UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

KIRK DAHL, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. BAIN CAPITAL PARTNERS, LLC, et al., Defendants.	Lead Case No. 1:07-cv-12388-WGY CLASS ACTION SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF NAMED PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS WITH DEFENDANTS BAIN CAPITAL PARTNERS, LLC, AND THE GOLDMAN SACHS GROUP, INC.

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I. INTRODUCTION

Named Plaintiffs[1] filed their Unopposed Motion for Preliminary Approval of Settlements with Defendants Bain Capital Partners, LLC ("Bain Capital") and The Goldman Sachs Group, Inc. ("Goldman") and memorandum in support thereof ("Preliminary Approval Motion") on June 11, 2014.[2] Subsequently, Named Plaintiffs reached a settlement with defendant Silver Lake Technology Management, L.L.C. ("Silver Lake") (together with Bain Capital and Goldman, the "Settling Defendants") on the terms and conditions set forth in the Settlement Agreement attached to this Memorandum. *See* Ex. A hereto (hereinafter, the "Settlement" or "Settlement Agreement"; together with the Bain Capital and Goldman settlement agreements, the "Settlement Agreements" or "Settlements"). Named Plaintiffs therefore file this supplemental memorandum requesting preliminary approval of the Settlement with defendant Silver Lake in conjunction with the settlements reached with Bain Capital and Goldman.[3]

As part of the Settlement, Silver Lake has agreed to pay $29,500,000 in cash. Together with the Bain Capital and Goldman settlements, which provide cash payments of $54,000,000 and $67,000,000 respectively, these Settlement Agreements provide a total monetary benefit to Settlement Class Members of $150,500,000. Like the Bain Capital and Goldman settlements, the Silver Lake Settlement was the product of vigorous arm's-length negotiations between experienced counsel and followed years of hard-fought litigation. Also like Bain Capital and Goldman, Silver

[1] Named Plaintiffs include Kirk Dahl, Police and Fire Retirement System of the City of Detroit, City of Omaha Police and Fire Retirement System, and Michael Wojno as Executor for the Estate of Robert Zimmerman.

[2] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreements.

[3] Named Plaintiffs incorporate herein by reference all arguments in support of preliminary approval of the Bain Capital and Goldman settlements, which apply with equal force to the Silver Lake Settlement.

Lake has agreed to cooperate with Named Plaintiffs in the prosecution of their claims against the Non-Settling Defendants in certain respects relating to the authenticity and admissibility of Silver Lake documents.

Co-Lead Counsel submit that the Settlement with Silver Lake, like those with Bain Capital and Goldman, represents an excellent result for Settlement Class Members, is well within the range of fairness, adequacy and reasonableness under Rule 23 and the standards of this Circuit and, along with a proposed form and manner of notice, should be preliminarily approved by the Court.[4]

II. FACTUAL BACKGROUND

A. Background of the Litigation

Silver Lake, like Bain Capital and Goldman, has vigorously disputed Named Plaintiffs' allegations from the outset of this litigation and continues to deny any liability and deny that Named Plaintiffs and the putative class members suffered any damages as a result of their conduct. After defendants unsuccessfully sought an order transferring this Action to the Southern District of New York, the Court denied most of defendants' – including Silver Lake's – motions to dismiss the Third Amended Complaint. *See* Dkt. Nos. 157, 201. Thereafter, Silver Lake joined in the unsuccessful petition for interlocutory appeal. *See* Dkt. No. 200. Silver Lake participated in each of the three phases of discovery conducted over several years and produced well over a half million pages of

[4] Named Plaintiffs, with the consent of counsel for Silver Lake, will address at the July 14, 2014 hearing the submission of an amended proposed order preliminarily approving the three pending Settlements, amended long-form and summary notices to incorporate the Silver Lake Settlement and a proposed Rule 54(b) Final Judgment Order as to Silver Lake. These documents will be substantially similar to those filed in connection with Named Plaintiffs' Preliminary Approval Motion of June 11, 2014. Named Plaintiffs herein by reference incorporate the schedule of events governing the remaining procedural aspects of the proposed Settlements previously suggested to the Court, along with their request for appointment of Co-Lead Counsel and the parameters of their fee and expense applications, as set forth in Named Plaintiffs' Preliminary Approval Motion. *See* Dkt. No. 985 at 9, 19-20.

documents. Co-Lead Counsel deposed six Silver Lake executives, including three of its co-founders. Following discovery, Silver Lake filed multiple summary judgment motions, including a motion for reconsideration of the Court's order denying its renewed summary judgment motion, which the Court denied. *See* Dkt. No. 951. Silver Lake zealously opposed Named Plaintiffs' motion for class certification and will be prepared to defend itself at trial in November in the absence of a settlement.

B. Settlement Negotiations

As part of the mediation process described in Named Plaintiffs' Preliminary Approval Motion, Co-Lead Counsel engaged with counsel for Silver Lake before the same mediator in multiple sessions in an effort to resolve the litigation. When the mediation failed, Co-Lead Counsel engaged in individual, informal settlement negotiations with Silver Lake. Through these efforts, the Parties negotiated a separate memorandum of understanding and, ultimately, the final terms of the Settlement Agreement.

This litigation is at an advanced stage. The Parties have undertaken an extensive investigation and evaluation of the relevant law and facts necessary to assess the strengths and weaknesses of Named Plaintiffs' claims and Silver Lake's defenses. Based on these investigations, the Parties have independently concluded that entering into the proposed Settlement is in their best interests.

C. The Settlement Agreement

The proposed Settlement requires Silver Lake to make a cash payment for the benefit of Settlement Class Members in the amount of twenty-nine million five hundred thousand dollars ($29,500,000). This sum will be paid into a "qualified settlement fund" – the Silver Lake Settlement Fund – no later than thirty (30) business days after the signing of the Notice Order. The Silver Lake Settlement Fund will then be invested in U.S. Government-backed securities to earn interest pending

distribution, which will follow the same plan of distribution set forth in Named Plaintiffs' Preliminary Approval Motion as to the Bain Capital and Goldman Settlement Funds, or as otherwise ordered by the Court. *See* Dkt. No. 985 at 7. Silver Lake will have no involvement in reviewing or challenging the claims submitted.

In addition to monetary consideration, Silver Lake has agreed to cooperate with Named Plaintiffs in the prosecution of their claims against Non-Settling Defendants on the same terms previously agreed to by Bain Capital and Goldman.

In return for the above consideration, Named Plaintiffs and the Settlement Class Members have agreed to release all Released Claims (as defined in the Silver Lake Settlement Agreement) against Silver Lake and the Releasees.[5]

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES UNDER RULES 23(a) AND (b)(3)[6]

Before determining whether the proposed Settlement is fair, the Court must preliminarily certify the proposed Settlement Class under Rules 23(a) and in this instance (b)(3) of the Federal Rules of Civil Procedure. *See In re Relafen Antitrust Litig. v. Smithkline Beecham Corp.*, No. 01-

[5] In addition to the definitions set forth in Named Plaintiffs' Preliminary Approval Motion as to Bain Capital and Goldman, the addition of Silver Lake means "Releasees" will also include Silver Lake; the predecessors, successors and assigns of Silver Lake; and each and all of Silver Lake's past, present, and future direct and indirect parent, subsidiaries, or affiliated entities, partnerships, general partners, limited partners (who are not Non-Settling Defendants), shareholders, investors (however denominated), investment funds that it or any of its affiliates managed or advised and such funds' respective affiliates, joint ventures and joint venturers (except co-sponsors with respect to the transactions identified in the Settlement Class definition set forth in the Preliminary Approval Motion), members, officers, directors, managers, managing directors, employees, contractors, consultants, auditors, accountants, financial advisors, professional advisors, investment bankers, representatives, insurers, trustees, trustors, agents, attorneys, professionals, supervisors, partners, heirs, executors, administrators, assigns, or controlling persons.

[6] Named Plaintiffs ask the Court to certify the Settlement Class identified in the Preliminary Approval Motion as to Silver Lake as well as to Bain Capital and Goldman. *See* Dkt. No. 985 at 6-7.

CV-12239-WGY, 2004 U.S. Dist. LEXIS 29834, at *9-*10 (D. Mass. Nov. 24, 2004) ("*Relafen I*"). A party seeking class certification must first show that the class action satisfies the following four prerequisites set forth in Rule 23(a): (1) numerosity; (2) commonality of questions of law or fact; (3) typicality of the named plaintiff's claims and defenses; and (4) the adequacy of the named plaintiff. *See* Fed. R. Civ. P. 23(a). The party seeking class certification must also satisfy one of the categories set forth in Rule 23(b). Here, certification is sought pursuant to Rule 23(b)(3), requiring that "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members," and resolution via class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Under the terms the proposed Silver Lake Settlement, the Parties have agreed for the sole purpose of the Settlement and without adjudication of the merits to seek certification of the Settlement Class.[7]

A. The Requirements of Rule 23(a) Are Satisfied

1. The Settlement Class Is Sufficiently Numerous

The Rule 23(a)(1) requirement that "the class [be] so numerous that joinder of all members is impracticable," is easily met here. Fed. R. Civ. P. 23(a)(1). As discussed in Named Plaintiffs' Preliminary Approval Motion and Memorandum in Support of Motion for Class Certification ("Class Certification Motion," which is incorporated herein by reference), joinder of all members is impracticable because the Settlement Class consists of thousands of investors who sold or exchanged shares of stock in the eight deals that remain at issue in the case. *See* Dkt. Nos. 985, at 10 and 928, 11-13.

[7] In the event the Settlement Agreement does not become effective for any reason, the parties shall proceed in all respects as though the Settlement Agreement had not been executed. Settlement Agreement, ¶32.

2. Common Questions of Law and Fact Exist

Rule 23(a)(2) requires that the "'resolution of the common questions affect all or a substantial number of the class members'" – not that all issues of fact and law be common. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 69 (D. Mass. 2005) ("*Relafen II*") (quoting *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 63 (D. Mass. 1997)). Here, there are numerous common issues of fact and law that all Settlement Class Members would be required to establish to prove Silver Lake's liability and any resulting damages, including, *inter alia*, whether Silver Lake engaged in the alleged anticompetitive conduct and whether Silver Lake is shielded from liability for any resulting injuries. *See* Dkt. Nos. 985, at 10 and 928, at 13-15; *see also Relafen II* at 69. Such conduct is common to members of the Settlement Class and is sufficient to satisfy the Rule 23(a)(2) requirement. *See In re IKO Roofing Shingle Prods. Liab. Litig.*, No. 14-1532, 2014 U.S. App. LEXIS 12684, at *9 (7th Cir. July 2, 2014) (explaining that conduct common to class members, not commonality of damages, is the relevant inquiry under Rule 23(a)(2) under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

3. Named Plaintiffs' Claims are Typical of Those of the Settlement Class Members

As stated by the Court in *Relafen II*:

> Plaintiffs may establish typicality by demonstrating that the "named plaintiffs' claims arise from the same course of conduct that gave rise to the claims of the absent [class] members." "The typicality' requirement focuses less on the relative strengths of the named and unnamed plaintiffs' case than on the similarity of the legal and remedial theories behind their claims." For purposes of demonstrating typicality, "[a] sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory."

Relafen II at 69 (internal citation omitted). As Named Plaintiffs have previously argued, the claims of each Settlement Class Member arise from the same course of conduct – the "overarching

agreement between the Defendants to refrain from 'jumping' each other's announced proprietary deals" with respect to eight deals: AMC Entertainment Inc., SunGard Data Systems Inc., Aramark Corporation, Kinder Morgan, Inc., HCA Inc., Freescale Semiconductor, Inc., Harrah's Entertainment, Inc., and TXU Corp. (the "Eight Deals"). Mar. 13, 2013 Memorandum and Order (Dkt. No. 763) at 30. The claims of all Settlement Class Members thus arise from the same alleged uniform course of conduct.

Certain Defendants have argued in opposition to class certification that because certain Named Plaintiffs and Settlement Class Members signed releases in prior shareholder litigation lawsuits, there is "varying evidence" that make Named Plaintiffs' claims atypical of many of the Settlement Class Members' claims. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification (Dkt. No. 966) at 16-17. But the Court has already ruled on this issue in denying certain Defendants' renewed motions for summary judgment when it rejected similar arguments with respect to the releases and emphasized that that the overarching conspiracy claim "does not arise out of any specific transaction" and instead alleges "an agreement across all eight announced proprietary transactions." Dkt. 894 at 16. Moreover, this argument ignores the fact that courts routinely grant class certification despite the existence of releases that apply to some class members but not others. *See Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997) (that some class members, including plaintiff, signed papers releasing the company from liability while others did not is not enough to justify rejection of class certification); *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 681 (N.D. Cal. 2011) (rejecting argument that release renders class certification inappropriate and finding "[t]he fact that some members of a putative class may have . . . released claims against a defendant does not bar class certification"); *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 75-76 (S.D.N.Y. 2006) ("Defendants may not invoke the releases executed by certain

class members to defeat typicality.").[8] Indeed, this Court has already denied summary judgment notwithstanding similar arguments by Defendants, reasoning that "[a] release by one group of shareholders does not, thereby, bind another group of shareholders for damages sustained pursuant to the overarching conspiracy."[9]

4. Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Settlement Class

Rule 23(a)(4) requires that the proposed class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement "'has two parts. The moving party must show first that the interests of the representative party will not conflict with the interests

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[8] *See also Wagner v. Nutrasweet Co.*, 95 F.3d 527, 534-35 (7th Cir. 1996) (reversing and remanding denial of class certification on the basis that the district court's concern that defendant's "defense based on the releases went too far," noting that "[t]ypicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members"); *Shanehchian v. Macy's, Inc.*, No. 1:07-CV-00828, 2011 U.S. Dist. LEXIS 24376, at *17 (S.D. Ohio Mar. 10, 2011) (the "factual difference—that some putative members may have signed releases and others may not have—'is not enough to justify rejection of class certification'") (citation omitted); *Yost v. First Horizon Nat'l Corp.*, No. 08-2293-STA-cgc, 2011 U.S. Dist. LEXIS 60000, at *50-*52 (W.D. Tenn. June 3, 2011) (finding that "releases do not defeat class certification" and that no "insurmountable conflict of interest" exists between plaintiffs who did not sign releases and approximately 4% of class who did); *Titus v. Burns & McDonnell, Inc.*, No. 09-00117-CV-W-DGK, 2010 U.S. Dist. LEXIS 94840, at *7 (W.D. Mo. Sept. 13, 2010) ("The releases signed by potential class members are not a bar to typicality because the relevant inquiry is into 'the company's actions, not . . . particularized defenses it might have against certain class members.'") (citation omitted); *In re Williams Co. ERISA Litig.*, 231 F.R.D. 416 (N.D. Okla. 2005) (granting certification and finding typicality and adequacy where class representatives did not sign releases, 10% of the class did sign releases and plaintiffs agreed to include a class representative who did sign a release); *Nelson v. IPALCO Enters.*, No. 02-477-C H/K, 2003 U.S. Dist. LEXIS 26392, at *18-*20 (S.D. Ind. Sept. 30, 2003) (Granting motion to certify despite argument that release bars typicality and noting that "the fact that the defendants may be able to raise different defenses against the claims of different class members does not necessarily defeat typicality. 'Typicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members.'") (citation omitted); *Wells v. Allstate Ins. Co.*, 210 F.R.D. 1, 8 (D.D.C. 2002) ("the existence of general releases does not disqualify a class under Rule 23(a)(3)").

[9] July 16, 2013 Memorandum and Order (Dkt. No. 894) at 16.

of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation.'" *Relafen II* at 69 (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)). Given that there are no conflicts between Named Plaintiffs and Settlement Class Members and that Co-Lead Counsel have a wealth of experience in antitrust class actions, Named Plaintiffs easily satisfy this element. All Settlement Class Members were paid a depressed price per share of the stock they sold to Defendants as a result of the same conspiracy. *See* Dkt. No. 928 at 18-25. Named Plaintiffs seek the same relief for themselves that they seek for all Settlement Class Members – damages for underpayment for their shares. *Id.* Additionally, the Settling Defendants do not dispute that Co-Lead Counsel have demonstrated their extensive experience in antitrust litigation and a deep commitment to the successful prosecution of the litigation. *Id.* at 26-27.

Certain Non-Settling Defendants argue that the purported effect of the releases renders Named Plaintiffs inadequate representatives of the Settlement Class. Not only has this Court previously held that the evidence of released transactions can be used as evidence of the overarching conspiracy (Nov. 19, 2008 Order at 2 (Dkt. No. 153)), other courts, facing similar circumstances, have either allowed plaintiffs to present evidence of released conduct or otherwise found such conduct relevant to plaintiffs' claims. For example, in *Insignia Sys. v. News Am. Mktg. In-Store*, No. 04-4213 (JRT/AJB), 2011 U.S. Dist. LEXIS 11376, at *1 (D. Minn. Feb. 4, 2011), the court rejected defendants' pretrial request to bar plaintiff from presenting evidence regarding anticompetitive conduct based on the signing of a settlement agreement and release. In doing so, the Insignia court noted two prior rulings allowing pre-release information to be brought in the case, including allegations in the amended complaint that "provide important background for the claims in this action" and discovery of pre-release documents that it found relevant. *Insignia*, 2011 U.S. Dist.

LEXIS 11376, at *2-*3. Similarly, in *Mims-Johnson v. Bechtel Nat'l, Inc.*, No. CV-10-3119-RMP, 2012 U.S. Dist. LEXIS 20370, at *11-*12 (E.D. Wash. Feb. 16, 2012), the court found that information from plaintiff's entire employment history should be disclosed and produced, including information from the time period covered by a release.[10]

The requirements of Rule 23(a) thus weigh in favor of certifying the Settlement Class for settlement purposes only.

B. The Requirements of Rule 23(b)(3) Are Satisfied

1. Common Questions of Law and Fact Predominate

Predominance under Rule 23(b)(3) does not require an entire universe of common issues – it simply requires "'a sufficient constellation'" of them. *Relafen II* at 70 (citation omitted); *see also Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 39 (1st Cir. 2003) ("Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class."). The main issues here – namely whether the Settling Defendants entered into an unlawful agreement and whether the premiums paid to the Settlement Class would have been higher absent Defendants' agreements not to compete – are common issues that predominate over those that are personal to individual Settlement Class Members. *See* Dkt. No. 928 at 29-36.

Again, Non-Settling Defendants have tried to argue that the variation in evidence available to Settlement Class Members as a result of various shareholder releases deprives them of common

[10] Given that courts are generally reluctant to bar class certification based on defendants' unique defenses such as the existence of releases applying to some class members, courts have addressed the admissibility of evidence related to releases well after class certification, such as in motions *in limine*. *See Mims-Johnson*, 2012 U.S. Dist. LEXIS 20370, at *11-*12 ("Defendant's challenges to any proposed admission of the evidence in light of the release are best raised as motions *in limine*."); *Insignia*, 2011 U.S. Dist. LEXIS 11376, at *1-*5 (addressing in a motion in limine whether plaintiff was barred from presenting evidence or argument that defendant engaged in allegedly anticompetitive conduct prior to when a release was signed).

proof. *See* Dkt. No. 966 at 12. But the Court, in its Memorandum and Order denying certain Defendants' renewed motions for summary judgment, already disposed of this issue when it found that it is "each Defendant's conduct with respect to the deals for which they have not been released which connects them to the overarching conspiracy." Dkt. No. 894 at 17. Defendants' argument ignores a wealth of authority finding the opposite, including controlling First Circuit precedent expressly rejecting any per se rule that treats the presence of any such defenses as an automatic disqualifier to class certification. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295-96 (1st Cir. 2000) (possible differences in applying statute of limitations to individual class members "does not compel that individual issues predominate over common ones"). In fact, the First Circuit has specifically recognized that "where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses." *Smilow*, 323 F.3d at 39.[11] "Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *Smilow*, 323 F.3d at 39. In *McAdams v. Mass. Mut. Life Ins. Co.*, No. 99-30284-FHF, 2002 U.S. Dist. LEXIS 9944, at *16-*21 (D. Mass. May 15, 2002), *aff'd*, 391 F.3d 287 (1st Cir. 2004), this Court applied Mowbray's reasoning in finding typicality despite one of two class representatives having signed a release where the release did not threaten to distract from the issues common to the class as a whole.[12]

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[11] *See also George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 181 (D. Mass. 2012) (quoting same).

[12] *See also Bond v. Fleet Bank (RI), N.A.*, No. 01-177 L, 2002 U.S. Dist. LEXIS 22324, at *21, n.3 (D.R.I. Oct. 10, 2002) (granting class certification, finding "that some members may be subject to a valid arbitration agreement does not preclude this court from certifying a class" and citing case holding "that some members had signed liability release forms did not justify denying class certification"); *McAdams*, 2002 U.S. Dist. LEXIS 9944, at *17 (only where a unique defense would consume the merits of the case should a class not be certified).

2. A Class Action Is the Superior Method for Resolution

The superiority requirement "address[es] the Advisory Committee's concern with 'vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Relafen II* at 70 (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997)). Where, as here, "the other elements of Rule 23 are satisfied, a class action is surely the superior method for resolving the claims in light of the large number of harmed individuals and organizations. Especially for the individual consumer, where the individual losses are low, the transaction costs in bringing suit are likely prohibitive." *Relafen II* at 71. Here, the class mechanism eliminates the risk of inconsistent adjudication and provides a venue to thousands of Settlement Class Members, most of whose individual damages are too small to bring on an individual basis. *See* Dkt. No. 928 at 40-42.

Certain Defendants have argued that the releases obtained in prior unrelated cases render a class trial unmanageable. Dkt. No. 966 at 12-15. This argument is misplaced. As explained above, because the Court has already found that evidence in released cases may be used by the Settlement Class to establish the existence of the overarching conspiracy (Dkt. No. 153 at 2), there will be no manageability issues affecting the admission of evidence. Moreover the manageability of a class trial is not an issue the trial court need consider in the settlement context. As the Supreme Court noted, a trial court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem*, 521 U.S. at 620; *Relafen II* at 69.

The requirements of Rule 23(b)(3) thus weigh in favor of certifying the Settlement Class.

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

Under Rule 23 of the Federal Rules of Civil Procedure, a court may approve a settlement only upon a finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). '"When

sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement.'" *Relafen II* at 71-72 (quoting *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)); *see also Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 107 (D. Mass. 2010) ("there is generally a presumption in favor of the settlement '[i]f the parties negotiated at arm's length and conducted sufficient discovery'") (citation omitted).

Before finally approving a settlement a court "must first make a 'preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.'" *Hochstadt*, 708 F. Supp. 2d at 107 (quoting the *Manual for Complex Litigation* §21.632 (4th ed. 2004)). A presumption of fairness attaches to the court's preliminary fairness determination when "'(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *In re Lupron (R) Mktg. & Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)). For the reasons set forth below, the Settlement with Silver Lake easily satisfies the preliminary approval standard in the First Circuit.

First, the settlement negotiations between Co-Lead Counsel and counsel for Silver Lake were conducted at arm's length and the Settlement was reached only after intense efforts by Co-Lead Counsel to achieve the very best results for the Settlement Class. The negotiations – which included global mediation sessions and, after the Parties were unable to reach a resolution, individual discussions with Silver Lake – do not raise any suspicions of collusion between Co-Lead Counsel and counsel for Silver Lake. The $29,500,000 cash sum that Co-Lead Counsel has obtained for the

Settlement Class is a testament to the intense adversarial negotiations that took place. *See* Dkt. 985 at 13-14.

Second, as explained in Named Plaintiffs' Preliminary Approval Motion, the Settlement with Silver Lake was reached only after years of contentious litigation and thorough discovery. *Id.* at 14-16. This included thousands of pages of briefing on motions to dismiss, several rounds of summary judgment and discovery-related motion practice. *Id.* Silver Lake alone produced over half a million pages of documents and Co-Lead Counsel took depositions of Silver Lake's mid-level and senior-most executives. Co-Lead Counsel and Named Plaintiffs understand the strengths and weaknesses of their case against Silver Lake, and recognize they face substantial risks should they continue to litigate, including threats from possible upcoming renewed summary judgment motions and a possible defeat at trial. *Id*. at 16. By contrast, the proposed Settlement, provides a concrete recovery for Settlement Class Members.

Third, Co-Lead Counsel and Silver Lake's counsel are thoroughly experienced in complex antitrust and class action litigation. *Id.* at 16-17. They have expended substantial resources in prosecuting and defending this litigation, and both Parties believe that the Settlement is fair, reasonable and adequate.

Fourth and finally, as explained in their Preliminary Approval Motion, Named Plaintiffs are unaware at this time of any opposition to the proposed Settlement. *Id.* at 17.

As with the Bain Capital and Goldman settlements, the proposed Settlement with Silver Lake confers substantial benefits upon the Settlement Class while eliminating: (i) the uncertainty of future relief after protracted and expensive litigation, including the difficulties of proving liability, causation and damages against Silver Lake under the Sherman Act and Clayton Act and the possible

defenses to such claims; and (ii) the risk that Named Plaintiffs may not ultimately prevail and thus may not secure any relief for the Settlement Class.

V. CONCLUSION

For all of the reasons set forth above, the Settlement is well within the range of reasonableness contemplated by courts in this Circuit, and the Court should preliminarily approve the proposed Settlement.

Dated: July 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on July 10, 2014.

s/ David W. Mitchell
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