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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELVYN KLEIN, Derivatively on Behalf of Nominal Defendant OPUS BANK,

Plaintiff,

v.

STEPHEN H. GORDON, MARK CICIRELLI, MARK E. SCHAFFER, MICHAEL MEYER, ROBERT SHACKLETON, THOMAS M. BOWERS, CURTIS A. GLOVIER, and DAVID KING,

Defendants,

And

OPUS BANK, a California Corporation,

Nominal Defendant.

Case No. 8:17-CV-00123(AB)(JPR)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT

Hearing Date: July 20, 2018

Time: 10:00 AM
Courtroom: 7B – First Street
Judge: Hon. André Birotte, Jr.
Action Filed: January 24, 2017

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Plaintiff Melvyn Klein ("Plaintiff Klein"),[1] by and through his undersigned counsel, hereby submits this memorandum of points and authorities in support of his motion for final approval of the settlement (the "Settlement") of the above-captioned shareholder derivative action (the "*Klein* Action") brought on behalf of Opus Bank ("Opus" or the "Bank").[2]

I. INTRODUCTION

Plaintiff Klein is pleased to inform the Court that after arm's length negotiations, the Parties to the Derivative Actions agreed to the Settlement, which fully, finally, and forever resolves, discharges, and settles the Released Claims, while conferring substantial benefits upon Opus and Opus Shareholders. Plaintiffs' efforts in the Derivative Actions were a precipitating and material factor in the adoption and implementation by the Bank of the valuable corporate governance reforms that are set forth in Exhibit A to the Stipulation (the "Corporate Governance Reforms"). Moreover, the filing and pendency of the Derivative Actions comprised

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[1] All capitalized terms not defined herein shall have the same definitions as set forth in the Stipulation of Settlement dated January 29, 2018 (the "Stipulation") (attached as Exhibit 1 to the Declaration of Thomas J. McKenna in Support of Final Approval submitted herewith) (hereinafter "McKenna Fact Decl."). Citations to the Stipulation shall appear in the following format: "Stip. at __."

[2] Pursuant to the Stipulation, this Settlement also intends to settle claims raised in the shareholder derivative action filed by plaintiff Andrew Dillard ("Plaintiff Dillard") pending in the Superior Court of California, Los Angeles County (the "California State Court"), styled *Dillard v. Gordon, et al.,* Case No. BC651522 (the "*Dillard* Action"). Accordingly, the parties in the California State Court filed a Stipulation and Proposed Order for Entry of Order to Facilitate Settlement of Related Cases (a) informing the California State Court of the Parties' Settlement and the Stipulation, and (b) ordering that Plaintiff Dillard, Opus, and Defendants shall file a Stipulation and Proposed Order Voluntarily Dismissing the *Dillard* Action with Prejudice within four (4) business days of the Final Judgment becoming Final and that the *Dillard* Action shall be dismissed with prejudice. Stip. at 10. Collectively, the *Klein* Action and the *Dillard* Action are referred to herein as the "Derivative Actions."

a substantial contributing factor to the decision by Opus to adopt five other corporate governance reforms that Opus has already instituted ("Initial Reforms"), which are also set forth in Exhibit A to the Stipulation.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Opus Bank is a California corporation and California-chartered commercial bank. Between July 28, 2014 and October 16, 2016, Plaintiff alleged that the Defendants willfully or recklessly made and/or caused the Bank to issue false and misleading statements and fail to disclose that: (1) certain Bank loans were of poor quality, (2) the Bank was over-representing the quality of certain loans to the public; (3) the Bank was not accounting for the loans in adherence to Generally Accepted Accounting Principles ("GAAP"); (4) consistent with the foregoing false representations, the Bank would be forced to recognize large charge-offs associated with certain loans; and (5) the Bank's internal controls over financial reporting and accounting were inadequate (collectively, the alleged "Misconduct").

On October 17, 2016, the truth was revealed to the investing public when Opus issued a press release titled, "Opus Bank Announces Loan Charge-Offs Will Impact Third Quarter Earnings." That press release announced Opus's earnings for the third quarter of fiscal year 2016 would include a $0.59 per diluted share impact from $38.8 million in charge-offs recognized on eight loan relationships, which the Bank expected to result in a net loss of approximately $0.05 per diluted share for the quarter. The price of Opus Bank stock fell to $27.20 per share at the close of the market on October 17, 2016, down $7.25, or 21%, from a closing price of $34.45 per share on the prior trading day, October 14, 2016.

Opus sustained damages resulting from the conduct of the Defendants including, but not limited to: (1) legal fees associated with a related Securities Class

Action[3] filed against the Bank and certain Defendants, and amounts paid to outside lawyers, accountants, and investigators in connection thereto; (2) the $17 million cash settlement in the Securities Class Action; and (3) a loss of reputation and goodwill. Such damages could have been avoided through appropriate corporate governance, as will be established by the corporate governance reforms the Bank has agreed to implement in settling the Derivative Actions.

B. Procedural History

On January 24, 2017, Plaintiff Klein commenced this action, asserting claims derivatively on behalf of Opus. Stip. at Section I, p. 2. On February 22, 2017, Plaintiff Andrew Dillard ("Dillard") commenced a related derivative action against Defendants in the California State Court, styled *Dillard v. Gordon, et al.,* No. BC651522 (Cal Super. Ct., L.A. Cnty.), also asserting claims derivatively on behalf of Opus ("the *Dillard* Action"). *Id.*

The complaints in the Derivative Actions generally allege that Defendants: (1) breached their fiduciary duties; (2) made or permitted the making of material false and misleading statements to the investing public that failed to disclose that (a) certain of the Bank's loans were of poor quality, (b) the Bank was over-representing the quality of the loans, (c) the accounting for the loans did not adhere to Generally Accepted Accounting Principles ("GAAP"), and (d) the Bank would be forced to recognize large charge-offs associated with the loans; and (3) Defendants permitted the Bank to maintain inadequate internal controls over financial reporting and accounting. The complaint in the *Klein* Action alleged counts for breach of fiduciary duty, gross mismanagement, unjust enrichment, and violations of Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereunder. The *Dillard* complaint

[3] That action is captioned *Schwartz v. Opus Bank*, et al., 2:16-cv-7991-AB-JPR (C.D. Calif).

alleged counts for breach of fiduciary duty, unjust enrichment, abuse of control, gross mismanagement and corporate waste. *Id.*

On March 28, 2017, the Court entered an order appointing Gainey McKenna & Egleston as Interim Lead Counsel for Plaintiff Klein and staying the *Klein* Action until the resolution of the motion to dismiss filed in the related Securities Class Action. *Id.*, p. 2-3. On July 13, 2017, the California State Court entered an order appointing The Rosen Law Firm, P.A. as Interim Lead Counsel for Plaintiff Dillard and staying the *Dillard* Action until the resolution of the motion to dismiss filed in the Securities Class Action. *Id.*, p. 3.

C. Settlement Negotiations

The Parties participated in a mediation of the Derivative Actions and the Securities Class Action presided over by Gregory P. Lindstrom, Esq. of Phillips ADR (the "Mediator") on November 1, 2017. *Id.* Prior to attending the Mediation, the Plaintiffs in the *Klein* Action and the *Dillard* Action agreed to make a joint settlement demand upon the Defendants. The Derivative Actions did not settle at the mediation. Instead, after weeks of additional negotiations, on December 12, 2017, the Parties executed a memorandum of understanding memorializing a settlement in principal for the Derivative Actions. *Id.* Thereafter the Parties negotiated the terms of the Stipulation with its necessary exhibits, including the form of a proposed preliminary approval order, notice to the shareholders and a proposed final judgment. The Stipulation was executed as of January 29, 2018. McKenna Fact Decl., ¶ 18.

Plaintiffs' Counsel advised Plaintiffs to enter into the Stipulation only after over one year of investigation and litigation. These efforts included, *inter alia*: (1) inspecting, analyzing, and reviewing Opus's public filings, press releases, announcements, transcripts of investor conference calls, and news articles; (2) drafting and filing the respective complaints in the *Klein* Action and the *Dillard* Action; (3)

researching the applicable law with respect to the claims asserted in the Derivative Actions and the potential defenses thereto; (4) researching corporate governance issues and best practices; (5) preparing extensive written settlement demands together with proposals for corporate governance reforms; (6) participating in extensive and numerous, in-person and telephonic settlement discussions with Defendants' Counsel and the Mediator; and (7) drafting and negotiating the written settlement documents. *Id.*, ¶19.

Moreover, the Stipulation provided for confirmatory discovery to verify the reasonableness and adequacy of the Settlement, which included the same confirmatory discovery produced to the plaintiffs in the Securities Class Action. It consisted of a document production of over 2,300 pages of internal Opus documents and a deposition transcript of Jenny Simmons, Chief Operating Officer of Opus. The documents were produced to Plaintiffs pursuant to a confidentiality agreement, together with the deposition transcript of Ms. Simmons. Plaintiffs' Counsel reviewed the documents and the deposition transcript and determined that the materials affirmed the reasonableness and adequacy of the proposed settlement prior to seeking the Court's final approval of the Settlement at the upcoming Final Hearing. *Id.*, ¶20.

The Parties continued to negotiate an appropriate Fee and Expense Award among themselves. Those efforts faltered, and the Parties resumed their mediation. A further mediation session was held on June 4, 2018 before the Mediator. Progress was made but no resolution was reached. The issue of the Fee and Expense Award is the subject of the separate Motion for an Award of Fees and Expenses filed concurrently with the instant motion. *Id.*, ¶21.

D. Preliminary Approval and Notice to Shareholders

On March 9, 2018, this Court conducted a hearing on the motion for preliminary approval of the proposed settlement. On March 13, 2018, the Court

entered an order (the "Preliminary Approval Order") preliminarily approving the Settlement and directing that a final settlement hearing be held on July 20, 2018 (the "Final Hearing") to determine the fairness, reasonableness, and adequacy of the Settlement, the Fee and Expense Award, and the Service Awards. Pursuant to the terms of the Preliminary Approval Order, the Notice to Opus Shareholders was filed by Opus with the SEC on Form 8-K on June 13, 2018, it was published in a press release, and was posted, together with the Stipulation, on the Investor Relations portion of Opus's website also on June 13, 2018. *Id.*, ¶22. Interim Lead Counsel for Plaintiff Klein, Gainey McKenna & Egleston, has also posted the Notice on its webpage, together with the court-filed copy of the Stipulation with its supporting exhibits. *Id.*, ¶22.

The Notice contained a detailed description of the history of the Derivative Actions and the Settlement, the claims that will be released if the Settlement is finally approved, the maximum Fee and Expense Award sought by Plaintiffs' Counsel, and the Service Awards sought for Plaintiffs. The Notice further disclosed the time and location of the Final Hearing and advised Opus Shareholders of the procedures for objecting to the proposed Settlement, Fee and Expense Award, and/or Service Awards. *Id.*, ¶23.

E. Benefits of the Settlement

The Parties agree that the filing and pendency of the Derivative Actions comprise a substantial contributing factor to the decision by the Bank to implement the Initial Reforms. Moreover, both of the Plaintiffs were a precipitating and material factor in the adoption and implementation of the Corporate Governance Reforms by the Bank The Parties agree that the Corporate Governance Reforms, as well as the Initial Reforms, confer a substantial benefit to the Bank and its shareholders. *Id.*, ¶25.

The Corporate Governance Reforms call for modifications and improvements to, *inter alia*, the Bank's risk oversight and internal controls, and are designed to ensure, *inter alia*, that the Bank identifies and addresses material problems in connection to the Bank's commercial loan portfolio and that the Bank disseminates accurate and truthful statements in its public disclosures. *See* Stip., Ex. A. The Corporate Governance Reforms, thus, directly address the allegations made in the Derivative Actions that Defendants made and/or caused the Bank to make false and misleading statements to the investing public. McKenna Fact Decl., ¶25.

Under these circumstances, Plaintiff Klein respectfully submits that the Settlement has produced a substantial benefit to the Bank and its shareholders and should be granted final approval.

In sum, the Settlement represents an outstanding resolution for Opus in a case of substantial complexity and cost and fully justifies this Court's final approval of the Settlement as fair, reasonable, and adequate. *Id.*, ¶¶27-29. Accordingly, Plaintiff Klein respectfully requests the Court to: (i) approve the Settlement set forth in the Stipulation; (ii) find that the form of the Notice and direct publication of the Notice as contemplated by the Stipulation satisfied due process; and (iii) enter the proposed Final Judgment. *Id.*, ¶28.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND WARRANTS FINAL APPROVAL

The Settlement creates substantial, material benefits for Opus and is the result of intense, arm's-length negotiations by experienced counsel. Plaintiffs' efforts in the Derivative Actions were a precipitating and material factor in the adoption and implementation by the Bank of the Corporate Governance Reforms. Moreover, the filing and pendency of the Derivative Actions comprised a substantial contributing factor to the decision by Opus to adopt the five Initial Reforms that Opus has already instituted. The substantial corporate governance reforms are designed to

prevent the recurrence of the very misconduct alleged in the Derivative Actions. Accordingly, Plaintiff respectfully submits that the Settlement is fair, reasonable, adequate, and should be approved by the Court. *Id.*, ¶31.

A. Legal Standards for Final Approval of Derivative Settlement

It is well settled that "[c]ompromises of disputed claims are favored by the courts . . . ." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982) (recognizing that the "settlement process [is] favored in the law"); *U.S. v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977) (explaining that "there is an overriding public interest in settling and quieting litigation"). This is particularly true with respect to shareholder derivative litigation, "because such litigation is 'notoriously difficult and unpredictable.'" *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (citation omitted). *See also In re AOL Time Warner S'holder Deriv. Litig.*, No. 02 Civ. 6302(SWK), 2006 U.S. Dist. LEXIS 63260, at *8 (S.D.N.Y. Sept. 6, 2006) (recognizing that public policy favors settlement of shareholder derivative litigation); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) (settlement of shareholder derivative suits is "particularly favored").

Under Federal Rule of Civil Procedure 23.1, court approval is required for any settlement of derivative claims. Fed. R. Civ. P. 23.1(c). While the district court exercises its "sound discretion" in evaluating a settlement, in exercising its discretion "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625; *see also In re Pac. Enter. Sec. Litig.*, 47 F.3d

373, 377-78 (9th Cir. 1995) (affirming ruling that shareholder derivative settlement was "'fair, reasonable and adequate to [the company]'" (citation omitted)).

In determining whether a settlement is fair, reasonable, and adequate, courts consider the following factors: (a) the benefits conferred on the corporation; (b) the risks, costs, and delays of continued litigation; (c) the stage of proceedings; (d) whether the settlement is the product of arm's-length negotiations by experienced counsel; and (e) the reaction of shareholders to the proposed settlement. *See Officers for Justice*, 688 F. 2d at 625. The Ninth Circuit, however, has cautioned that "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits." *Id.*

B. The Settlement Satisfies the Standards for Final Approval

As discussed in detail below, the Settlement merits final approval.

1. The Settlement Confers Substantial Benefits on the Bank and its Shareholders

"'The principal factor to be considered in determining the fairness of a settlement concluding a shareholders' derivative action is the extent of the benefit to be derived from the proposed settlement by the corporation, the real party in interest.'" *In re Atmel Corp. Deriv. Litig.*, No. C 06-4592, 2010 U.S. Dist. LEXIS 145551, at *41 (N.D. Cal. Mar. 31, 2010) (citation omitted). Corporate governance measures such as those achieved here provide valuable benefits to public companies. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 395-96 (1970) ("[A] corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature," because '"corporate therapeutics' . . . furnish a benefit to all shareholders"); *see also In re NVIDIA Corp. Deriv. Litig.*, No. C-06-06110-SBA (JCS), 2008 U.S. Dist. LEXIS 117351 (N.D. Cal. Dec. 28, 2008); *In re Rambus Inc. Deriv. Litig.*, No. C 06-3513 JF (HRL), 2009 U.S. Dist. LEXIS 131845 (N.D. Cal. Jan. 20, 2009); *In re Hewlett-Packard Co.*

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S'holder Deriv. Litig., No. 3:12-cv-06003-CRB, 2015 U.S. Dist. LEXIS 32212 (N.D. Cal. Mar. 13, 2015); *In re MRV Commc'ns, Inc. Deriv. Litig.*, No. CV 08-03800 GAF (MANx), 2013 U.S. Dist. LEXIS 86295 (C.D. Cal. June 6, 2013).

The filing and pendency of the Derivative Actions comprised a substantial contributing factor in Opus's decision to implement the Initial Reforms, and Plaintiffs were a precipitating and material factor in the adoption and implementation of the Corporate Governance Reforms (collectively, "the Reforms"). "Opus acknowledges and agrees … that the [Reforms] confer a substantial benefit to the Bank and its shareholders." Stip., Ex. A at 2.

Highlights of the Reforms, which are fully set forth in Exhibit A to the Stipulation are as follows:

- **Chief Compliance Officer**
  Establishing a Chief Compliance Officer ("CCO") position with numerous responsibilities addresses the Misconduct through organized, proactive, and effective leadership in identifying, managing, and mitigating risk. The CCO will also protect the Company's assets, reputation, and shareholders by, *inter alia*, preventing a diffusion of responsibility and ensuring that one person takes ownership of compliance.
- **Review of Loan Portfolio**
  Independent third-party review of the outstanding commercial loan portfolio for each of years 2018 and 2019 will provide management with objective information regarding at least 10% of outstanding commercial loans over $1 million. This Reform requires the bank to take action in the event that material problems are discovered through the review. This Reform ensures that the Board is appraised of relevant developments in order to effectively exercise its

oversight authority and timely address any weaknesses in loan-making and disclosure.

- **Risk Oversight Committee**

  By requiring the Risk Oversight Committee to hold quarterly executive sessions with both the Head of Credit Review and Chief Risk Officer, the Reforms ensure that the Board will remain abreast of the Company's Credit Policy and Credit Review Plan, Enterprise Risk Management Program, quarterly provision for loan losses, and adequacy of review for impaired loans, *inter alia*.

- **Other Reforms**

  The remaining Reforms also serve to prevent recurrences of the Misconduct. First, enhanced training ensures personnel involved in loan-making cause the Bank to enter into appropriate loan agreements, facilitates reasonable risk-taking in loan-making, and promotes proper loan disclosure. Second, third-party operation of the whistleblower hotline ensures appropriate procedures are in place for reporting malfeasance, allowing correction before false and misleading information is disseminated. Third, the Initial Reforms will diminish the Company's exposure to risk by limiting the number of low quality loans it will extend. Thus, the Reforms directly address the Misconduct, confer a substantial benefit on Opus and its stockholders, and justify the application of a positive multiplier in the determination of the attorneys' fees award.

The Reforms, thus, directly address the allegations made in the Derivative Actions that the Defendants' internal controls regarding their loan portfolio were insufficient to guard against overly risky loans and/or caused the Bank to make false and misleading statements to the investing public about their loan portfolio. Moreover, the Bank approved the Settlement only after determining that the

1 Settlement of the Derivative Actions under the terms set forth in the Stipulation,
2 including the institution of the Corporate Governance Reforms, benefits the Bank.
3 McKenna Fact Decl., ¶37.
4 The fact that the governance reforms provided by the Settlement directly
5 target the organizational and corporate compliance failures alleged in the Derivative
6 Actions strongly militates in favor of approval. *See Sved v. Chadwick*, 783 F. Supp.
7 2d 851, 864 (N.D. Tex. 2009) (approving derivative litigation settlement because it
8 "offers tangible, long-term remedial measures that are specifically designed to
9 avoid the alleged missteps in [the company's] past and protect shareholders as the
10 company moves forward"); *Mohammed v. Ells*, No. 12-cv-1831-WJM-MEH, 2014
11 U.S. Dist. LEXIS 118796, at *12 (D. Colo. Aug. 26, 2014) (finding settlement fair
12 and adequate where "the corporate governance reforms provided for as part of the
13 settlement are specifically and appropriately designed to prevent the recurrence of
14 the alleged misconduct that formed the basis for this action."); *Maher*, 714 F.2d at
15 466 ("a settlement may fairly, reasonably, and adequately serve the best interest of a
16 corporation, on whose behalf the derivative action is brought, even though no
17 direct monetary benefits are paid by the defendants to the corporation") (citing
18 *Goldman v. Northrop Corp.*, 603 F.2d 106, 108-09 (9th Cir. 1979)).
19 Corporate governance reforms that "serve to prevent and protect [the
20 company] from the reoccurrence of" alleged wrongdoing confer a substantial benefit,
21 warranting settlement approval. *United Nat'l Ret. Fund v. Watts*, No. Civ. A.
22 04CV3603DMC, 2005 U.S. Dist. LEXIS 26246, at *18 (D.N.J. Oct. 28, 2005).
23 Indeed, "[a]s corporate debacles such as Enron, Tyco and WorldCom demonstrate,
24 strong corporate governance is fundamental to the economic well-being and success
25 of a corporation," and "'[c]ourts have recognized that corporate governance reforms
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1 such as those achieved here provide valuable benefits to public companies.'"
2 *NVIDIA*, 2008 U.S. Dist. LEXIS 117351, at *10 (citation omitted).[4]
3 The Settlement achieves for Opus and its shareholders the substantial benefit
4 of significant reforms that will materially improve the Bank's corporate governance.
5 *See* Stip., Ex. A. These reforms are not only designed to address the "corporate
6 trauma" alleged in the Derivative Actions, but also to strengthen and enhance
7 compliance, as well as oversight of compliance, in the highly regulated banking
8 industry. These reforms also enhance the functioning and accountability of the Board
9 and its various governing committees. McKenna Fact Decl., ¶40.

10 **2. The Settlement Appropriately Weighs the Benefits**
11 **Conferred upon Opus with the Significant Risks of Continued Litigation**

12 Although there is no "bright-line" test that courts employ in making the "fair,
13 reasonable and adequate" determination, in addition to the benefits to be conferred
14 upon the corporation (which is undoubtedly the most crucial factor), additional factors
15 that courts review are: (1) the risks, costs, and delays of continued litigation; (2) the
16 stage of the proceedings; (3) whether the settlement is the product of arms-length
17 negotiations by experienced counsel; and (4) the reaction of shareholders to the
18 proposed settlement. *Officers for Justice*, 688 F.2d at 625.[5]
19

20 [4] *See also In re Schering-Plough Corp. S'holders Derivative Litig*., No. 01-1412, No.
21 Civ. A. 01-1412, 2008 WL 185809, at *4 (D.N.J. Jan. 14, 2008) (improvements to corporate governance structure and oversight functions conferred "substantial
22 benefits" to the company); *In re Intel Corp. Derivative Litig*., C.A. No. 09-867-JJF, 2010 WL 2955178, at *2 (D. Del. July 22, 2010) (approving settlement based on
23 governance reforms that "have value to both the Company and its shareholders both currently and in the long-term").

24 [5] Also, as Rules 23 and 23.1 of the Federal Rules of Civil Procedure both require court
25 approval for the compromise of class and derivative actions, the factors laid out for determining whether to approve a class action settlement – as done in *Officers for*
26 *Justice* -- are also applicable to derivative settlements. *See* Alba Conte and Herbert B. Newberg, 4 Newberg on Class Actions § 22:109 (4th Ed. 2002); *see also Shlensky v.*
27 *Dorsey*, 574 F.2d 131, 147 (3d Cir. 1978) ("While in *Girsh v. Jepson* we discussed the necessity of considering such factors in determining the fairness of the settlement of a
28

a. The Risks of Continued Litigation

In assessing the fairness, reasonableness and adequacy of the Settlement, the Court should balance the benefits of settlement against the continuing risks of litigation. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also Officers for Justice*, 688 F.2d at 625. There is no question that derivative actions are complex and fraught with risk. The Ninth Circuit, in affirming the district court's approval of a settlement of a derivative action, noted that "the odds of winning [a] derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely successful." *In re Pac. Enters.*, 47 F.3d at 378. Indeed, courts have long recognized that shareholder derivative litigation "is notably difficult and notoriously uncertain," *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973), and that compromise is particularly appropriate. *Nelson v. Bennett*, 662 F. Supp. 1324, 1334 (E.D. Cal. 1987).

Here, Plaintiffs did not issue pre-suit demands on the Board prior to commencing the Derivative Actions. McKenna Fact Decl., ¶44. Thus, absent the Settlement, there is, at the least, an open question as to whether the Plaintiffs would have standing to bring claims on the Bank's behalf. *Id*. In order to pursue their claims, Plaintiffs would first have to establish that demand on the Board was excused as a matter of law. *See, e.g.*, *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). Establishing demand futility is always an uncertain proposition, particularly where, as here, a significant portion of the Board consists of "outside" directors. *See, e.g.*, *Beam v. Stewart*, 845 A.2d 1040, 1048-52 (Del. 2004); *Levine v. Smith*, 591 A.2d 194, 197-208 (Del. 1991).

Even assuming Plaintiffs adequately alleged demand futility, they still would have had to overcome protections afforded under the business judgment rule. *Id*. Defendants would undoubtedly contend their actions were protected by the business

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class action in order to protect the rights of absent members of the class of plaintiffs, it is clear that the same factors are relevant in a shareholders' derivative suit.").

judgment rule, which creates a powerful presumption that directors are "faithful to their fiduciary duties." *In re Impax Lab., Inc. S'holder Deriv. Litig.*, No. 14-cv-04266-HSG, 2015 U.S. Dist. LEXIS 117979, at *14 (N.D. Cal. Sept. 3, 2015). This is a difficult hurdle for derivative plaintiffs to overcome, up through and including trial. *See, e.g.*, *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 35 (Del. 2006). Although Plaintiffs believed the rule did not apply with respect to the acts challenged in the Derivative Actions, the prospect that Defendants could have been protected by the business judgment rule made establishing liability uncertain. McKenna Fact Decl., ¶45. Thus, Plaintiffs are mindful of the numerous potential risks faced in continued litigation and establishing liability in the Derivative Actions, which favors the Settlement. *Id.*

An evaluation of the benefits of a settlement must also be tempered by recognition that any compromise involves concessions on the part of all of the settling parties. Indeed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624 (citations omitted). Although Plaintiffs believe that the claims asserted in the Derivative Actions were meritorious, liability was by no means a foregone conclusion. Had Plaintiffs continued to litigate, there was a risk that they would not have been successful at the motion to dismiss stage of their respective actions. *Id.*, ¶46.

Even if Plaintiffs were successful and survived the motion to dismiss stage, continued litigation would be extremely complex, costly, and of substantial duration. *Id.*, ¶47. Document discovery would need to be completed, depositions would need to be taken, experts would need to be designated, and expert discovery conducted. *Id.* Opus's and Defendants' expected motions for summary judgment would have to be briefed and argued, and if defeated, then a trial would have to be held. *Id.* Indeed, significant risks remained in getting past Opus's and Defendants' anticipated motions

1 for summary judgment and obtaining a favorable judgment after trial. *Id*.

2 Beyond the hurdle of establishing the Defendants' liability for their alleged
3 wrongdoing, Plaintiffs faced considerable uncertainty with respect to establishing
4 damages to Opus. *Id*., ¶47. If Plaintiffs established liability, the issue of damages to
5 Opus would have been hotly disputed and the subject of expert testimony proffered by
6 all parties. *See, e.g.*, *In re Lloyd's Am. Trust Fund Litig*., No. 96 Civ. 1262 (RWS),
7 2002 U.S. Dist. LEXIS 22663, at *61 (S.D.N.Y. Nov. 26, 2002). The damages
8 assessments of experts would surely vary substantially, and the assessment of this
9 crucial element of Plaintiffs' claims would be reduced at trial to a "battle of the
10 experts." *See, e.g.*, *In re Emerging Commc'ns S'holders Litig*., 2004 Del. Ch. LEXIS
11 70, at *40 (Del. Ch. May 3, 2004). It is far from certain that a jury would have
12 disregarded Defendants' experts' opinions. McKenna Fact Decl. ¶48. Indeed, a jury
13 might be swayed by defense experts seeking to establish that damages were caused by
14 factors other than Defendants' wrongdoing, or, alternatively, trying to minimize the
15 amount of the Bank's damages. *See, e.g.*, *In re PaineWebber Ltd. P'ships Litig*., 171
16 F.R.D. 104, 129 (S.D.N.Y. 1997). Conceivably, a jury could find there were no
17 damages, or the damages were a mere fraction of the amount claimed. McKenna Fact
18 Decl., ¶48.

19 Plaintiffs' Counsel anticipated that trials of the Derivative Actions would have
20 taken, at minimum, several weeks. McKenna Fact Decl., ¶49. The expense of such
21 trials and the use of both judicial resources and the resources of the Parties would
22 have been substantial. Further, submitting a matter to a jury is always, at best, an
23 uncertain proposition. *Id*.; *see Weiss v. Mercedes-Benz of North America, Inc*., 899 F.
24 Supp. 1297, 1300-01 (D.N.J. 1995) ("[W]hen parties negotiate a settlement they have
25 far greater control of their destiny than when a matter is submitted to a jury.
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27
28

1 Moreover, the time and expense that precedes the taking of such a risk can be
2 staggering.”).
3 Considering the difficulty and unpredictability of a lengthy and complex trial,
4 the benefits of obtaining a Settlement were significant. McKenna Fact Decl., ¶50. It is
5 also clear that even a victory at trial is no guarantee that the judgment would
6 ultimately be sustained on appeal or by the trial court in post-trial motions. *Id*. The
7 proposed Settlement eliminates these and other risks of continued litigation, including
8 the very real risk of no recovery after several more years of litigation, while providing
9 Opus with substantial benefits immediately. *See, e.g.*, *Maher*, 714 F.2d at 466
10 (affirming approval of derivative settlement where district court found that ‘“the
11 parties’ conclusion, that any possible benefit to [the company] from pursuing the
12 remaining causes of action could be more than offset by the additional cost of
13 litigation, [wa]s based on an intelligent and prudent evaluation of their case.”’).[6]
14 Plaintiffs weighed each of these risks against the immediate benefits the
15 Settlement will provide to the Bank and to Opus Shareholders. McKenna Fact Decl.,
16 ¶51. These risks presented the possibility not only that the prosecution of the
17 Derivative Actions could be unsuccessful, but that prosecution of the Derivative
18 Actions through extensive depositions and trial could be potentially detrimental to the
19 Bank. *Id.*[7] In light of the complexity, length, and uncertainty of the continued
20
21 [6] *See, e.g.*, *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 748 (S.D.N.Y.
22 1985), *aff’d*, 798 F.2d 35 (2d Cir. 1986) (“[a]n appeal could seriously and adversely
23 affect the scope of an ultimate recovery, if not the recovery itself.”).

24 [7] *See, e.g.*, *Ryan v. Gifford*, 2009 Del. Ch. LEXIS 1, at *29-30 (Del. Ch. Jan. 2, 2009)
25 (noting that savings to the nominal defendant corporation in legal and other
26 professional fees that would have been incurred but for the settlement “are properly
considered by the Court when deciding whether a settlement is fair, reasonable, and
27 adequate.”).
28

prosecution of the Derivative Actions, and the substantial benefits achieved by the Reforms and the Settlement, it is clear that the Settlement is fair, reasonable, and adequate, and should be finally approved. *Id*.

b. The Stage of the Proceedings

Courts also consider the extent of discovery completed and the stage of the proceedings together as one factor in determining the fairness, reasonableness, and adequacy of the proposed Settlement. *Officers for Justice*, 688 F.2d at 625; *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 616-17 (N.D. Cal. 1979). The Ninth Circuit has noted that "'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 459 (9th Cir. 2000) (citation omitted); *see also Sved*, 783 F. Supp. 2d at 861 (Courts "look[] not to the amount of discovery, but rather to 'whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it.'" (citation omitted)).

Here, Plaintiffs and Plaintiffs' Counsel have engaged in extensive investigation, document review, and other litigation efforts throughout the prosecution of the Derivative Actions, including, among other things: (1) reviewing Opus's press releases, public statements, governmental filings, and securities analysts' reports and advisories about the Bank; (2) reviewing media reports about the Bank; (3) researching the applicable law with respect to the claims alleged in the Derivative Actions and the potential defenses thereto; (4) preparing and filing two derivative complaints; (5) analyzing the damages suffered by the Bank; (6) participating in informal conferences with Defendants' Counsel regarding the

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specific facts of the cases, the perceived strengths and weaknesses of the cases, and other issues in an effort to facilitate negotiations and fact gathering; (7) participating in a day-long mediation on liability, with numerous follow-up settlement conferences; (8) reviewing in confirmatory discovery thousands of pages of internal Opus documents and the transcript of the deposition of the Chief Operating Officer concerning the factual allegations involved in the Derivative Actions; and (9) negotiating the terms of the Reforms as part of this Settlement with Defendants. McKenna Fact Decl. ¶53. The accumulation of the information discovered through the above efforts enabled Plaintiffs and Plaintiffs' Counsel to be well informed about the strengths and weaknesses of the cases and to engage in effective settlement discussions with Defendants. *Id*.

c. The Settlement Was Negotiated at Arm's-Length by Experienced Counsel

A strong presumption of fairness applies to settlements that have been negotiated at arm's-length by experienced counsel and with the assistance of an independent mediator. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *In re MRV Commc'ns*, 2013 U.S. Dist. LEXIS 86295, at *9 ("'The involvement of experienced [] counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery ha[s] taken place create a presumption that the agreement is fair.'" (citation omitted)); *In re Austrian and German Bank Holocaust Litig*., 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000) (Where "the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex . . . litigation, the Settlement will enjoy a presumption of fairness.").

The Settlement here was reached after extensive arm's-length negotiations between counsel for the Parties. The negotiations included Plaintiffs sending Defendants a detailed set of settlement demands and counter-demands, and an in-

person mediation session, together with continued assistance from Mediator Lindstrom, a well-respected mediator who is well versed in the field of complex litigation.[8] McKenna Fact Decl. ¶59. This factor thus weighs in favor of approval of the proposed Settlement. *See In re Atmel*, 2010 U.S. Dist. LEXIS 145551, at *43 (noting that the Mediator's "participation weighs considerably against any inference of a collusive settlement.").[9]

All counsel possessed a firm understanding of the strengths and weaknesses of their respective claims and defenses. McKenna Fact Decl. ¶60. The Parties and their respective counsel believe that that the proposed Settlement before the Court represents a fair, reasonable, beneficial, and practical resolution of highly uncertain litigation, and that its terms fairly account for the risks and potential rewards of the claims being settled. *Id.* As the Ninth Circuit has recognized, significant weight should be attributed to the parties' belief that the litigation should be settled on the proposed terms, since "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter.*, 47 F.3d at 378; *see also In re First Capital Holdings Corp. Fin. Prod. Sec. Litig.*, MDL No. 901, 1992 U.S. Dist. LEXIS 14337 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed

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[8] *See* Gregory P. Lindstrom, Esq. Profile, at http://www.phillipsadr.com/bios/gregory-lindstrom (last visited on June 15, 2018).

[9] *See also Khanna v. Intercon Sec. Sys. Inc.*, No. 2:09-CV-2214 KJM EFB, 2014 WL 1379861, at *9 (E.D. Cal. Apr. 8, 2014) ("That the settlement was reached during an outside mediation supports the conclusion that the settlement was not collusive."); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (finding that assistance of an experienced mediator in the settlement process "tends to support the conclusion that the settlement process was not collusive").

settlement represented the most beneficial result for the class to be a compelling factor in approving settlement).

In appraising the fairness of the Settlement, the opinion and recommendation of experienced counsel favoring the Settlement is entitled to considerable weight. *Officers for Justice*, 688 F.2d at 625. As the courts have stated: "[b]ecause the settlement resulted from arm's length negotiations between experienced counsel . . . the Court may presume the settlement to be fair, adequate, and reasonable." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006); *In re Nat'l Student Marketing Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974) (stating that "[t]he opinion and judgment of experienced counsel, whose labors produced the settlement, should also receive due consideration."); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). Moreover, Plaintiffs' Counsel negotiated with counsel for Defendants—attorneys from a premier international defense firm and well-capable of defending the Defendants' interests.

Here, Plaintiffs' Counsel have litigated scores of shareholder class and derivative actions and have well-known national reputations of pursuing their cases to a successful resolution.[10] McKenna Fact Decl., ¶62. Plaintiffs' Counsel have made a considered judgment based on their knowledge of the facts of the Derivative Actions and their extensive experience that the Settlement is in the best interests of Opus and Opus Shareholders and is an excellent achievement under all the circumstances. Accordingly, the Settlement should be finally approved. McKenna Fact Decl., ¶62.

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[10] *See* the firm biography of Gainey McKenna & Egleston, attached as Exhibit A to the McKenna Fee Decl.; the firm biography of The Rosen Law Firm, P.C., attached as Exhibit A to the Fee and Expense Declaration of Phillip Kim ("Kim Fee Decl."); the firm biography of The Brown Law Firm, P.C., attached as Exhibit A to the Fee and Expense Declaration of Timothy W. Brown ("Brown Fee Decl."); and the firm biography of The Wagner Firm, attached as Exhibit A to the Fee and Expense Declaration of Avi N. Wagner ("Wagner Fee Decl.").

IV. CONCLUSION

The Settlement clearly represents a fair, adequate, and reasonable result for Opus in light of the nature and strength of Plaintiffs' claims, the defenses thereto, and all other pertinent facts and circumstances. Accordingly, Plaintiffs respectfully request that the Court approve the Settlement and enter the proposed Final Judgment.

Dated: June 15, 2018

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PROOF OF SERVICE BY ELECTRONIC POSTING

I, the undersigned say:

I am not a party to the above case, and am over eighteen years old. On June 15, 2018, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Central District of California, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 15, 2018, at Los Angeles, California.

s/ Avi Wagner
Avi Wagner

Mailing Information for a Case 8:17-cv-00123-AB-JPR Melvyn Klein v. Stephen H. Gordon et al

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