UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SMART TECHNOLOGIES, INC. SHAREHOLDER LITIGATION	No. 11-CV-7673-(KBF) ECF CASE

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, the City of Miami General Employees' and Sanitation Employees' Retirement Trust ("Lead Plaintiff"), on behalf of itself and the U.S. Settlement Class, respectfully submits this memorandum of law in support of its motion for final approval of the proposed settlement resolving all claims asserted against the Settling Defendants in this Action and in the related Canadian Action in return for the payment of $15.25 million in cash for the benefit of the U.S. Settlement Class and the Canadian Class (collectively the "Classes")[1] (the "Settlement"), and for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[2]

PRELIMINARY STATEMENT

The Settlement achieved by Lead Plaintiff is an excellent result for the U.S. Settlement Class. The Settlement provides a substantial and immediate monetary benefit to the U.S. Settlement Class (as well as the Canadian Class) in the form of a cash payment of $15.25

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[1] The U.S. Settlement Class certified by this Court in its Order Preliminarily Approving Proposed Settlement and Providing for Notice dated May 23, 2013 (ECF No. 176) (the "Preliminary Approval Order"), consists of:

> all Persons who purchased or otherwise acquired, from July 14, 2010 through and including May 18, 2011 (the "U.S. Settlement Class Period"), SMART common stock in the United States, and were damaged thereby.

Preliminary Approval Order ¶ 1. The Canadian Class certified by the Canadian Court consists of:

> all persons and entities, wherever resident, who purchased or otherwise acquired SMART common stock offered by SMART's Canadian Prospectus from an underwriter domiciled in Canada from July 15, 2010 through and including July 20, 2010 and continued to hold any of those shares on or after November 10, 2010.

See Stipulation and Agreement of Settlement of Class Actions dated April 30, 2013 (ECF No. 172-1) (the "Stipulation"), at ¶ 1(g). The Settling Defendants and certain other affiliates of the Settling Defendants (as set forth in the Stipulation) and any Persons who submit a request for exclusion that is accepted by either of the Courts are excluded from the Classes.

[2] Unless otherwise indicated, all capitalized terms shall have those meanings ascribed to them in the Stipulation or the Declaration of Hannah G. Ross in Support of (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Ross Declaration" or "Ross Decl."), filed herewith.

million. The Settlement is the product of more than two years of hard-fought litigation, which included Lead Plaintiff's successful opposition of two rounds of motions to dismiss filed by the U.S. Defendants; a successful motion for class certification; and substantial discovery, including the review of approximately one million pages of documents and fourteen depositions, and was achieved only after a formal mediation before David Geronemus, Esq. of JAMS, followed by months of additional, arm's-length settlement negotiations guided by Mr. Geronemus. The Settlement is especially beneficial to the U.S. Settlement Class given the serious risks involved in the Action, including the significant risk that the U.S. Defendants could ultimately prevail and the U.S. Settlement Class would recover nothing at all. Moreover, as discussed in the Ross Declaration and below, the Settlement Amount represents a significant portion – approximately 30% – of the likely maximum recoverable damages. It is Lead Plaintiff's and Lead Counsel's informed opinion that, in light of the significant risks and the delay, expense and uncertainty of pursuing the Action through trial and subsequent appeals, that the Settlement is in the best interests of the U.S. Settlement Class.

The terms of the proposed Settlement are set forth in the Stipulation and Agreement of Settlement of Class Actions dated April 30, 2013 (the "Stipulation"), which was previously submitted to the Court (ECF No. 172-1). In its May 15, 2013 Order by endorsed letter and the May 23, 2013 Preliminary Approval Order, the Court preliminarily approved the Settlement, certified the U.S. Settlement Class for settlement purposes, directed that notice of the proposed Settlement be given to the U.S. Settlement Class, and scheduled the final Settlement Hearing for September 17, 2013 (ECF Nos. 175, 176). In order for the Settlement to become effective, the Settlement must be approved by this Court and the Canadian Court (which will assess the reasonableness of the Settlement to the Canadian Class), and the class claims asserted in the

Harper Action in California state court must be dismissed with prejudice and all appeal rights with respect to such dismissal exhausted.[3]

As detailed in the Ross Declaration,[4] at the time the agreement to settle was reached, Lead Plaintiff and Lead Counsel had extensively litigated the Action and had a well-developed understanding of the strengths and weaknesses of the claims and defenses in the Action. Before the Settlement was agreed to, Lead Counsel had engaged in more than two years of hard-fought litigation, which included (i) a thorough investigation of the claims in the Action, including interviews with numerous confidential witnesses; an extensive review of SEC filings, press releases, news reports and other public information; and consultation with experts; (ii) researching and drafting two detailed amended complaints; (iii) extensive briefing in opposition to two rounds of motions to dismiss; (iv) substantial discovery, including the exchange of written discovery requests and responses, issuing subpoenas to eighteen third parties including the lead underwriters of SMART's IPO, review and analysis of approximately one million pages of documents, and the taking and defending of fourteen depositions; (v) extensive briefing of Lead Plaintiff's successful class certification motion; (vi) discussions with financial experts regarding the damages suffered by the class, with professional securities industry consultants concerning the issue of "tracing" SMART shares purchased in the secondary market to the stock issued in the IPO, and with industry experts in educational technology concerning the demand for

[3] On May 16, 2013, the California state court granted Lead Plaintiff's motion and stayed the *Harper* Action pending final resolution of the Settlement. Ross Decl. ¶ 55.

[4] The Ross Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; the value of the Settlement, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Lead Counsel provided for the benefit of the U.S. Settlement Class.

SMART's whiteboard products; (vii) preparation and exchange of detailed mediation statements; and (viii) settlement negotiations over the course of several months. Ross Decl. ¶ 5.

In reaching the Settlement, Lead Plaintiff and Lead Counsel considered the substantial risks associated with continuing the litigation. For example, the U.S. Defendants might have ultimately been successful in demonstrating that there were no misrepresentations in the offering materials for the IPO, or, even if there were, that they were not liable for the misrepresentations. As discussed in greater detail below and in the Ross Declaration, the U.S. Defendants vigorously argued and presented supporting evidence that there was, in fact, no decrease in demand for SMART's key products during the relevant period and that SMART's offering materials adequately warned investors of a risk of a decrease in demand. If the U.S. Defendants had been successful on any of their liability-related defenses, the U.S. Settlement Class would have been left with no recovery at all. Ross Decl. ¶¶ 62-63. In addition, the U.S. Defendants might have prevailed on one or more of their arguments seeking to reduce the damages claimed in the Action, including by showing that U.S. class members who purchased in the secondary market for SMART's stock could not "trace" their stock purchases to the U.S. offering materials, and, therefore, could not claim damages, or by demonstrating that any damages suffered by the class were caused by intervening factors unrelated to the alleged misrepresentations. *Id.* ¶¶ 64-65. The significance of these risks was heightened by the prospect of additional months or years of protracted litigation through costly expert discovery, contested motions, a trial and the likely ensuing appeals. The Settlement avoids these and other risks while providing a substantial and immediate monetary benefit to the Classes.

In light of these considerations, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement is an excellent result for the U.S. Settlement Class, and provides a fair and reasonable resolution of the claims against the U.S. Settling Defendants in this Action.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04 CIV. 8141 (DAB), 2012 WL 345509, at *3 (S.D.N.Y. Feb. 2, 2012).

In this Circuit, public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*") ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 159-60 (S.D.N.Y. 2011). ("Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement.") (internal quotation marks omitted); *In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) ("public policy favors settlement, especially in the case of class actions").

In ruling on final approval of a class settlement, the court should examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Visa*, 396 F.3d at 116; *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012); *Giant Interactive*, 279 F.R.D. at 160.

A. The Settlement Was Reached After Arm's-Length Negotiations with the Assistance of an Experienced Mediator and Is Procedurally Fair

Courts have found that a strong presumption of fairness attaches to a proposed settlement if it is reached through arm's-length negotiations by experienced and capable counsel after meaningful discovery. *See Visa*, 396 F.3d at 116; *IMAX*, 283 F.R.D. at 189; *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *1 (S.D.N.Y. Dec. 28, 2011) ("a strong presumption of fairness attaches because the settlement was reached by experienced counsel after arm's length negotiations").

The Settling Parties here negotiated the Settlement at arm's length after a formal mediation in December 2012 with David Geronemus, Esq. of JAMS, an experienced mediator of class actions and other complex litigation, and several months of additional negotiations, which were also guided by Mr. Geronemus. Ross Decl. ¶¶ 56-59. The settlement negotiation process was lengthy and arduous. While negotiations were ongoing, Lead Counsel was simultaneously engaged in substantial discovery, including preparing for, taking and defending depositions in the U.S. and Canada, in anticipation of the scheduled close of fact discovery on March 20, 2013. *Id.* ¶¶ 37-40. The Term Sheet memorializing the agreement in principle to settle was executed on March 11, 2013 – just nine days before the scheduled close of fact discovery. *Id.* ¶ 58. Moreover, Lead Counsel, which negotiated the Settlement on behalf of the U.S. Settlement Class, has extensive experience in prosecuting complex securities class actions and, given the amount of discovery conducted and procedural posture of the case at the time the agreement in principle was reached, had sufficient information about the strengths and weaknesses of the claims in the Action to make an informed recommendation concerning the Settlement. Ross Decl. ¶¶ 5, 14-46, 85.

Given the arm's-length nature of the negotiations, counsel's experience and well-developed knowledge of the case, and the active involvement of an experienced mediator, there can be no question that the Settlement is procedurally fair and is not the product of collusion. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *Giant Interactive*, 279 F.R.D. at 160 (settlement was entitled to the presumption of fairness because it was "the product of prolonged, arms-length negotiation . . . facilitated by a respected mediator"); *see also In re Penthouse Exec. Club Comp. Litig.*, No. 10 Civ. 1145 (KMW), 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013) ("The assistance of two experienced mediators, [including] David Geronemus of JAMS . . . reinforces that the Settlement Agreement is non-collusive.").

B. Application of the *Grinnell* Factors Supports Approval of the Settlement as Substantively Fair, Reasonable and Adequate

The Settlement is also substantively fair, reasonable, and adequate. The standards governing approval of class action settlements are well established in this Circuit. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following factors should be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Wal-Mart*, 396 F.3d at 117; *In re*

Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig., 909 F. Supp. 2d 259. 265-66 (S.D.N.Y. 2012).

"In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)). Additionally, in deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

Here, the Settlement easily satisfies the criteria for approval articulated by the Second Circuit in *Grinnell*.

1. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation omitted). Indeed, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute," *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted); *see*

also Strube v. Am. Equity Inv. Life Ins. Co., 226 F.R.D 688, 698 (M.D. Fla. 2005) (noting the "overriding public interest in favor of settlement" because it is "common knowledge that class action suits have a well-deserved reputation as being most complex").

Achieving a litigated verdict in this Action for Lead Plaintiff and the class would have required substantial time and expense. As set forth in the Ross Declaration, Lead Plaintiff had already overcome two rounds of motions to dismiss, achieved class certification and conducted substantial fact discovery by the time the Settlement was reached. *See* Ross Decl. ¶¶ 5, 14-46. However, in the absence of the Settlement, the continued litigation of the Action would have required the preparation of expert reports, taking and defending expert depositions, likely further motion practice on defendants' request for a class "opt-in" form or questionnaire, an expected motion for summary judgment, and a trial involving substantial expert and factual testimony with respect to liability and damages. Finally, whatever the outcome at trial, it is virtually certain that appeals would be taken from any verdict. All of the foregoing would pose substantial expense for the U.S. Settlement Class and delay the ability to recover – assuming, of course, that Lead Plaintiff was ultimately successful on its claims.

The complexity of the Action was further increased by the fact that it involved public stock offerings in both Canada and the United States – a circumstance that lead to specific and difficult legal challenges with respect to establishing the traceability of shares purchased in the United States to the U.S. offering materials and required additional legal research, factual investigation, and expert consultation. Ross Decl. ¶¶ 44, 46, 52, 64. The complexity and time required to resolve the Action was also increased by the fact that the same claims were the basis of a parallel action in Canada, as well as a duplicative, tag-along action filed in California state

court, which necessitated multi-party settlement discussions and substantial motion practice seeking to stay the California Action. *Id.* ¶¶ 8, 36-38, 52.

Lead Plaintiff and Lead Counsel recognized that, if the Lead Plaintiff were to prevail on its claims against the U.S. Defendants at trial, they would have to marshal and analyze substantial factual evidence about the demand for SMART's key products and the other alleged misrepresentations in order to present the claims to a jury in a simple and comprehensible manner and be prepared to present well-qualified expert testimony to establish traceability and damages. Lead Counsel was prepared to do so, but it cannot be disputed that achieving a litigated verdict in this Action would have required a substantial investment of time and resources by attorneys for the class and experts working on their behalf.

In contrast to complex, lengthy, and uncertain litigation, the Settlement provides an immediate, significant and certain recovery of $15.25 million for members of the Classes. Accordingly, this factor supports approval of the Settlement.

2. <u>The Reaction of the U.S. Settlement Class to the Settlement</u>

The reaction of the class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g., FLAG Telecom*, 2010 WL 4537550, at *16; *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695 (CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007).

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Rust Consulting, Inc. ("Rust"), began mailing copies of the Notice and Claim Form to potential Class Members and nominees on June 5, 2013. *See* Affidavit of Eric Schachter Regarding (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Exhibit 1 to the Ross Declaration ("Schachter Aff."), at ¶¶ 4-5. As of June 28, 2013, Rust had mailed a total of 29,898 copies of the Notice

Packet (consisting of the Notice and Claim Form) to potential Class Members and their nominees. *See id*. ¶ 8.[5] In addition, a Summary Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire* on June 13, 2013. *See id*. ¶ 9. The Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to opt out of the Classes or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Class Members to exclude themselves or object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation and only one request for exclusion have been received. The deadline for submitting objections and requesting exclusion from the Classes is July 22, 2013. As provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers no later than September 10, 2013 addressing all requests for exclusion and any objections that may be received.

3. The Stage of the Proceedings and the Amount of Discovery Completed Support Approval of the Settlement

The Settlement was reached after more than two years of hard-fought litigation that included a detailed investigation, extensive motion practice and substantial discovery. Accordingly, Lead Plaintiff and Lead Counsel had a firm grasp of the strengths and weaknesses of the case when negotiating and evaluating the proposed Settlement.

Lead Counsel's investigation prior to the filing of the First Amended Complaint was comprehensive, involving interviews with numerous confidential witnesses, an extensive review of publicly available information, including SEC filings, press releases, news reports and other

[5] Of the 29,898 total Notice Packets disseminated by Rust as of June 28, 2013, 24,327 (or 81%) were mailed to potential Class Members or nominees with U.S. mailing addresses, 2,082 (or 7%) were mailed to potential Class Members or nominees with Canadian mailing addresses, and 3,489 (or 12%) were mailed to potential Class Members or nominees in other countries. *See* Schachter Aff. ¶ 8.

public information, consultation with experts, and legal research and analysis. Ross Decl. ¶¶ 5, 18. Thereafter, Lead Counsel conducted an additional investigation, including interviews with more confidential witnesses, which allowed Lead Plaintiff to include additional allegations in the Second Amended Complaint bolstering its claims concerning the alleged misrepresentations regarding the demand for SMART's interactive whiteboard products. *Id.* ¶ 24.

Following the resolution of the U.S. Defendants' motions to dismiss, Lead Plaintiff and its counsel engaged in substantial discovery, which included issuing subpoenas to eighteen third parties, the review of approximately one million pages of documents produced by U.S. Defendants and third-parties, and taking and defending of fourteen depositions. Ross Decl. ¶¶ 29-40. Indeed, the agreement to settle was not reached until fact discovery was substantially completed, coming just days before the scheduled close of fact discovery. *Id.* ¶ 58. By that time, Lead Counsel had already started preparations for expert discovery as well, including, among other things, consulting with damages experts regarding preparation of an expert report on the damages suffered by the U.S. class, with professional securities industry consultants concerning the stock tracing argument, and with industry experts in educational technology concerning the true state of demand for SMART's interactive whiteboard products. *Id.* ¶ 52. Lead Plaintiff and Lead Counsel also understood the U.S. Defendants' defenses to the claims asserted in the Action through the extensive briefing of the two rounds of motion to dismiss, the U.S. Defendants' opposition to class certification and their detailed mediation statement. *Id.* ¶¶ 5, 21-28, 43-44.

As a result of Lead Counsel's thorough investigation, the substantial discovery completed, the litigation of the motions to dismiss and class certification motion, and the settlement negotiation process, Lead Plaintiff and Lead Counsel clearly had a "sufficient understanding of the case to gauge the strengths and weaknesses of the claims and the adequacy

of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *see Sadia*, 2011 WL 6825235, at *1 (this factor supported settlement where plaintiffs' counsel had reviewed 65,000 pages, taken one deposition and consulted experts). Based on the information developed, Lead Plaintiff and Lead Counsel were able to make an informed appraisal of the value of the case and they believe that the Settlement represents a resolution that is highly favorable to the U.S. Settlement Class without the substantial uncertainty and delay of continued litigation.

4. The Risks of Establishing Liability and Damages Support Approval of the Settlement

Grinnell holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability [and] the risks of establishing damages." 495 F.2d at 463 (citations omitted). While Lead Plaintiff and Lead Counsel believe that the claims asserted against the U.S. Defendants have merit, they also recognize that there were significant risks as to whether they would ultimately be able to prove liability and establish damages on their claims.

First, Lead Plaintiff faced significant challenges in proving that SMART's offering materials for the IPO contained misrepresentations or, even if misrepresentations could be established, that the U.S. Defendants were liable for them. For example, the U.S. Defendants had repeatedly argued and would continue to argue that Lead Plaintiff's allegations concerning the alleged misrepresentations concerning the demand for SMART's interactive whiteboards and NextWindow products failed because SMART's revenues from these products continued to increase from 2008 through several months after the IPO. Ross Decl. ¶ 62. The U.S. Defendants would also have argued that the offering materials contained detailed disclaimers warning investors of the risk of a decline in demand for interactive whiteboards or NextWindow's

products. Thus, U.S. Defendants might have been able to convince a jury that the statements in the offering materials were not misleading or that investors in SMART common stock had been adequately warned of the risks attendant to SMART's business. *Id*. If the U.S. Defendants had prevailed on either of these arguments, the U.S. Settlement Class would have been left with no recovery at all.

Moreover, as the Court noted in its opinion regarding the U.S. Defendants' first motion to dismiss, "the 'gravamen'" of Lead Plaintiff's claims was that "defendants … were aware of certain known trends and . . . were obligated to disclose the impact of those trends on SMART's business." *McKenna v. SMART Technologies Inc.*, No. 11 Civ. 7673 (KBF), 2012 WL 1131935, at *8 (S.D.N.Y. Apr. 3, 2012). Lead Plaintiff therefore faced the substantial risk that it would be unable to prove that SMART's executives were aware – or could have been aware with reasonable diligence – of the alleged trends in demand for SMART's products. Accordingly, even if Lead Plaintiff had been successful in establishing that demand for SMART's products was declining prior to the IPO, the U.S. Defendants might have nevertheless escaped liability if they established that the Individual Defendants were not aware of this trend, and nor could they have been aware with reasonable diligence. Ross Decl. ¶ 63.

Lead Plaintiff also faced the risk that the U.S. Defendants might have been able to succeed in one or more of their defenses seeking to reduce the damages claimed in the Action. The U.S. Defendants vigorously disputed whether U.S. class members who had purchased their SMART stock in the secondary market could "trace" their purchases to the U.S. IPO offering materials. Specifically, the U.S. Defendants argued that U.S. purchasers in the secondary market had to "trace" their shares to the U.S. offering materials and, because SMART's shares were offered to the public through offerings conducted in both the U.S. and Canada, they would be unable to do

so because the shares sold pursuant to the U.S. offering materials had been "comingled" with shares issued pursuant to the Canadian offering materials. Ross Decl. ¶ 64. While the Court had rejected this argument as a basis for defeating class certification, it indicated that Persons would be required to prove that the shares they purchased were issued pursuant to the U.S. offering materials in order to establish membership in the class. *Id*. The Court's framing of the "tracing" requirement created an extremely high threshold for secondary market purchasers. There was an exceedingly substantial risk that many U.S. purchasers would not have been able to meet the Court's requirement and, thus, would be eliminated from the class and overall damages would be reduced commensurately. *Id*.

Additionally, under Section 11 of the Securities Act, the U.S. Defendants had a "negative loss causation" defense allowing them to show that any damages suffered by investors were caused by non-actionable, intervening factors such as negative news involving SMART that was unrelated to the alleged misrepresentations. The U.S. Defendants would have undoubtedly continued to advance a negative loss causation defense through summary judgment and trial, which represented a significant risk to Lead Plaintiff's and the U.S. class's damages claims. Ross Decl. ¶ 65. *See Giant Interactive*, 279 F.R.D. at 161-62 (approving settlement and noting the significant litigation risk posed by defendants' credible "negative causation" defense).

Moreover, Lead Plaintiff's proof of traceablility and damages, including its rebuttal of Defendants' arguments that damages resulted from confounding, non-actionable information, would have required presentation of expert testimony at trial. The important role of such expert testimony created additional uncertainty about the outcome of any trial because Lead Plaintiff could not be certain which experts' views would be credited by the jury. *See, e.g., FLAG Telecom*, 2010 WL 4537550, at *18 ("establishing the amount of damages at trial would have

resulted in a 'battle of experts.' The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable"); *Veeco*, 2007 WL 4115809, at *9 ("A jury could be swayed by Defendants' expert seeking to establish that damages were caused by factors other than Defendants' wrongdoing, or, alternatively, trying to minimize the amount of losses suffered by the class. . . . The jury's verdict . . . would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain"); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 427 (S.D.N.Y. 2001) ("In this 'battle of experts' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad non-actionable factors such as general market conditions") (citation omitted).

When viewed in the context of these significant litigation risks and the uncertainties involved with any litigation, the Settlement is a very favorable result. Accordingly, this factor supports approval of the Settlement.

5. The Risks of Maintaining the Class Action Through Trial Support Approval of the Settlement

The risks of maintaining the Action as a class action through trial should also be considered in evaluating a proposed settlement. *See Grinnell*, 495 F.2d at 463. Here, the Court certified a class before the Settlement was reached and Lead Plaintiff is confident that the claims in this case would continue to be found appropriate for class treatment through trial. However, as noted above, there were substantial risks that the U.S. Defendants might succeed in their arguments to exclude all purchasers of SMART common stock who could not directly trace the shares they purchased to the U.S offering from membership in the class (or from any recovery at trial). Ross Decl. ¶ 64. Such an outcome would have greatly reduced the size of the U.S. class

eligible to recover and reduced overall recoverable damages to approximately $45 million. *Id*. Accordingly, this factor also strongly supports approval of the Settlement.

6. <u>The Ability of the Defendants to Withstand a Greater Judgment</u>

Lead Plaintiff and Lead Counsel believe that it is likely the Defendants could withstand a greater judgment against them than the amount of the Settlement. "But a defendant is not required to 'empty its coffers' before a settlement can be found adequate." *IMAX*, 283 F.R.D. at 191 (citation omitted). Indeed, Courts have repeatedly recognized that this factor, standing alone, does not weigh against approval of a settlement where, as here, the other factors weigh heavily in favor of approving the Settlement. *See D'Amato*, 236 F.3d at 86; *IMAX*, 283 F.R.D. at 191; *FLAG Telecom*, 2010 WL 4537550, at *19 ("the mere ability to withstand a greater judgment does not suggest the settlement is unfair"); *McBean v. City of New York,* 233 F.R.D. 377, 388 (S.D.N.Y. 2006) ("the ability of defendants to pay more, on its own, does not render the settlement unfair, especially where the other *Grinnell* factors favor approval").

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and all the Attendant <u>Risks of Litigation Supports Approval of the Settlement</u>

The last two substantive factors courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. In analyzing these factors, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. The court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citation and internal

quotations omitted), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Lead Plaintiff submits that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. When weighed against the risks of continued litigation, the proposed Settlement for $15.25 million in cash is an excellent result. As discussed above, if a jury or the Court had credited even some of Defendants' arguments with respect to liability or damages, the U.S. Settlement Class might have recovered nothing or its potential recoverable damages might have been dramatically reduced. Additionally, as the Court had already ruled that Persons would have to present "proof" establishing that the shares they purchased "traced" to the U.S. offering materials, Lead Plaintiff recognized that a very high hurdle had been established that could well eliminate a very substantial number of purchasers of SMART common stock during the U.S. class period from the U.S. class. Indeed, based on Lead Plaintiff's extensive work and analysis with experts, it was extremely unlikely that class members would be able to trace their shares as required by the Court. Based on the Court's class certification decision, Lead Plaintiff's expert estimated that the likely maximum recoverable damages would be approximately $45 million. Ross Decl. ¶ 64.[6] In light of these risks, the Settlement provides an excellent result for the U.S. Settlement Class.

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[6] Based on Lead Plaintiff's expert's analysis, the Settlement Amount represents approximately 30% of the maximum likely recoverable damages. This percentage far exceeds settlements routinely approved by the courts. *See, e.g., In re Canadian Superior Sec. Litig.*, No. 09 Civ. 10087 (SAS), 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011) (approving a settlement representing 8.5% of maximum damages, which the court noted "exceeds the average recovery in shareholder litigation"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in

(Cont'd)

The conclusions of Lead Plaintiff and Lead Counsel that the Settlement is fair and reasonable and in the best interests of the U.S. Settlement Class further support its approval. Lead Plaintiff is a sophisticated institutional investor and took an active role in supervising this litigation, as envisioned by the PSLRA. *See* Declaration of Ron Silver, General Counsel of the City of Miami General Employees' & Sanitation Employees' Retirement Trust, in Support of (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation; (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses; and (C) Lead Plaintiff's Request for Reimbursement of Costs And Expenses ("Silver Decl."), attached as Exhibit 2 to the Ross Declaration at ¶¶ 4-6. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *Veeco,* 2007 WL 4115809, at *5; *see In EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) (same). "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *Id.*

In addition, the judgment of Lead Counsel, which is highly experienced in securities class action litigation, that the Settlement is an excellent recovery and is in the best interests of the U.S. Settlement Class should also be given considerable weight. *See, e.g.*, *Veeco*, 2007 WL 4115809, at *12 (courts should "consider the opinion of experienced counsel with respect to the

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class action[] securities litigations"); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (settlement representing 3.8% of plaintiffs' damage calculation was "within the range of reasonableness"); Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2012 Review and Analysis*, at 8, 11 (Cornerstone Research 2013) (the median settlement as a percentage of estimated damages for all PSLRA cases was 1.8% in 2012 and 3.3% from 1996-2011; the median settlement in cases asserting only Section 11 and 12(a)(2) claims was 7.5%); *see generally Grinnell*, 495 F.2d at 455 n.2 ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery"). Even if one were to assume that class members would be able to prove traceability, based on the Court's other findings in the case, likely maximum recoverable damages would be about $120 million. Even under this scenario, the Settlement still falls well within the range of settlements regularly approved by the courts.

value of the settlement"); *PaineWebber,* 171 F.R.D. at 125 ("'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation").

* * *

In sum, all of the *Grinnell* factors – including the complexity, expense and delay of further litigation, the well-developed stage of the proceedings and substantial discovery conducted, and the significant risks of the litigation – support a finding that the Settlement is fair, reasonable and adequate.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate. *See IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See IMAX*, 283 F.R.D. at 192. Plans of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *PaineWebber,* 171 F.R.D. at 133. In determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See Giant Interactive*, 279 F.R.D. at 163 ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel") (citation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) ("In determining whether a plan of allocation is fair, courts give substantial weight to the opinions of experienced counsel.").

Here, the proposed plan of allocation (the "Plan of Allocation"), which was developed by Lead Plaintiff's damages expert, in consultation with Lead Counsel and Canadian Class Counsel, provides for the distribution of the Net Settlement Fund on a *pro rata* basis based on a formula based on the statutory measure of damages under Section 11(e) of the Securities Act of 1933, 15 U.S.C. § 77k(e). No amount has been allocated for distribution specifically to the U.S. Settlement Class or Canadian Class. Instead, members of both Classes who submit valid claims will receive allocations from the Net Settlement Fund on a *pro rata* basis based on the amount of their individual Recognized Claims calculated under the Plan of Allocation. Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as result of the conduct alleged in the U.S. Action and Canadian Action. Moreover, the Plan of Allocation, which is set forth on pages 11 to 14 of the Notice, has received no objections from Class Members to date. Ross Decl. ¶ 78.

Accordingly, for all of the reasons set forth herein and in the Ross Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

III. NOTICE TO THE U.S. SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the U.S. Settlement Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement

and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114.

Both the substance of the Notice and the method of its dissemination to potential members of the U.S. Settlement Class Members satisfied these standards. The Court-approved Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 77z-1(a)(7), including: (i) an explanation of the nature of the Actions and claims; (ii) the definitions of the U.S. Settlement Class and Canadian Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Class Members' right to opt-out of the Classes or object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, beginning on June 5, 2013 through June 28, 2013, the Claims Administrator has mailed 29,898 copies of the Notice by first-class mail to potential members of both the U.S. Settlement Class and the Canadian Class and nominees. *See* Schachter Aff. ¶¶ 4-8. In addition, Lead Plaintiff caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* on June 13, 2013. Schachter Aff. ¶ 9. Copies of the Notice, Claim Form, Preliminary Approval Order and Stipulation were made available on the Settlement website maintained by Rust, www.SMARTTechnologiesShareholderLitigation.com, beginning on June 5, 2013, and copies of the Notice and Claim Form were made available on Lead Counsel's website. *See* Schachter Aff. ¶ 11; Ross Decl. ¶ 71. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an

appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *12-*13 (S.D.N.Y. 2009); *Global Crossing,* 225 F.R.D. at 448-49.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Settlement as fair, reasonable and adequate and approve the Plan of Allocation as fair and reasonable.

Dated: July 8, 2013

Respectfully submitted,

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