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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

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| In re TAHOE RESOURCES, INC. SECURITIES LITIGATION | Case No. 2:17-cv-01868-RFB-NJK<br><br>**U.S. PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** |
| This Document Relates to: All Actions | |

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## MOTION

Lead Plaintiff Tiffany Huynh, as executor for the estate of Kevin Nguyen, on behalf of herself ("U.S. Plaintiff"), and the putative Class,[1] respectfully moves this Court for an Order pursuant to Rule 23(e) of the Federal Rules of Civil Procedure: (a) granting final approval of the proposed Settlement of the above-captioned securities class action lawsuit (the "U.S. Action"); (b) finding that the form and manner of providing notice of the Settlement to the U.S. Settlement Class satisfied due process, Rule 23, and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"); (c) certifying the proposed class for purposes of Settlement; (d) appointing U.S. Plaintiff as Class Representative, Faruqi & Faruqi, LLP (the "Faruqi Firm") as U.S. Class Counsel, and Muckleroy Lunt, LLC (the "Muckleroy Firm") as U.S. Liaison Class Counsel; and (e) granting final approval of the proposed Plan of Allocation.

This motion is based upon the memorandum of points and authorities set forth below; the Wilson Declaration, with attached exhibits, filed herewith, the Sullivan Declaration, with attached exhibits, filed herewith;[2] the pleadings and records on file in this U.S. Action, and other such matters and argument as the Court may consider at the hearing of this motion. This Memorandum sets out the parameters of the U.S. Settlement and the basis for the Court to grant final approval. Defendants support final approval of the Settlement and do not oppose this motion.

## MEMORANDUM OF POINTS AND AUTHORITIES

U.S. Plaintiff, on behalf of herself, and the putative U.S. Settlement Class, respectfully submits this memorandum in support of her motion for final approval of the Settlement.

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[1] Unless otherwise noted, the following conventions are used herein: (a) all emphases are added; (b) all internal citations and quotation marks are omitted; (c) all capitalized terms have the meaning ascribed to them in the Joint Stipulation and Agreement of Global Settlement of Two Related Securities Class Actions Pending in Different Jurisdictions dated May 25, 2023 ("Stipulation" or "Stip.") (ECF No. 242); (d) "U.S. Settlement" refers to the settlement of the U.S. Action set forth in the Stipulation; (e) all references to "Rule(s)" refers to the Federal Rules of Civil Procedure; and (f) all references to Exhibits are to the exhibits annexed to the Declaration of James M. Wilson, Jr. in support of this motion, filed concurrently herewith (the "Wilson Declaration").

[2] The "Sullivan Declaration" or "Sullivan Decl." refers to the Declaration of Owen F. Sullivan Regarding: (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion.

## INTRODUCTION

As discussed in U.S. Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Motion" or "PA Motion"), ECF No. 243, U.S. Plaintiff, on behalf of herself, and the putative Class, and Defendants Tahoe Resources, Inc., its successor 0799714 B.C. Ltd. (Tahoe Resources, Inc. and 0799714 B.C. Ltd. referred to as "Tahoe" or the "Company"), Ronald W. Clayton, C. Kevin McArthur, Mark T. Sadler, and Edie Hofmeister (collectively "Defendants"), have reached a proposed U.S. Settlement for $19,500,000 that, if given final approval, will resolve all claims in the U.S Action. The U.S. Settlement represents a favorable result for the class in light of the significant risk that a smaller recovery—or no recovery at all—might be achieved after further litigation, particularly in light of the risks posed by continued litigation.

As discussed below and in the Wilson Declaration, the U.S. Settlement was reached only after more than five years of hard-fought litigation and resulted from arms'-length negotiations among experienced and capable counsel with a comprehensive understanding of the merits and value of the claims asserted.

The U.S. Class's reaction to the U.S. Settlement and U.S. Plan of Allocation has been positive overall. Pursuant to the U.S. Order Preliminarily Approving U.S. Settlement and Providing for Notice ("U.S. Preliminary Approval Order" or "U.S. PA Order") (ECF No. 252), the Court-approved U.S. Claims Administrator, Epiq Systems, Inc. ("Epiq"), has, *inter alia*, mailed 11,307 copies of the Notice of Pendency and Proposed Settlement of Class Action Lawsuit Pending in United States District Court for the District of Nevada (the "U.S. Notice") and the U.S. Proof of Claim and Release Form ("U.S. Claim Form") to potential U.S. Class Members and nominees, posted the requisite documents to the U.S. Action's settlement website, and caused the Summary Notice of Pendency and Proposed Settlement of Class Action Lawsuit Pending in United States District Court for the District of Nevada ("U.S. Summary Notice") to be published in *Investor's Business Daily* and posted to *GlobeNewswire*. Sullivan Decl. ¶¶ 3-12 and 15; Wilson Decl. ¶¶ 8, 67-68, 70, 80. Although the January 18, 2024 deadline for U.S. Class Members to

object to the U.S. Settlement or request exclusion has not yet passed, through December 12, 2023, Epiq has not received any requests for exclusion. Sullivan Decl. ¶ 16; Wilson Decl. ¶¶ 72-73, 80.

In light of the considerations discussed herein, U.S. Plaintiff and U.S. Plaintiff's Counsel submit that the U.S. Settlement is fair, reasonable, and adequate; satisfies the standards of Rule 23, the PSLRA, 15 U.S.C. § 78u-4, and due process; and provides a favorable recovery for the U.S. Settlement Class. U.S. Plaintiff accordingly requests that the U.S. Court: (1) approve the U.S. Settlement on the terms set forth in the Stipulation; (2) find that the form and manner of giving notice of the U.S. Settlement to the U.S. Class satisfied due process, Rule 23, and the PSLRA; (3) finally certify the U.S. Class for settlement purposes; (4) finally appoint U.S. Plaintiff as Class Representative, the Faruqi Firm as Class Counsel, and the Muckleroy Firm as Liaison Class Counsel for Settlement purposes; and (5) approve the U.S. Plan of Allocation.

## FACTUAL AND PROCEDURAL BACKGROUND

To avoid undue repetition, U.S. Plaintiff's Counsel respectfully refers the Court to the Wilson Declaration for a more detailed description of U.S. Plaintiff's claims and the prosecution of the U.S. Action. *See* Wilson Decl. ¶¶ 11-50.

Briefly, on August 31, 2018, U.S. Plaintiff filed a Consolidated Amended Class Action Complaint ("AC") naming as defendants Tahoe, C. Kevin McArthur, Ronald W. Clayton, Edie Hofmeister, Mark T. Sadler, and Elizabeth McGregor. ECF No. 59. The AC alleged that during the Class Period, defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and SEC Rule 10b-5 promulgated thereunder. *Id.* at ¶ 1. Specifically, U.S. Plaintiff alleged that Defendants made misleading statements and omissions concerning Tahoe's Escobal mine located in Guatemala and the failure to consult the local indigenous population regarding the mining project. *See id*. at ¶¶ 150-86.

On October 30, 2018, Defendants filed a motion to dismiss the AC. ECF No. 65. Following oral argument on Defendants' motion to dismiss, on June 19, 2019, the Court denied Defendants' motion to dismiss except for the claims against former Chief Financial Officer, Elizabeth McGregor. ECF No. 84. As part of it is order, the Court instructed the parties to

bifurcate discovery into two phases, beginning with discovery in the United States in phase one and foreign discovery in phase two. ECF No. 83 at 50:8-51:5. After the motion to dismiss order was entered, Defendants and the U.S. Plaintiff began diligently engaging in the first phase of discovery, including exchanging more than 150,000 discovery documents.

Also in October 2018, a purported class action lawsuit was filed by Abram Dyck ("Canadian Plaintiff"), a Tahoe shareholder, against Tahoe and Clayton in the Ontario Superior Court of Justice ("Canadian Action"). Stip. 2. Dyck, represented by Siskinds, LLP in Toronto ("Canadian Plaintiff's Counsel"), alleged that Tahoe and Clayton violated Canadian securities laws by making material misstatements or omissions that caused Tahoe stock to be artificially inflated during the period between May 24, 2017 and July 5, 2017. *Id.* at 2, 10. In August 2021, the Canadian Court granted the Canadian Plaintiff's motion for leave to proceed with a secondary market securities claim and granted certification of the proposed class of Tahoe shareholders. *Id.* at 3.

On August 2, 2019, Defendants filed their Answer to the AC and a motion to certify the motion to dismiss order for interlocutory appeal. ECF Nos. 88, 90, 91. On March 23, 2020, the U.S. Court denied Defendants' motion for interlocutory appeal. ECF No. 114.

In March of 2020 the Covid-19 pandemic began which caused large scale disruption of services and the ability to travel. This challenge caused a substantial delay in the discovery process. However, at the time of settlement substantially all domestic document, deposition, and third-party discovery had been completed and final arrangements were being made for depositions and third-party discovery to begin in Guatemala and Peru.

On July 1, 2021, U.S. Plaintiff filed a motion to certify a class of individuals who purchased Tahoe common stock in the United States or on the NYSE between April 3, 2013 and August 24, 2017. ECF No. 142. On February 8, 2022, the U.S. Court held a remote hearing to discuss the U.S. Plaintiff's class certification motion, requested supplemental filings from the Parties in support of their respective positions and discussed the scheduling of an in-person evidentiary hearing on the issue of class certification, which was then scheduled for April 27-28,

2022. ECF Nos. 165 & 173.

On January 29, 2022, Lead Plaintiff, Kevin Nguyen, passed away. *See* ECF No. 175. Therefore, on April 1, 2022, his wife and the sole executor of his estate, Tiffany Huynh, moved to be substituted for Mr. Nguyen as Lead Plaintiff. *Id*. On September 14, 2022, the Court granted Ms. Huynh's motion and appointed her as the Lead Plaintiff. ECF No. 193.

U.S. Plaintiff, Canadian Plaintiff, and Defendants engaged Robert Meyer, a highly experienced JAMS Mediator (the "Mediator"), and scheduled a mediation for July 28, 2022 in an effort to negotiate a global resolution of the U.S. Action and the Canadian Action. *See* ECF No. 190. After agreeing to proceed with a mediation that involved the U.S. and Canadian Parties, U.S. Parties sought and obtained a temporary stay of the U.S. case pending a report to the court by July 29, 2022 of the outcome of the Mediation. ECF No. 184. After exchanging detailed mediation briefs, a pre-mediation conference was held on July 25, 2022. ECF Nos. 190. During that conference, it became apparent that productive mediation for a global settlement of the U.S. and Canadian Actions would not be possible at that time because of unresolved disagreements between the U.S. and the Canadian plaintiffs. *Id.*

After the mediation scheduled for July 28, 2022 was cancelled, the Parties reported to the Court that the Mediation had been cancelled and sought to reschedule the class certification evidentiary hearing (*id.*) and to extend the remaining pre-trial deadlines to among other things finish domestic and foreign fact discovery. ECF No. 191. Thereafter, Plaintiff continued with discovery, which included taking the depositions of all the individual defendants and moving for the issuance of letters rogatory to obtain documents and depositions from non-party witnesses who live in Guatemala and Peru. ECF Nos. 195 to 228.

After cancelling the mediation that had been scheduled for July 28, 2022, the Parties continued to communicate about a possible resolution of all claims in the U.S. and Canadian Actions. As a result of these communications, the Parties were able to reach an agreement on certain threshold issues so that a formal mediation with the Mediator could resume and it was re-scheduled at the JAMS offices in Los Angeles, California for January 31, 2023. On January 31,

2023, the Parties met for a full-day mediation session with the Mediator. The Parties were able to reach an agreement in principle for a global settlement of the claims against Defendants in both Actions.

On May 25, 2023, U.S. Plaintiff filed the U.S. Preliminary Approval Motion. Following a hearing on October 6, 2023, the Court issued the U.S. Preliminary Approval Order on November 15, 2023, which, *inter alia*, approved the form and manner of providing notice to the U.S. Settlement Class, preliminarily certified the U.S. Settlement Class for settlement purposes, and set a hearing date for the U.S. Final Approval Hearing as well as deadlines for the briefing related thereto. The details of the notice program's progress to date is explained in further detail in Section III, *infra*.

## ARGUMENT

### I. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

Rule 23(e) provides that a class action settlement must receive court approval. A court should approve a class action settlement if it determines that the settlement is "fair, reasonable, and adequate[.]" Rule 23(e)(2). While the authority to grant such approval lies within the court's discretion, the Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005). Indeed, as one court has explained, "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." *Nobles v. MBNA Corp.*, 2009 WL 1854965, at *1 (N.D. Cal. June 29, 2009). Thus, when deciding whether to approve a settlement, the court must ensure that: (1) "the settlement is not the product of collusion among the negotiating parties" and (2) that the "settlement is fundamentally fair, adequate, and reasonable." *Hayes v. MagnaChip Semiconductor Corp.*, 2016 WL 6902856, at *4 (N.D. Cal. Nov. 21, 2016).

**A. The Proposed Settlement Is Not The Result Of Collusion**

As the Ninth Circuit explained in *In re Bluetooth Headset Products Liability Litigation*, the court must analyze whether the settlement was reached as a result of collusion between the parties. *DeStafano v. Zynga, Inc.*, 2016 WL 537946, at *8 (N.D. Cal. Feb. 11, 2016) (citing *Bluetooth*, 654 F.3d 935, 947 (9th Cir. 2011)). As U.S. Plaintiff explained in the U.S. Preliminary Approval Motion, *see* ECF No. 243 at 9-10, there was no collusion here.

**B. The Proposed Settlement Is Fair, Adequate, And Reasonable**

To determine whether a proposed settlement is fair, adequate, and reasonable, courts consider the factors in recently amended Rule 23(e)(2), which provides that a court may grant final approval of a settlement:

> . . . only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) 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;
>
> (D) the proposal treats class members equitably relative to each other.

Rule 23(e)(2).

As explained in the U.S. Preliminary Approval Motion, amended Rule 23(e)(2)'s factors do not displace the factors that the Ninth Circuit previously used to determine whether the settlement is fair, reasonable, and adequate, several of which overlap with Rule 23(e)(2)'s factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the

experience and views of counsel; (7) the presence of a governmental participant;[3] and (8) the reaction of the class members to the proposed settlement. *See Churchill Vill., L.L.C. v. Gen. Electric*, 361 F.3d 566, 575 (9th Cir. 2004). To find that a settlement is substantively fair, reasonable, and adequate, not every factor needs to be satisfied. *See Zynga*, 2016 WL 537946, at *8 ("The Court need not consider all of these factors, or may consider others.").

As explained in the U.S. Preliminary Approval Motion, all of the requirements imposed by Rule 23(e)(2) and the relevant Ninth Circuit factors have been met. Courts that have analyzed proposed settlements following the amendments to Rule 23 have found that the factors are usually satisfied where, as here, little has changed between preliminary and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg., Sales Practices, & Prods. Liab. Litig.*, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (finding that the conclusions the court made in granting preliminary approval "stand and counsel equally in favor of final approval now"); *In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at *1 (S.D.N.Y. June 16, 2020) (stating that the Court's previous orders granting preliminary approval of the settlements at issue already detailed why the relevant factors support approval, readopting that analysis at the final approval stage, and focusing only on "those few developments since" preliminary approval that impact the analysis). Nevertheless, the factors are analyzed below.

**1. The Class Has Been Adequately Represented**

Rule 23(e)(2)(A) is satisfied because U.S. Plaintiff and U.S. Plaintiff's Counsel have adequately represented the U.S. Settlement Class throughout the litigation and will continue to do so through the U.S. Settlement administration process. U.S. Plaintiff's interests are directly aligned with those of other U.S. Settlement Class members, as she claims to have suffered damages from the same alleged conduct, and through those claims seeks the same recovery from Defendants. *See* PA Motion 8 (explaining U.S. Plaintiff's adequacy). Additionally, while serving

[3] The "presence of a governmental participant" is not relevant here because there is no governmental entity involved. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (noting that this factor did not apply to the court's analysis where "[t]here is no governmental participant in this Class Action[]"). Lead Plaintiff will therefore not analyze this factor.

as Lead Plaintiff, Mr. Nguyen actively oversaw the litigation every step of the way, having, among other things, reviewed filings in this Action, communicated regularly with counsel about all aspects of the case, responded to discovery requests, and sat for a 7-hour deposition. *See* Wilson Decl., Ex. 33. After her substitution, Ms. Huynh diligently took up the work of her husband and served diligently as Lead Plaintiff, communicating with counsel about the case, reviewing documents and filings prepared in this Action, and participating in the settlement. *See* Wilson Decl., Ex. 5 (U.S. Plaintiff's declaration). Furthermore, U.S. Plaintiff's Counsel has zealously represented the U.S. Settlement Class at all times. *See generally* Wilson Decl.; *see also* PA Motion 8-9, 21 (explaining counsels' adequacy).

**2. The Proposed Settlement Was Negotiated at Arm's Length**

Rule 23(e)(2)(B) is satisfied because the proposed Settlement was the result of arm's length negotiations between U.S. Plaintiff's Counsel and Defendants' counsel. The Ninth Circuit "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution" in approving a class action settlement. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009); *see also In re Netflix Privacy Litig.*, 2013 WL 1120801, at *3 (N.D. Cal. Mar. 18, 2013) (finding the fact that the settlement "was a product of arm's length negotiation before a mediator" relevant to its decision to grant final approval). Courts also recognize that "[t]he presence of a mediator strongly suggests the absence of collusion or bad faith by the parties or counsel." *Walsh v. CorePower Yoga LLC*, 2017 WL 4390168, at *7 (N.D. Cal. Oct. 3, 2017).

The Settlement is the product of extensive arm's length negotiations among counsel with significant experience in securities class action litigation, and was reached following mediation with an experienced mediator. This action was litigated aggressively by both parties from the beginning. U.S. Plaintiff's Counsel, *inter alia*, thoroughly investigated the relevant facts; drafted the AC; vigorously opposed Defendants' motion to dismiss; vigorously opposed Defendants' motion for interlocutory appeal; engaged in numerous meet and confers with Defendants regarding the parties' discovery obligations; engaged in extensive fact discovery including reviewing and exchanging hundreds of thousands of documents, serving numerous third party subpoenas, and

conducting more than a dozen fact and expert depositions; fully briefed and argued a motion for class certification; and initiated foreign discovery by moving for and serving letters rogatory. *See* Wilson Decl. ¶¶ 28, 51.

After submitting mediation statements and exhibits, postponing the mediation and rescheduling it, the parties engaged in a mediation session with the assistance of Robert Meyer, a well-respected mediator. *See id*. at ¶ 53. After debating their positions during the mediation session, the parties reached an agreement in principle to settle the actions. *See id*. at ¶¶ 7, 54. Thereafter, the parties negotiated to come to a final agreement on the full terms of the Settlement. *See id*. at ¶ 54.

Thus, the Settlement was plainly the result of hard-fought, arm's length negotiations among the parties.

**3. The Relief Provided for the Class Is Adequate**

Rule 23(e)(2)(C) requires the U.S. Court to take four specific considerations into account when determining whether the relief provided for the class is adequate. Each of these considerations is addressed below, along with the Ninth Circuit factors that overlap with them.

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

Rule 23(e)(2)(C)(i) requires the U.S. Court to consider whether the U.S. Settlement Amount is adequate when taking into account the costs, risks, and delay of trial and appeal. This inquiry overlaps with the following Ninth Circuit factors: "[t]he strength of the plaintiffs' case;" "[t]he risk, expense, complexity, and likely duration of further litigation;" and "[t]he amount offered in settlement[.]" *See Churchill*, 361 F.3d at 576.

As the Ninth Circuit has noted, "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators[]"; rather, "the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Officers for Justice v. Civ. Serv. Comm'n of City and Cnty. of S.F.*, 688 F.2d 615, 624-25 (9th Cir. 1982). Thus, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is

grossly inadequate and should be disapproved." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). When determining the reasonableness of the settlement, "the Court must balance against the continuing risks of litigation (including the strengths and weaknesses of the plaintiff's case), the benefits afforded to members of the Class, and the immediacy and certainty of a substantial recovery." *Johansson-Dohrmann v. Cbr Sys., Inc.*, 2013 WL 3864341, at *4 (S.D. Cal. July 24, 2013).

As explained in the U.S. Preliminary Approval Motion, the $19,500,000 U.S. Settlement Amount provides an immediate benefit to the U.S. Class and is adequate when compared to the risk that no recovery, or lesser recovery, might be achieved after protracted litigation. U.S. Plaintiff has always believed that the claims have merit and would be proven through fact discovery. Despite her belief in the merits of this case, U.S. Plaintiff is aware of the substantial delay as well as risks and expenses that would be presented by further litigation.

For one thing, it is well known that class action litigation is inherently complex, *see Nobles*, 2009 WL 1854965, at *2, and this case is no exception. This case involved events that began more than a decade ago in a foreign country. Due to these hurdles, there was a substantial risk that U.S. Plaintiff may not have been able to obtain sufficiently convincing evidence to prevail at trial on issues such as scienter. Moreover, at the time of settlement, U.S. Plaintiff's motion for class certification was still pending, and there is a chance that the U.S. Court could have denied certification of the class or changed its scope in ways that could limit or eliminate the rights of certain class members under this settlement. As explained in the Preliminary Approval Motion and the Wilson Declaration, the difficulty and litigation surrounding foreign discovery and class certification demonstrates the cost, risks, and delay present in this Action. *See* Wilson Decl. ¶¶ 57-58. There is no doubt that Defendants would continue to aggressively litigate this Action if it were to continue. Thus, even after the considerable time and expense of additional discovery, which would span many more months or even years, given the complexity of foreign discovery, there is a chance U.S. Plaintiff's claims may not ultimately prevail. Even if a litigation class was certified and U.S. Plaintiff's claims survived summary judgment, a trial in the U.S. Action would

require the commitment of significant judicial resources, would be time consuming and expensive, and likely would not begin for months. *See id.*

In light of the foregoing, the U.S. Settlement Amount of $19,500,000 provides a favorable result for the U.S. Settlement Class and is well within the range of reasonableness. *Id.* at ¶¶ 3, 5, 9, 60-64, 80. It represents approximately 5.7% of the U.S. Settlement Class's maximum possible statutory damages (assuming the proposed U.S. Settlement Class is certified and all claims and damages are proven) estimated by Plaintiff's damages consultant. *See id*. at ¶ 85; PA Mot. 13. This is well within the range of typical recoveries in complex securities litigation such as this. *See IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving securities class action settlement where recovery was "about 3.5% of the maximum damages that Plaintiffs believe could be recovered at trial[]"); *Vataj v. Johnson*, 2021 WL 5161927, at *6 (N.D. Cal. Nov. 5, 2021) (approving settlement recovering approximately 2% of estimated damages as "consistent with the 2-3% average recovery that the parties identified in other securities class action settlements[]"); *In re Regulus Therapeutics Inc. Sec. Litig.*, 2020 WL 6381898, at *6 (S.D. Cal. Oct. 30, 2020) (approving $900,000 settlement representing 1.99% of total estimated damages and collecting cases approving damages of 1.6-5% of estimated damages); *In re Citigroup Inc. Sec. Litig.*, 2014 WL 2112136, at *5 (S.D.N.Y. May 20, 2014) (determining settlement amount representing 2% of the class's out-of-pocket losses "falls squarely within this range of reasonableness").

**b. The Proposed Method for Distributing Relief Is Effective**

Rule 23(e)(2)(C)(ii) requires the court to consider whether the proposed method of distributing relief to the class is effective, including the processing of class members' claims. The method used in this Action is traditionally used in securities class actions.

Pursuant to the U.S. Preliminary Approval Order, beginning on November 17, 2023, 11,307 copies of the U.S. Notice and U.S. Claim Form were mailed to potential U.S. Settlement Class Members and nominees, and the U.S. Summary Notice was published in *Investor's Business Daily* and transmitted over *GlobeNewswire* on November 27, 2023. Sullivan Decl. ¶¶ 3-7 and 12.

U.S. Settlement Class Members who want to object to the U.S. Settlement or request exclusion from the U.S. Settlement Class are required to do so by January 18, 2024. *See* U.S. PA Order at ¶¶ 10, 17. Although the time for objections and exclusions has not yet expired, through December 12, 2023, Epiq has not received any requests for exclusion. Thus, the reaction of the U.S. Settlement Class so far confirms the adequacy of the U.S. Settlement. *See Redwen v. Sino Clean Energy, Inc.*, 2013 WL 12303367, at *8 (C.D. Cal. July 9, 2013) (explaining that "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement[]" and finding that the class's reaction was "overall positive" where there were five requests for exclusion and one objection).

Additionally, the U.S. Settlement's claims process is similar to the process commonly used in securities class action settlements. The claims process provides for cash payments to eligible class members based on their *pro rata* share of the recovery as established by the trading information eligible U.S. Settlement Class Members provide. *See* PA Motion 14. This factor supports final approval for the same reason that it supported preliminary approval.

**c. Terms of Attorneys' Fees and Timing of Payment**

Rule 23(e)(2)(C)(iii) requires the U.S. Court to consider "the terms of any proposed award of attorney's fees, including timing of payment[.]" Consistent with the U.S. Notice, and as discussed in the Fee Motion, U.S. Plaintiff's Counsel seeks an award of attorneys' fees in an amount of 33% of the U.S. Settlement Fund, which is in line with similar awards granted in this Circuit. *See e.g., Rodriguez v. Nike Retail Servs., Inc.*, 2022 WL 254349, at *6 (N.D. Cal. Jan. 27, 2022) (approving an award of 33% in attorneys' fees); *Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *6 (C.D. Cal. Sept. 18, 2020) (finding that a fee of one third of the settlement fund was appropriate in light of the "the great risk" of non-payment assumed by counsel); *Villalpando v. Exel Direct Inc.*, 2016 WL 7740854, at *2 (N.D. Cal. Dec. 12, 2016) (holding that "[t]he fee request for one-third of the common fund also is reasonable when compared with Counsel's total lodestar."). This amount is supported by U.S. Plaintiff's Counsel's

lodestar, which is $7,735,656.75 based on 12,198.05 hours of attorney and professional staff time and results in a negative multiplier. *See* Wilson Decl. ¶¶ 89, 91; Muckleroy Decl.[4] ¶¶ 4-5.

As explained in the U.S. Preliminary Approval Motion, the Stipulation provides that attorney's fees are to be paid "immediately after entry of the Order awarding such attorneys' fees and expenses and entry of the U.S. Judgment or an Alternative Judgment, notwithstanding the existence of any timely filed objections thereto or to the Settlement," subject to the obligation to repay as described therein. Stip. ¶¶ 15-24. The timing of payment is standard in class action cases and typically approved. *See* PA Motion 12. Lead Counsel respectfully submits that the contemplated attorneys' fee award and the timing of payment are reasonable and do not weigh against final approval.

**d. Related Agreements**

Rule 23(e)(2)(C)(iv) requires the U.S. Court to determine the proposed U.S. Settlement's adequacy in light of any agreements made in connection with it. As disclosed in the U.S. Preliminary Approval Motion, the only agreements here are the Confidential Supplemental Agreement Regarding Requests for Exclusion, which was submitted to the Court under seal, *see* ECF Nos. 249, 253, and the escrow agreement between U.S. Plaintiff's Counsel and the proposed U.S. Escrow Agent, which governs the deposit, investment, and disbursement of the U.S. Settlement Fund in terms consistent with the Stipulation.

**4. The Settlement Treats Class Members Equitably**

Rule 23(e)(2)(D) requires the court to consider whether "the proposal treats class members equitably relative to each other." As discussed in Section II, *infra*, the U.S. Plan of Allocation does just that, calculating each Authorized U.S. Claimant's losses based on the timing of their purchases and sales of Tahoe common stock and providing that each Authorized U.S. Claimant shall receive their *pro rata* share of the U.S. Net Settlement Fund based on their recognized losses. U.S. Plaintiff's request for an award of $10,000 pursuant to 15 U.S.C. § 78u-4(a)(4) is reasonable, as explained in the accompanying Fee Motion, and does not change this conclusion. *See* U.S. PA

[4] "Muckleroy Decl." refers to Declaration of Martin A. Muckleroy in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses.

Motion 14; *see In re Regulus Therapeutics Inc. Sec. Litig.*, 2020 WL 6381898, at *5 (S.D. Cal. Oct. 30, 2020) (finding that a reasonable service award to Lead Plaintiff "does not constitute inequitable treatment of class members").

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

When determining whether the stage of the proceedings and extent of discovery completed supports settlement, "the court focuses on whether the parties carefully investigated the claims before reaching a resolution." *Zynga*, 2016 WL 537946, at *12.

As explained in Section I.B.2, *supra*, the parties garnered substantial information related to the Action and their respective claims and defenses prior to engaging in settlement negotiations, and had sufficient information to make an informed assessment of the U.S. Action's strengths and weaknesses and the U.S. Settlement's fairness. *See Rieckborn v. Velti PLC*, 2015 WL 468329, at *6 (N.D. Cal. Feb. 3, 2015) (finding that "[d]espite reaching settlement relatively early in the life span of this case, the Settling Parties have shown that their decision to settle was made on the basis of a thorough understanding of the relevant facts and law[,]" even though settlement was reached before the filing of a motion to dismiss). Indeed, U.S. Plaintiff's Counsel reviewed tens of thousands of discovery documents, interviewed witnesses on the ground in Guatemala, obtained the issuance of letters rogatory to serve subpoenas on relevant non-parties in Guatemala and Peru with the help of associated counsel in those countries, and conducted more than a dozen fact and expert depositions prior to entering into mediation discussions. Those depositions included Tahoe's former CEO, Kevin McArthur and former chief corporate counsel, Eddie Hofmeister. *See* Wilson Decl. at ¶¶ 31, 48-49. Thus, this factor supports final approval.

**6. The Risks of Maintaining the Class Action Through Trial**

As explained in the U.S. Preliminary Approval Motion, the U.S. Class has not yet been certified. While U.S. Plaintiff and U.S. Plaintiff's Counsel are confident that the U.S. Settlement Class meets the requirements for certification, Defendants vigorously opposed U.S. Plaintiff's motion for class certification. *See* PA Mot. 15-16. Specifically, Defendants argued that U.S. Plaintiff cannot establish the predominance requirement because the information that U.S. Plaintiff

alleged was concealed was not the information that was disclosed in the alleged corrective disclosures. *See* ECF No. 159 at 9-11. Defendants also argued that the damages model proposed by U.S. Plaintiff's expert was flawed for various reasons. *See* ECF No. 159 at 12-21. Accordingly, the risks facing the certification of a litigation class in this Action weigh strongly in favor of settlement.

Even if the Court were to certify the U.S. Class, U.S. Plaintiff's claims may be dismissed at summary judgment. Additionally, the damages issues present in this case would boil down to a "battle of the experts" at trial, creating the risk of a substantial reduction in the potential damages available to the class. Wilson Decl. ¶ 57; *see In re Linkedin User Priv. Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015). Where it is impossible to predict which expert's testimony or methodology would be accepted by the jury, courts have recognized the need for compromise. *See In re American Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) (stating that "[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997).

**7. The Experience and Views of Counsel**

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *DIRECTV*, 221 F.R.D. at 528; *see also Ramirez v. Ghilotti Bros. Inc.*, 2014 WL 1607448, at *1 (N.D. Cal. Apr. 21, 2014) (finding that experienced class counsel's support for the settlement, which "was reached after arm's length negotiations," weighed in favor of settlement).

As set forth in detail in the Faruqi Firm's resume, U.S. Plaintiff's Counsel is a national law firm that has substantial experience litigating securities class action lawsuits. *See* Wilson Decl., Ex. 2. Likewise, the Muckleroy Firm has substantial complex litigation experience and has served the Class ably as Liaison Counsel. *See* Muckleroy Decl.; ECF No. 243-3. Defendants were also represented by highly reputable firms.

U.S. Plaintiff's Counsel, having carefully considered and evaluated the relevant legal authorities and evidence to support the claims asserted against Defendants, the likelihood of prevailing on these claims, the risk, expense, and duration of continued litigation, and the likelihood of subsequent appellate proceedings even if U.S. Plaintiff prevailed at trial, concluded that settlement here is a favorable result for the U.S. Settlement Class. *See* Wilson Decl. ¶¶ 57-58. Thus, since "[b]oth Parties are represented by experienced counsel[,] . . . their mutual desire to adopt the terms of the proposed settlement, while not conclusive, is entitled to [a] great deal of weight." *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007). U.S. Plaintiff's Counsel has been unyielding in its belief that this case has substantial value and did not recommend settlement until what it considered to be a fair and adequate offer was made.

**8. The Reaction of the Class**

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class [action settlement] are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). "[T]he willingness of the overwhelming majority of the class to approve the offer and remain part of the class presents at least some objective positive commentary as to its fairness." *In re Celera Corp. Sec. Litig.*, 2015 WL 7351449, at *7 (N.D. Cal. Nov. 20, 2015).

To date, a total of 11,307 copies of the U.S. Notice and U.S. Claim Form have been mailed to potential U.S. Settlement Class members and nominees, and the U.S. Summary Notice was published in *Investor's Business Daily* and transmitted over *GlobeNewswire* on November 27, 2023. *See* Wilson Decl. ¶¶ 8, 68. Despite this large number of potential U.S. Settlement Class Members, no objections or requests for exclusion have been received. Thus, although the time for objections and exclusions has not yet expired, the reaction of the U.S. Settlement Class so far confirms the adequacy of the Settlement. *See id.* ¶¶ 73, 80; *see also Zynga*, 2016 WL 537946, at *14 (stating that a low number of exclusions supports a settlement's reasonableness).

## II. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

The Court has broad discretion in approving a plan of allocation. "Approval of a plan of allocation of settlement proceeds in a class action under FRCP 23 is governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable, and adequate." *In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *18 (C.D. Cal. July 28, 2014). "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5159441, at *6 (N.D. Cal. Sept. 2, 2015).

In developing the U.S. Plan of Allocation, U.S. Plaintiff enlisted the help of a damages consultant who is familiar with the damage issues in the U.S. Action, as well as the help of the U.S. Claims Administrator which has experience implementing plans of allocation in securities class actions. *See* Wilson Decl. ¶ 79. The U.S. Plan of Allocation's objective is to distribute a *pro rata* share of the U.S. Net Settlement Fund to Authorized U.S. Claimants based upon their claimed losses consistent with the AC's allegations. *See id*. ¶¶ 76, 78-79. Specifically, after Authorized U.S. Claimants submit their U.S. Claim Forms and supporting documentation, the U.S. Claims Administrator will calculate their recognized loss according to a formula that will take into account when and at what price they purchased Tahoe common stock. *See id*. ¶ 78.

Thus, "the plan allocates the settlement fund proportional to the actual injury of each class member. Accordingly, the plan of allocation is fair, reasonable and adequate." *Patel v. Axesstel, Inc.*, 2015 WL 6458073, at *7 (S.D. Cal. Oct. 23, 2015); *see also Heritage*, 2005 WL 1594403, at *11 ("[A] plan of allocation . . . fairly treats class members by awarding a *pro rata* share to every Authorized Claimant, [even as it] sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue.").

The terms of the U.S. Plan of Allocation were fully disclosed in the U.S. Notice that was mailed to 11,307 potential U.S. Class Members and nominees and posted on the U.S. Settlement website. *See* Wilson Decl. ¶¶ 8, 67, 70-71, 80. While U.S. Class Members have until January 18,

2024 to object, there have been no objections to the Plan to date. *See id.* ¶¶ 72-73, 80. Thus, U.S. Plaintiff respectfully requests that the Court approve the U.S. Plan of Allocation as fair, reasonable, and adequate.

## III. THE NOTICE PROGRAM SATISFIES RULE 23, THE PSLRA, AND DUE PROCESS

Notice of a class action settlement must meet the requirements of Rule 23, the PSLRA, and the due process clause of the United States Constitution. Rules 23(c)(2)(B) and 23(e)(1)(B) require that the Court direct to class members "the best notice that is practicable under the circumstances" and "in a reasonable manner." The PSLRA and the due process clause impose similar requirements. *See* PA Mot. 21-23.

The U.S. Court preliminarily approved the form, content, and method of dissemination of the notices provided to potential U.S. Settlement Class Members. *See* U.S. PA Order at ¶ 14. Pursuant to the U.S. Preliminary Approval Order, the U.S. Notice and U.S. Proof of Claim Form have been mailed to 11,307 potential U.S. Settlement Class Members and nominees beginning on November 17, 2023. *See* Sullivan Decl. ¶¶ 2-10. The day prior, the U.S. Notice and U.S. Claim Form were also made available on the U.S. Settlement website, along with the Stipulation and its exhibits, and the U.S. Preliminary Approval Order. *See id.* at ¶ 15. The U.S. Summary Notice was published in *Investor's Business Daily* and posted by *GlobeNewswire* on November 27, 2023. *See id.* at ¶ 12. Additionally, Epiq has set up a toll-free telephone helpline to accommodate potential U.S. Settlement Class Members who have questions regarding the Settlement. *See id.* at ¶¶ 13-14.

As described in the U.S. Preliminary Approval Motion, the U.S. Notice included the information required by Rule 23, the due process clause, and the PSLRA. *See* PA Motion 21-23 (describing the contents of the U.S. Notice).

Courts in this Circuit have routinely found that this method of mailing, publication, and Internet notice satisfies the applicable notice standards in similar class actions. This manner of providing notice represents the best notice practicable under the circumstances, is typical of the

notice given in other class actions, and satisfies the requirements of Rule 23, the PSLRA, and due process. *See, e.g., Celera*, 2015 WL 7351449, at *5 (finding a similar notice plan appropriate).

Thus, U.S. Plaintiff respectfully requests that the U.S. Court find the notice program satisfies the requirements of Rule 23, the PSLRA, and due process.

## IV. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Pursuant to the U.S. Preliminary Approval Order, the U.S. Court conditionally certified the Class for Settlement purposes. *See* PA Order at ¶ 2. Since the entry of that Order, no circumstances have changed to alter the propriety of the Court's certification and appointments. *See In re Bear Stearns Cos., Inc. Sec., Derivative, and ERISA Litig.*, 909 F. Supp. 2d 259, 264 (S.D.N.Y. 2012) (certifying a settlement class where there had been no material changes since the court preliminarily certified the class). Thus, pursuant to Rules 23(a) and (b)(3), and for reasons set forth below and in further detail on pages 17-21 of the U.S. Preliminary Approval Motion, U.S. Plaintiff respectfully requests that the Court grant final certification of the following U.S. Settlement Class for purposes of Settlement only:

> All Persons who purchased or otherwise acquired Tahoe common stock in the United States or on the NYSE between April 3, 2013 and August 24, 2017, inclusive, and who suffered damages thereby. Stocks with the ticker symbol TAHO will be presumed to meet this definition. Excluded from the U.S. Settlement Class are the Company, its officers and directors, employees, affiliates, legal representatives, heirs, predecessors, successors, and assigns, and any entity in which the Company has a controlling interest or of which the Company is a parent or subsidiary. Also excluded from the U.S. Settlement Class will be any Person who or which timely and validly seeks exclusion from the U.S. Settlement Class.

Stipulation ¶ 1.uuu.

U.S. Plaintiff also respectfully requests that the U.S. Court appoint Ms. Huynh as U.S. Settlement Class Representative, the Faruqi Firm as U.S. Settlement Class Counsel, and the Muckleroy Firm as U.S. Liaison Class Counsel.

## CONCLUSION

For the reasons stated above, U.S. Plaintiff respectfully requests that the Court: (a) grant final approval of the proposed U.S. Settlement; (b) find that the form and manner of giving notice of the U.S. Settlement to the U.S. Settlement Class satisfied due process, Rule 23, and the PSLRA;

(c) certify the U.S. Settlement Class for settlement purposes; (d) appoint U.S. Plaintiff as U.S. Settlement Class Representative, the Faruqi Firm as U.S. Settlement Class Counsel, and the Muckleroy Firm as U.S. Liaison Class Counsel for settlement purposes; and (e) grant approval of the U.S. Plan of Allocation.

Dated: December 14, 2023

Respectfully submitted,

By: /s/ James M. Wilson, Jr.

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*Attorneys for Lead Plaintiff Tiffany Huynh, as executor for the estate of Kevin Nguyen*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2023, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

By: /s/ James M. Wilson, Jr.
James M. Wilson, Jr.