutual bar order.

8 As stated above, plaintiffs allege both Securities Act and Exchange Act claims against Baker Tilly and only Securities Act claims against the Underwriters. Against Baker Tilly, plaintiffs allege Section 11 claims and Section 10(b) / Rule 10b–5 claims. Against the Underwriters, plaintiffs allege Section 11 claims and Section 12(a)(2) claims. The Section 11 claims are also alleged against all other defendants, i.e., Velti and all individual defendants. The Section 12(a)(2) claims are also alleged against Velti, Goldstein, Hobley, Kaskavelis, Mann, Moukas, and Negroponte. Because the parties do not distinguish between Section 11 and Section 12(a)(2) for the purposes of the judgment reduction issue, I do not consider the distinction.

9 The Nonsettling Defendants also contend that their judgment reduction must be coextensive with the bar order. In other words, if the bar order extends to a group of persons beyond the Settling Defendants, the judgment reduction must factor in the proportionate fault of all such persons. *See* Baker Tilly Opp. 15; Underwriters Opp. 17. There does not appear to be any dispute on this issue, as Settlement Agreement ¶ 5.6 already provides that the judgment reduction calculation will be based on either "the percentage of responsibility of the Released Persons" or the amount paid on their behalf. Settlement Agreement ¶ 5.6.

10 Of course, the *Kaypro* proportionate fault rule is not equal to the judgment reduction method set out in Section 78u–4(f)(7)(B). But when the proportionate fault approach is combined with the "one satisfaction rule"—i.e, the basic principle that "a plaintiff is only entitled to one satisfaction for any given injury," *Kaypro,* 884 F.2d at 1231—the result is the Section 78u–4(f)(7)(B) formula. *Cf.* *Fluck,* 969 F.Supp. at 1237 (noting that in enacting Section 78u–4(f)(7)(B) "Congress attempted to redress the weaknesses of the pro tanto and proportionate liability approaches by combining them").

11 Plaintiffs' reliance on *DCD Programs, Ltd. v. Leighton,* 90 F.3d 1442 (9th Cir. 1996), and *Seymour v. Summa Vista Cinema, Inc.,* 809 F.2d 1385, 1389 (9th Cir. 1987), is also unconvincing given that those cases do not directly address the judgment reduction methodology issue. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *E. & J. Gallo Winery v. EnCana Corp.,* 503 F.3d 1027, 1046 n.14 (9th Cir. 2007) (internal modifications omitted); *but see* *Fluck,* 969 F.Supp. at 1237 (describing *Kaypro,*

DCD, and *Seymour* as "a trio of inconsistent Ninth Circuit decisions, none of which even acknowledges the others).

12 I recognize that in cases like this one, where the nonsettling defendants have deeper pockets than the settling defendants, and the settling defendants are either insolvent or on the verge of insolvency, applying a proportionate fault reduction may result in the nonsettling defendants paying *less* than if all parties had gone to trial. *See* *WorldCom,* 2005 WL 591189, at *6–9. But this was also true when *Kaypro* was decided. Moreover, the Supreme Court considered and rejected this "inconsistency" in *McDermott, Inc. v. AmClyde,* 511 U.S. 202 (1994), in which the Court held that where a partial settlement is entered in an admiralty case, a nonsettling defendant is entitled to a proportionate fault reduction. *See* 511 U.S. at 204. The Court stated:

> [T]here is no tension between joint and several liability and a proportionate share approach to settlements. Joint and several liability applies when there has been a judgment against multiple defendants. It can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall ... [T]he proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement.

511 U.S. at 220–21 (footnotes and citations omitted). *McDermott* is an admiralty case, and this language is dicta. Nevertheless, I am persuaded that the chance that the proportionate fault approach will result in a nonsettling defendant paying less than if all parties had gone to trial does not warrant rejecting the method.

13 The Nonsettling Defendants argue in the alternative that they are entitled to a Section 78u–4(f)(7)(B) reduction because plaintiffs have alleged at least one Exchange Act claim against each Settling Defendant. Each Settling Defendant is thus a covered person under Section 78u–4(f)(10)(C), and because Section 78u–4(f)(7)(B) applies to all settlements by covered persons, the statute should apply to all Securities Act claims settled by all Settling Defendants. *See* Baker Tilly Opp. 7; Underwriter Opp. 16 n.4; *see also,* *In re Thornburg Mortgage, Inc. Sec. Litig.,* 912 F.Supp.2d 1178, 1247–48 (D.N.M.2012); *In re Sterling Foster & Co., Inc., Sec. Litig.,* 238 F.Supp.2d 480 (E.D.N.Y.2002); *In re Cendant Corp. Sec. Litig.,* 139 F.Supp.2d 585, 591–93 (D.N.J.2001). Because I conclude that the Section 78u–4(f)(7)(B) formula is the appropriate judgment reduction method for the reasons stated above, I do not address this argument.

End of Document

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No.
CV-20-00638930-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM OF THE UNDERWRITERS
(Opposing CannTrust's Motion for Plan Filing and Meeting Order, ret March 19, 2021)

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