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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ATUL SINGH DEORA, *et al.*,

Plaintiffs,

v.

NANTHEALTH, *et al.*,

Defendants.

Case No. 2:17-cv-01825-TJH-MRWx

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND TO DIRECT CLASS NOTICE

Date: January 13, 2019
Time: UNDER SUBMISSION
Judge: The Hon. Terry J. Hatter, Jr.
Courtroom: 9B

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INTRODUCTION

Plaintiff is pleased to report that after several years of litigation, the parties have finalized a proposed class settlement that is ready to undergo the court-approval process. As the Court may recall from earlier proceedings, this suit alleges that NantHealth and certain of its officers and directors misled investors about the demand for the company's genetic sequencing services, in violation of federal securities laws.

While Plaintiff believes it has a strong liability case, Plaintiff also recognizes that continuing to prosecute the case would necessarily jeopardize class members' recoveries and require further protracted litigation. The proposed settlement, on the other hand, delivers meaningful relief without imposing further delay and risk. The settlement provides a $16.5 million cash fund from NantHealth, which constitutes over 40% of what Plaintiff would have been able to recover at trial had Plaintiff prevailed in full—a substantial recovery in this type of action, considering that court-approved-settlements in securities actions often deliver less than 10% of the class's estimated damages. Here, NantHealth's $16.5 million payment will not only provide strong compensation to the Classes, but also will cover the costs of settlement administration, class notice, a compensatory award, and Plaintiff's litigation costs and attorneys' fees.

From Plaintiff's perspective, this settlement provides strong value to the Classes in exchange for their release of claims and is thus worthy of the Court's approval. This is particularly true since, absent a settlement, this case would have faced challenges at summary judgment and trial, where the case could either fail on liability, or at least be whittled down. Defendants have adamantly denied liability throughout the litigation and would have continued to mount a strong defense through trial. Even if Plaintiff prevailed through trial, an appeal would likely follow, taking another two-plus years to resolve. At best, recovery for the Classes would come by perhaps 2022 or 2023. Given the strong recovery that this settlement

1 delivers now, Plaintiff respectfully requests that the Court preliminarily approve the
2 Settlement, direct notice to the Classes, and set a schedule for final approval. In
3 support of this motion, Plaintiff attaches a copy of the parties' stipulation of
4 settlement, including exhibits. *See* Declaration of David Stein, Exhibit A.

5 **HISTORY OF THE LITIGATION**

6 **I. Plaintiff's Allegations and Defendants' Denials**

7 NantHealth is a healthcare technology company specializing in genetic
8 diagnostics. (ECF No. 38, ¶¶ 31, 33.) Its flagship product, GPS Cancer, combines
9 DNA and RNA sequencing with protein analysis to help inform cancer treatment.
10 (*Id.*, ¶¶ 35–40.) NantHealth's CEO and founder is Dr. Patrick Soon-Shiong. (*Id.*, ¶¶
11 14, 21, 30.)

12 On May 6, 2016, NantHealth filed a registration statement with the SEC
13 before its IPO of 6.5 million shares. (*Id.*, ¶¶ 62, 65.) NantHealth and its underwriters
14 priced the offering at $14 per share. (*Id.*, ¶ 65.)

15 In its prospectus, NantHealth told investors that a research university—later
16 revealed to be the University of Utah—had contracted to buy $10 million worth of
17 its sequencing services. (*Id.*, ¶ 70.) Plaintiff alleges that NantHealth touted the
18 contract as evidence of demand for its services. (*Id.*, ¶¶ 4, 69, 78.) The prospectus
19 stated that although the contract was "partially" funded by a gift from nonprofit
20 organizations affiliated with Dr. Soon-Shiong, the "university was not contractually
21 or otherwise required to use our molecular profiling solution . . . as part of the
22 charitable gift." (*Id.*, ¶ 70.) The IPO raised more than $80 million. (*Id.*, ¶ 68.)

23 Plaintiff alleges that in public statements after the IPO, NantHealth and its
24 executives continued to discuss the University contract in a manner intended to
25 suggest demand for NantHealth's services. (*Id.*, ¶¶ 87–91; 95–98; 107–08; 112.)
26 Plaintiff also alleges that NantHealth overstated the demand for GPS Cancer,
27 including by counting the University's orders when reporting GPS Cancer sales. (*Id.*,
28 ¶¶ 92; 94; 96; 99–102, 106; 110–11.)

Plaintiff alleges that NantHealth's misstatements and omissions about the demand for GPS Cancer and the company's relationship with the University of Utah were later revealed through a series of partial disclosures. (*Id.*, ¶ 115.) Working with its expert, Plaintiff concluded that—to a high degree of statistical significance—four of those disclosures caused NantHealth's stock price to fall, and thus damaged investors:

First, NantHealth issued a 10-K earnings report on November 7, 2016, in which the company revealed it had received only 524 GPS Cancer orders in the third quarter. (*Id.*, ¶¶116–17.) The next day, NantHealth's stock price fell $1.08 per share, or 9.7%. (*Id.*, ¶ 122.) ***Second***, on March 6, 2017, the medical news organization, STAT, published an article that challenged NantHealth's representation that the University of Utah had not been obligated to choose NantHealth to perform the research funded by Dr. Soon-Shiong's gift, and questioned the company's characterization of the University services as "GPS Cancer." (*Id.*, ¶¶ 123–24.) The day the article was published, NantHealth's stock price fell $1.67 per share, or more than 23%. (*Id.*, ¶ 126.) The next day, the stock price fell an additional $0.56 per share, or over 10%. (*Id.*, ¶ 129.) ***Third***, Politico published a report on Dr. Soon-Shiong's alleged pattern of directing his non-profit organizations to make donations that benefited his for-profit businesses on April 9, 2017. (*Id.*, ¶ 133.) The next day, NantHealth's stock price fell $0.75 per share, or 14.4%. (*Id.*, ¶ 134.) Finally, ***fourth***, on April 26, 2017, *The Salt Lake Tribune* reported that Utah legislators announced they "had reason to look into" the University because of its arrangement with NantHealth and Dr. Soon-Shiong. (*Id.*, ¶ 148.) That day, NantHealth's stock price fell $0.29 per share, or 8.2%. (*Id.*, ¶ 149.)

Plaintiff and its expert have concluded that these four statistically significant corrective disclosures led to a total of $40,935,148 in damages for the Classes. (Stein Decl., ¶ 6.) Plaintiff alleges that NantHealth and its management's statements and omissions about the University deal and GPS Cancer artificially inflated

NantHealth's share price in violation of Sections 10(b), and 20(a) of the Exchange Act and Rule 10b-5.

Defendants deny all of Plaintiff's allegations, deny that they acted unlawfully in any way, and deny that any of the alleged corrective disclosures caused NantHealth's share price to decline. Defendants also dispute Plaintiff's damages calculation. Had the litigation continued, Defendants would have challenged the effect of each alleged disclosure, and the damages Plaintiff alleged it caused, at summary judgment and trial, supported by their own expert. Defendants would also have challenged Plaintiff's expert's methodology under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

II. Procedural Background

This proposed class action began in March 2017. (ECF No. 1.) Initially, three investors filed overlapping suits alleging violations of the Securities and Exchange Acts against NantHealth and its executives. The suits were deemed related and assigned to Hon. Beverly Reid O'Connell. *See Atul Singh Deora v. NantHealth, Inc., et al.*, No. 2:17-cv-01825; *Di Rienzo v. NantHealth, Inc., et al.*, No. 2:17-cv-01912; and *Shafik v. NantHealth, Inc., et al.*, No. 2:17-cv-01940. The Court consolidated the three cases in June 2017, and pursuant to the Private Securities Litigation Reform Act, appointed SEPTA and Michael Fontaine as Co-Lead Plaintiffs, and their counsel, Gibbs Law Group LLP and Kehoe Law Firm, P.C., as Lead Counsel. (ECF No. 33.) The consolidated action was assigned to this Court on October 24, 2017. (ECF No. 44.)

Co-Lead Plaintiffs filed a consolidated amended class action complaint against NantHealth, and several NantHealth officers and directors, in June 2017. (ECF No. 38.) Defendants filed a motion to dismiss the amended complaint in August 2017. (ECF No. 39.) The Court dismissed Plaintiffs' Section 10(b) Exchange Act and Rule 10b-5 claims against one officer defendant, but otherwise denied the motion. (ECF No. 46.)

1 The parties then engaged in protracted discovery. Plaintiffs served three sets of
2 document requests, five sets of interrogatories, and two sets of requests for
3 admission on NantHealth, and additional discovery on the officer and director
4 defendants; sought documents or testimony from 24 third-parties though subpoenas,
5 including to the University of Utah and the four non-profit entities that had funded
6 the donation; made a public records request to the State of Utah; and deposed
7 witnesses from the University of Utah and NantHealth, including the company's
8 former president. (Stein Decl., ¶ 4.)
9 Defendants ultimately produced over one million pages of documents. (*Id.*)
10 Defendants likewise served document requests, interrogatories, and requests for
11 admission on Co-Lead Plaintiffs; deposed both SEPTA and Michael Fontaine; and
12 sought documents from numerous third-parties, including several international
13 parties. (*Id.*; ECF Nos. 88-91; 102-05.) At the time of settlement, the close of fact
14 discovery was days away. (*See* ECF No. 101.)
15 In September 2018, in the midst of the discovery efforts described above,
16 Plaintiffs moved to certify the following classes of investors: (1) All persons or
17 entities who purchased or acquired NantHealth common stock in or traceable to
18 NantHealth's IPO (Securities Act Class); and (2) All persons and entities who
19 purchased any NantHealth common stock between June 1, 2016, and May 1, 2017
20 (Exchange Act Class). (ECF No. 64.) Defendants opposed the motion in part,
21 arguing, among other things, that the Securities Act Class was overbroad, and that
22 SEPTA was not an adequate class representative for the Securities Act Class. (ECF
23 No. 79.) In June 2019, while the class certification motion was pending, SEPTA
24 moved to substitute Melanie Fontaine Alonzo as Co-Lead Plaintiff in place of
25 Michael Fontaine, who passed away in May 2019. (ECF No. 92.)
26 In an order issued in July 2019, the Court granted the motion for class
27 certification and denied the motion to substitute, leaving SEPTA as the sole Lead
28 Plaintiff. (ECF No. 100.) NantHealth petitioned the Ninth Circuit to review this

Court's certification decision, and Plaintiff filed an opposition. *See Atul Singh Deora v. NantHealth, et al.*, Case No. 19-80106 (9th Cir.). The petition remained pending when the parties settled.

As the parties prepared to move for summary judgement in early 2020, Plaintiff retained an economic expert to calculate damages attributable to Plaintiff's theory of liability. At the time of the settlement, Plaintiff was working actively with the expert to meet the deadline of November 1, 2019, to serve expert reports under the case schedule. (*See* ECF No. 101.)

In early 2019, the parties had mediated with the help of JAMS mediator Robert A. Meyer. (Stein Decl., ¶ 7.) Although the parties were unable to come to an agreement at the first mediation, they continued to engage with Mr. Meyer and later agreed to participate in another mediation on September 11, 2019. (*Id.*) Again, the parties did not come to an agreement at the mediation, but continued to work with Mr. Meyer over the next month, and ultimately agreed to terms to resolve the litigation in late October 2019. (*Id.*)

The parties have since prepared the formal stipulation of settlement now before the Court, which involved cooperative efforts to finalize the terms of the agreement, and to prepare and finalize the agreement's exhibits and this motion. (*Id.*, ¶ 8.) Plaintiff also recently retained the services of an experienced settlement administrator, JND Legal Administration, to assist with overseeing the claims administration process. (*Id.*, ¶ 10.)

OVERVIEW OF THE SETTLEMENT

I. The Settlement Fund

The parties' proposed settlement will create a $16,500,000 cash settlement fund for the benefit of the Classes. (*Id.*, Ex. A, § I.EE.) To distribute that fund among Class Members, Plaintiff has worked with its economic expert to devise a plan of allocation that will equitably compensate class members on a pro rata basis

for losses sustained due to the conduct alleged, as detailed below. (*Id.*, Ex. A-2, at 10-15).

The settlement fund will also cover all costs associated with settlement administration and class notice, attorneys' fees and litigation-cost reimbursements, and the compensatory award for the Lead Plaintiff. (*Id.*, Ex. A, § III.A.) The settlement fund is nonreversionary, meaning Defendants will not be entitled to retain any part of the settlement fund for any reason. (*Id.*, Ex. A, § III.E.)

II. Claim Form

Plaintiff has developed a simple, user-friendly claim form to assist Class Members making claims. (*Id.*, Ex. A-4.) To assist in transmitting payment to the Classes (and in administering the settlement generally), Plaintiff retained the services of JND Legal Administration. JND Legal Administration will set up a dedicated website where Class Members can find out more about the settlement, access the claim form, and submit claims and supporting documentation. (*Id.*, ¶ 10.)

III. The Scope of Class Members' Release of Claims

In exchange for the benefits provided under the settlement, Plaintiff and Class Members will provide a release of claims against Defendants and other Released Parties. (*Id.*, Ex. A, § I.AA.) The release encompasses claims "(i) that were, could have been, or could in the future be asserted in any complaint based on the facts alleged in the operative complaint in this Action," or "(ii) that arise out of, are based on, or relate in any way to the acts, facts, statements, or omissions alleged in the operative complaint in this Action, and that were, could have been, or could in the future be asserted in any forum, case, or action, , including, without limitation, all claims that arise out of, are based on, or relate in any way to the purchase, other acquisition, holding, sale, or other disposition of NantHealth, Inc. securities by the Classes or Class Members." (*Id.*, Ex. A, § I.BB.) Such a release is appropriate and typical. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010).

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IV. The Provision for Attorneys' Fees, Cost Reimbursements, and a Compensatory Award for the Lead Plaintiff

Lead Counsel have yet to be compensated for their litigation efforts. Having litigated the case for over two years and advancing hundreds of thousands of dollars in litigation expenses on behalf of the Classes, Lead Counsel will file a motion at final approval requesting that the Court approve an award of up to 25% of the settlement fund ($4.125 million) to pay their attorneys' fees. In addition, Lead Counsel intends to seek reimbursement of up to $375,000 in expenses they have or will incur prosecuting this case. (Stein Decl., ¶ 6.) This falls within the 25% benchmark rate for attorney's fee awards in the Ninth Circuit and is consistent with awards in similar complex class action cases. *See, e.g.*, Order Granting Attorney's Fees, ECF No. 108, *Robert Ford v. Natural Health Trends Corp.*, No. 2:16-cv-00255-TJH-AFM (C.D. Cal. Apr. 2, 2018) (awarding 25% of settlement fund in attorneys' fees and requested costs in securities class action); *Loritz v. Exide Techs.*, No. 2:13-cv-02607, 2016 WL 7246076, at *1 (C.D. Cal. June 15, 2016) (same).

Plaintiff also intends to ask the Court for a compensatory award for Lead Plaintiff SEPTA in connection with its time and efforts expended in this litigation. As Plaintiff will describe in more detail in its fee application, SEPTA's representative sat for a deposition, responded to discovery, and actively participated in the litigation for over two years, all of which benefitted the Classes. (Stein Decl., ¶ 11.) To compensate it for the time and costs expended for the Classes' benefit, Plaintiff will request an award not to exceed $25,000 from the settlement fund.

Plaintiff will provide additional detail and support for both the proposed compensatory award and Lead Counsel's requested fees and expense reimbursements when Plaintiff files its formal fee and final approval motion, but consistent with the PSLRA, the Mailed and Summary Notices include the proposed fee, expense, and compensatory award sought in an aggregate and per share basis. (Stein Decl., Ex. A-2 at 1, 8 & Ex. A-5; 15 U.S.C. § 78u–4(a)(7)(c).) The stipulation

1 of settlement acknowledges the Court's supervisory authority to determine the
2 appropriateness of any motion for attorneys' fees and costs and compensatory
3 award. (Stein Decl., Ex. A, § VII.)

4 **THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AND**
5 **DIRECT NOTICE TO THE CLASSES**

6 In years past, district courts have commonly undertaken a "preliminary
7 approval" process when first evaluating a proposed class action settlement. In
8 December 2018, this process was formalized. *See* Fed. R. Civ. P. 23(e)(1). Under the
9 new rule: "The court must direct notice [of the proposed settlement] in a reasonable
10 manner to all class members who would be bound by the proposal if giving notice is
11 justified by the parties' showing that the court will likely be able to . . . approve the
12 proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B).

13 Below, Plaintiff details why this motion should be granted and notice sent to
14 the Classes. In short, the settlement is poised to provide a strong monetary recovery
15 to the Classes, making the settlement fair, reasonable, and adequate, and thus
16 worthy of the Court's approval.

17 **I. The Proposed Settlement Merits Approval**

18 "The decision to give notice of a proposed settlement to the class is an
19 important event. It should be based on a solid record supporting the conclusion that
20 the proposed settlement will likely earn final approval after notice and an
21 opportunity to object." Fed. R. Civ. P. 23(e)(1) advisory committee's note (2018). A
22 careful review at this stage of the proceedings is important, as the next step will be
23 the costly and time-consuming process of disseminating class notice. *See* Newberg
24 on Class Actions § 13:10 (5th ed.).

25 The revised Rule 23 now provides a checklist of factors to consider when
26 assessing whether a proposed settlement is fair, reasonable, and adequate. *See* Fed.
27 R. Civ. P. 23(e)(2). Previously, the Ninth Circuit and other courts had developed
28 their own lists of factors to be considered; the revised Rule 23 "directs the parties to

present [their] settlement . . . in terms of [this new] shorter list of core concerns." Fed. R. Civ. P. 23(e)(2) advisory committee's note. Below, Plaintiff analyzes each of the Rule 23(e)(2) factors in turn, bearing in mind the Ninth Circuit's recent admonition that the key "underlying question remains this: Is the settlement fair?" *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018); *accord* Fed. R. Civ. P. 23(e)(2) advisory committee's note (2018) ("The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate."). As will be discussed, the settlement is fair, and the Rule 23(e)(2) factors weigh in favor of approving it.

A. Lead Plaintiff and Lead Counsel have adequately represented the Classes

Under Rule 23(e)(2)(A), the first factor to be considered is the adequacy of representation by the class representatives and attorneys. This analysis includes "the nature and amount of discovery" undertaken in the litigation. Fed. R. Civ. P. 23(e)(2)(A) advisory committee's note.

Here, Lead Plaintiff SEPTA has diligently represented the class. SEPTA's representative, Gino Benedetti, actively participated in the litigation and discovery over the past several years, including by responding to over a dozen written discovery requests, conducting ESI searches, producing documents, responding to interrogatories, and serving as SEPTA's Rule 30(b)(6) deponent. (Stein Decl., ¶ 11.) Throughout, Mr. Benedetti, an attorney himself, remained in contact with Lead Counsel, stayed apprised of the litigation, and acted with the interests of the Classes in mind. (*Id.*)

Lead Counsel have also adequately represented the Classes. They vigorously prosecuted this case, opposing Defendants' motion to dismiss, moving for class certification, and defending this Court's certification order on appeal. (*Id.*, ¶¶ 4–5.) Lead Counsel also engaged in protracted discovery that featured over a million

pages of documents and depositions across the country, as well as subpoenas of 24 third parties. (*Id.*, ¶ 4.)

Lead Counsel also engaged the services of an economist who assisted in calculating the damages that would be available were Plaintiff to prevail at trial. (*Id.*, ¶ 6.) As part of these efforts, Lead Counsel has or will advance up to $375,000 in litigation expenses on behalf of the Classes, with no assurance that those expenses would be reimbursed. (*Id.*)

Finally, as this Court recognized when appointing Lead Counsel, "[b]oth [Gibbs Law Group LLP and Kehoe Law Firm, P.C.,] have significant securities class action litigation experience and have achieved highly favorable settlements for plaintiffs in previous actions." (ECF No. 33.) Lead Counsel have brought that experience and knowledge to bear on behalf of the Classes here. (*Id.*, ¶ 2 & Ex. C; Declaration of John Kehoe, ¶ 4 & Ex. A.)

B. The parties negotiated the proposed settlement at arm's length.

The second Rule 23(e)(2) factor asks the Court to confirm that the proposed settlement was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2)(B). As with the preceding factor, this can be "described as [a] 'procedural' concern[], looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2)(A) and (B) advisory committee's note (2009).

There are multiple indicia here of the arm's length nature of the negotiations. First, the parties did not begin negotiations until earlier this year, after the case had already been pending for nearly two years. (Stein Decl., ¶ 7.) By the time they reached agreement, the parties had engaged in significant pretrial motion practice, conducted extensive discovery, worked with consultants and experts, and the Court had certified the two Classes. *Cf. In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (heightened scrutiny of class settlements required only where settlement *precedes* certification of a litigation class).

Second, the parties resolved the litigation with the assistance of experienced JAMS mediator, Robert A. Meyer. (Stein Decl., ¶ 7.) "[T]he involvement of a neutral or court-affiliated mediator or facilitator in [the parties'] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Fed. R. Civ. P. 23(e)(2)(B) advisory committee's note; *accord Pederson v. Airport Terminal Servs.*, No. 15-cv-02400, 2018 WL 2138457, at *7 (C.D. Cal. April 5, 2018) (the oversight "of an experienced mediator" reflected noncollusive negotiations). The parties conducted two separate mediations under Mr. Meyer's supervision in January and September 2019; even then, they were not able to reach agreement until later, through further conversations with (and under the supervision of) Mr. Meyer. (Stein Decl., ¶ 7.)

Third and finally, several potential warning signs for collusion are absent here: the requested attorneys' fees are proportional to class member compensation, there is no "clear sailing" arrangement whereby Defendants have agreed not to contest the fee motion, and no unawarded money will revert to Defendants. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d at 611 & n.19.

C. The quality of relief to the Classes weighs in favor of approval

The third factor to be considered is whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). Under this factor, the relief "to class members is a central concern." Fed. R. Civ. P. 23(e)(2)(C) advisory committee's note.

1. The settlement provides strong relief for the Classes

The settlement will reimburse millions of dollars in investment losses to individuals and entities who purchased NantHealth common stock through the

company's IPO or in the eleven months following it. The settlement also represents a sizeable portion of what the Classes could have recovered at trial. As the parties were working with Mr. Meyer to settle this case, Plaintiff was working with its expert to calculate the amount of recoverable damages were Plaintiff to prevail in full at trial. (*See* Stein Decl. ¶ 6.) The calculations analyzed the effect of each alleged misrepresentation and corrective disclosure on NantHealth's share price, adjusting for market or industry forces. (*Id.* & Ex. A-2 at 10-15.) Plaintiff's expert estimated that—were Plaintiff to prevail at trial and on any subsequent appeal—the recovery would likely be approximately $40.9 million in aggregate damages. (*Id.*, ¶ 6.) Of course, that estimate is subject to substantial downward pressure due to the continued litigation risks remaining: Defendants could prevail on their Rule 23(f) appeal, on summary judgment, at trial, or on appeal, reducing the recovery or leaving the class with no recovery at all.

As it stands, the settlement recovers over 40% of what Plaintiff estimates the Classes may have recovered had they prevailed on all their claims at trial. This is a strong result in a securities class action, where recoveries are often far less. *See, e.g.*, *In re Biolase, Inc. Sec. Litig.*, No. 13-cv-1300, 2015 WL 12697736, at *8 (C.D. Cal. June 5, 2015) (finding recovery of 8% of maximum recoverable damages a "substantial benefit to the class" noting it "equals or surpasses the recovery in many other securities class actions" and collecting cases); *In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 254, 459 (9th Cir. 2000) (holding that a settlement worth one-sixth of the class's potential recovery was fair "given the difficulties in proving the case").

Having recovered over 40% for the Classes through settlement as they may have recovered after a trial, Plaintiff has no reservation in recommending that the Court approve this settlement on behalf of the Classes. While there can always be room for improvement, this settlement returns millions of dollars to Class Members in a case that was fiercely contested and where there was substantial litigation risk.

Under these circumstances, Lead Plaintiff and its counsel wholeheartedly endorse the negotiated resolution of this action. (Stein Decl., ¶ 12; Kehoe Decl., ¶ 9.)

2. Continued litigation would entail substantial cost, risk, and delay

Almost all class actions involve high levels of cost, risk, and lengthy duration, which supports the Ninth Circuit's "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998). Here, had the parties not settled, the litigation would have been risky, protracted, and costly.

With respect to the remaining cost and time needed to prosecute the case, though the parties had already completed much discovery, a number of additional depositions would have been forthcoming (including depositions of both parties' experts). (Stein Decl., ¶ 13.) The parties would also have briefed summary judgment, *Daubert* issues, motions in limine, a possible decertification motion, and then trial, each with added risk and delay. (*Id.*) And if the Ninth Circuit granted Defendants' Rule 23(f) petition, which was pending at the time of settlement, the parties may have faced multiple years of delay and a possible stay. The settlement ensures the Classes will receive immediate relief and avoids the risks and attendant delay at each additional stage of the litigation.

As to the merits of the case, Plaintiff believes the Classes had a strong case on liability. But Lead Counsel also recognize, based on their experience in similar class actions and based on their familiarity with the record, that the case faced real challenges at summary judgment, and trial, where the case could either fail on liability, or at least be whittled down. This case alleged several misstatements and corrective disclosures, each with its own risks. Defendants would likely have challenged each disclosure at summary judgment, a particularly difficult task for the Exchange Act claims, where it is Plaintiff's burden to prove loss causation to a statistically significant degree, and scienter. Defendants were also likely to continue challenging this Court's class certification order, or at least attempting to narrow the

Class definitions, based on the discovery Defendants were seeking from international parties.

While Plaintiff believes it had reasonably strong prospects of overcoming Defendants' arguments and defenses, and that the evidence would support a finding of liability, there can be little doubt that those defenses presented the possibility that the Classes would recover nothing if the case persisted, or at least far less than Plaintiff was seeking. Of course, even if Plaintiff prevailed on each of these issues through trial, an appeal would likely follow, taking another two-plus years to resolve. At best, recovery for the Classes would come by perhaps 2022 or 2023.

As this Court has emphasized, the "Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). So, while there were reasonable prospects for a greater recovery following a trial and appeals, that victory would have entailed substantial risk, cost, and delay. All of these considerations favor settlement; the Classes will receive meaning relief now—not years down the road, assuming they would have prevailed at all.

3. The settlement agreement provides for an effective distribution of proceeds to the Classes

The stipulation of settlement contemplates an efficient and effective distribution process. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Although the entire settlement fund will be exhausted, with no money reverting to Defendants, it is necessary for Class Members to submit claims. The claims will allow the Settlement Administrator to identify members of the Classes and determine the amounts owed to each, since there is no other way to identify everyone that bought and sold shares of NantHealth stock, when, and at what prices. To facilitate the process, Plaintiff created a simple claim form that requires only the

information necessary to approve and calculate payments. (Stein Decl., Ex. A-4.) Class Members will be able to submit their claims and supporting documents through the mail or a dedicated settlement website maintained by the Settlement Administrator. The settlement website will also allow Class Members to download the claim form, the Mailed and Summary Notices, the stipulation of settlement, and other case documents, and will provide contact information for Lead Counsel.

The Settlement Administrator will evaluate claims submitted by Class Members, and will determine which claims shall be allowed, subject to appeal to the Court. (*Id.*, ¶ 10 & Ex. A-2 at 12-13.) The Settlement Administrator will also oversee distribution of the settlement fund pursuant to the plan of allocation discussed below. (*Id.*, ¶ 6 & Ex. A-2 at 10-15.)

4. The terms of the proposed award of attorneys' fees, including timing of payment, also support settlement approval

Nothing about the proposed award of attorneys' fees should detract from the fairness of the settlement. As noted above, Plaintiff is seeking compensation for their counsel from the settlement fund, not to exceed 25% of the settlement fund. The percentage-of-recovery method is the prevailing standard in this Circuit, *see Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002), and the PSLRA itself expressly codified the percentage-of-recovery approach for awarding fees, *see* 15 U.S.C. § 78u-4(a)(6). The fee requested would compensate counsel at a multiplier of less than 2, which courts have recognized is reasonable in cases like this—where protracted litigation led to a strong recovery for the class. *See Vizcaino*, 290 F.3d at 1051 ("Typically, a lodestar is multiplied up to four times to yield an enhanced award."); *In re Mannkind Corp. Sec. Litig.*, No. 11-cv-0929, 2012 WL 13008151, at *8 (C.D. Cal. Dec. 21, 2012) (awarding 2.3 times multiplier); *Buccellato v. AT&T Operations, Inc.*, No. 10-cv-00463, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (awarding 4.3 times multiplier). The proposed award is thus appropriate, which Plaintiff will detail further in its Rule 23(h) motion for attorneys' fees.

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5. The settlement agreement, including exhibits and documents incorporated by reference, is the only extant agreement

The Court also must evaluate any agreement made in connection with the proposed settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3). As reflected in the parties' settlement agreement, they have entered into a supplemental agreement that provides that if Class Member opt-outs reach a certain threshold, Defendants will have the option to terminate the settlement. Plaintiff has filed the settlement agreement, including all exhibits and the supplemental agreement, concurrently with this motion. (Stein Decl. Ex. A; ECF No. 110.) The supplemental agreement is standard in class action settlements and has no negative impact on the fairness of the settlement. *See In re Carrier IQ, Inc. Consumer Privacy Litig.*, No. 12-md-02330, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) ("[O]pt-out deals are not uncommon as they are designed to ensure than an objector cannot try to hijack a settlement in his or her own self-interest.").

D. The settlement treats all Class Members equitably.

The final Rule 23(e)(2) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note.

The settlement will be distributed among Class Members with compensable damages on a pro rata basis pursuant to the proposed plan of allocation developed by Plaintiff's economic expert. (*See* Stein Decl., ¶ 6 & Ex. A-2 at 10-15.) "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable. It is also reasonable to allocate more of the settlement to class members with stronger claims on the merits." *In re Heritage Bond Litig.*, No. 02-ml-1475, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005) (citations omitted).

Therefore, a plan of allocation treats class members fairly by awarding pro rata shares to Class Members who make valid claims, even as it sensibly makes distinctions based upon the relative strengths and weaknesses of Class Members' individual claims and the timing of purchases of the securities at issue. *See id.*

Under the proposed plan of allocation here, Class Members' pro rata shares of the settlement fund will be calculated using a formula based on the timing of their purchases and sales of NantHealth common stock. (*See* Stein Decl., ¶ 6 & Ex. A-2 at 10-15.) The formula was developed by Plaintiff's economic expert to account for the alleged artificial inflation in the share price at various points during the Class Period, and is tied to the difference between the amount of estimated alleged artificial inflation on the date the shares were purchased and the amount of estimated alleged artificial inflation on the date of sale. (*Id.*)

In consideration of the higher burden for proving claims under Section 10(b) of the Exchange Act, as compared Section 11 of the Securities Act, the plan of allocation calls for an enhancement (by 26%) of Class Members' recoveries under the Securities Act Class. (*Id.*, ¶ 6 & Ex. A-2 at 12.) This proposed "apportionment of relief among class members" therefore "takes appropriate account of differences among their claims," and allows for equitable compensation to the Classes. *See* Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note. Lead Counsel and Plaintiff's damages expert thus believe this allocation is appropriate based on the relative strengths and weaknesses of the claims. *See In re Countrywide Financial Corp. Sec. Litig.*, Order Granting Preliminary Approval to Settlement and Directing Dissemination of Notice to the Class, ECF No. 976 at 48, Case No 2:07-cv-05295-MRP-MAN (C.D. Cal.) (approving 25% enhancement for securities with Section 11 claims, in recognition of the higher burden under Section 10(b)); Stein Decl., Ex. D (citing L.T. Bulan, E.M. Ryan, L.E. Simmons, Securities Class Actions Settlements,

2018 Review and Analysis, Cornerstone Research (2019), at 7, Fig. 6[1] (estimating a 26% increase in damages for securities class actions that involve Section 11 claims in addition to Section 10(b), versus Section 10(b) only, after analyzing settlements from 2009-2018)).

The proposed plan of allocation also complies with Section 21D(e)(1) of the Exchange Act, in that the Recognized Loss Amount for Class Members who held shares on or after April 26, 2017, will not exceed the difference between the purchase or sale price paid or received, and the mean trading price of the Class Member's shares during the 90-day period after the date of the last alleged corrective disclosure. (Stein Decl., Ex. A-2, Table B.) The plan of allocation is fully described in the notice to be mailed to the Classes. (*Id.*, Ex. A-2 at 10-15.)

Finally, although Lead Counsel intends to ask the Court for a compensatory award for Lead Plaintiff in recognition of its efforts expended on behalf of the Classes, that award will not go beyond the reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class. *See* 15 U.S.C. § 78u–4(a)(4). Such awards are typical in class action cases and are consistent with the PSLRA. *See Loritz v. Exide Techs.*, 2016 WL 7246076, at *2 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)).

E. The settlement provides the best method of notice practicable.

Before approving a class settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1).

Plaintiff proposes two forms of notice: a long form notice (Mailed Notice) and a summary publication notice (Summary Notice). (Stein Decl., Exs A-2 & A-5.) The proposed Mailed Notice informs Class Members of the nature of the case; the Class

[1] Available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2018-Review-and-Analysis.

definitions; the claims that will be released; the binding effect of a judgment on Class Members under Rule 23(c)(3); that a Class Member may enter an appearance through counsel if desired; the procedures and deadline for objecting to the proposed settlement, the proposed plan of allocation, or the requested attorneys' fees and expenses; the procedures and deadline for Class Members to seek exclusion from the Classes; the procedures and deadline for submitting a Proof of Claim to recover from the settlement; and the date, time and location of the Final Approval Hearing. (*Id.*, Ex. A-2.) Consistent with the PSLRA, the Mailed Notice also provides the relevant statement of recovery, potential outcomes of the case, awards for reimbursement sought, attorneys' fees and expenses sought, attorney information, and the reasons for the Settlement. (*Id.*; *see* 15 U.S.C. § 78u-4(a)(7).)

The Settlement Administrator will mail the Mailed Notice by first class mail to every Class Member who can be identified through reasonable effort within 21 days after entry of the Preliminary Approval Order. (Stein Decl., ¶ 10.) In addition, the Settlement Administrator will publish the Summary Notice twice on a national business newswire at approximately 10 days and again at approximately 20 days after Mailed Notice is distributed. (*Id.*)

Plaintiff thus requests that the Court approve this notice plan as the best practicable under the circumstances. The Mailed and Summary Notices comply with Rule 23(c)(2)(B) in that they "clearly and concisely state in plain, easily understood language" the nature of the action; the Class definitions; the Classes' claims, issues, or defenses; that the Class Member may appear through counsel; that the Court will exclude from the Classes any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on Class Members. (*See* Stein Decl., Exs A-2 & A-5.) The Mailed and Summary Notices also comply with the PSLRA and are consistent with the samples provided by the Federal Judicial Center.

Notice of the proposed settlement will also be provided as required by the Class Action Fairness Act, 28 U.S.C. § 1715. (Stein Decl., Ex. A, § XIV.) Defendants will provide these government officials with copies of all required materials so that the states and federal government may make an independent evaluation of the settlement and bring any concerns to the Court's attention prior to final approval.

THE COURT SHOULD SET A SCHEDULE FOR FINAL APPROVAL

Once the Court directs notice of the settlement to the Classes, the next steps in the settlement approval process are to schedule a final approval hearing, allow time for notice to be sent to the classes and an opportunity for class members to submit objections and opt-out requests, and allow the parties to conduct appropriate objector discovery if needed.

Plaintiff proposes the following schedule:

- Deadline for disseminating class notice: 21 days after entry of order
- Plaintiff to file a motion for final approval and award of attorneys' fees: 50 days after entry of order
- Deadline for class members to opt out of or object to the settlement: 21 days before final approval hearing
- Replies in support of final approval and fee application: 111 days after entry of order
- Deadline for filing of affidavit attesting that notice was disseminated as ordered: 115 days after entry of order
- Final approval hearing: approximately 125 days after entry of order

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter the accompanying proposed order directing notice of the proposed settlement to the

1 Classes, and setting a hearing for the purpose of deciding whether to grant
2 final approval of the settlement.
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4 Dated: December 10, 2019

Respectfully submitted,

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