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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re: BROCADE SECURITIES LITIGATION	Consolidated Case No.: 3:05-CV-02042-CRB **CLASS REPRESENTATIVES' NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT** Date: _November 14, 2008__________ Time: _10:00 A.M._ Dept.: Courtroom 8, 19th Floor Judge: Hon. Charles R. Breyer

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 14, 2008 at 10:00 a.m., before the Honorable Charles R. Breyer, District Court Judge, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Lead Plaintiff and Class Representative, the Arkansas Public Employees Retirement System ("APERS"), and Class Representative, Erie County Pennsylvania Public Employees Retirement System ("ERIE") (collectively, "Class Representatives"), on behalf of themselves and others similarly situated, including the class previously certified by the Court,[1] will, and hereby do, move pursuant to Rule 23 of the Federal Rules of Civil Procedure for (i) preliminary approval of the proposed settlement with the Defendants and the proposed plan of allocation; (ii) certification of a settlement class regarding claims against KPMG;[2] (iii) approval of the form and manner of notice proposed by Class Representatives; (iv) appointment of a notice and claims administrator; and (v) a hearing date for final approval of the settlement and application for attorneys' fees and reimbursement of expenses.

STATEMENT OF ISSUES TO BE DECIDED (Civil L.R. 7-4(a)(3))

1. Whether the Court should preliminarily approve the proposed settlement of $160,000,000.00 with Brocade;

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[1] On October 12, 2007, the Court granted Class Representatives' motion to certify a class consisting of:

> All persons and entities who purchased or otherwise acquired the securities of Brocade between May 18, 2000 and May 15, 2005, inclusive (the "Class Period"), and who were damaged thereby. Excluded from the Class are Defendants, the officers and directors of the Company and its subsidiaries and affiliates, any Defendant's partnerships, partners and associates, at all relevant times, and members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

[2] APERS and KPMG reached an agreement to settle prior to the filing of the motion for class certification. Accordingly, APERS and ERIE did not seek to certify a class regarding their claims against KPMG.

2. Whether the Court should preliminarily approve the proposed settlement with KPMG, whereby KPMG will reimburse Class Representatives and the Class in an amount not to exceed $98,500.00 for reasonable costs incurred in the administration of the Brocade settlement;

3. Whether the Court should preliminarily certify a class for settlement purposes only regarding claims asserted against KPMG, appoint APERS and ERIE as class representatives for such settlement class, and appoint their counsel of record as class counsel for such settlement class;

4. Whether the Court should approve the proposed form of class notice and the manner for its transmission to class members and appoint Epiq Systems Inc. as the notice and claims administrator for the class; and

5. Whether the Court should set a date for a hearing for final approval of the settlement and application for an award of attorneys' fees and reimbursement of expenses.

MEMORANDUM OF POINTS AND AUTHORITIES[3]

I. PRELIMINARY STATEMENT

Class Representatives have obtained an extraordinary recovery for the Class. Specifically, Class Representatives have entered into two settlement agreements with total cash payments of $160,098,500.00. First, Class Representatives have obtained a settlement with Defendant Brocade, whereby the Class will release their claims against Defendants Brocade, Greg Reyes, Antonio Canova, Larry Sonsini, Seth Neiman and Neal Dempsey in exchange for Brocade's payment to the Class in the amount of $160,000,000.00.[4] Second, Class Representatives have obtained a settlement with Defendant KPMG, which was previously dismissed as a Defendant by the Court, whereby the Class will release their claims against Defendant KPMG in exchange for a payment by KPMG to the Class in an amount not to exceed $98,500.00 as reimbursement to the Class for reasonable costs incurred in the administration of the two settlements.[5]

The Stipulation and Agreement of Settlement between Class Representatives and KPMG and between Class Representatives and Brocade and the Individual Defendants were filed today, October 24, 2008, at Docket Numbers 470 and 471, respectively. These agreements are collectively referred to herein as the "Stipulations" and are incorporated as if set forth fully herein. The Stipulations set forth the terms of the agreements between the parties and have, as attachments, the following identical exhibits: Exhibit A (Proposed Order for Notice and Hearing); Exhibit A, Tab 1 (Proposed Notice of Class Action, Proposed Settlement, Motion for Attorneys' Fees and Fairness Hearing); Exhibit A, Tab 2

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[3] Capitalized terms not defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement.

[4] The Company did not have insurance funds to pay to settle these claims. Further, during and/or before the Class Period, Reyes, Canova, Sonsini, Dempsey and Neiman (the "Individual Defendants") executed Indemnity Agreements with Brocade, which currently require Brocade to advance all legal costs and pay any settlement or judgment as to each of the Individual Defendants (the parties respective duties regarding these matters are currently being litigated by Brocade and the Individual Defendants). Accordingly, while Class Representatives and the Class will release their claims against the Individual Defendants pursuant to the settlement, the Company will pay the entirety of the $160,000,000.00 settlement amount.

[5] The two settlements are referred to herein collectively as the "Settlements."

(Proposed Proof of Claim); Exhibit A, Tab 3 (Proposed Publication Notice); and Exhibit B (Proposed Final Order and Judgment).

Accordingly, at this time, Class Representatives respectfully ask this Court to enter an order preliminarily approving these two settlements, requiring Class Representatives to issue notice of the settlements to the Class and scheduling a final fairness hearing. In the context of the preliminary approval of a settlement, the sole issue before the Court is whether the settlement is *within the range* of what could be found to be fair, adequate and reasonable, so that notice may be given to the proposed class and a hearing for final approval scheduled. This standard easily is satisfied here for numerous reasons.

First, the Settlement was the result of intense, hard fought, arms-length negotiations. Class Representatives and Brocade engaged in settlement negotiations for more than a year and a half. The Honorable Layn R. Phillips, U.S.D.J. (Ret.) ("Judge Phillips") and the Honorable Charles Renfrew, U.S.D.J. (Ret.) ("Judge Renfrew") conducted these settlement negotiations. Judge Phillips and/or Judge Renfrew personally supervised all settlement negotiations between Class Representatives and Brocade, and also presided over and ruled upon disputes regarding the terms of the settlement documents.

Separately, Class Representatives engaged in extensive arms-length negotiations with Defendant KPMG and reached a settlement whereby KPMG will reimburse the Class for reasonable costs incurred in the administration of the Settlements in an amount not to exceed $98,500.00, the cost of which normally is borne entirely by the Class. Class Representatives achieved this recovery after the Court granted KPMG's motion to dismiss and despite the fact that the DOJ alleged—and a jury found—that KPMG was a victim of Defendant Reyes' fraudulent conduct. Without doubt, the settlement process and the Settlement achieved resulted from arms-length negotiations.

Second, the amount of the Settlements certainly is within the range of reasonableness. Indeed, at the time Class Representatives agreed to settle the Class' claims against the Settling Defendants, the $160,098,500.00 obtained was the largest settlement ever recovered in an "options backdating" case. More importantly, the amount obtained constitutes an unprecedented recovery in terms of the percentage of the Class' overall damages. Depending on the damage model ultimately accepted by the

Court and jury at trial, this recovery represents 65% to 100% of the total damages the Class could have proved at trial. Class Representatives believe these percentages make this settlement one of the most—if not *the most*—significant settlements in history in a securities fraud class action in terms of the total percentage of damages recovered. The recovery obtained is even more extraordinary considering that the issue of whether Defendants' conduct actually caused any "loss" was hotly contested not only in this litigation but also in the parallel SEC and DOJ actions. It also was uncertain whether Class Representatives would be able to prove that the conduct at issue caused them or the Class to suffer any damages whatsoever. Further, Class Representatives obtained a settlement with KPMG—a defendant that the Court previously dismissed from this litigation and that the jury in Defendant Greg Reyes' criminal trial found to be a victim of the conduct at issue.

Third, the Court already has determined that class certification is appropriate in this case. In cases where the court has not yet decided the issue of class certification, the court must determine whether it is appropriate to certify a "settlement only class." Here, however, the Court determined that it was appropriate to certify this action to proceed as a class action against Brocade and the Individual Defendants after extensive briefing and a hearing on these issues.[6] The Settlements were reached by the same Class Representatives and Class Counsel on behalf of the same Class certified by the Court. Therefore, the Court need not readdress the issue of certification regarding Brocade and the Individual Defendants. Further, because the KPMG settlement involves the same Class, Class Representatives and Class Counsel as the settlement with Brocade, the Court may simply adopt its prior certification order in determining that it is appropriate to certify a settlement class as to KPMG.

Finally, the settlements come after more than three years of intense litigation. At the time APERS filed its Complaint, the Class faced significant uncertainties regarding its ability to establish liability, much less prove that Defendants caused the Class to suffer damages. The issue of options backdating had just begun to catch the attention of investors and the press, and no options backdating

[6] The Court previously had granted KPMG's Motion to Dismiss; therefore, KPMG was not a Defendant at the time the Court granted Class Representatives' Motion for Class Certification regarding Brocade and the Individual Defendants.

securities fraud cases yet had been prosecuted. The Supreme Court had just handed down *Dura*, its opinion regarding pleading loss causation, and was preparing to address the pleading standards applicable to securities fraud cases in *Tellabs*, thus causing significant uncertainty regarding how a plaintiff must allege and ultimately prove every element of a securities fraud claim. And, neither the SEC nor the DOJ had filed charges against the Individual Defendants.

Nevertheless, APERS (and later ERIE) vigorously prosecuted the Class' claims and achieved an outstanding recovery for the Class. Plaintiffs' Counsel[7] and Class Representatives achieved this hard-fought settlement only after Class Representatives conducted an extensive independent investigation, reviewed millions of pages of documents that were obtained after a successful motion to lift the discovery stay imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), engaged in extensive discovery, successfully defeated motions to dismiss filed by Brocade and the Individual Defendants, obtained partial summary judgment against Defendant Reyes on the issue of liability, obtained a partial summary judgment against Brocade regarding Reyes' course and scope of employment, won a hotly contested class certification motion, and participated in multiple mediation sessions conducted by Judge Phillips and Judge Renfrew. As a result of this process, Class Representatives and Plaintiffs' Counsel believe that, under the circumstances of this Action, as described below and in the accompanying declarations, this Settlement is well within the range of what could be found to be fair, reasonable and adequate, and should be preliminarily approved.

II. EVENTS LEADING TO THE SETTLEMENT

A. Factual Background

This securities class action is based on an alleged fraudulent scheme carried out by Brocade, its former officers and directors, and its former outside auditor, KPMG, to fraudulently grant, record, account for and disclose stock option grants to Brocade's newly hired employees, current employees,

[7]"Plaintiffs' Counsel" means the law firms of Nix, Patterson & Roach, LLP, Class Counsel; Patton Roberts, PLLC, Class Counsel; Keil & Goodson P.C., additional counsel for APERS; and Schiffrin Barroway Topaz & Kessler, LLP, additional counsel for ERIE.

executives and directors. The purpose of the scheme was to hide the negative impact of unlawful stock option grants upon Brocade's earnings per share, income, compensation expenses and related tax expenses. As a result of the scheme, every single financial statement issued by Brocade for fiscal years 2000 through 2004 was materially false and misleading when made, and as a result, Brocade was forced to restate its financial statements for those years.

As a result of the revelation of Brocade's false and misleading statements regarding its stock option practices, a series of complaints were filed against Brocade alleging violations of the federal securities laws. The first complaint was filed on May 19, 2005. On January 12, 2006, pursuant to the provisions of the PSLRA, the Court appointed APERS as Lead Plaintiff to prosecute this litigation and concluded that APERS was typical of other class members and would adequately and properly represent the Class in this Action.

On April 14, 2006, following an extensive investigation of their claims, including numerous interviews of former Brocade employees, APERS filed a 105-page Consolidated Class Action Complaint against Defendants (the "Complaint"), setting forth in great detail the manner in which Defendants allegedly carried out the scheme to enrich themselves through illegally backdated stock options, while concealing the cost of these options from the Company's financial statements. The Complaint alleged that this conduct violated Sections 10(b), 20(a) and 20A of the Securities Exchange Act of 1934. The Complaint alleged that Defendants issued false and misleading statements and made material omissions regarding Brocade's financial performance, including its earnings and expenses during the Class Period. The Complaint further alleged that as a result of the false and misleading statements, the value of Brocade's securities was inflated and the members of the Class who purchased or acquired those securities were damaged when the truth about Brocade's financial condition was revealed and the value of its securities dropped.

B. Class Representatives' Successful Litigation of the Case

On July 14, 2006, Brocade, the Individual Defendants and KPMG filed motions to dismiss the Complaint. A few days later, on July 20, 2006, the SEC filed an enforcement action against Brocade's former officers: Reyes, Canova, and Stephanie Jensen (the "SEC Action"). That same day, the United

States of America filed a criminal action against Reyes and Jensen (the "DOJ Criminal Action") and a federal Grand Jury subsequently indicted Reyes and Jensen, charging them with making false statements (the "Indictment"). On September 29, 2006, APERS filed a Motion for Partial Modification of the PSLRA's automatic discovery stay to enable APERS to obtain documents that Brocade had produced to the various governmental bodies investigating Brocade's options backdating practices.

On November 3, 2006, the Court held a hearing on Defendants' motions to dismiss and on APERS' Motion for Partial Modification of the PSLRA Discovery Stay. The Court denied Brocade's, Reyes', and Canova's motions to dismiss from the bench. The Court granted APERS leave to file an amended complaint against Sonsini, Neiman and Dempsey (the "Audit Committee Defendants")[8] and KPMG within sixty (60) days from the date of the hearing.

In an additional ruling from the bench, the Court granted APERS' Motion for Partial Modification of the PSLRA Discovery Stay. The Court ordered Brocade to produce to APERS, no later than the day APERS filed any amended complaint, all documents and other data that had been produced to the federal regulators and other parties. As a result, APERS received millions of pages of documents.

After the November 3, 2006 hearing, APERS and KPMG entered into settlement discussions. To facilitate these discussions, KPMG agreed to extend the deadline by which APERS was to file an amended complaint against KPMG by forty-five (45) days in order to attempt to reach a resolution of APERS' claims against KPMG. On or about June 4, 2007, APERS and KPMG reached an agreement in principle to resolve APERS' claims against KPMG (the "KPMG Settlement").

On December 18-20, 2006, APERS and Brocade engaged in their first mediation before Judge Phillips. The mediation was unsuccessful.

On January 2, 2007, APERS filed its Amended Consolidated Class Action Complaint against Brocade and the Individual Defendants (the "Amended Complaint"). On March 9, 2007, the Audit

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[8] APERS also was granted leave to file an amended complaint against Mark Leslie, Christopher Paisley, and Nicholas Moore. As a result of its continuing investigation and limited access to documentation, as well as the Court's previous ruling, APERS chose not to file an amended complaint against these individuals.

Committee Defendants filed a motion to dismiss the Amended Complaint. On August 27, 2007, the Court denied the Audit Committee Defendants' motion to dismiss.

The criminal trial of Greg Reyes began on June 18, 2007, and concluded on August 7, 2007, with a unanimous guilty verdict on all ten counts.

On June 22, 2007, APERS and ERIE filed their Motion for Class Certification. Brocade and the Individual Defendants filed their opposition on August 3, 2007, and APERS and ERIE filed their reply on August 24, 2007.

On August 23, 2007, Brocade filed a motion for partial summary judgment regarding loss causation. By agreement of the Parties, the briefing on that motion was stayed.

On August 24, 2007, APERS moved for partial summary judgment against Reyes on the issue of liability based on collateral estoppel. Reyes filed his opposition on September 21, 2007, and APERS filed its reply on September 28, 2007. On October 12, 2007, the Court granted APERS' motion for partial summary judgment regarding Reyes' liability for Brocade's 10-Ks filed with the SEC for years ended 2001, 2002 and 2003. On October 12, 2007, the Court certified the class and appointed APERS and ERIE as Class Representatives.

On October 21, 2007, the parties engaged in a further mediation before Judge Phillips. The mediation was unsuccessful. The parties continued the mediation process via separate teleconferences with Judge Phillips, albeit unsuccessfully, through the remainder of October and November 2007.

On January 18, 2008, Class Representatives moved for partial summary judgment against Brocade on the issue of liability, seeking a determination that Reyes acted within the course and scope of his employment when he executed Brocade's Form 10-Ks for fiscal years ended 2001, 2002, and 2003. The Court granted Class Representatives' motion on May 13, 2008.

On May 13, 2008, the parties engaged in a further mediation with Judge Phillips and Judge Renfrew. This mediation concluded with a Mediator's Recommendation that was accepted by Brocade and Class Representatives on May 30, 2008.

Class Representatives have developed an in-depth understanding of the strengths and weaknesses of their claims, and the value of a settlement at this juncture in the case. This understanding

is based on: (i) Plaintiffs' Counsel's extensive investigation of Class Representatives' claims, including interviews with many witnesses and review of all publicly-available information concerning the illegal compensation practices which form the basis of Class Representatives' claims; (ii) the results of extensive discovery; (iii) the extensive and successful litigation of Class Representatives' claims including briefing in opposition to motions to dismiss, in prosecution of summary judgment, and in seeking to certify the class; (iv) consultation with industry, accounting and damages experts; (v) research of the applicable law; and (vi) multiple days of formal mediation sessions with Judge Phillips and Judge Renfrew, both former federal judges and experienced mediators of complex cases, in addition to untold hours of informal telephonic and in-person negotiations. As a result of these above-described efforts, Class Representatives and Plaintiffs' Counsel have more than sufficient information to recommend this Settlement to the Court for preliminary approval.

III. ARGUMENT

A. The Standards For Preliminary Approval of a Class Action Settlement

The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. *Class Plaintiffs v. Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992). Indeed, "there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see Utility Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989).

The approval of a class action settlement is a matter within the sound discretion of the district court. *See Class Plaintiffs,* 955 F.2d at 1276; *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); Newberg & Conte, NEWBERG ON CLASS ACTIONS §11.41 (3d ed. 1992). This discretion should be exercised in the context of public policy strongly favoring the pretrial settlement of class action lawsuits. *Class Plaintiffs*, 955 F.2d at 1276; *Officers for Justice*, 688 F.2d at 625. The district court's "decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions and proof." *In re: Mego*

Financial Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (quoting *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, *Torrisi v. Tuscon Elec. Power*, 8 F.3d 1370, 1375 (9th Cir. 1993); *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1026 (9th Cir. 1998), the Ninth Circuit has directed that:

> [T]he 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, 688 F.2d at 625.

Furthermore, the court does not "have the ability to delete, modify or substitute certain provisions [of the settlement]. The settlement must stand or fall in its entirety." *Yeagley v. Wells Fargo & Co*., No. C 05-03403 CRB, 2008 U.S. Dist. LEXIS 5040, at *7 (N.D. Cal. Jan. 18, 2008) (Breyer, J.) (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998)). "It is the settlement: taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id*.

In the context of the preliminary approval of a settlement, the sole issue before the Court is whether the settlement is *within the range* of what could be found to be fair, adequate and reasonable, so that notice may be given to the proposed class and a hearing for final approval can be scheduled. *West v. Circle K Stores, Inc.*, No. S-04-0438, 2006 U.S. Dist. LEXIS 42074, at *29 (E.D. Cal. June 13, 2006).[9] As stated by the Court in *Young v. Polo Retail, LLC*, No. C-02-4546, 2006 U.S. Dist. LEXIS 81077, at *12-13 (N.D. Cal. Oct. 25, 2006), the Court should grant preliminary approval:

> [i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no, obvious deficiencies, does not improperly grant

[9] In those cases in which the "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both (1) the propriety of the certification and (2) the fairness of the settlement." *Staton v. Boeing Co*., 327 F.3d 938, 952 (9th Cir. 2003). Here, a class has already been certified as to Brocade and the Individual Defendants, and thus, the first prong of this analysis is not relevant. However, because the KPMG Settlement was reached prior to class certification, a brief discussion of the propriety of class certification as to the claims against KPMG will be discussed below.

> preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing.

(citing Manual for Complex Litigation, Second § 30.44 (1985))*; see also West*, 2006 U.S. Dist. LEXIS 42074, at *34. In assessing a settlement proposal for its fairness, adequacy, and reasonableness, the district court is required to balance a number of factors:

(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.

Hanlon, 150 F.3d at 1026; *In re: Mego*, 213 F.3d at 458; *Yeagley*, 2008 U.S. Dist. LEXIS 5040, at *7-8. Given that some of these factors cannot be fully assessed until the court conducts the fairness hearing, "a full fairness analysis is unnecessary at this [preliminary approval] stage…" *West*, 2006 U.S. Dist. LEXIS 42074, at *29. Instead, at this preliminary approval stage, the Court need only "determine whether the proposed settlement is within the range of possible approval." *Alberto v. GMRI, Inc*., No. CIV. 07-1895, 2008 U.S. Dist. LEXIS 50418, at *31 (E.D. Cal. June 23, 2008). Essentially, the Court should only consider "whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys…" *West*, 2006 U.S. Dist. LEXIS 42074, at *34.

As demonstrated below, the Settlements satisfy the criteria for preliminary approval.

B. The Settlements Should Be Preliminarily Approved

1. The Proposed Settlements Fall Within the Range of What Could be Found to be Fair, Reasonable and Adequate

The Settlements provide an outstanding recovery for the Class, providing a total cash payment of $160,000,00.00 from Brocade and payment of up to $98,500.00 for reasonable administration

expenses from KPMG. As such, the amount of the Settlements standing alone clearly falls within the range of a fair, reasonable and adequate recovery for the Class. However, the strength of the Settlements is even more apparent when the benefits are compared to the risk that a protracted and contested period of litigation, including dispositive motion practice, trial and likely appeals—which could possibly extend years into the future—might lead to a smaller recovery, or no recovery at all, against the Settling Defendants. Indeed, "[b]asic to [analyzing a proposed settlement] in every instance, is the need to compare the terms of the compromise with the likely rewards of litigation." *Yeagley*, 2008 U.S. Dist. LEXIS 5040, at *11 (quoting *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)).

Here, Class Representatives faced many of the risks attendant to complex, securities fraud class actions such as this. Brocade had no insurance coverage available for the Class' claims and, as such, any payment by Brocade would be outside of insurance. Moreover, throughout this litigation, Brocade vigorously contested the issue of loss causation, an essential element of Class Representatives' claims. Greg Reyes vigorously challenged the issue of "loss" in his criminal case and the SEC's civil case against him. In his criminal case, Reyes successfully defeated an attempt by the Government to obtain an enhancement to Reyes' offense level on the basis of "loss" and obtained an order finding that the Government failed to meet its burden to show that Reyes caused investors to lose in excess of $3 million as a result of his conduct. While Class Representatives strongly believe in the strength of their ability to establish this element of their case, a jury, or even an appellate court, could reach a contrary conclusion. Likewise, Class Representatives faced the risk that after a trial on the merits, a jury might award none or only a fraction of the Class' losses as damages. Finally, after years of litigation, any victory on behalf of the Class at trial would likely be appealed by Defendants, creating further uncertainty and significant delay. Moreover, the Settlement with Brocade represents 65% to 100% of the total damages that the Class could hope to recover after a successful trial of this case.

ii. There Are No Grounds to Doubt the Fairness of the Settlements and There Are No Obvious Deficiencies

The Settlement with Brocade is the result of vigorous arms-length negotiations between experienced, informed counsel and under the supervision of Judge Phillips and Judge Renfrew, which

followed years of hard-fought litigation involving extensive factual investigation, briefing, and discovery. Indeed, the amount and terms of the Settlement resulted from a Mediator's Recommendation issued by Judge Phillips and Judge Renfrew after over one and a half years of negotiations. The Settlement was reached after Class Representatives obtained volumes of information concerning the claims against Brocade and the Individual Defendants, the Company's ability to fund a settlement, and insurance issues relating to the Individual Defendants. It is therefore presumptively fair, adequate, and reasonable. *See, e.g., Linney v. Alaska Cellular P'ship*, 1997 WL 450064, at *16 (N.D. Cal. July 18, 1997) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair."), *aff'd*, 151 F.3d 1234 (9th Cir. 1998)); *In re Heritage Bond Litig.*, MDL Case No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *21-22 (C.D. Cal. June 10, 2005) (same).

Here, the presumptive fairness of the Settlement is underscored by the fact that Class Representatives and Brocade only reached a compromise following several mediation sessions, held over the course of almost two years, before two highly capable and experienced former federal judges. *See Glass v. UBS Fin. Servs., Inc.*, No. 06-4068, 2007 U.S. Dist. LEXIS 8476, at *15 (N.D. Cal. Jan. 26, 2007)("The settlement was negotiated and approved by experienced counsel on both sides of the litigation, with the assistance of a well-respected mediator with substantial experience…[and] this factor supports approval of the settlement."). Therefore, there can be no doubt that the Settlement was obtained without collusion and after good faith bargaining.

In sum, there are no grounds to cast doubt on the fairness of the Settlement and there are no obvious deficiencies in the Settlement.

C. The Court Already Has Certified a Class Against Brocade and the Individual Defendants And, As Such, Need Not Conduct Another Certification Analysis Regarding These Defendants

On October 12, 2007, the Court granted Class Representatives' class certification motion against Brocade and the Individual Defendants, thereby certifying a class in this Action that, with certain exclusions, consists of: "All persons and entities who purchased or otherwise acquired the securities of

Brocade between May 18, 2000 and May 15, 2005, inclusive, and who were damaged thereby." The certified class is the same class on behalf of whom the settlement was reached and as to whom Class Representatives are asking the Court to approve. Accordingly, the issue of certifying a "settlement class" as to the claims against Brocade is not at issue here.

D. Certification of a Settlement Class Against KPMG Is Proper

The Settlement with KPMG was obtained on behalf of the same class previously certified regarding the Class' claims against Brocade and the Individual Defendants. Prior to the certification briefing and the Court's ruling, however, APERS reached an agreement in principle to settle the claims of the putative class against KPMG. For this reason, KPMG did not participate in, nor was the subject of, the October 12, 2007 class certification ruling.

Class Representatives now respectfully request that the Court certify a settlement class identical to that certified against Brocade and the Individual Defendants for the sole purpose of effectuating the KPMG Settlement. The analysis and rationale used by the Court to certify the class against Brocade and the Individual Defendants applies equally to the KPMG Settlement. Accordingly, for the same reasons the Court certified this action against Brocade and the Individual Defendants, Class Representatives respectfully request that the Court certify an identical class to effectuate the KPMG Settlement and appoint Class Representatives and Plaintiffs' Counsel as class representatives and class counsel for such class.[10]

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[10] For consistency purposes and in order to make class notice less complex, Class Representatives respectfully request that the Court adopt the following class definition and exclusions for the KPMG Settlement, which are contained in both the Brocade and KPMG Stipulations and Agreements of Settlement:

> All persons and entities who purchased or otherwise acquired Brocade Securities during the Class Period, and who were damaged thereby. Excluded from the Class are (i) Defendants; (ii) all officers, directors, and partners of any Defendant and of any Defendant's partnerships, subsidiaries, or affiliates, at all relevant times; (iii) members of the immediate family of any of the foregoing excluded parties; (iv) the legal representatives, heirs, successors, and assigns of any of the foregoing excluded parties; and (v) any entity in which any of the foregoing excluded parties has or had a controlling interest. Also excluded from the Class are any putative members of the Class who exclude themselves by timely requesting exclusion in accordance with the requirements set forth in the Notice.

E. The Form And Manner of The Proposed Notice to The Class is Adequate

When a court certifies a class under Rule 23(b)(3), notice must be served on all class members who can be identified through reasonable efforts. FED. R. CIV. P. 23(c)(2)(B). Rule 23(e) also instructs courts to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal or compromise." *Id.* at 23(e)(1)(B). Thus, notice of a proposed settlement to the class must be given in the most practicable manner under the circumstances, describing "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980); *see also* Fed. R. Civ. P. 23(c)(2)(B). Thus, in terms of content, a settlement notice "need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Attached to the Stipulations of Settlement, Class Representatives have submitted two forms of notice to the Court for approval: (1) Notice of Class Action, Proposed Settlement, Motion for Attorneys' Fees and Fairness Hearing ("Notice"); and (2) Publication Notice. Class Representatives propose that the Claims Administrator shall cause the Publication Notice to be published in the national edition of the *Wall Street Journal* and over the *PR Newswire*, and send a copy of the Notice to the last known mailing address of those members of the Class whose addresses may be identified through reasonable effort.[11] This is a well-established means of providing legally sufficient notice. *See, e.g., In re Sorbates Direct Purchaser Antitrust Litig.*, No. C 98-4886MMC, 2002 WL 31655191, *4 (N.D. Cal.) (N.D. Cal. Nov. 25, 2002) (holding that notice by first-class mail and by publication in the

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[11] The Notice also will be mailed to more than one thousand (1,000) brokers, banks and other financial institutions acting as nominees for members of the Class. These brokers, banks and other financial institutions will then forward the Notice to all Class Members identifiable from their records or provide the names and addresses of such Class Members to the Claims Administrator.

national edition of the *Wall Street Journal* "was adequate and sufficient and constituted the best notice practicable as required by Rule 23 of the Federal Rules of Civil Procedure and due process."). To accomplish the dissemination of the Notice, Class Representatives have requested the Court to appoint Epiq Systems, Inc. as Claims Administrator. *See* Section V, *infra*.

Furthermore, the proposed notice complies with the requirements for notice set forth in the PSLRA by stating: (a) the amount of the Settlements proposed to be distributed to the Class is $160,098,500, less approved fees and expenses; (b) the average amount of damages per share; (c) the attorneys' fees and costs sought; (d) the name, telephone number, and address of Class Counsel who will be reasonably available to answer questions from Class Members concerning matters contained in the notice; (e) Class Members' right to object to the settlement or seek exclusion from the Class; and (f) the reasons why the Parties propose the settlement. *See* 15 U.S.C. § 77z-1(a)(7). The Publication Notice provides similar information in a summary form, and informs the reader how to obtain a copy of the more detailed Notice. Undoubtedly, both notices will apprise interested parties of the proposed Settlements and their options with respect to the Settlements.

F. Appointment of Epiq Systems Inc. as Administrator is Proper

To accomplish the dissemination of Notice and processing of claims made in response to the Notice, Plaintiffs' Counsel respectfully requests the Court to appoint Epiq Systems Inc. ("Epiq") as the Notice and Claims Administrator of the Settlements.

Epiq is a well-respected firm with a successful history of administering notice campaigns and processing claims for some of the largest class action settlements in the United States.[12] Further, Epiq has agreed to work together with Professor Francis McGovern, a noted expert on the issue of administering large settlement funds, to help facilitate the notice, administration and claims process in this case in order to maximize Class member participation. The undersigned counsel have worked with Epiq and Professor McGovern in other cases and are confident they will properly administer the notice campaign and claims process approved and ordered by the Court.

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[12] *See* http://www.epiqsystems.com/solutions.php?ServiceID=18

1 **IV. CONCLUSION**

2 For all the foregoing reasons, Class Representatives respectfully request that the Court enter the
3 proposed Order for Notice and Hearing, which is attached as Exhibit A to the Stipulations, which, *inter*
4 *alia*, (1) preliminarily approves the proposed Settlement and plan of allocation as within the range of
5 possible fairness, reasonableness and adequacy; (2) preliminarily certifies a class for settlement
6 purposes only to effectuate the settlement of the claims asserted against KPMG; (3) appoints Class
7 Representatives as class representatives of the KPMG Settlement Class; (4) appoints Plaintiffs' Counsel
8 as class counsel for such settlement; (5) approves the form and manner of notice proposed by Class
9 Representatives; (6) appoints Epiq Systems Inc. as notice and claims administrator to disseminate the
10 Class notices and administer the claims of Class Members; and (7) sets a date and time for the hearing
11 regarding final approval of the Settlement and Plaintiffs' Counsel's application for attorneys' fees and
12 reimbursement of expenses.
13
14 DATED: October 24, 2008 Respectfully submitted,
15 NIX, PATTERSON & ROACH, L.L.P.
16
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