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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re LEAPFROG ENTERPRISES, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Master File No. 3:15-cv-00347-EMC CLASS ACTION LEAD PLAINTIFF'S NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: March 15, 2018 Time: 1:30 p.m. Courtroom: 5, 17th Floor Judge: Hon. Edward M. Chen

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on March 15, 2018, at 1:30 p.m., or as soon thereafter as it may be heard, in the Courtroom of the Honorable Edward M. Chen, United States District Judge at the United States District Court for the Northern District of California, Courtroom 5, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Lead Plaintiff KBC Asset Management NV ("KBC" or "Lead Plaintiff"), on behalf of itself and all members of the proposed Settlement Class, will respectfully move this Court for an Order, pursuant to Rule 23 of the Federal Rules of Civil Procedure: (i) granting preliminary approval of the proposed Settlement; (ii) preliminarily certifying the Settlement Class for settlement purposes only; (iii) preliminarily appointing Lead Plaintiff as Class Representative and Lead Counsel as Class Counsel for the Settlement Class; (iv) approving the form and substance of the proposed long-form notice, proof of claim, and publication notice, as well as the proposed methods of disseminating notice to the Settlement Class; (v) scheduling a date for the final settlement hearing and scheduling various deadlines relevant thereto; and (vi) providing such other and further relief as this Court deems just and proper. Defendants do not oppose this motion.

This motion is supported by the following memorandum of points and authorities, the accompanying Declaration of Willow E. Radcliffe in Support of Lead Plaintiff's Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement ("Radcliffe Decl.") and the exhibits attached thereto, including the Stipulation of Settlement, dated February 22, 2018 ("Stipulation"), which is annexed as Exhibit 1, and the Declaration of Michael Joaquin Regarding Notice Plan ("Joaquin Decl.") and the exhibit attached thereto.[1]

A proposed Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement

[1] All capitalized terms used herein are defined in the Stipulation and have the same meanings as set forth therein. All references to "Ex. ___" herein are references to exhibits attached to the Radcliffe Decl.

("Preliminary Approval Order"), with annexed exhibits, which was negotiated by the Parties, is also submitted herewith.

STATEMENT OF ISSUES TO BE DECIDED

(1) Should the Court grant preliminary approval of the proposed Settlement on the terms set forth in the Stipulation?

(2) Should the Court preliminarily certify, for purposes of settlement only, a class of all persons and entities that purchased or acquired LeapFrog common stock between May 5, 2014 and June 11, 2015, inclusive (the "Settlement Class")?

(3) Should the Court appoint Lead Plaintiff as Class Representative and Lead Counsel as Class Counsel for the Settlement Class?

(4) Should the Court approve the form and substance of the proposed Notice of Proposed Settlement of Class Action ("Settlement Notice"), Proof of Claim and Release form ("Proof of Claim"), and the Summary Notice ("Summary Notice"), appended as Exhibits A-1 through A-3 to the proposed Preliminary Approval Order, as well as the manner of notifying the Settlement Class of the proposed Settlement?

(5) Should the Court schedule a hearing to determine whether the Settlement and Plan of Allocation should be finally approved and to consider Lead Counsel's application for an award of attorneys' fees and payment of expenses ("Settlement Hearing")?

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Lead Plaintiff, through its counsel, Motley Rice LLC ("Motley Rice") and Robbins Geller Rudman & Dowd LLP ("Robbins Geller," and together with Motley Rice, "Lead Counsel"), submits this memorandum of points and authorities in support of its unopposed motion, pursuant to Federal Rules of Civil Procedure 23(a), (b)(3), and (e), for preliminary approval of a proposed class action settlement (the "Settlement") in the amount of $5,500,000 in cash, pursuant to the terms set forth in the Stipulation. Lead Plaintiff entered into the Stipulation with each of the Defendants in the Action: LeapFrog Enterprises, Inc. ("LeapFrog" or the "Company"), John Barbour and Raymond L. Arthur (the "Individual Defendants," and with LeapFrog, the "Defendants").

Lead Plaintiff respectfully submits that the Settlement is a very good result for the Settlement Class and should be preliminarily approved by the Court. The decision to settle was informed by a comprehensive investigation, fact and expert discovery, and two rounds of mediated in-person, and arm's-length negotiations. The mediation sessions were conducted by the Honorable James Ware (Ret.), a former District of Northern California judge and well-respected complex litigation

mediator. For the reasons stated herein, Lead Plaintiff respectfully requests that the Court grant this motion.

A. Procedural Background

The initial class action complaint was filed on January 23, 2015, alleging that Defendants violated the federal securities laws. ECF No. 1. On March 24, 2015, four separate movants filed motions seeking to be appointed as lead plaintiff and for approval of their selection of counsel. ECF Nos. 17-23. On May 5, 2015, the Court issued an order appointing KBC as lead plaintiff and approving its selection of Motley Rice and Robbins Geller as co-lead counsel. ECF No. 43.

On July 10, 2015, Lead Plaintiff filed the Corrected Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("CAC"), alleging violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act"). ECF No. 52.

The CAC was based upon Lead Counsel's extensive factual investigation, which included, among other things, the review and analysis of: (i) press releases, news articles, transcripts, and other public statements issued by or concerning LeapFrog and the Individual Defendants; (ii) research reports issued by financial analysts concerning LeapFrog's business; (iii) reports filed publicly by LeapFrog with the U.S. Securities and Exchange Commission (the "SEC"); (iv) an investigation conducted by and through Lead Plaintiff's attorneys; (v) news articles, media reports, and other publications concerning the electronic toys and content industry and markets; and (vi) other publicly available information and data concerning LeapFrog, its securities, and the markets therefor.

Defendants moved to dismiss the CAC on July 24, 2015. ECF Nos. 53-54. Following briefing, the Court heard argument on October 8, 2015, during which it indicated it would be likely to grant Defendants' motion and offered Lead Plaintiff the opportunity to file an amended complaint in the attempt to cure the deficiencies identified. ECF No. 63. In response to the Court's suggestion, Lead Plaintiff filed the First Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("FAC") on December 4, 2015. ECF No. 70. Defendants moved to dismiss the FAC on January 15, 2016. ECF Nos. 72-73. Lead Plaintiff opposed the motion. ECF Nos. 75-78. The Court heard argument on the motion to dismiss the FAC on April 11, 2016. ECF No. 84.

The Court granted Defendants' motion to dismiss in full on August 2, 2016. ECF No. 88. Lead Plaintiff filed a motion for leave to file a motion for reconsideration of the order dismissing the FAC on August 19, 2016. ECF Nos. 90-91. The Court denied Lead Plaintiff's request on August 31, 2016. ECF No. 93.

On September 20, 2016, Lead Plaintiff filed the Second Amended Consolidated Class Action Complaint for Violation of the Securities Laws ("SAC") against Defendants. ECF No. 97. On November 4, 2016, Defendants moved to dismiss the SAC. ECF Nos. 100-102. The Court heard argument on Defendants' motion to dismiss the SAC on February 9, 2017. ECF No. 113. On February 24, 2017, the Court granted in part and denied in part Defendants' motion to dismiss. ECF No. 117. In so ruling, the Court effectively reduced the pleaded class period from May 5, 2014, to June 11, 2015, inclusive, to January 23, 2015, to June 11, 2015, inclusive. On March 24, 2017, Defendants filed their answer to the SAC. ECF No. 118.

On July 5, 2017, Defendants filed a motion for leave to file a motion for reconsideration of the February 24, 2017 order granting in part and denying in part Defendants' motion to dismiss the SAC. ECF No. 131. The Court denied Defendants' motion on August 10, 2017. ECF No. 137.

B. Discovery

Following the partial denial of Defendants' motion to dismiss the SAC, the parties proceeded with discovery. Lead Plaintiff served requests for production of documents on both Defendant LeapFrog and the Individual Defendants. Lead Plaintiff also served document subpoenas on third-party entities, including Duff & Phelps Corporation, which performed valuation analyses on LeapFrog; Morgan Stanley & Co., LLC, which assisted LeapFrog in marketing itself to potential acquirers; and PricewaterhouseCoopers LLP, which was LeapFrog's auditor. On April 16, 2017, the Court ordered pre-mediation discovery and the parties submitted an agreed-upon Joint Pre-Mediation Discovery Plan. ECF Nos. 123, 127. In total, Lead Plaintiff's counsel received, reviewed, and analyzed more than 13,700 pages of documents produced by Defendants and third-parties, including hundreds of spreadsheets documenting complex accounting processes. Lead Plaintiff also served 42 requests for admission on Defendants.

In addition, Lead Plaintiff responded to 19 interrogatories and 41 requests for production of documents from Defendants, and produced 4,417 pages of responsive documents. Moreover, KBC's corporate representative flew from Brussels, Belgium, to San Francisco, California, to participate in the first mediation session.

During fact discovery, the Parties also required Court assistance to resolve several discovery disputes. On July 28, 2017, the Court ordered that Defendants were not permitted to stay discovery pursuant to their motion for leave to file a motion for reconsideration. ECF No. 135. On September 28, 2017, the Court granted Defendants' request to bifurcate discovery, but allowed Lead Plaintiff to seek discovery from five employees of the Company, and to proceed with third-party discovery. ECF No. 153.

C. Class Certification

On November 7, 2017, Lead Plaintiff filed its motion for class certification and accompanying memoranda and declarations, including an expert report on market efficiency and damages methodology prepared by Prof. Steven P. Feinstein, Ph.D., CFA. ECF Nos. 158-160. Following the agreement to settle the Action, the Parties stipulated – and the Court approved – that class certification briefing and the scheduled hearing be vacated pending a further order by the Court. ECF No. 163.

D. Settlement Discussions

On August 30, 2017, the Parties attended an in-person mediation with Judge Ware (Ret.). The mediation was preceded by the submission of a mediation statement by each party to Judge Ware (Ret.), and involved a protracted effort to settle the claims. Although the Parties were unable to reach an agreement, Judge Ware (Ret.) continued his efforts to facilitate discussions among the Parties following the mediation. The Parties attended a second in-person mediation conducted by Judge Ware (Ret.) on November 29, 2017. As a result of the mediation on November 29, 2017, the Parties reached an agreement-in-principle to settle the Action.

E. The Proposed Settlement

Pursuant to the proposed Settlement, Defendants shall cause their insurers to pay the $5,500,000 Settlement Amount into an escrow account within fifteen (15) business days after

(i) entry of the Preliminary Approval Order, and (ii) providing LeapFrog with payment instructions. In exchange for this payment, upon the Effective Date of the Settlement, Lead Plaintiff and the Settlement Class will release all Released Claims against each and every one of the Released Defendant Parties and shall forever be barred and enjoined from commencing, instituting, prosecuting, or maintaining any and all of the Released Claims against any and all of the Released Defendant Parties. The definitions of Released Claims and Unknown Claims have been tailored to release claims that relate to transactions in LeapFrog common stock that were raised or could have been raised by Settlement Class Members in the Action. *See* Stipulation, ¶¶1.25 and 1.38.

F. Proposed Schedule of Events

Lead Plaintiff respectfully proposes the following schedule for the various Settlement-related events:

Deadline for mailing individual Settlement Notices and Proofs of Claim (the "Notice Date")	***15 business days after entry of the Preliminary Approval Order***
Deadline for publication of Summary Notice in *The Wall Street Journal* and transmission over *Business Wire*	***Within 14 calendar days of the Notice Date***
Deadline for filing motions in support of the Settlement, the Plan of Allocation, and Lead Counsel's application for an award of attorneys' fees and expenses	***No later than 35 calendar days before the Settlement Hearing***
Deadline for submission of requests for exclusion from the Settlement Class, or objections to the Settlement, Plan of Allocation, or the request for attorneys' fees and expenses	***No later than 21 calendar days before the Settlement Hearing***
Deadline for filing reply papers in support of the Settlement, the Plan of Allocation, and/or Lead Counsel's application for an award of attorneys' fees and expenses	***No later than 14 calendar days before the Settlement Hearing***
Deadline for submission of Proofs of Claim	***Postmarked or electronically submitted no later than 120 calendar days from the Notice Date***
Settlement Hearing	***At the Court's convenience at least 90 days from entry of the Preliminary Approval Order***

The foregoing schedule is similar to schedules used and approved by numerous courts in class action settlements and complies with the Ninth Circuit's ruling in *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010) (requiring that fee motion be made available to the class before the deadline for objecting to the fee).

II. ARGUMENT

A. The Settlement Merits Preliminary Approval

As a matter of public policy, settlement is a strongly favored method for resolving disputes, especially in complex class actions. *See, e.g.*, *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."); *Grant v. Capital Mgmt. Servs., L.P.*, No. 10-cv-2471-WQH (BGS), 2013 WL 6499698, at *2 (S.D. Cal. Dec. 11, 2013) ("'Voluntary conciliation and settlement are the preferred means of dispute resolution in complex class action litigation.'").[2]

Federal Rule of Civil Procedure 23 requires court approval for any settlement of a class action. Approval of class action settlements normally proceeds in two stages: (i) preliminary approval, followed by notice to the class; and (ii) final approval. *See, e.g.*, *Noll v. eBay, Inc.*, 309 F.R.D. 593, 602 (N.D. Cal. 2015); *West v. Circle K Stores, Inc.*, No. CIV.S-04-0438 WBS (GGH), 2006 WL 1652598, at *2 (E.D. Cal. June 13, 2006); *Manual for Complex Litigation* §13.14 (4th ed. 2004). By this motion, Lead Plaintiff requests that the Court take the first step in the approval process: preliminary approval of the Settlement.

The preliminary approval standard involves "both a procedural and a substantive component." *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006). As the court in *Young* explained:

> If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing. . . .

[2] Emphasis is added and citations are omitted throughout unless otherwise stated.

Id. (citing *Manual for Complex Litigation* §30.44 (2d ed. 1985)); *see also In re Zynga Inc. Sec. Litig.*, No. 12-cv-04007-JSC, 2015 WL 6471171, at *8-*11 (N.D. Cal. Oct. 27, 2015) (granting preliminary approval after finding proposed settlement was "non-collusive," "lacks obvious deficiencies," and was "within the range of possible approval").

A court "'need not conduct a full settlement fairness appraisal before granting preliminary approval.'" *Grant*, 2013 WL 6499698, at *5. "The Court cannot fully assess all of [the] fairness factors until after the final approval hearing; thus, 'a full fairness analysis is unnecessary at this stage.'. . . Instead, 'the settlement need only be ***potentially*** fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval after such time as any party has had a chance to object and/or opt out.'"[3] *Zynga*, 2015 WL 6471171, at *8 (emphasis in original).

B. The Settlement Is the Result of a Thorough, Rigorous, and Arm's-Length Process

There is an initial presumption that a proposed settlement is fair and reasonable when it is the "product of arms-length negotiations." *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 1991529, at *6 (N.D. Cal. June 30, 2007); *see also Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair."), *aff'd*, 151 F.3d 1234 (9th Cir. 1998). Here, the Parties have vigorously investigated and litigated the Action since its inception and the Settlement was achieved only after a thorough arm's-length mediation process under the supervision of an experienced mediator with considerable knowledge and expertise in the field of federal securities law, including securities fraud class actions under the 1934 Act.

[3] In connection with final approval of the Settlement, the Court will be asked to review the following factors identified by the Ninth Circuit: "'(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.'" *Zynga*, 2015 WL 6471171, at *8 (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)).

Courts have recognized that "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007). Here, Judge Ware (Ret.) played an active role in addressing the relevant issues with the Parties and bringing about the Settlement. Indeed, "[t]he use of a mediator and the presence of discovery 'support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.'" *Zynga*, 2015 WL 6471171, at *9 (quoting *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012)).

Before and during the mediation sessions, the strengths and weaknesses of Lead Plaintiff's and Defendants' respective claims and defenses were fully explored by the Parties. Lead Counsel developed a deep understanding of the facts of the case and merits of the claims through their analysis of, *inter alia*: (i) publicly available information regarding the Company; (ii) substantive briefing on Defendants' motions to dismiss and motion for reconsideration; (iii) discovery; (iv) consultations with experts in damages and loss causation as well as in-house forensic accountants; and (v) frank discussions with the mediator during the mediation process. With an informed understanding, Lead Plaintiff agreed to the Settlement. There has been no collusion.

Additionally, throughout the Action, Lead Plaintiff had the benefit of the advice of knowledgeable counsel with extensive experience in shareholder class action litigation and securities fraud cases. Motley Rice and Robbins Geller are among the most experienced and skilled firms in the securities litigation field, and have long and successful track records in such cases. *See* Radcliffe Decl., Exs. 2-3. Motley Rice has served as lead counsel in a number of high profile securities fraud cases and class action litigation. *See, e.g.*, *In re Barrick Gold Sec. Litig.*, No. 1:13-cv-03851 (RPP) (S.D.N.Y.) ($140 million recovery); *Bennett v. Sprint Nextel Corp.*, No. 2:09-cv-02122-EFMKMH (D. Kan.) ($131 million recovery); *Minneapolis Firefighters' Relief Ass'n v. Medtronic, Inc.*, No. 08-6324 (PAM/AJB) (D. Minn.) ($85 million recovery). Likewise, Robbins Geller has served as lead counsel in scores of securities class actions throughout the United States, and has recovered billions of dollars for investors. *See, e.g.*, *Jaffe v. Household Int'l Inc.*, No. 02-C-05893 (N.D. Ill.) ($1.575 billion recovery); *Luther v. Countrywide Fin. Corp.*, No. 12-cv-05125 (C.D. Cal.) ($500 million

recovery); *Jones v. Pfizer Inc.*, No. 1:10-cv-03864 (S.D.N.Y.) ($400 million recovery); *Nieman v. Duke Energy Corp.*, No. 3:12-cv-00456 (W.D.N.C.) ($146.25 million recovery).

Courts give considerable weight to the opinion of experienced and informed counsel. *See, e.g.*, *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS), 2008 WL 5382544, at *4 (N.D. Cal. Dec. 22, 2008) ("[S]ignificant weight should be attributed to counsel's belief that settlement is in the best interest of those affected by the settlement."); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (recommendation of counsel weighed in favor of settlement given their familiarity with the dispute and their significant experience in securities litigation). Lead Counsel's belief in the fairness and reasonableness of the Settlement warrants a presumption of reasonableness.

C. The Settlement Is Well Within the Range of Reasonableness

"[A]t this preliminary approval stage, the court need only 'determine whether the proposed settlement is within the range of possible approval.'" *West*, 2006 WL 1652598, at *11. This Settlement is well within the range of reasonableness for several reasons.

First, the fairness and adequacy of the Settlement is underscored by taking into account the amount of estimated damages recovered and the obstacles the Settlement Class would face in ultimately succeeding on the merits, as well as the expense and likely litigation. *See, e.g.*, *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Lead Plaintiff's damages expert has estimated that if liability were to be established with respect to all of the claims upheld by the Court, the maximum aggregate damages recoverable at trial under the upheld Class Period would likely total $14.7 million. This damages figure reflects the estimated damages that Lead Plaintiff's expert believes could be attributable to the alleged fraud for the upheld period of January 23, 2015 through June 11, 2015. As a percentage of these maximum estimated damages, the $5.5 million Settlement represents a recovery of more than 35% for that period.[4] Since the passage of the Private Securities

[4] Lead Plaintiff's expert estimates that the maximum recoverable damages under the alleged Class Period of May 5, 2014, through June 11, 2015, are $89 million. The Settlement would thus still represent a significant recovery of 6.2% of the maximum estimated damages. Under the Plan of Allocation, however, the period of May 5, 2014 through January 22, 2015 is compensated at a significant discount considering that the Court dismissed claims for that period (*see* §II.E hereof),

Litigation Reform Act of 1995 ("PSLRA"), courts have approved settlements that recovered a much smaller percentage of maximum damages. *See, e.g.*, *McPhail v. First Command Fin. Planning, Inc.*, No. 05-cv-179-IEG- JMA, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding settlement recovering 7% of estimated damages was fair and adequate); *Omnivision*, 559 F. Supp. 2d at 1042 (settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *Int'l Bd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving settlement recovering about 3.5% of the maximum damages that plaintiffs believe could be recovered at trial and noting that the amount is within the median recovery in securities class actions settled in the last few years). According to NERA, median securities class action settlements as a percentage of investor losses has ranged from 1.3% to 2.7% between 2008 and 2017.[5] The proposed Settlement in this Action dwarfs those percentages.

Defendants vigorously challenged Lead Plaintiff's damage theories, and would likely have argued that there can be no loss causation and therefore no legally cognizable losses. Specifically, because LeapFrog's stock price declined in the wake of the Company's announcement of its disappointing fiscal year 2015 financial results, an announcement that also contained substantial commentary on issues not directly related to taking a charge for LeapFrog's long-lived asset impairment, Defendants would have argued that facts other than the announcement of the impairment were the proximate cause of Lead Plaintiff's losses. If this argument prevailed at summary judgment or trial, the Settlement Class would have recovered substantially less, or nothing.

The Settlement also represents a prompt and substantial tangible recovery, without the considerable risk, expense, and delay of prevailing on summary judgment motions, trial, and post-trial litigation. *See, e.g.*, *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015)

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and maximum estimated damages for the entirety of the Class Period, including that discount, is $15.6 million.

[5] Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review*, at 38, Figure 29, *available* at http://www.nera.com/content/dam/nera/publications/2018/PUB_Year-End-Trends_Report_0118_final.pdf.

("'Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'"); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 158947, at *4 (W.D. Wash. July 28, 1988) (finding settlement to be in the "best interests of the class . . . before it is subjected further to the vagaries of litigation"). While Lead Plaintiff believes it could have succeeded in establishing each of the elements of its claims, it faced considerable obstacles in continuing the Action.

For instance, if the case were to proceed, Lead Plaintiff would have had to argue, and the Court would have ruled on, class certification, *Daubert*, and summary judgment motions. There is no guarantee that Lead Plaintiff would prevail upon these motions, and, even if it did, the Court's rulings would affect how the case would be presented to the jury. Among other things, Defendants would likely continue to assert that the allegedly false and misleading statements are neither false, misleading, nor material. Defendants would also continue to argue that they lacked the requisite state of mind because their determination that LeapFrog's long-lived assets were not impaired was based on a third-party valuation company's analysis, and therefore that Defendants lacked scienter. In addition, because proper accounting treatments are not set in stone but rather are subject to reasonable interpretation, Lead Plaintiff would have been required to prove that Defendants' long-lived asset determination were beyond the range of acceptable accounting treatments, and the parties' contentions on this point (and others) would have largely been reduced to a battle of experts with the risk that the jury would have found Defendants' expert more credible. These risks aside, the trial of Lead Plaintiff's claims would inevitably be complex and long, and even a favorable verdict would likely spur a lengthy post-trial and appellate process.

The risks for the portion of the Class Period that the Court dismissed – May 5, 2014, through January 22, 2015 – were particularly high. With respect to LeapFrog's alleged false forecasts, Lead Plaintiff would have had to overcome the protections of the PSLRA's Safe Harbor and the heightened scienter standard for forward-looking statements. And as to the alleged failure to test for goodwill impairment, Lead Plaintiff would have had to overcome the Ninth Circuit's recent decision in *City of Dearborn Heights Act 345 Police & Fire Retirement System v. Align Technology, Inc.*, 865 F. 3d 605 (9th Cir. 2017), addressing goodwill claims. In particular, this Court found that in the

context of this case, the positive factor of the upcoming holiday season mitigated Lead Plaintiff's claims regarding LeapFrog's alleged failure to test for and record a goodwill impairment charge. *See, e.g.*, ECF No. 137 at 2.

Accordingly, in light of the substantial risks and expense of continued litigation, and compared to the certain and prompt recovery of $5,500,000, the Settlement is a result well within the range of reasonableness. *See, e.g.*, *Orvis v. Spokane Cty.*, 281 F.R.D. 469, 475 (E.D. Wash. 2012) ("[T]he proposed benefit to class members appears to the Court to be within the range of fair and reasonable compensation given the uncertain outcome of the legal arguments and the risks and probable delay for Plaintiff and class members if litigation were to proceed toward trial"); *Lo v. Oxnard European Motors, LLC*, No. 11CV1009 JLS (MDD), 2011 WL 6300050, at *5 (S.D. Cal. Dec. 15, 2011) (addressing preliminary approval and stating that "'[c]onsidering the potential risks and expenses associated with continued prosecution of the Lawsuit, the probability of appeals, the certainty of delay, and the ultimate uncertainty of recovery through continued litigation,' the Court finds that, on balance, the proposed settlement is fair, reasonable, and adequate.").

D. The Proposed Notice Program Satisfies Rule 23(e), Due Process, and the PSLRA's Requirements

Lead Counsel propose that notice be provided to the Settlement Class in the form of the mailed Settlement Notice and published Summary Notice, attached as Exhibits A-1 and A-3 to the proposed Preliminary Approval Order. Notice to the Settlement Class in the form and in the manner set forth in the proposed Preliminary Approval Order will fulfill the requirements of due process and comply with the Federal Rules of Civil Procedure and the PSLRA. Lead Counsel have also reviewed the Northern District of California's settlement guidelines and this Court's orders and approved notices in *In re Vocera Communications Inc., Securities Litigation*, No. 13-cv-03567-EMC (N.D. Cal.) and *Westley v. Oclaro, Inc.*, No. C11-02448-EMC (N.D. Cal.) for guidance.

Notice must be given to class members in the most practicable manner under the circumstances and must describe "'the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *See, e.g.*, *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962

(9th Cir. 2009)); *see also* Fed. R. Civ. P. 23(c)(2)(B). Lead Plaintiff proposes to provide Settlement Class Members notice in two ways: (i) by first-class mailing of the long-form Settlement Notice, addressed to all Settlement Class Members who can reasonably be identified and located; and (ii) by publication of the Summary Notice in *The Wall Street Journal* and its transmission over *Business Wire*. *See* Joaquin Decl., ¶¶4-11; *In re HP Sec. Litig.*, No. 3:12-cv-05980-CRB, 2015 WL 4477936, at *2 (N.D. Cal. July 20, 2015) (finding the procedures for notice, including mailing individual notice and publication notice satisfy Rule 23, the PSLRA, and constitute the best notice practicable). The Settlement Notice, along with other relevant documents, will also be posted on the case website. Joaquin Decl., ¶15.

The form and substance of the notice program are also sufficient. The proposed forms of notice describe the terms of the Settlement and the Settlement Class' recovery; the considerations that caused Lead Plaintiff and Lead Counsel to conclude that the Settlement is fair, adequate, and reasonable; the maximum attorneys' fees and expenses that may be sought; the procedure for requesting exclusion from the Settlement Class;[6] the procedure for objecting to the Settlement; the procedure for participating in the Settlement; the proposed Plan of Allocation; and the date and place of the Settlement Hearing. *See Ching v. Siemens Indus., Inc.*, No. C 11-4838 MEJ, 2013 WL 6200190, at *6 (N.D. Cal. Nov. 27, 2013) (approving notice that "adequately describes the nature of the action, summarizes the terms of the settlement, identifies the class and provides instruction on how to opt out and object, and sets forth the proposed fees and expenses to be paid to Plaintiff's counsel and the settlement administrator in clear, understandable language").

The Settlement Notice also satisfies the PSLRA's separate disclosure requirements by, *inter alia*, stating: (i) the amount of the Settlement determined in the aggregate and on an average per share basis; (ii) that the Parties do not agree on the average amount of damages per share that would

[6] LeapFrog may terminate the Settlement if a certain threshold of exclusion requests is received, pursuant to the Parties' confidential Supplemental Agreement Regarding Requests for Exclusion ("Supplemental Agreement"), dated February 22, 2018. *See* Stipulation, ¶11.3. The Supplemental Agreement will be filed with the Court *in camera* given its confidential nature. *See, e.g.*, *Nisch v. Dreamworks Animation Skg Inc.*, No. 14-CV-04062-LHK, 2017 U.S. Dist. LEXIS 29920, at *8-*9 (N.D. Cal. Mar. 2, 2017) (granting motion to seal supplemental agreement and noting reasons to maintain confidentiality).

be recoverable in the event Lead Plaintiff prevailed, and stating the issue(s) on which the Parties disagree; (iii) that Lead Counsel intend to make an application for an award of attorneys' fees and expenses (including the amount of such fees and expenses determined on an average per share basis), and a brief explanation of the fees and expenses sought; (iv) the name, telephone number, and address of one or more representatives of counsel for the Settlement Class who will be available to answer questions concerning any matter contained in the Settlement Notice; and (v) the reasons why the Parties are proposing the Settlement. *See* 15 U.S.C. §78u-4(a)(7)(A)-(F). The proposed Settlement Notice contains all of the information required by the PSLRA.[7]

The Notices will, when mailed and published as provided for in the Preliminary Approval Order submitted herewith, fairly apprise Settlement Class Members of the Settlement and their options with respect thereto, and fully satisfy all due process requirements.

Lead Counsel also propose that the Court appoint Gilardi & Co. LLC ("Gilardi") as the Claims Administrator for the Settlement to provide all notices approved by the Court to Settlement Class Members, to process Proofs of Claim, and to administer the Settlement. Gilardi is a recognized leader in legal administration services for class action settlements and legal noticing programs in the country. *See* Joaquin Decl., ¶3. For nearly 30 years, Gilardi has administered some of the largest class actions of all time, including the $7.2 billion settlement in the *Enron* securities litigation and the $1.575 billion settlement in the *Household* securities litigation, among many others. *Id.*

E. Proposed Plan of Allocation

At the Settlement Hearing, the Court will be asked to approve the proposed Plan of Allocation for the Settlement proceeds, which is reflected in full in the Notice. A plan of allocation, which is evaluated separately from the evaluation of the settlement itself, is nonetheless held to the same standard as the settlement, *i.e.*, it must be fair, reasonable and adequate. *Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992). Courts routinely analyze the fairness of the plan of allocation

[7] As set forth in the Settlement Notice, the average recovery per allegedly damaged share of LeapFrog common stock would be approximately $0.125 per share before deduction of Court-approved fees and expenses, such as attorneys' fees and expenses, and approximately $0.083 per allegedly damaged share after deduction of attorneys' fees and expenses.

separately from the settlement. *See In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *5 (N.D. Cal. Nov. 26, 2007) (concluding the proposed settlement to be fair, reasonable and adequate before turning to the review of the plan of allocation).[8]

The Plan of Allocation was drafted in consultation with Lead Plaintiff's damages expert, based on the measure of damages for claims under the 1934 Act. "'[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.'" *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx), 2013 U.S. Dist. LEXIS 100275, at *29 (C.D. Cal. July 9, 2013).

For losses to be compensable damages under the 1934 Act, the disclosure of the allegedly misrepresented information must be the cause of the decline in the price of LeapFrog common stock. In this case, Lead Plaintiff initially alleged that Defendants issued false statements and omitted material facts from May 5, 2014, through June 11, 2015, inclusive (the alleged Class Period), that artificially inflated the price of LeapFrog common stock. The Court, however, effectively limited the Class Period to January 23, 2015, through June 11, 2015, inclusive. Under the Plan of Allocation, taking in the risks related to the litigation, LeapFrog common stock must have been purchased or otherwise acquired during the Class Period and held through the end of trading on May 15, 2015 (Friday). Because of the heightened risks related to the dismissed statements for the time period of May 5, 2014, through January 22, 2015, the Plan of Allocation significantly reduces the compensable loss for this period.

Individual claimants' recoveries will depend on when and how much LeapFrog stock they bought and sold. Eligible claimants will recover their proportioned "*pro rata*" amount of the Net Settlement Fund based on their "Recognized Loss," as set forth in the Plan of Allocation. The Recognized Loss Amounts are based on the amount of artificial inflation allegedly in the prices of

[8] *See also In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 121 (S.D.N.Y. 2009) (noting that the plan of allocation was not a necessary term of the stipulation of settlement and not a condition of the stipulation of settlement).

LeapFrog's common stock. The Claims Administrator will calculate claimants' Recognized Losses using the transactional information provided by claimants in their claim forms. Because most securities are held in "street name" by the brokers that buy them on behalf of clients, the Claims Administrator, Lead Counsel, and Defendants do not have class members' transactional data.

Once the Claims Administrator has processed all submitted claims, distributions will be made to eligible Authorized Claimants whose claims calculate at more than $10.00. After an initial distribution of the Net Settlement Fund, if there is any balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed checks, or otherwise) after at least six (6) months from the date of initial distribution, Lead Counsel will, if feasible and economical, re-distribute the balance among Authorized Claimants who have cashed their checks and would receive at least $10.00. These re-distributions will be repeated until the balance in the Net Settlement Fund is no longer feasible to distribute to Authorized Claimants. Any balance that still remains in the Net Settlement Fund after re-distribution(s), after payment of any outstanding Notice and Administration Expenses or Taxes, will be donated in equal amounts to Bay Area Legal Aid and Consumer Federation of America – both of which have programs that assist consumers facing financial fraud and other unfair treatment. *See* Stipulation, ¶7.10; *see also* https://baylegal.org/what-we-do/stability/consumer-protections/; https://consumerfed.org/issues/consumer-protection/fraud/.

F. Anticipated Legal Fees, Litigation Expenses and Administrative Fees

As set forth in the Settlement Notice, Lead Counsel intend to move for attorneys' fees of 25% of the Settlement Fund and litigation expenses of no more than $275,000. In addition, Lead Plaintiff will request an award not to exceed $5,600.

A 25% fee would amount to $1,375,000, which is substantially less than the time Lead Counsel have expended in this case. The requested fee results in a significant negative "multiplier" to Lead Counsel. The basis of Lead Counsel's fee and expense request will be detailed in their upcoming motion requesting fees and expenses. The bulk of Lead Counsel's expenses are made up of the fees and expenses of experts, investigators and the mediator, as well as for out-of-town travel and legal and factual research charges.

The Claims Administrator currently estimates that Settlement notice and administrative fees and expenses may be approximately $200,000. This estimate assumes that 30,000 notice packets of a certain size (consisting of a Settlement Notice and Proof of Claim) will be mailed and that claims representing 20% to 30% of the notices mailed will be received. Joaquin Decl., ¶¶19-20. In the event that actual experience differs from these assumptions, the administrative fees and expenses incurred in connection with this Settlement will differ from this estimate.

Lead Plaintiff estimates that the Net Settlement Fund will be approximately $3,644,400. This represents $5,500,000 minus approximately $1,855,600 in notice and administration costs, expenses related to taxes, and attorneys' fees and expenses, and Lead Plaintiff's expenses.

III. THE COURT SHOULD PRELIMINARILY CERTIFY THE SETTLEMENT CLASS

A. Standards Applicable to Class Certification

At the Settlement Hearing, the Court will be asked to grant final approval of the Settlement on behalf of the Settlement Class. For that reason, it is appropriate for the Court to consider, at the preliminary approval stage, whether the certification of the Settlement Class is appropriate. *See Jaffe v. Morgan Stanley & Co., Inc.*, No. C 06-3903 (TEH), 2008 WL 346417, at *2 (N.D. Cal. Feb. 7, 2008). Courts have acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). Indeed, in the Ninth Circuit, "'Rule 23 is to be liberally construed in a securities fraud context because class actions are particularly effective in serving as private policing weapons against corporate wrongdoing.'" *In re Cooper Cos. Sec. Litig.*, 254 F.R.D. 628, 642 (C.D. Cal. 2009); *see also In re THQ Inc. Sec. Litig.*, No. CV 00-1783AHM(EX), 2002 WL 1832145, at *2 (C.D. Cal. Mar. 22, 2002) ("'[T]he law in the Ninth Circuit is very well established that the requirements of Rule 23 should be liberally construed in favor of class action cases brought under the federal securities laws.'"). A settlement class, like other certified classes, must satisfy all the requirements of Rule 23(a) and (b). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). Nevertheless, the manageability concerns of Rule 23(b)(3) are not at issue for a settlement class. *See Amchem Prods.*, 521 U.S. at 593 ("Whether

trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested.").

As discussed below and in the filings related to Lead Plaintiff's Notice of Motion and Motion for Class Certification, Appointment of Class Representative, and Approval of Class Counsel (ECF Nos. 158-160), the Action satisfies all the factors for certification. Under Rule 23(a), a class may be certified if: (i) it is so numerous that joinder of all members is impracticable; (ii) there are questions of law and fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class. *See, e.g.*, *Sandoval v. Tharaldson Emp. Mgmt.*, No. EDCV 08-00482-VAP (OPx), 2009 WL 3877203, at *1 (C.D. Cal. Nov. 17, 2009). The proposed class additionally must fall within one of the three categories of class actions defined in Rule 23(b). *See, e.g.*, *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 936 (9th Cir. 2009).

Lead Plaintiff requests that the Court preliminarily certify a Settlement Class of all persons and entities that purchased or acquired the shares of LeapFrog common stock between May 5, 2014 and June 11, 2015, inclusive, excluding those persons and entities expressly identified in ¶1.32 of the Stipulation.

B. The Settlement Class Meets the Requirements of Rule 23(a)

1. Rule 23(a)(1): Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). There is no fixed number of class members which either compels or precludes the certification of a class. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). Indeed, the exact size of the class need not be known so long as "'general knowledge and common sense indicate that [the class] is large.'" *Perez-Funez v. Dist. Dir., I.N.S*, 611 F. Supp. 990, 995 (C.D. Cal. 1984). In securities litigation, courts regularly find the numerosity requirement is satisfied with respect to putative purchasers of nationally traded securities on the volume of outstanding shares. *See Howell v. JBI, Inc.*, 298 F.R.D. 649, 654-55 (D. Nev.

2014) ("in securities cases, when millions of shares are traded during the proposed class period, a court may infer that the numerosity requirement is satisfied"); *Cooper Cos.*, 254 F.R.D. at 634 ("The Court certainly may infer that, when a corporation has millions of shares trading on a national exchange, more than 40 individuals purchased stock over the course of more than a year. It is likely that thousands of people made such purchases.").

Here, there can be no dispute that the Settlement Class satisfies numerosity and consists of (at least) thousands of investors. During the Class Period, LeapFrog had approximately 66 million shares of common stock outstanding and actively trading on the New York Stock Exchange ("NYSE"). *See* Response No. 25, Defendants' Responses & Objections to Plaintiff's First Set of Requests for Admission to Defendants (ECF No. 159-2). Common sense dictates that these shares were purchased by hundreds or thousands of investors, making joinder impracticable.

2. Rule 23(a)(2): Questions of Law or Fact Are Common

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Ninth Circuit construes this requirement "permissively," and has stated that that "[a]ll questions of fact and law need not be common to satisfy the rule." *Hanlon*, 150 F.3d at 1019. "To show commonality, a plaintiff 'need not show . . . that every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2).'" *In re Lending Club Sec. Litig.*, No. C 16-02627 WHA, 2017 WL 4750629, at *4 (N.D. Cal. Oct. 20, 2017) (quoting *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014)). Securities fraud cases have long been found to satisfy the commonality requirement:

> The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the "common question" requirement. Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit.

Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975); *see also Luna v. Marvell Tech. Grp., Ltd.*, No. C 15-05447 WHA, 2017 WL 4865559, at *2 (N.D. Cal. Oct. 27, 2017) ("[L]ead plaintiff's allegations that investors were defrauded by the same misleading statements over the same period of

time, and suffered similar losses as a result are sufficient to fulfill Rule 23(a)'s commonality requirement."); *In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009) ("Repeated misrepresentations by a company to its stockholders satisfy the commonality requirement of Rule 23(a)(2).").

In this case, common questions of both law and fact abound. The central questions – whether Defendants' public statements during the Class Period regarding LeapFrog's business, in particular, Defendants falsely represented that LeapFrog's long-lived assets were not impaired as of December 31, 2014, were false and misleading and whether Defendants acted with the requisite mental state – are the same for all Settlement Class Members.

3. Rule 23(a)(3): Lead Plaintiff's Claims Are Typical of Those of the Settlement Class

Rule 23(a)(3) is satisfied where the claims of the proposed class representatives arise from the same course of conduct that gives rise to the claims of the other class members, and where the claims are based on the same legal theory. "'The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.'" *In re Diamond Foods, Inc.*, 295 F.R.D. 240, 252 (N.D. Cal. 2013). Rule 23(a)(3) does not require plaintiffs to show that their claims are identical on every issue to those of the class, but merely that significant common questions exist. *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 344 (C.D. Cal. 2005). Differences in the amount of damages, the size or manner of purchase, type of purchase, and even the specific documents influencing the purchase will not render the claim atypical in most securities actions. *See Tsirekidze v. Syntax-Brillian Corp.*, No. CV-07-02204-PHX-FJM, 2009 WL 2151838, at *4 (D. Ariz. July 17, 2009).

Here, Lead Plaintiff's claims are typical to those of the other members of the Settlement Class. Like all Settlement Class Members, Lead Plaintiff purchased or acquired LeapFrog common stock during the Class Period and claims to have suffered damages when Defendants' alleged material misstatements and omissions were revealed.

4. Rule 23(a)(4): The Lead Plaintiff Is Adequate

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000) (citing *Hanlon*, 150 F.3d at 1020).

Here, Lead Plaintiff is a sophisticated institutional investor that has and will continue to represent the interests of the Settlement Class fairly and adequately. There is no antagonism or conflict of interest between Lead Plaintiff and the proposed Settlement Class. Lead Plaintiff and members of the Settlement Class share the common objective of maximizing their recovery from Defendants when considering the totality of the relevant circumstances.

In addition, Lead Counsel have extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States.[9] Lead Counsel are well qualified and able to conduct the Action and have ably and effectively represented Lead Plaintiff and the proposed Settlement Class throughout the Action. Therefore, Rule 23(a)(4) is satisfied.

C. The Settlement Class Meets the Requirements of Rule 23(b)(3)

1. Common Questions of Law or Fact Predominate

Rule 23(b)(3) sets forth two requirements, the first being that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. "'When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §1778 (2d ed.

[9] *See* Lead Counsel's Firm Resumes (Exs. 2 and 3).

1986)). The predominance inquiry "'focuses on the relationship between the common and individual issues.'" *Diamond Foods*, 295 F.R.D. at 246. Class certification under Rule 23(b)(3) is proper "when common questions represent a significant portion of the case and can be resolved for all members of the class in a single adjudication." *Id.* (quoting *Hanlon*, 150 F.3d at 1022). The predominance requirement is "readily met" in securities class actions. *Amchem Prods.*, 521 U.S. at 625; *see also Cooper Cos.*, 254 F.R.D. at 632 ("[S]ecurities fraud cases fit Rule 23 'like a glove.'").

Here, common questions of law and fact predominate over individual questions because Defendants' alleged fraudulent statements and omissions affected all Settlement Class Members in the same manner (*i.e.*, through public statements made to the market and documents publicly filed with the SEC). Predominance of common questions generally will be found when, as alleged here, "'many purchasers have been defrauded over time by similar misrepresentations, or by a common scheme to which alleged non-disclosures related.'" *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 492 (C.D. Cal. 2006); *see also In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, No. MDL 901, 1993 WL 144861, at *6 (C.D. Cal. Feb. 26, 1993) ("The Ninth Circuit has repeatedly found that common issues predominate in federal securities actions where the proposed class members have all been injured by the same alleged course of conduct."). Falsity, materiality, and loss causation are common issues to a class because 'failure of proof" of any of these elements "would end the case" for all putative class members. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013); *see also id.* at 467 ("[M]ateriality is a 'common questio[n]' for purposes of Rule 23(b)(3).").

Moreover, class-wide reliance is established in this Action through the application of the "fraud-on-the-market" presumption of reliance in *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988). Application of *Basic* dispenses with the requirement that each Settlement Class Member prove individual reliance on Defendants' alleged misstatements and/or omissions. *See id.* In order to be entitled the *Basic* presumption of reliance, the market for the security must be "efficient." *Id.* at 248. Here, where LeapFrog common shares are traded on NYSE, a national securities exchange, there is sufficient evidence of market efficiency. *See generally* Report on Market Efficiency of Professor Steven P. Feinstein, Ph.D., CFA (ECF No. 159-1).

Lead Plaintiff is also entitled to a presumption of reliance under *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). The *Affiliated Ute* presumption applies to claims "involving primarily a failure to disclose." *Id.* at 153; *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (*Affiliated Ute* presumption applies to Ninth Circuit "cases that primarily allege omissions"). In such cases, "positive proof of reliance is ***not*** a prerequisite to recovery." *Affiliated Ute*, 406 U.S. at 153. Instead, "[a]ll that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of [their] decision." *Id.* at 153-54; *see also Plascencia v. Lending 1st Mortg.*, 259 F.R.D. 437, 447 (N.D. Cal. 2009) (same).

Here, the claims asserted against Defendants are predicated in part upon omissions of material fact which there was a duty to disclose. Defendants allegedly deceived the market by omitting material information, for example, that LeapFrog's long-lived assets were impaired during the Class Period by concealing that LeapFrog's long-lived assets should have been written down by 96% as of F3Q15, but were not until F4Q15. *See* ECF No. 97,¶19. A reasonable investor would have wanted to know this concealed information. A jury presented with these facts could reasonably conclude that Settlement Class Members would not have agreed to purchase LeapFrog common stock at the prices they did if Defendants had clearly disclosed that LeapFrog's long-lived assets were impaired. Lead Plaintiff is therefore entitled to the *Affiliated Ute* presumption to establish reliance.

2. A Class Action Is a Superior Method of Adjudication

Finally, Rule 23(b)(3) also requires that the action be superior to other available methods for the fair and efficient adjudication of the controversy. The rule lists several matters pertinent to this finding: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D); *see also Desai*, 573 F.3d at 937. Each factor weighs in favor of superiority here. *See, e.g., McPhail v. First Command Fin. Planning, Inc.*, 247 F.R.D. 598, 615 (S.D. Cal. 2007) (noting "class action is the superior method for fair and efficient adjudication" because

individual suits would "'clog[ ] the federal courts with innumerable individual suits litigating the same issues repeatedly,'" the plaintiffs assert complex claims that "would be very costly to litigate," and each claim is for a "relatively small amount").

Further, without the settlement class device, Defendants could not obtain a class-wide release, and therefore would have had little, if any, incentive to enter into the Settlement. Certification of a class for settlement purposes will allow the Settlement to be administered in an organized and efficient manner. Accordingly, this Court should preliminarily certify the Settlement Class.

IV. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court issue an order substantially in the form of the proposed Preliminary Approval Order: (a) preliminarily approving the Settlement; (b) preliminarily certifying the Settlement Class; (c) holding that the manner and forms of notice set forth in the Preliminary Approval Order satisfy due process and provide the best notice practicable under the circumstances, and ordering that notice be provided to the Settlement Class; (d) setting a date for the Settlement Hearing; (e) appointing Gilardi as Claims Administrator; and (f) granting such other and further relief as may be required.

DATED: February 23, 2018

Respectfully submitted,

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Co-Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2018, 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 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 23, 2018.

s/ Willow E. Radcliffe
WILLOW E. RADCLIFFE

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Mailing Information for a Case 3:15-cv-00347-EMC In Re: LeapFrog Enterprise, Inc. Securities Litigation

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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Manual Notice List

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