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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re: CV SCIENCES, INC. SECURITIES LITIGATION	Case No. 2:18-cv-01602-JAD-BNW **LEAD PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
This Document Relates to: All Actions	

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MOTION

Lead Plaintiff Richard Ina, as Trustee for the Ina Family Trust ("Ina" or "Lead Plaintiff"), on behalf of himself, as trustee, and the putative Class,[1] respectfully moves this Court for an Order pursuant to Rule 23(e) of the Federal Rules of Civil Procedure: (a) preliminarily approving the proposed Settlement of the above-captioned securities class action lawsuit (the "Action"); (b) approving the form and manner of providing notice of the Settlement to the Class; (c) certifying the Class for settlement purposes; (d) appointing Lead Plaintiff as Class Representative, Faruqi & Faruqi, LLP (the "Faruqi Firm") as Class Counsel, and Muckleroy Lunt, LLC (the "Muckleroy Firm") as Liaison Class Counsel, for settlement purposes; and (e) setting a hearing date for final approval of the Settlement, the proposed Plan of Allocation, and Plaintiff's Counsel's motion for an award of attorneys' fees, reimbursement of litigation expenses and an award for Lead Plaintiff's costs and expenses pursuant to 15 U.S.C. § 78u-4(a)(4).

This motion is based upon the memorandum of points and authorities set forth below; the Declaration of Katherine M. Lenahan, with attached exhibits, filed herewith; the Stipulation, with attached exhibits, filed herewith; the pleadings and records on file in this Action, and other such matters and argument as the Court may consider at the hearing of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Lead Plaintiff, on behalf of himself, as trustee, and the putative Class, and defendants CV Sciences, Inc. ("CV Sciences" or the "Company"), Michael Mona, Jr., Joseph D. Dowling, and Michael Mona, III (collectively "Defendants"), have reached a proposed Settlement for $712,500.00 that, if approved, will resolve all claims in the above-captioned action (the "Action"). The Settlement was reached only after three years of hard-fought litigation, which included a thorough investigation by Lead Counsel, the filing of two amended complaints, comprehensive briefing on Defendants' motion to dismiss and Lead Plaintiff's two motions to compel discovery, and a mediation session

[1] Unless otherwise noted, the following conventions are used herein: (a) all emphases are added; (b) all internal citations and quotation marks are omitted; (c) all capitalized terms have the meaning ascribed to them in the Stipulation of Settlement dated January 31, 2022 ("Stipulation" or "Stip."), filed concurrently herewith; (d) "Settlement" refers to the settlement set forth in the Stipulation; (e) all references to "Rule(s)" refers to the Federal Rules of Civil Procedure; and (f) all references to Exhibits 1-3 are to the exhibits annexed to the Declaration of Katherine M. Lenahan in support of this motion, filed concurrently herewith.

with a well-respected mediator. The proposed Settlement is well within the range of reasonableness and represents a favorable result for the Class, particularly in light of the risks posed by further litigation and the Company's financial position.

For these reasons, as well as those set forth below, Lead Plaintiff respectfully submits this memorandum of points and authorities in support of his motion and requests that the Court: (1) preliminarily approve the Settlement set forth in the Stipulation; (2) certify the Class for Settlement purposes; (3) appoint Lead Plaintiff as Class Representative, the Faruqi Firm as Class Counsel, and the Muckleroy Firm as Liaison Class Counsel for settlement purposes; (4) approve the form and manner of providing notice of the Settlement to the Class; and (5) set a date for the Final Approval Hearing.

FACTUAL AND PROCEDURAL BACKGROUND

A. Description Of The Action

This litigation began on August 24, 2018, when the initial class action complaint was filed in the United States District Court for the District of Nevada. ECF No. 1. On November 15, 2018, District Judge Jennifer A. Dorsey appointed Ina as Lead Plaintiff and the Faruqi Firm as Lead Counsel. ECF No. 21.

On January 4, 2019, Lead Plaintiff filed an Amended Securities Class Action Complaint ("AC"), naming as defendants CV Sciences; former Founder Emeritus, director, and Chief Executive Officer ("CEO") Michael Mona, Jr. ("Mona Jr."); CEO and director Joseph D. Dowling ("Dowling"); and former Chief Operating Officer ("COO") and director Michael Mona, III ("Mona III"). ECF No. 30. The AC alleged that during the Class Period, Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and SEC Rule 10b-5 promulgated thereunder, by making misleading statements concerning the patent application status and patentability of the Company's lead pharmaceutical product, CVSI-007. *See id.* at ¶¶ 49, 51, 53, 55, 57, 61, 63, 65, 67, 69, 71, 73, 75, 77-79.

On March 5, 2019, Defendants filed a motion to dismiss the AC (the "MTD"), ECF Nos. 33-35. While the decision on the MTD was still pending and after obtaining leave from the Court (ECF Nos. 59-60, 63), Lead Plaintiff filed as supplemental authority to his opposition to the MTD ("MTD

Opposition" or "MTD Opp.") a decision from the United States Trademark and Patent Office's ("USPTO") Patent Trial and Appeal Board, dated September 17, 2019, upholding the USPTO's final rejection of the CVSI-007 patent application. ECF No. 64.

On December 10, 2019, the Court denied Defendants' MTD. *See generally* ECF No. 70 ("MTD Order"). Thereafter, the Parties began to engage in discovery,[2] and Lead Plaintiff filed a Second Amended Securities Class Action Complaint ("SAC"). ECF No. 127.

During the discovery process, the Parties met and conferred frequently over discovery issues. Lead Plaintiff filed two motions to compel, the first against the Mona Defendants in October 2020 (ECF No. 88), which was granted and denied in part (ECF Nos. 109, 111, 149), and the second against the Company Defendants in March 2021 (ECF No. 130), which was denied as moot after the parties informed the Court of their intent to engage in settlement negotiations (ECF No. 153).

On October 25, 2021, the Settling Parties engaged in a mediation session before Jed D. Melnick, Esq., a highly experienced securities litigation mediator at JAMS. The mediation was preceded by submission of confidential mediation statements and exhibits. The Settling Parties came to an agreement in principle during the mediation session and thereafter engaged in negotiations regarding the complete terms of the settlement which are set forth in the Stipulation and which are subject to approval by the Court.

B. The Proposed Settlement

The Settling Parties agreed to resolve the litigation for total consideration of $712,500.00. The Settlement Amount will be paid by Defendants and/or their insurers, placed into an escrow account, and after paying attorneys' fees and expenses approved by the Court and other costs of settlement, the Settlement Fund will be distributed to Authorized Claimants. In exchange for the payment of the Settlement Amount, Lead Plaintiff and the Class will release all Released Claims against the Released Parties. As further described below, Lead Plaintiff entered into this Settlement with a full and comprehensive understanding of the strengths and weaknesses of the claims. Lead Plaintiff and Lead Counsel believe that the Settlement set forth in the Stipulation confers substantial

[2] While the parties were engaging in discovery, the USPTO issued United States Patent No. 10,653,639, entitled "Pharmaceutical Formulations Containing Cannabidiol and Nicotine for Treating Smokeless Tobacco Addition," which the Company claims formally grants CV Sciences patent protection for CVSI-007.

benefits upon, and thus is in the best interests of, the Class.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

The Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution").

Rule 23(e) provides that any compromise of a class action must receive judicial approval, and that notice of any proposed settlement be given in the manner directed by the Court. Rule 23(e). Approval of class action settlements involves a two-step process: "(1) preliminary approval of the settlement; and (2) final approval of the settlement at a fairness hearing following notice to the class." *In re Celera Corp. Sec. Litig.*, 2015 WL 1482303, at *3 (N.D. Cal. Mar. 31, 2015).

Under the amendments to Rule 23 that went into effect on December 1, 2018, the issue at preliminary approval is whether "the court will ***likely*** be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Rule 23(e)(1)(B). For the reasons explained below, the settlement meets Rule 23(e)'s requirements

A. The Court "Will Likely Be Able To" Approve The Proposed Settlement

Rule 23(e)(2) directs the court to determine whether the settlement is "fair, reasonable, and adequate" after considering whether: (A) the class has been adequately represented; (B) the proposal was negotiated at arms' length; (C) the relief provided is adequate; and (D) the proposal treats class members equitably relative to each other. Rule 23(e)(2).

Rule 23(e)(2)'s new factors, however, do not displace the factors that the Ninth Circuit previously used to determine whether a settlement is "fair, reasonable, and adequate." *See* Rule 23(e)(2) advisory committee's note to 2018 amendments (explaining that the amendment's goal "is not to displace any factor" courts previously considered when evaluating a proposed settlement). While the factors considered in a court's fairness assessment may vary from case to case, the Ninth Circuit traditionally uses the following factors, several of which overlap with Rule 23(e)(2)'s factors:

"the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining a class action status throughout the trial; the amount offered in the settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Szymborski v. Ormat Techs., Inc.*, 2012 WL 4960098, at *2 (D. Nev. Oct. 16, 2012) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).[3] Where, as here, the parties reach a settlement agreement prior to class certification, "the court also must ensure that the settlement is not the product of collusion among the negotiating parties." *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018).

As more fully explained below, the Settlement satisfies the applicable factors such that Notice of the proposed Settlement should be sent to the Class.

1. Lead Plaintiff and Plaintiff's Counsel Adequately Represented the Class

Rule 23(e)(2)(A) requires that the Court consider whether "the class representatives and class counsel have adequately represented the class[.]" Rule 23(e)(2)(A). Determining adequacy requires "[r]esolution of two questions . . . : (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020, *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Here, both prongs are met. Throughout the litigation of the Action, and during mediation and settlement negotiations, the interests of Lead Plaintiff and Plaintiff's Counsel have been fully aligned with those of other Class Members as Lead Plaintiff claims to have suffered damages from the same alleged conduct, and through those claims seeks the same recovery from Defendants.

Additionally, Lead Counsel is a national law firm that is qualified, experienced, and able to conduct this litigation. *See* Ex. 1, the Faruqi Firm Resume. Lead Counsel has devoted significant efforts to identifying and investigating the potential claims in this Action and has fought to preserve those claims. Likewise, the Muckleroy Firm has substantial complex litigation experience and has

[3] The "presence of a governmental participant" and "the reaction of the class members to the proposed settlement" are not relevant at this stage because there is no governmental entity involved and notice has not yet been disseminated to the Class.

served the Class ably as Liaison Counsel to date. *See* Ex. 2, the Muckleroy Firm Resume.

2. The Proposed Settlement Was Negotiated at Arm's Length and Is Not the Result of Collusion

Rule 23(e)(2)(B) requires the Court to consider whether the proposed settlement "was negotiated at arm's length[.]" Rule 23(e)(2)(B). Here, the Parties engaged in a mediation session after, *inter alia*: (1) Lead Counsel conducted a lengthy investigation into the facts alleged in the Action, including reviewing and analyzing documents filed publicly with the SEC, information from the USPTO, press releases, news articles, financial information, and public statements issued by or concerning the Company; (2) Lead Counsel drafted the AC and SAC; (3) Defendants and Lead Plaintiff engaged in Motion To Dismiss briefing; (4) Defendants filed answers to the AC and SAC; (5) Defendants and Lead Plaintiff exchanged discovery requests; (5) Lead Counsel reviewed the documents Defendants produced during discovery; (6) the Parties briefed two motions to compel filed by Lead Plaintiff following numerous meet and confers; (7) Defendants reviewed documents produced by Lead Plaintiff; and (8) Defendants and Lead Plaintiff each drafted thorough mediation statements to be submitted to the mediator prior to the mediation session.

Thereafter, the Parties engaged in a mediation session with Jed S. Melnick, Esq., a "highly qualified mediator[.]" *Xuechen Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014). Thus, the Parties engaged in settlement negotiations on a fully informed basis and with the requisite knowledge of the strengths and weaknesses of each party's claims and defenses and the procedural hurdles facing this Action. *See In re Zynga Sec. Litig.*, 2015 WL 6471171, at *8 (N.D. Cal. Oct. 27, 2015) ("For the parties to have brokered a fair settlement, they must have been armed with sufficient information about the case to have been able to reasonably assess its strengths and value."). After vigorously debating their positions during the mediation session, the Parties reached an agreement in principle to compromise this Action. Thereafter, the Parties worked to finalize the Settlement's terms.

The proposed Settlement is clearly not the product of collusion. For one thing, this litigation was hard-fought by the Parties at every step of the Action, which is evidenced by, *inter alia*, the Parties' comprehensive briefing on the Motion To Dismiss and motions to compel. The fact that the

Settlement was reached with the assistance of an experienced mediator is also strong evidence that the Settlement is non-collusive. *See In re Illumina, Inc. Sec. Litig.*, 2019 WL 6894075, at *5 (S.D. Cal. Dec. 18, 2019) (Courts have recognized that "[s]ettlements reached with the help of a mediator are likely non-collusive."); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at *8 (N.D. Cal. Sept. 28, 2016) (finding no collusion when the parties "participated in a formal private mediation, then spent several weeks negotiating the details of the Settlement Agreement and the class notice.").

Furthermore, Lead Counsel is a nationally recognized law firm with substantial experience prosecuting securities class actions, *see* Ex. 1, and Defendants' counsel, Procopio, Cory, Hargreaves & Savitch LLP (the "Procopio Firm"), is well-versed in complex securities litigation. Courts in this district have found that where a settlement is "the result of arm's-length negotiations by experienced Class Counsel[,] . . . [it] is entitled to an initial presumption of fairness." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 2016 WL 4010049, at *14 (N.D. Cal. July 26, 2016).

None of the subtle factors indicating collusion are present either. *See In Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (identifying three subtle signs of collusion: (1) when class counsel receives a disproportionate percentage of the settlement; (2) when the parties negotiate a "clear sailing" agreement separate from the settlement fund; and (3) when the parties arrange for fees not paid to revert to defendants). Lead Counsel will request an award of attorneys' fees equal to 25% of the Settlement Fund, which is based on the benchmark in this Circuit and often awarded in similar actions, thus weighing against a finding of collusion. *See* § I.A.3.c., *infra*; *Rieckborn v. Velti PLC*, 2015 WL 468329, at *8 (N.D. Cal. Feb. 3, 2015) (finding 25% fee and request for approximately $219,000 in litigation expenses weighed against finding of collusion). There is also no "clear sailing" agreement—*i.e.*, an "arrangement providing for the payment of attorneys' fees separate and apart from class funds[.]" *Bluetooth*, 654 F.3d at 947. The attorneys' fees are to be paid only out of the Settlement Fund, at a rate approved by the Court, and any fees requested but denied by the Court would remain in the Class's Settlement Fund. *See* Stip. ¶¶ 6.2-6.3, 6.5. Even if there were such an agreement, "the absence of a 'kicker provision' stating that all fees not awarded would revert to defendants, weighs against a finding of collusion." *Klee v. Nissan N.*

Am., Inc., 2015 WL 4538426, at *10 (C.D. Cal. July 7, 2015).

3. The Relief Provided for the Class Is Adequate

Rule 23(e)(2)(C) requires the Court to determine whether the relief provided for the Class is adequate, taking the following four specific considerations into account: (1) the costs, risks, and delay of trial and appeal; (2) the effectiveness of distributing relief to the class; (3) the terms and timing of attorneys' fees; and (4) any related agreements. Rule 23(e)(2)(C). Each of these considerations is addressed below, along with the Ninth Circuit factors that overlap with them.

a. The Costs, Risks, and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) requires the Court to consider whether the Settlement Amount is adequate when taking into account the costs, risks, and delay of trial and appeal. Rule 23(e)(2)(C)(i). This inquiry overlaps with the following Ninth Circuit factors: "the strength of the plaintiffs' case;" "the risk, expense complexity, and likely duration of further litigation;" and "the amount offered in settlement[.]" *See Hanlon*, 150 F.3d at 1026.

Here, the Settlement Amount of $712,500 provides the Class with an immediate benefit and is adequate when compared to the risk that no recovery, or lesser recovery, might be achieved after protracted litigation. While Lead Plaintiff believes that the claims asserted in the Action are meritorious and that the information developed to date supports those claims, he acknowledges that continued prosecution of the Action poses significant risks and additional costs. "[S]ecurities actions are highly complex and . . . securities class litigation is notably difficult and notoriously uncertain." *Hefler*, 2018 WL 6619983, at *13. This case is no exception.

Defendants have raised numerous challenges and continue to deny any wrongdoing. *See* Stipulation § III; *see generally* ECF Nos. 33-35 (Defendants' MTD), ECF Nos. 98, 100, 134 (Defendants' briefing on Lead Plaintiff's motions to compel). Although Lead Plaintiff's claims survived a motion to dismiss (ECF No. 70), the difficulty and litigation surrounding discovery thereafter plainly demonstrates the cost, risks, and delay present in this Action. *See, e.g.,* ECF Nos. 88, 98, 100, 103–04, 106–09, 111, 116–17, 121–24, 126, 128, 130, 134–36, 149 (briefing, orders, and minutes of proceedings related to Lead Plaintiff's motions to compel). Without this Settlement, the Action would have continued to be vigorously contested.

Although the Settling Parties have engaged in discovery and would seek further discovery absent the proposed Settlement, the chance remains that class certification may be denied, *see* Section I.A.6, *infra,* or Lead Plaintiff's claims may be dismissed at summary judgment. Even assuming Lead Plaintiff's claims survive summary judgment, a trial in the Action would be time consuming and expensive and result in the expense of judicial resources. Indeed, the damages issues present in this case would likely boil down to a "battle of the experts" at trial, creating a risk that the jury may believe Defendants' expert over Lead Plaintiff's and find in Defendants' favor. Thus, after the expense and time devoted to taking this Action to trial, the Class could be left with no recovery at all.

Moreover, even if Lead Plaintiff were to prevail at trial, Defendants may appeal the decision resulting in further protracted, expensive litigation that could continue for years. "The settlement prevents these expenses" of "discovery, motion practice, experts, trial, and appeals" "and the likely long duration of the litigation from eroding or delaying the ultimate recovery, if any, of the class members." *Patel v. Axesstel, Inc.*, 2015 WL 6458073, at *5 (S.D. Cal. Oct. 23, 2015). Furthermore, "[i]n most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Id.* at *5.

The risks of further litigation are exacerbated by CV Sciences' financial position. It is Lead Plaintiff's understanding that the Company's ability to fund a settlement in this Action is limited, and that continued litigation would further erode the asserts available to fund a judgment or a settlement made at a later date. For example, CV Sciences had approximately $1.66 million in cash and cash equivalents as of September 30, 2021 (*see* CV Sciences, Inc. Quarterly Report at ii (Form 10-Q) (Nov. 15, 2021)) and limited insurance coverage. The Company's stock is currently trading at about $0.15. *See* CVSI, Yahoo! Finance, https://finance.yahoo.com/quote/CVSI (last visited Jan. 31, 2022).

Thus, the Settlement Amount of $712,500 is well within the range of reasonableness under the circumstances. It is currently estimated that if Class Members submit claims for 100% of the shares eligible for distribution, the average distribution per share of common stock will be approximately $0.013 per share before deduction of Court-approved fees and expenses. The Settlement Amount represents approximately 3.39% of the Class's maximum potential damages

(assuming all claims and damages were proven) that Lead Plaintiff's expert estimated the Class sustained as a result of Defendants' alleged fraudulent activity. This is higher than the median ratio of settlement amounts to investor losses for 2019 and 2020, which NERA Economic Consulting determined was 2.0% and 1.7%, respectively. *See* Ex. 3, NERA Report at 20, Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review* (NERA 2021). This is also consistent with the range of typical recoveries in complex securities litigation. *See IBEW v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving securities class action settlement where recovery was "about 3.5% of the maximum damages that Plaintiffs believe could be recovered at trial[]").

In light of the foregoing, the Settlement represents a favorable recovery that is in the best interests of the Class.

b. The Proposed Method for Distributing Relief Is Effective

Rule 23(e)(2)(C)(ii) requires the court to consider whether the proposed method of distributing relief to the class is effective, including the processing of class members' claims. The Settlement provides a well-established method for distributing relief to eligible Class Members and processing claims. As explained in Section II, *infra*, the notice plan includes mailing the Notice and Proof of Claim and Release form to all Class Members who can be identified with reasonable effort. *See* Stipulation, Exs. A-1 & A-2. These documents will request the information necessary for the Claims Administrator to calculate each eligible Class Member's claim pursuant to the Plan of Allocation. *See* Stipulation, Ex. A-1 at 14-19, Ex. A-2. Under the proposed Plan of Allocation, which was developed with the assistance of a damages consultant, Class Members who are entitled to a distribution of at least $10 will receive a *pro rata* share of the recovery based upon their claimed losses consistent with the Action's allegations. *See* Stipulation, Ex. A-1 at 14-19. Lead Plaintiff respectfully submits that this method of distribution and claims processing is effective. *See Hefler*, 2018 WL 6619983, at *8 (finding a similar method of distribution and claims processing to be effective).

Additionally, the settlement contemplates a *cy pres* award only if residual settlement funds are left in the Net Settlement Fund that cannot feasibly be distributed to Authorized Claimants. *See* Stip

¶ 5.6. The proposed beneficiary of the *cy pres* award, the Investor Protection Trust ("IPT"), is an appropriate recipient for any such residual funds as "it bears a substantial nexus to the interests of the class members[.]" *Thomas v. MagnaChip Semiconductor Inc.*, 2016 WL 1394278, at *8 (N.D. Cal. Apr. 7, 2016). IPT is a 501(c)(3) non-profit organization that serves as an independent source of non-commercial investor education at the state and national level.[4] IPT is an appropriate potential *cy pres* beneficiary for any residual funds in this class action alleging violations of the Securities Exchange Act on behalf of a putative class of investors nationwide. *See Rihn v. Acadia Pharms. Inc.*, 2018 WL 513448, at *4 (S.D. Cal. Jan. 22, 2018).

c. Terms of Attorneys' Fees and Timing of Payment

Rule 23(e)(2)(C)(iii) requires the Court to consider "the terms of any proposed award of attorney's fees, including timing of payment[.]" Plaintiff's Counsel intends to seek an award of attorneys' fees of 25% of the Settlement Amount, plus accrued interest, and expenses in an amount not to exceed $50,000. "In common fund cases such as this, [the Ninth Circuit has] established twenty-five percent (25%) of the common fund as the benchmark award for attorneys' fees." *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012). A "[c]alculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002). Plaintiff's Counsel will provide a detailed lodestar report with its motion for an award of attorneys' fees and reimbursement as contemplated in the proposed schedule of events set forth in § III below. However, an award of 25% of the Settlement Amount (approximately $178,125) amounts to substantially less than the actual fees incurred, resulting in a negative multiplier. As the multiplier will be negative, no argument can be made that the requested attorneys' fees would result in a windfall to Plaintiff's Counsel.

The Stipulation provides that payment of attorney's fees and expenses shall be payable "immediately after the Court executes an order awarding such fees and expenses notwithstanding any objection thereto[,]" subject to the obligation to repay as described therein. Stipulation ¶¶ 6.2-6.3. The timing of payment is standard in class action cases and typically approved. *See, e.g.*, *In re China*

[4] *See* IPT, About IPT, http://www.investorprotection.org/ipt-activities/?fa=about (last visited Jan. 31, 2022).

MediaExpress Holdings, Inc. S'holder Litig., 2015 WL 13639423, at *2 (S.D.N.Y. Sept. 18, 2015) (awarding fees to be paid "from the Settlement Fund within ten calendar days" of the entry of the final judgment or the fee order, if later, subject to an obligation to repay). Lead Counsel respectfully submits that the contemplated attorneys' fee award and the timing of payment are reasonable and do not weigh against preliminary approval.

d. Related Agreements

Rule 23(e)(2)(C)(iv) requires the Court to determine the proposed Settlement's adequacy in light of any agreements made in connection with it. The only agreement here is the escrow agreement between Lead Counsel and the proposed Escrow Agent, which governs the deposit, investment, and disbursement of the Settlement Fund in terms consistent with the Stipulation.

4. The Settlement Treats Class Members Equitably

Under Rule 23(e)(2)(D) and in accordance with Ninth Circuit precedent, courts must also evaluate whether the settlement treats class members equitably relative to each other. *See, e.g., Zynga*, 2015 WL 6471171, at *12. "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 . . . ." *Id.* "[C]ourts recognize that an allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Id.*

Here, pursuant to the proposed Plan of Allocation, Class Members who are eligible to participate in the Settlement will be required to sign the same release and will receive a *pro rata* share of the recovery based upon their claimed losses consistent with the Action's allegations. *See* Stipulation, Ex. A-1 at 14-19. As such, the proposed settlement treats Class Members equitably relative to each other. *See Hefler*, 2018 WL 6619983, at *8 (finding settlement treated class members equitably where those "who submit timely claims will receive payments on a *pro rata* basis based on the date(s) class members purchased and sold [the Company's] shares as well as the total number and amount of claims filed[]").

While Lead Plaintiff will receive a distribution from the Net Settlement Fund in accordance with the Plan of Allocation, he may also seek an award of up to $12,000 for his reasonable costs and expenses (including lost wages) directly relating to his representation of the class, as authorized by

the PSLRA. *See* 15 U.S.C. § 78u-4(a)(4). Lead Plaintiff plans to support his request for an award at the final approval stage with a declaration attesting to the amount of time he devoted to the Action and any reasonable expenses he personally incurred in representing the Class.

5. The Stage of the Proceedings and the Extent of Discovery Completed

Courts in the Ninth Circuit also consider the extent of discovery completed and the stage of proceedings when evaluating a class action settlement to determine whether the parties had sufficient information about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). The Parties garnered substantial information related to the Action and their respective claims and defenses prior to engaging in settlement negotiations. Lead Counsel conducted a thorough investigation into the claims asserted, as described in § I.A.2, *supra*. Lead Counsel also conducted extensive legal research in connection with drafting the amended complaints and briefing Defendants' MTD, which helped Lead Counsel better evaluate and understand the strengths and weaknesses of the claims asserted. Prior to the mediation, Lead Counsel, *inter alia*: (i) reviewed the discovery Defendants produced; (ii) engaged in numerous meet and confers with Defendants' counsel regarding Defendants' discovery obligations; (iii) drafted and responded to numerous letters concerning the Parties' respective positions on Defendants' discovery obligations; (iv) researched and drafted two motions to compel discovery from Defendants; and (v) consulted with a damages expert to evaluate the Class's damages.

Thus, Lead Plaintiff and Lead Counsel had sufficient information to make an informed assessment of the Action's strengths and weaknesses and the Settlement's fairness. *See Mego*, 213 F.3d at 459 (affirming district court's approval of $1.725 million settlement where no discovery took place, noting "[t]he district court's conclusion that the Plaintiffs had sufficient information to make an informed decision about the Settlement is not clearly erroneous[]"); *Rieckborn*, 2015 WL 468329, at *6 (finding that "[d]espite 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 thorough understanding of the relevant facts and law[,]" even though settlement was reached before the filing of a motion to dismiss).

6. The Risks of Maintaining the Class Action Through Trial

The Class has not yet been certified. While Lead Plaintiff and Lead Counsel are confident that the class meets the requirements for certification, *see* § I.B., *infra*, they understand that Defendants intend to vigorously oppose Lead Plaintiff's anticipated motion for class certification.

To prevail on a motion for class certification, Lead Plaintiff must show that common issues predominate over individual ones. *See* Rule 23(b)(3). Defendants would likely argue that Lead Plaintiff cannot establish predominance because he will not be able to invoke the fraud-on-the-market presumption of reliance. While Lead Plaintiff believes that he would be able to overcome such challenges—and that the class may be certified under the presumption of reliance set forth in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) in any event, *see* SAC ¶ 121—Lead Plaintiff is aware that there is a chance the Court may disagree.

Additionally, even if the Court were to certify the Class, there is always a risk that the Class could be decertified later. *See* Rule 23(c)(1)(C) (providing that a class certification order may be altered or amended any time before a decision on the merits). Thus, this factor weighs in favor of the Settlement.

7. The Experience and Views of Counsel

As set forth in detail in the Faruqi Firm's resume, Lead Counsel is a nationally-recognized law firm that has substantial experience litigating securities class action lawsuits and has negotiated substantial recoveries for classes throughout the country. *See* Ex. 1. Defendants were similarly represented by the Procopio Firm, a highly reputable firm with significant experience in complex securities litigation. Lead Counsel, having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence to support the claims asserted against Defendants, the likelihood of prevailing on these claims, the risk, expense, and duration of continued litigation, and the likelihood of subsequent appellate proceedings even if Lead Plaintiff were victorious at trial, concluded that settlement here is a favorable result for the Class. *See* § I.A.3.a. The opinion of experienced, informed counsel supporting a settlement is entitled to great judicial weight. *See, e.g., Katz v. China Century Dragon Media, Inc.*, 2013 WL 11237202, at *5 (C.D. Cal. Oct. 10, 2013) ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D.

Cal. 2008) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.").

B. The Court "Will Likely Be Able To" Certify the Class For Settlement

Rule 23(e)(1)(B)(ii) requires the Court to consider whether it "will likely be able to certify the class for purposes of judgment on the proposal." Lead Plaintiff seeks certification of the following Class for purposes of Settlement only:

> [A]ll Persons who purchased the common stock of CV Sciences in the United States or on the OTC between June 19, 2017 and August 20, 2018 at 1:21 p.m. EST, inclusive, and were allegedly damaged thereby. Excluded from the Class are: (a) Defendants; (b) the officers and directors of the Company at all relevant times; (c) members of any Defendant's immediate families; (d) any entity in which Defendants have or had a controlling interest or which is related to or affiliated with any of the Defendants; (e) the legal representatives, heirs, agents, successors or assigns of such excluded Persons; (f) Defendants' liability insurance carriers and any affiliates or subsidiaries thereof; (g) those who purchased CV Sciences common stock on foreign exchanges, in accordance with the United States Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 267 (2010) ("[I]t is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which §10(b) applies."); and (h) any Persons who exclude themselves by submitting a request for exclusion that is accepted by the Court.

Stipulation ¶ 1.4.

Rule 23(a) sets forth four prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(a). Additionally, the Court must find that at least one of the three subsections of Rule 23(b) is met. *See Zynga*, 2015 WL 6471171, at *6. Pursuant to Rule 23(b)(3), a class may be certified if the Court finds that: (1) the questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Rule 23(b)(3). "As in almost all lawsuits by shareholders of public companies, the investors in this case easily satisfy the requirements of Rule 23." *In re Magma Design Automation, Inc. Sec. Litig.*, 2007 WL 2344992, at *1 (N.D. Cal. Aug. 16, 2007).

1. The Proposed Settlement Class Meets the Requirements of Rule 23(a)

a. The Settlement Class Is Sufficiently Numerous

Rule 23(a) provides that a class may be certified if it is "so numerous that joinder of all members is impracticable[.]" Rule 23(a)(1). In terms of whether joinder would be impracticable, "impracticability does not mean impossibility, but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Ests., Inc*., 329 F.2d 909, 913-14 (9th Cir. 1964). "There is no specific minimum number of plaintiffs asserted to obtain class certification, but a proposed class of at least forty members presumptively satisfies the numerosity requirement." *Vinh Nguyen v. Radient Pharms. Corp*., 287 F.R.D. 563, 569 (C.D. Cal. 2012).

During the Class Period, CV Sciences securities were listed and actively traded on OTCQB Marketplace maintained by the OTC Markets Group. SAC ¶ 119. As of September 30, 2018, CV Sciences had 94,355,178 shares of issued and outstanding common stock (CV Sciences, Inc., Quarterly Report at 1 (Form 10-Q) (filed Nov. 7, 2018)), potentially owned by hundreds or thousands of persons who are Class Members. Accordingly, joinder would be impracticable, thus satisfying the numerosity requirement of Rule 23(a)(1). *See Howell v. JBI, Inc.*, 298 F.R.D. 649, 654–55 (D. Nev. 2014) ("in securities cases, when millions of shares are traded during the proposed class period, a court may infer that the numerosity requirement is satisfied").

b. There Are Common Questions of Law and Fact

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Rule 23(a)(2). "Courts regularly hold that commonality is plainly satisfied in a securities case where the alleged misrepresentations . . . obviously present important common issues." *Booth v. Strategic Realty Trust, Inc.*, 2015 WL 3957746, at *3 (N.D. Cal. June 28, 2015); *see also In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009) ("Repeated misrepresentations by a company to its stockholders satisfy the commonality requirement of Rule 23(a)(2).").

The overarching issues shared by all Class Members is whether Defendants violated the Exchange Act and the rules promulgated thereunder in connection with the factual allegations discussed above. Specifically, common questions of law and fact in this case include, *inter alia*: (a) whether the federal securities laws were violated by Defendants' acts as alleged in the SAC; (b) whether Defendants' publicly disseminated statements made during the Class Period omitted to state

material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; (c) whether and to what extent Defendants' omissions of material fact caused the market price of CV Science's common stock to be artificially inflated during the Class Period; (d) whether Defendants acted with the requisite level of scienter in omitting material facts when they made misleading statements; (e) whether the Individual Defendants were controlling persons of the Company; and (f) whether the Class members have sustained damages, and, if so, the proper measure of damages. SAC ¶ 110. These are all common questions because each Class Member has to prove the same elements to establish Defendants' liability and satisfy the low hurdle of Rule 23(a)(2). *See Zynga*, 2015 WL 6471171, at *6.

c. The Proposed Class Representative's Claims Are Typical

A class may be certified if the claims of the representative parties are typical of the claims of the Class. Rule 23(a)(3). "Under the rule's permissive standards, representative claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "The test is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Juniper*, 264 F.R.D. at 589.

Lead Plaintiff's claims arise from the same events and alleged misconduct and are based on the same legal theories as those of the proposed Class. Lead Plaintiff claims: (a) that Defendants violated §§ 10(b) and 20(a) of the Exchange Act as described in the SAC; (b) that Lead Plaintiff and other Class Members purchased CV Sciences common stock at artificially inflated prices based on those statements and were damaged thereby; and (c) by proving his own claims, Lead Plaintiff would prove the claims of the Class Members. As such, there is a sufficient nexus between Lead Plaintiff's claims and the claims asserted on behalf of the members of the Class to satisfy Rule 23(a)(3).

d. The Proposed Class Representative Will Fairly and Adequately Protect the Interests of the Settlement Class

Under Rule 23(a)(4), the plaintiff must establish that "the representative parties will fairly and adequately protect the interests of the class." Lead Plaintiff has established his adequacy for the reasons explained in Section I.A.1, *supra.*

2. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Once the four prerequisites of Rule 23(a) are met, the proposed class must also satisfy one of the requirements of Rule 23(b). A class may be certified under Rule 23(b)(3) if the Court finds that: (1) the questions of law or fact common to class members predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

a. Common Questions of Law and Fact Predominate

The predominance prong is satisfied because, as described above, the questions of law or fact common to the settlement Class predominate over any individual questions. *See Zynga*, 2015 WL 6471171, at *7 (finding predominance satisfied when each class member purchased stock and suffered damages as a result). Additionally, "[p]redominance is a test readily met in certain cases alleging . . . securities fraud[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

Here, the common questions of law and fact described above predominate over any individual questions. The same set of operative facts applies to each Class Member (*i.e.*, each Class Member purchased CV Sciences common stock during the Class Period and were damaged thereby). As such, the "predominance" requirement is satisfied.

b. A Class Action Is Superior to Other Methods of Adjudication

Rule 23(b)(3) outlines the following four factors to be considered by the Court in making a determination regarding superiority: (a) the interest of individual members in controlling the litigation; (b) the extent and nature of any litigation concerning the controversy already commenced; (c) the desirability or undesirability of concentrating litigation of the claims in a particular forum; and (d) the difficulties likely to be encountered in the management of the class action.[5] *See Amchem*, 521 U.S. at 616. Prosecution of this lawsuit on a class action basis will be more efficient than adjudication of the numerous individual shareholder claims because the shareholders are geographically dispersed and likely have relatively small claims. *In re Verisign, Inc. Sec. Litig.*, 2005 WL 7877645, at *9 (N.D. Cal. Jan. 13, 2005) ("Class actions are particularly well-suited in the

[5] The fourth factor need not be considered because the proposed Settlement eliminates any manageability problems that may have existed. *See Amchem*, 521 U.S. at 620 (stating that when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . .").

context of securities litigation, wherein geographically dispersed shareholders with relatively small holdings would otherwise have difficulty in challenging wealthy corporate defendants.").

Additionally, Lead Plaintiff and Plaintiff's Counsel have already invested significant resources in preserving and prosecuting the claims asserted in the SAC. *See* §§ I.A.2-3, I.A.5. Class action treatment of this case is also superior to other methods as it avoids the duplication of efforts and inconsistent rulings and efficiently resolves the claims of the entire Class at once. *See, e.g.*, *Zynga*, 2015 WL 6471171, at *7. Further, class certification is the superior method to facilitate the resolution of the Class's claims against Defendants because, absent certification, Defendants would not be able to obtain a Class-wide release and thus would have little incentive to enter into a settlement. Accordingly, Lead Plaintiff has satisfied the superiority requirement of Rule 23(b)(3) and this Court should certify the proposed Class for purposes of settlement.

3. Plaintiff's Counsel Is Adequate to Serve as Class Counsel

Rule 23(g) requires a court that certifies a class to also appoint class counsel, while considering counsel's: (i) work in identifying or investigating potential claims; (ii) experience in handling class actions and the asserted claims; (iii) knowledge of the relevant law; and (iv) resources that it will commit to representing the class. Rule 23(g)(1)(A). Plaintiff's Counsel has, and will continue to, fairly and adequately represent the Class. As explained in Section I.A.1, proposed counsel is knowledgeable about the applicable law, experienced in handling class actions, has performed substantial work in pursuing the claims and in reaching a settlement, and has committed the necessary resources to representing the settlement Class. As such, Lead Plaintiff respectfully requests that the Court appoint the Faruqi Firm as Class Counsel and the Muckleroy Firm as Liaison Counsel for the Class.

II. THE PROPOSED PLAN AND FORMS OF NOTICE SHOULD BE APPROVED

Due process for class action plaintiffs requires that counsel provide "notice plus an opportunity to be heard and participate in the litigation[.]" *Epstein v. MCA, Inc.*, 179 F.3d 641, 649 (9th Cir. 1999). "For any class certified under Rule 23(b)(3), class members must be afforded the best notice practicable under the circumstances, which includes individual notice to all members who can be identified through reasonable effort." *Zynga*, 2015 WL 6471171, at *13. Under this standard,

the notice must state the following in plain language: (i) the nature of the action; (ii) the class definition; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusions; and (vii) the binding effect of a class judgment on members. *Id*. Rule 23(e) requires notice that describes "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015). Furthermore, the PSLRA requires that the notice contain: (i) a statement of the recovery; (ii) a statement of the potential outcome of the case (pertaining to damages issues); (iii) a statement of attorneys' fees and costs; (iv) identification of the legal representatives; (v) reasons for settlement; (vi) other information the court requires; and (vii) a cover page summarizing that information. *See* 15 U.S.C. § 78u-4(a)(7).

The Notice and Proof of Claim form will be sent by mail to potential Class Members and will be available on the website www.CVSciencesSecuritiesLitigation.com, and the Summary Notice will be published on *Investor's Business Daily* and on *PR Newswire*. *See* Stip., Ex. A. The Notice and Summary Notice have been carefully drafted to notify the Class of the settlement's terms, the Class Members' rights in connection with the settlement, and the date of the Final Approval Hearing in compliance with Rule 23(c)(2) and 23(e), the PSLRA, and due process. *See* Stip., Exs. A-1, A-3.

This manner of providing notice represents the best notice practicable under the circumstances, is typical of the notice given in other class actions, and satisfies the requirements of Rule 23, the PSLRA, and due process. *See, e.g., In re Portal Software, Inc. Sec. Litig.*, 2007 WL 1991529, at *7 (N.D. Cal. June 30, 2007) (approving notice by mail and publication to all reasonably identifiable class members as best practicable). As such, the Court should find that the notices and the procedure for dissemination of the notices are reasonably calculated, under the circumstances, to provide notice of the settlement to Class Members.

III. PROPOSED SCHEDULE OF EVENTS

As outlined in the proposed Preliminary Approval Order submitted herewith, the parties propose the following schedule:

Event	Timeline for Compliance
Deadline for CV Sciences to cause Lead Counsel to be provided with a list of record owners	7 calendar days after entry of the Preliminary Approval Order (¶ 10)[6]
Deadline for Claims Administrator to mail the Notice and Proof of Claim and Release forms to the list of record owners and publish them to the website ("Notice Date")	21 business days after entry of the Preliminary Approval Order (¶ 11)
Deadline for publishing Summary Notice	14 calendar days after the Notice Date (¶ 12)
Deadline for Submitting Proofs of Claim and Release	90 calendar days from the Notice Date (¶ 18)
Deadline for filing the motion in support of final approval of the Settlement and the application for attorneys' fees and expenses	At least 56 calendar days prior to the Final Approval Hearing (¶ 25)
Deadline for filing the proof of mailing of the Settlement Notice, Proof of Claim and Release forms, and Summary Notice	At least 7 calendar days prior to the Final Approval Hearing (¶ 17)
Deadline for objections and exclusions	At least 21 calendar days prior to the Final Approval Hearing (¶ 23)
Deadline for filing reply memoranda in response to any objections	At least 7 calendar days prior to the Final Approval Hearing (¶ 25)
Final Approval Hearing	At least 100 calendar days after entry of the Preliminary Approval Order (¶ 5)

CONCLUSION

For the reasons stated above, Lead Plaintiff respectfully requests that the Court enter the Preliminary Approval Order which will: (a) preliminarily approve the proposed Settlement; (b) approve the proposed form and manner of providing notice; (c) preliminarily certify the Class for settlement purposes; (d) preliminarily appoint Lead Plaintiff as Class Representative, the Faruqi Firm as Class Counsel, and the Muckleroy Firm as Liaison Counsel for settlement purposes; and (e) set a hearing date for the Final Approval Hearing.

Dated: January 31, 2022

By: */s/ Katherine Lenahan*
Katherine Lenahan

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[6] All "¶ __" references in this chart are to the Preliminary Approval Order (Stip. Ex. A).

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

By: */s/ Katherine Lenahan*
Katherine Lenahan