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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re VAXART, INC. SECURITIES LITIGATION	Case No. 3:20-cv-05949-VC
	CLASS ACTION
This Document Relates to: *ALL ACTIONS*	**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF PROPOSED PARTIAL CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION, AND MEMORANDUM IN SUPPORT THEREOF**
	Hearing Date: January 12, 2023 Time: 10:00 A.M. Courtroom: 4, 17th Floor Judge: Hon. Vince Chhabria

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NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 12, 2023, at 10:00 a.m. PDT, via Zoom, the Honorable Vince Chhabria presiding, the Court-appointed Lead Plaintiffs, Wei Huang ("Huang") and Langdon Elliott ("Elliott") (collectively, "Lead Plaintiffs"), and Additional Plaintiff Ani Hovhannisyan ("Hovhannisyan") (together with Lead Plaintiffs, "Plaintiffs") will and hereby do move for an Order pursuant to Federal Rule of Civil Procedure 23: (a) granting final approval of the proposed settlement (the "Settlement" or "Partial Settlement") set forth in the Stipulation and Agreement of Settlement dated July 27, 2022 (the "Stipulation"); (b) approving the proposed Plan of Allocation; and (c) granting final certification of the proposed Settlement Class.

This motion is based upon this Notice of Motion and Motion (together, the "Motion"); the supporting Memorandum that follows; the accompanying declarations—including the Joint Declaration of Reed R. Kathrein and William C. Fredericks in Support of (i) Plaintiffs' Motion for Final Approval of Proposed Partial Settlement and Plan of Allocation and (ii) Plaintiffs' Fee and Expense Application, dated December 8, 2022 ("Joint Decl."), and the Declaration of Adam D. Walter of A.B. Data Regarding (a) Mailing of the Notice; (b) Publication of the Summary Notice; and (c) Additional Information Concerning Settlement Administration, dated December 7, 2022 (the "Walter Decl.")—and the Stipulation; the pleadings and records on file in the Action; the arguments of counsel; and all such other matters as the Court may consider in evaluating the Motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should grant final approval of the proposed Partial Settlement.

2. Whether the Court should grant final approval of the proposed Plan of Allocation.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs, on behalf of themselves and the Settlement Class, respectfully submit this Memorandum in support of their motion for final approval of the proposed Partial Settlement and Plan of Allocation, and for final certification of the Settlement Class for settlement purposes.[1]

I. PRELIMINARY STATEMENT

After roughly two years of vigorous litigation—including two rounds of motion to dismiss briefing, substantial document discovery, and a protracted arm's-length negotiation conducted under the auspices of a highly experienced mediator—Plaintiffs have secured a partial settlement of the claims asserted in this securities class action. Under the terms of the proposed Settlement, the Settlement Class would receive $12,015,000 in cash in exchange for the release of all claims asserted against both (a) the Settling Defendants (consisting of Vaxart, Inc. ("Vaxart" or the "Company") and current or former Vaxart officers and/or directors Andrei Floroiu, Wouter Latour, Todd Davis, Michael Finney, Robert Yedid and Sean Tucker—but only in their Vaxart capacities) (a/k/a the "Vaxart Defendants") and (b) Non-Settling Defendants and former Vaxart directors Steven Boyd ("Boyd") and Keith Maher ("Maher"), but only in their Vaxart—as opposed to their Armistice Capital LLC ("Armistice") or personally-interested—capacities.

As discussed below, the proposed Partial Settlement readily satisfies Rule 23(e)(2)'s standards for final approval. Standing alone, the $12,015,000 cash recovery reflects a meaningful recovery for the Settlement Class that effectively exhausts all of Vaxart's remaining D&O liability insurance—a depleting asset that would have almost certainly completely vanished well before this case could have been litigated through summary judgment. Similarly, even if Plaintiffs were to run the table on liability and damages, the prospects of obtaining a better recovery against the Vaxart Defendants appear remote, inasmuch as Vaxart shares (as of December 7, 2022) are now trading at barely $1.10 a share

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Stipulation. Unless otherwise noted, all internal quotation marks, citations, or other punctuation are omitted, and all emphasis is added.

compared to their inflated Class Period high of over $12.00 per share.[2] The proposed Partial Settlement therefore represents a meaningful "bird in the hand" which avoids the significant risks and expense of continued litigation against the Settling Defendants, as to which the prospects of ever obtaining a substantially greater recovery (after further years of litigation) are dubious at best.

Equally important, Plaintiffs' counsel carefully negotiated and drafted the proposed Partial Settlement to preserve Plaintiffs' and the Class's ability to pursue their potentially far more valuable claims under §§ 10(b), 20(a) and 20A of the Exchange Act against the "Non-Settling Defendants," consisting of (1) Armistice and its affiliated hedge fund entities, which controlled Vaxart at all relevant times and sold over $267 million worth of their Vaxart shares at grossly inflated prices during the Class Period (thereby reaping an estimated quarter ***billion*** dollars in ill-gotten profits); and (2) the two senior Armistice partners—Boyd and Maher—who, in their non-Vaxart capacities, orchestrated Armistice's role in the underlying fraud, and cashed out Armistice's massive stake in Vaxart while in possession of non-public, material adverse information about the Company.

Although Plaintiffs believe that the Partial Settlement as against the Settling Defendants is amply justified purely on ability to pay considerations, Plaintiffs also respectfully submit that this case has always been high risk. Thus, while Plaintiffs' counsel believes that the claims asserted against Settling Defendants are meritorious, the Action presented a number of substantial risks to establishing their liability, including with respect to proving falsity, materiality, scienter, and loss causation. *See also* Joint Decl., ¶¶ 37-40. For example, the Settling Defendants vigorously argued throughout that they lacked *scienter*, and that Vaxart's Class Period statements were not materially false and misleading when read in context. In addition, the Settling Defendants argued that they had strong loss causation arguments under § 10(b) such that, even if their § 10(b) and/or § 20(a) liability were otherwise established, recoverable damages would be materially less than what Plaintiffs urged. Plaintiffs believe they had good responses to each of these arguments, but also recognized that success

[2] Similarly, although Vaxart reported at its Q2 2022 earnings announcement that it had cash and other short-term assets of $131 million as of June 30, 2022, it also reported that it was losing roughly $30 million per quarter (and that it believed that its assets were only sufficient to fund operations for another 12 to 18 months).

in this regard could not be assured. Indeed, Plaintiffs' *scienter*-based § 10(b) fraud claims against the Settling Defendants arguably have far less jury appeal than Plaintiffs' § 20A "insider trading" claims against Armistice, Boyd, and Maher—claims which are ***not*** being settled—because the Settling Defendants profited relatively little from the alleged fraud, whereas Armistice (including Boyd and Maher in their Armistice capacities) reaped *$267 million* by selling Vaxart shares on the heels of Vaxart's misleading June 2020 statements while they were in possession of adverse material, non-public information.

As a procedural matter, the proposed Partial Settlement is also entitled to a presumption of fairness and adequacy as it was negotiated by Plaintiffs' counsel, who are highly experienced and were well aware of the settled claims' strengths and weaknesses based on their extensive pre-filing investigation, their litigation of two rounds of motion to dismiss, and their review of a negotiated set of "high priority" initial document discovery from Vaxart (which Plaintiffs insisted upon obtaining as a pre-condition to any mediation) —and that procedural presumption of fairness and reasonableness is all the stronger here given that the proposed Partial settlement was only reached following a protracted and arms-length mediation process conducted under the auspices of a highly experienced mediator, the Hon. Layn Phillips (U.S.D.J., ret.) of Phillips ADR (the "Mediator"). Indeed, the initial full-day mediation session of April 11, 2022 failed to result in any agreement, and it was only after further negotiations that the Mediator ultimately made a "mediator's proposal"—which became the basis for the Settlement—that the Parties were ultimately able to reach an agreement-in-principle to resolve the Action on June 10, 2022. Moreover, for all of the additional reasons discussed below, the proposed Settlement also merits approval under all the relevant Rule 23 criteria and applicable "*Churchill*" factors traditionally considered by courts in this Circuit.

Following a hearing on October 3, 2022, the Court issued its Preliminary Approval Order (ECF No. 242) finding that the Partial Settlement appeared sufficiently fair and reasonable to merit the issuance of Notice to the Settlement Class. While the deadline for objections has not yet passed, following the dissemination of more than 195,600 individual Notices to Settlement Class Members (as well as publication of the summary notice online and in print), to date no objections to the Settlement or Plan of Allocation (or even requests to opt-out) have been received. Walter Decl., ¶¶ 3,15-16; Joint

Decl., ¶ 7. Should any written objections be received prior to the Fairness Hearing, Plaintiffs will address them in appropriate reply papers.

As discussed below, in addition to granting final approval to the Settlement, the Court should also approve the proposed Plan of Allocation—which was prepared in consultation with Plaintiffs' counsel's damages expert and provides for a customary *pro rata* allocation of the Net Settlement Fund based on Class members' respective "Recognized Losses"—and grant final certification to the Settlement Class for purposes of Settlement.

II. THE PROPOSED PARTIAL SETTLEMENT MERITS FINAL APPROVAL

Rule 23(e) requires judicial approval of any class action settlement. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval."). Whether to grant such approval lies within the district court's sound discretion. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018). In exercising this discretion, a court should be guided by the Ninth Circuit's "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019); *see also Taafua v. Quantum Glob. Techs., LLC*, 2021 WL 579862, at *3 (N.D. Cal. Feb. 16, 2021) ("The Ninth Circuit has declared that a strong judicial policy favors settlement of Rule 23 class actions.").

Rule 23(e)(2), however, requires district courts to find that a proposed class action settlement is "fair, reasonable, and adequate" before it can be approved. *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1120-21 (9th Cir. 2020), with the Rule 23(e)(2) directing courts to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Consistent with the foregoing Rule 23(e)(2) guidance, the Ninth Circuit has identified similar and/or overlapping factors (the so-called "*Churchill* factors") for courts to consider in evaluating proposed class action settlements:

(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 to the proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2019 WL 2077847, at *1 (N.D. Cal. May 10, 2019) (considering both Rule 23(e)(2) factors and pre-existing Ninth Circuit factors).[3] In sum, the court's task is to determine whether "the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), but in so doing it "need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *accord Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

[3] In this regard, it should be noted that the stated goal of the 2018 amendments to Rule 23(e)(2) was "not to displace" any of the factors historically articulated by the various Circuits, "but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Campbell*, 951 F.3d at 1121 n.10. Accordingly, courts should "appl[y] the framework set forth in Rule 23, while continuing to draw guidance from the Ninth Circuit's factors and relevant precedent." *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018).

At preliminary approval, the Court found that the relevant factors showed that the Settlement was likely fair, reasonable and adequate, subject to further evaluation at the Fairness Hearing. ECF No. 242, ¶ 5. Nothing has changed to alter this prior analysis, and the factors supporting preliminary approval apply equally now. *See, e.g.*, *In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (court's prior reasons for granting preliminary approval weighed "equally in favor of final approval now").

A. The Class Has Been Adequately Represented Throughout

In determining whether to approve a class action settlement, Courts first consider whether Plaintiffs and their counsel "have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). To determine adequacy, "courts consider two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *See, e.g.*, *In re LendingClub Sec. Litig.*, 282 F. Supp. 3d 1171, 1182 (N.D. Cal. 2017).

Plaintiffs' claims, which are based on a common course of alleged wrongdoing by the Defendants, are typical of other Settlement Class Members, and Plaintiffs have no interests antagonistic to the Settlement Class. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (adequacy depends on "an absence of antagonism" and "a sharing of interest" between representatives and absent class members). Plaintiffs—like all other Settlement Class Members—also have a common interest in obtaining the largest possible recovery from Defendants. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

Plaintiffs' counsel have also plainly shown their commitment to the Class both by vigorously prosecuting the Action over the past two years, and by their commitment to *continuing* to litigate going forward against the Non-Settling Defendants. And for their part the named Plaintiffs have also shown their adequacy and commitment to the Class by, *inter alia*: retaining counsel who are highly experienced in securities class action litigation; reviewing pleadings and briefs; collecting and producing documents and information in response to Defendants' discovery requests; and

communicating regularly with Plaintiffs' counsel regarding the case, including both litigation and negotiation strategies. *See generally* Joint Decl., ¶ 63. *See also Churchill*, 361 F.3d at 576-77 (instructing courts to consider the "experience and views of counsel").

B. The Settlement Is the Product of Arm's-Length Negotiations by Informed Counsel

As noted above, the proposed Settlement was not only "negotiated at arm's length," Fed. R. Civ. P. 23(e)(2)(B), but was negotiated by counsel who had a firm understanding of the strengths and weakness of their case from having, *inter alia*, briefed multiple motions to dismiss, obtained significant pre-mediation document discovery, and consulted extensively with damages and loss causation experts. *See* Joint Decl., ¶ 55; *see also* Churchill factors (5) and (6) above; *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) (courts "afford[] a presumption of fairness and reasonableness … [where] agreement was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel"); *Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *9 (N.D. Cal. Sept. 4. 2018) (approving settlement reached only after the parties engaged in motion practice and participated in protracted mediation); *Linney v. Cellular Ala. P'ship*, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) ("involvement of experienced class action counsel" and that agreement was reached after relevant discovery had taken place, "create a presumption that the agreement is fair"), *aff'd*, 151 F.3d 1234 (9th Cir. 1998). Moreover, here "[t]he involvement of a neutral mediator is [further] evidence that settlement negotiations were conducted at arm's length." *Joh v. Am. Life Ins. Co.*, 2020 WL 109067, at *7 (N.D. Cal. Jan. 9, 2020); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 327 (N.D. Cal. 2018) (same). And any suggestion of collusion is further dispelled here as the Settlement's terms are based on a "mediator's proposal"—made by a retired federal judge (Layn Phillips)—which the Settling Parties only accepted after a prior full-day mediation session had failed to result in any agreements. Joint Decl., ¶ 5.

Finally, the Settlement has none of the miscellaneous indicia of possible collusion identified by the Ninth Circuit, such as a "clear-sailing" fee agreement or a provision that would allow any settlement proceeds to revert to Defendants. *Cf. In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011); *see also* Stipulation, ¶ 2.4 ("The Settlement is non-recapture, *i.e.* it is not a

claims-made settlement[.]"). In sum, the "arm's-length negotiation" factor plainly provides strong support for final approval.

C. Adequacy of Recovery in Light of Litigation Risk and Other Rule 23(e)(2) Factors

The remaining Rule 23(e)(2) factors overlap considerably with the *Churchill* factors (1) to (4), and all entail a review of the benefits of the proposed settlement in light of relevant litigation risk. *See generally* Fed. R. Civ. P. 23(e)(2), Advisory Comm. Notes to 2018 Amendment; *see also Churchill*, 361 F.3d at 575-77. These factors also weigh strongly in favor of approving the Settlement.

1. The Proposed Settlement Consideration

"The critical component of any settlement is the amount of relief obtained by the class." *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016). However, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not *per se* render the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). By definition, a settlement "embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *Officers of Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982); *see also Mild v. PPG Indus., Inc.*, 2019 WL 3345714, at *6 (C.D. Cal. July 25, 2019) ("Based on the significant risks of continued litigation and the Settlement amount, the Court finds that the amount offered for settlement is fair.").

Here, based on a number of objective metrics, the $12,015,000 million settlement compares favorably to other securities class action settlements. For example, the Settlement is almost double the size of the median securities class action settlement ($6.9 million) in the Ninth Circuit between 2012 and 2021.[4] In addition, Plaintiffs' consulting damages expert advised that, if Plaintiffs ran the table on disputed liability and loss causation issues, total potential damages against the Settling Defendants on the non-dismissed § 10(b) claims against them could be as high as roughly $400 million (Joint Decl., ¶ 37), which would mean that the proposed $12,015,000 million recovery here would equate to roughly

[4] *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements: 2021 Review and Analysis*, Cornerstone Research, at 19 (2021), available at https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf.

3% of *maximum* recoverable § 10(b) damages as against *all* potential defendants. However, settlements reflecting roughly 3% of *maximum* potential damages have been routinely approved by courts in this Circuit. *See, e.g.*, *Vataj v. Johnson*, 2021 WL 5161927, at *6 (N.D. Cal. Nov. 5, 2021) (approving settlement recovering "slightly more than 2% of [] estimated damages"); *IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving settlement recovering roughly 3.5% of maximum damages).[5]

Moreover, the proposed Settlement here does ***not*** purport to extinguish all of Plaintiffs or the Class's § 10(b) and § 20(a) claims—rather, it ***preserves*** all such claims against the Non-Settling Armistice entities, including defendants Boyd and Maher in all of their non-Vaxart capacities (as well as the Class's *additional* claims under § 20A against the various non-settling, Armistice-related defendants). In addition, the $12,015,000 cash recovery effectively exhausts all of Vaxart's remaining D&O liability insurance—a depleting asset that would have almost certainly completely vanished well before this case could have been litigated through summary judgment. In other words, even if Plaintiffs were to run the table on liability and damages, the prospects of obtaining a better recovery against the Vaxart Defendants appear remote, inasmuch as Vaxart shares (as of December 7, 2022) are now trading at barely $1.10 a share compared to their inflated Class Period high of over $12.00 per share.[6]

Given the severe collectability risks of trying to recover anything more than $12,015,000 million from the ***Settling*** Defendants, any discussion of trying to recover hundreds of millions of dollars from ***those*** defendants is more of a theoretical exercise than an assessment of a realistic recovery scenario. Accordingly, solely on a collectability-adjusted basis—and recognizing that the Partial Settlement ***preserves*** what are likely to be the Class's most valuable claims ***against the most***

[5] *See also In re LJ Int'l, Inc. Sec. Litig.*, 2009 WL 10669955, at *4 (C.D. Cal. Oct. 19, 2009) (approving settlement recovering 4.5% of maximum damages); *In re Broadcom Corp. Sec. Litig.*, 2005 WL 8153007, at *6 (C.D. Cal. Sept. 14, 2005) (approving settlement representing 2.7% of damages and finding such percentage was "not [] inconsistent with the average recovery in securities class action[s]").

[6] Similarly, although Vaxart reported at its Q2 2022 earnings announcement that it had cash and other short-term assets of $131 million as of June 30, 2022, it also reported that it was losing roughly $30 million per quarter (and that it believed that its assets were only sufficient to fund operations for another 12 to 18 months).

solvent (and non-settling) defendants—the "amount of the settlement" factor also weighs strongly in favor of approval.

2. The Strength of Plaintiffs' Claims (Other Risk Factors)

To determine whether the Settlement is fair, reasonable, and adequate, courts also "balance the risks of continued litigation, including the strengths and weaknesses of plaintiff's case, against the benefits afforded to class members, including the immediacy and certainty of [a] recovery." *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 831 (N.D. Cal. 2017); *see also Mego Fin. Corp. Sec. Litig.*, 213 F. 3d 454, 458 (9th Cir. 2000).

Here, Plaintiffs and their counsel are confident in the merits of their claims and believe that they could have ultimately prevailed against the Settling Defendants. However, some of the challenges that Plaintiffs faced in prevailing on liability on the § 10(b) claims that that they propose to settle were made clear early on. For example, Defendants' initial motions to dismiss in September 2021 raised colorable issues as to whether the statements at issue were false and misleading when read in context, and all defendants have vigorously disputed that they acted with *scienter* (even assuming that falsity were shown). Indeed, Plaintiffs' *scienter*-based fraud claims against the Settling Defendants likely have significantly less jury appeal than the § 20A "insider trading" claims against Armistice, Boyd and Maher (which are ***not*** being settled), given that the Settling Defendants profited little from the alleged fraud—whereas the Armistice Defendants (including Boyd and Maher in their Armistice capacities) sold *$267 million* worth of Vaxart shares at grossly inflated prices on the heels of Vaxart's fraudulent June 2020 press releases in violation of § 20A.[7] In addition, the Settling Defendants also had colorable loss causation defenses, which raised issues as to whether § 10(b) damages, which Plaintiffs' damages expert estimated to be as high as roughly $400 million, were actually materially less.

In sum, by accepting Judge Phillips' mediator's proposal and finalizing the proposed Settlement, Plaintiffs have closed on a $12 million "bird in the hand" to settle claims that, from a

[7] The Settling Defendants (in their Vaxart capacities) had little or no serious § 20A exposure because they sold no shares; moreover, although Plaintiffs allege that Armistice controlled Vaxart, there appears to be no basis to allege that Vaxart controlled *Armistice* (or that Vaxart benefitted from any Armistice insider sales that violated § 20A).

collectability standpoint, might well have ultimately proven to be worth ***zero*** even if, after years of litigation, Plaintiffs were to run the table on liability and damages. Yet Plaintiffs' counsel, while banking this "bird in the hand" for the Class, will also ***preserve*** what they believe are the Class's highest value claims, from both a liability and collectability perspective, against the highly solvent Armistice (as well as Boyd and Maher in their Armistice capacities). On a risk-adjusted basis, the "strength of plaintiffs' claims" factor therefore also weighs strongly in favor of approval.

3. The Complexity, Expense, and Duration of Continued Litigation

"Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015). Moreover, it is well-established that most class action litigation is inherently complex. *See Nobles v. MBNA Corp.*, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) (finding proposed settlement proper "given the inherent difficulty of prevailing in class action litigation"). This securities class action, prosecuted under the PSLRA, is no exception.[8]

Here, although the proposed Settlement will not bring the entire litigation to a close, its approval will at least dramatically reduce the number of active defendants, and allow the Plaintiffs and the Class to focus their efforts on pursuit of the highest value claims against the most solvent Non-Settling Defendants. Approval of the proposed partial Settlement will, therefore, reduce Plaintiffs' future litigation costs (and remove the Settling Defendants from the burdens of being named defendants), and allow the Settlement Class to collect at least a partial recovery now, without having to wait additional years for the chance of some recovery in the future. This factor therefore also supports final approval.

[8] Indeed, "the heightened pleading requirement of the PSLRA and the application of *Dura Pharms, Inc. v. Broudo*, 544 U.S. 336 (2005), which poses significant risks to plaintiffs' ability to survive … summary judgment and prevailing at trial, suggest that settlement here is prudent." *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007); *see also In re Heritage Bond Litig.*, 2005 WL 1594403, at *6 (C.D. Cal. June 10, 2005) (finding that securities class actions have well-deserved reputation for complexity).

4. Risk of Maintaining Class Action Status

When the Settlement was reached, Plaintiffs' motion for class certification was due to be filed on August 15, 2022. ECF No. 214. Although Plaintiffs are confident that they would succeed in obtaining certification of a class, the Settlement removes any uncertainty with respect to certification. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041-42 (N.D. Cal. 2008) ("If the Court were to refuse certification, the unrepresented potential plaintiffs would likely lose their chance at recovery entirely… . As Defendants agree to the class certification for the purposes of the Settlement, there is much less risk of anyone who may have actually been injured going away empty-handed.").[9] This factor also favors approval.

5. Extent of Discovery Completed and Stage of Proceedings

In assessing a settlement, courts should consider the stage of the proceedings and the amount of information available to the parties to assess the strengths and weaknesses of their case. *See, e.g.*, *Mego Fin. Corp.*, 213 F. 3d at 459; *In re Rambus Inc. Derivative Litig.*, 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009). Moreover, "[a] settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Velazquez v. Int'l Marine & Indus. Applicators, LLC*, 2018 WL 828199, at *5 (S.D. Cal. Feb. 9, 2018).

From the commencement of this Action in August 2020 through the Settling Parties' agreement to settle in July 2022, Plaintiffs' counsel spent substantial time and resources analyzing and litigating the factual and legal issues involved in the Action. At the time of the settlement, the Parties had already exchanged initial disclosures and began discovery. The Vaxart Defendants served document requests on Plaintiffs in February 2022, and after multiple meet & confers over the scope of those requests and related matters (*e.g.*, electronic search terms), Plaintiffs substantially completed their document productions by the end of March 2022. Joint Decl., ¶ 19.

[9] This factor would support the Settlement even if Plaintiffs obtained class certification, as the Court may exercise its discretion to re-evaluate the appropriateness of class certification at any time. Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *see also Omnivision*, 559 F. Supp. 2d at 1041 ("[T]here is no guarantee the certification would survive through trial, as Defendants might have sought decertification or modification of the class.").

Plaintiffs also served their document requests on Vaxart and the individual defendants in February 2022, and Defendants served formal objections and responses. Plaintiffs, focusing initially on the Vaxart Defendants, thereafter engaged in multiple meet and confers and negotiations over the scope of their requests, as well as extended discussions (including multiple exchanges of "hit count" reports) relating to proposed electronic search terms and which Vaxart employees' custodial documents should be searched. Vaxart ultimately agreed to make an initial production of documents prior to the Parties' April 11, 2022 mediation session, and as part of the settlement discussions that ultimately led to the signing of the Settlement's initial and amended Memorandum of Understanding ("MOU"), the production of additional documents from the Settling Defendants continued to be negotiated into July 2022, with the Settling Defendants ultimately finishing their production of documents under the terms of the Settling Parties' MOUs on July 27, 2022. Joint Decl., ¶ 20.

Plaintiffs also prepared and served subpoenas on three relevant third-parties: (1) Attwill Medical Solutions, LLC (which, according to a Vaxart press release at issue, had signed an MOU to "*manufacture a billion or more doses* per year" of Vaxart's purported COVID vaccine); (2) LifeSci Advisors, LLC (a healthcare-oriented investor & public relations firm that Vaxart had retained to help manage its public relations and communications with the market); and (3) Tiber Creek Partners, LLC (a consulting firm retained by Vaxart that advises biotech clients on government procurement issues). Following extended meet and confer discussions with each of these entities, these third parties produced a combined total of approximately 15,000 documents. *See* Joint Decl., ¶ 21.

Plaintiffs, through their counsel, also briefed two motions to dismiss and participated in a formal mediation with the Mediator, which included preparation of detailed mediation statements. *Id.*, ¶¶ 23-24.

This substantial record demonstrates that, when the Settlement was reached, "litigation had proceeded to a point in which both parties had a clear view of the strengths and weaknesses of their cases." *Zynga, Inc.*, 2016 WL 537946, at *12. This factor supports final approval of the Settlement.

6. The Experience and Views of Counsel

The informed opinion of experienced Lead Counsel that the Settlement is in the best interest of the Settlement Class should be afforded significant weight. *Nat'l Rural Telecomms. Coop. v.*

DirectTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("Great weight is accorded to the recommendation of counsel …. because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation."); *see also Quiruz v. Specialty Commodities, Inc.*, 2020 WL 6562334, at *7 (N.D. Cal. Nov. 9, 2020) ("[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight."). Here, as set forth above, Plaintiffs' counsel has a thorough understanding of the merits and risks of the Action and extensive prior experience in securities litigation (*see* Kathrein and Fredericks Fee Declarations, Ex. D; and Schall Fee Declaration, Ex. C (Plaintiffs' counsel's resumes)). Therefore, Plaintiffs' counsel's belief that the Settlement represents a very favorable outcome for Settlement Class Members favors approval of the Settlement.

7. Existence of a Governmental Investigation

Here, there was no governmental investigation into the claims alleged in the Action, and thus, the Settlement is the only recovery for Settlement Class Members. Thus, this factor supports approval.

8. The Class's Reaction

"In addition to the enumerated fairness factors of Rule 23(e)(2), courts within the Ninth Circuit typically consider the reaction of the class members to the proposed settlement." *In re Google LLC St. View Elec. Commc'ns Litig.*, 2020 WL 1288377, at *15 (N.D. Cal. Mar. 18, 2020); *see also Churchill*, 361 F.3d at 577. "The absence of a large number of objectors supports the fairness, reasonableness, and adequacy of the settlement." *Velazquez*, 2018 WL 828199, at *6. Here, as of the date of this filing, no objections to the Settlement have been filed. Walter Decl., ¶¶ 15-16. Moreover, Plaintiffs support the Settlement as well. This factor favors approval of the Settlement.

D. The Remaining Rule 23(e)(2) Factors Also Support Final Approval

In evaluating the Settlement, Rule 23(e)(2) instructs courts to also consider: (i) the effectiveness of the proposed method of distributing the relief provided to the class, including the method of processing class member claims; (ii) the terms of any proposed award of attorney's fees, including the timing of payment; (iii) any other agreement made in connection with the proposed settlement; and (iv) whether class members are treated equitably relative to each other. Fed. R. Civ. P.

23(e)(2)(C)(ii)-(iv), (e)(2)(D). These factors also weigh in favor of the Court's approval of the Settlement.

First, the proposed method of distribution and claims processing ensures equitable treatment of Settlement Class Members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii), (e)(2)(D). Settlement Class Members' Claims will be processed and the Net Settlement Fund distributed pursuant to a standard method routinely approved in securities class actions. The Court-authorized Claims Administrator, A.B. Data, Ltd. ("A.B. Data"), will review and process all Claims received, provide Claimants with an opportunity to cure any deficiency or request judicial review of the denial of their Claims, if applicable, and will ultimately mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund, as calculated under the Plan of Allocation. *See generally* Walter Decl. Importantly, none of the Settlement proceeds will revert to Defendants. *See* Stipulation, ¶ 2.4.

Second, the relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees and reimbursement of litigation expenses incurred in prosecuting this Action, including the timing of any such Court-approved payments. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). As shown in the Fee Memorandum,[10] the requested attorneys' fees of 30% of the Settlement Fund, made in accordance with Plaintiffs' retention agreement and to be paid only upon the Court's approval, are reasonable in light of Plaintiffs' counsel's efforts in prosecuting this Action over the past two years and obtaining a $12,015,000 million cash recovery, as well as the significant risks shouldered by Plaintiffs' counsel.[11]

As discussed in the Fee Memorandum, the requested fee is also near the benchmark for percentage fee awards in the Ninth Circuit and well within the range of fee percentages awarded by courts in this Circuit. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 768 F. App'x 651, 653 (9th Cir. 2019) (noting Ninth Circuit case law "permit[s] awards of attorneys' fees ranging from

[10] Plaintiffs' Counsel's Motion for An Award of Attorneys' Fees and Litigation Expenses (the "Fee Memorandum") is being concurrently filed with this motion.

[11] In connection with its fee request, Plaintiffs' counsel also seeks payment from the Settlement Fund of its litigation expenses in the total amount of $99,468.65 and $9,900 as an award to Plaintiffs to reimburse them for their time and expense representing the Class. Joint Decl., ¶¶10, 63.

20 to 30 percent of settlement funds, with 25 percent as the benchmark award"). Further, any fee award is separate from the approval of the Settlement, and neither Plaintiffs' counsel nor Plaintiffs may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. *See* Stipulation, ¶ 7.5. Additionally, the proposal that any Court-awarded attorneys' fees be paid upon issuance of such an award[12] is reasonable and consistent with common practice in similar cases, as the Stipulation dictates that if the Settlement were terminated or any fee award subsequently modified, Plaintiffs' counsel must repay the subject amount with interest. *Id.*, ¶ 7.2 As is the practice of this Court, Plaintiffs' counsel will request that 90% of its fee award be paid at the time of award and the remaining 10% be paid following the initial distribution to the Settlement Class.[13]

Lastly, as previously disclosed in Plaintiffs' Preliminary Approval motion, the only agreement the Parties entered into in addition to the initial and amended MOU and the Stipulation was a confidential Supplemental Agreement regarding requests for exclusion. *See* Stipulation, ¶ 10.5; *see also* Fed. R. Civ. P. 23(e)(2)(C)(iv). The Supplemental Agreement provides Vaxart with the option to terminate the Settlement in the event Settlement Class Members who timely and validly request exclusion from the Settlement Class meet certain conditions. This type of agreement is standard in securities class actions and has no negative impact on the fairness of the Settlement. *See, e.g.*, *Hefler*, 2018 WL 4207245, at *11 ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").

For the reasons set forth above and in the Joint Declaration, the Settlement is fair, reasonable, and adequate when evaluated under any standard, and, therefore, warrants the Court's final approval.

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[12] Such provisions in class action settlements, sometimes termed "quick-pay" provisions, "have generally been approved by other federal courts." *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020); *see also, e.g.*, *Miller v. Ghirardelli Chocolate Co.*, 2014 WL 4978433, at *5 (N.D. Cal. Oct. 2, 2014).

[13] Standing Order for Civil Cases Before Judge Vince Chhabria, at p. 17, available at https://www.cand.uscourts.gov/wp-content/uploads/judges/chhabria-vc/Civil-Standing-Order-rev_d-2022.5.27.pdf.

III. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE AND WARRANTS FINAL APPROVAL

A plan for allocating settlement proceeds under Rule 23 is evaluated under the same standard of review applicable to the settlement as a whole—the plan must be fair, reasonable, and adequate. *See, e.g.*, *Class Plaintiffs*, 955 F.2d at 1284-85; *Hampton v. Aqua Metals, Inc.*, 2021 WL 4553578, at *10 (N.D. Cal. Oct. 5, 2021). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014). Further, "[a] plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994).

Here, the Plan (set forth in the Notice) was developed by Plaintiffs' counsel in consultation with Plaintiffs' damages consultant—a Ph.D.-holding financial economist and chartered financial analyst ("C.F.A.") with over 25 years of experience in advising on (among other things) damages, loss causation and plan of allocation issues in federal securities cases. Joint Decl., ¶ 41. The Plan is designed to equitably distribute the Net Settlement Fund to Settlement Class Members who timely submit valid Claims demonstrating they suffered economic losses caused by Defendants' alleged misrepresentations and omissions, as opposed to losses caused by market or industry factors or Vaxart-specific factors unrelated to the allegations in the Action. *Id.*, ¶ 42.

The Plan is based upon the estimated amount of artificial inflation in the per share price of Vaxart common stock during the Settlement Class Period. *Id.* To have a Recognized Claim under the Plan, a Claimant must have purchased or otherwise acquired Vaxart common stock during the Settlement Class Period (i.e., between June 15, 2020 and August 19, 2020, inclusive) and held those shares through the alleged corrective disclosure dates, after the close of the market, that removed the alleged artificial inflation caused by Defendants' alleged misrepresentations. *See id.* A Claimant's loss under the Plan will depend upon several factors, including the date(s) when the Claimant purchased/acquired their shares of Vaxart common stock during the Settlement Class Period, and whether such shares were sold and if so, when and at what price, taking into account the PSLRA's statutory limitation on recoverable damages. *Id.* The sum of an Authorized Claimant's Recognized

Loss Amounts for all their Settlement Class Period purchases/acquisitions is the Authorized Claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. *Id.*, ¶ 42.

One hundred percent of the Net Settlement Fund will be distributed to Authorized Claimants. If any funds remain after an initial distribution to Authorized Claimants, as a result of uncashed or returned checks or other reasons, subsequent cost-effective distributions will be conducted. *See* Stipulation ¶ 4.15. In the event any residual funds remain after all cost-effective distributions of the Net Settlement Fund to Authorized Claimants have been completed, the Plan contemplates a non-sectarian, non-profit Section 501(c)(3) organization as the proposed *cy pres* recipient, as may be deemed appropriate by the Court. *Id*.

Notably, 195,638 copies of the Notice, containing the Plan and advising Settlement Class Members of their right to object to the Plan, have been mailed to potential Settlement Class Members and Nominees and, to date, no objections to the Plan have been received. Walter Decl., ¶¶ 15-16. Accordingly, Plaintiffs' counsel and Plaintiffs believe the Plan is fair, reasonable, and adequate and should be approved. Fed. R. Civ. P. 23(e)(2)(C)(ii), (e)(2)(D).

IV. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

As set forth in Plaintiffs' motion for preliminary approval of the Settlement, the Settlement Class satisfies all of the requirements of Rules 23(a) and (b)(3). ECF No. 224; Preliminary Approval Order, ¶¶ 2-4. None of the facts supporting certification of the Settlement Class have changed since Plaintiffs submitted their preliminary approval motion. Accordingly, Plaintiffs respectfully request that the Court certify the Settlement Class under Rules 23(a) and (b)(3) for purposes of effectuating the Settlement.

V. NOTICE OF THE SETTLEMENT SATISFIED THE REQUIREMENTS OF RULE 23, DUE PROCESS, AND THE PSLRA

Plaintiffs have provided the Settlement Class with adequate notice of the Settlement. Here, notice satisfied both: (i) Rule 23, as it was "the best notice … practicable under the circumstances" and directed "in a reasonable manner to all class members who would be bound by the" Settlement, Fed. R. Civ. P. 23(c)(2)(B) & (e)(1)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75

(1974); *In re MGM Mirage Sec. Litig.*, 708 F. App'x 894, 896 (9th Cir. 2017); and (ii) due process, as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

In accordance with the Court's Preliminary Approval Order, A.B. Data began mailing copies of the Notice Packet to potential Settlement Class Members and Nominees on October 24, 2022. Walter Decl., ¶¶ 6-9. Through December 7, 2022, A.B. Data has mailed a total of 195,638 Notice Packets. *Id.*, ¶ 9. In addition, A.B. Data caused the Summary Notice to be published in *Investors' Business Daily* and trasmnitted over *PR Newswire* on October 31, 2022. *Id.*, ¶ 10. A.B. Data also established a dedicated website, http://www.vaxartsecuritieslitigation.com, to provide additional information about the Action and the Settlement as well as access to downloadable copies of the Notice and Claim Form and other Settlement-related documents. *Id.*, ¶¶ 12-14.

Collectively, the notices apprise Settlement Class Members of, *inter alia*: (i) the amount of the Settlement; (ii) the reasons why the Parties are proposing the Settlement; (iii) the estimated average recovery per affected share of Vaxart common stock; (iv) the maximum amount of attorneys' fees and expenses that will be sought; (v) the identity and contact information for a representative from Plaintiffs' counsel available to answer questions concerning the Settlement; (vi) the right of Settlement Class Members to object to the Settlement; (vii) the right of Settlement Class Members to request exclusion from the Settlement Class; (viii) the binding effect of a judgment on Settlement Class Members; (ix) the dates and deadlines for certain Settlement-related events; and (x) the opportunity to obtain additional information about the Action and the Settlement by contacting Plaintiffs' counsel, the Claims Administrator, or visiting the Settlement Website. *See* Fed. R. Civ. P. 23(c)(2)(B); 15 U.S.C. § 78u-4(a)(7). The Notice also contains the Plan of Allocation and provides Settlement Class Members with information on how to submit a Claim in order to be potentially eligible to receive a payment from the Net Settlement Fund. *See* Walter Decl., Exs. A. The content disseminated through this notice campaign was more than adequate, as it "generally describe[d] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Young v. LG Chem., Ltd.*, 783 F. App'x 727, 736 (9th Cir. 2019); *Spann v. J.C. Penney Corp.*,

314 F.R.D. 312, 330 (C.D. Cal. 2016) ("Settlement notices must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.").

In sum, this combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmission over a newswire, and publication on internet websites, was "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Comparable notice programs are routinely approved by Courts in this District. *See, e.g.*, *Wong v. Arlo Techs., Inc.*, 2021 WL 1531171, at *2, *6 (N.D. Cal. Apr. 19, 2021) (approving similar notice plan); *Hayes v. MagnaChip Semiconductor Corp.*, 2016 WL 6902856, at *4-5 (N.D. Cal. Nov. 21, 2016) (same); *Zynga*, 2016 WL 537946, at *7-8 (same).

VI. CONCLUSION

For the reasons set forth herein and in the Joint Declaration, Plaintiffs respectfully request that the Court grant final approval of the Settlement, approve the Plan of Allocation, grant final certification of the Settlement Class for settlement purposes, and enter the Settling Parties' previously agreed form of [Proposed] Order and Final Judgment.

DATED: December 8, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re VAXART, INC. SECURITIES LITIGATION	Case No. 3:20-cv-05949-VC CLASS ACTION
This Document Relates to: *ALL ACTIONS*	**[PROPOSED] JUDGMENT PURSUANT TO RULE 54(b)** Judge Vince Chhabria

1. In accordance with and subject to the Stipulation and Agreement of [Partial] Settlement in this matter dated July 27, 2022 (the "Stipulation") (ECF No. 224-2), the claims asserted in the above-captioned securities class action are hereby (a) **DISMISSED WITH PREJUDICE** as to Settling Defendant Vaxart, Inc. ("Vaxart") and (b) **DISMISSED WITH PREJUDICE** as to additional Settling Defendants Andrei Floroiu, Wouter Latour, Todd Davis, Michael Finney, Robert Yedid, and Sean Tucker, but only in their capacities as current or former officers or directors of Vaxart.

2. Pursuant to Rule 54(b), the Court directs the entry of this final judgment as to each of the above-referenced Settling Defendants, having determined that there is no just reason for delay.

3. Without affecting the finality of this Judgment, the Court reserves jurisdiction over Plaintiffs, the Settlement Class, and the Settling Defendants, as those terms are defined in the

Stipulation, as to all matters concerning administration, consummation, and enforcement of the Stipulation.

SO ORDERED this ____ day of January, 2023.

THE HONORABLE VINCE CHHABRIA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re VAXART, INC. SECURITIES LITIGATION	Case No. 3:20-cv-05949-VC CLASS ACTION
This Document Relates to: *ALL ACTIONS*	

[PROPOSED] ORDER AND FINAL JUDGMENT APPROVING PARTIAL CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

WHEREAS, the Settling Parties[1], through their counsel, have agreed, subject to judicial approval following issuance of notice to the Settlement Class and a Fairness Hearing, to settle and dismiss with prejudice the claims asserted against the Settling Defendants in this Action upon the terms and conditions set forth in the Parties' Stipulation of Settlement dated July 27, 2022 (ECF No. 224-2) (the "Stipulation of Settlement");

WHEREAS, on October 3, 2022, the Court issued its Order Granting Preliminary Approval of Class Action Settlement, For Issuance of Notice to the Settlement Class, and For Scheduling of Fairness Hearing in this Action (the "Preliminary Order") (ECF No. 242);

WHEREAS, it appears in the record that the Notice substantially in the form approved by the Court in its Preliminary Order was mailed to all reasonably identifiable Settlement Class Members, and posted on the settlement website established by the Claims Administrator in this matter, in accordance with the Preliminary Order;

[1] Unless otherwise defined herein, all capitalized terms used herein have the same meaning as given them in the Stipulation of Settlement; *see* ¶ 1 below.

WHEREAS, it appears in the record that the Summary Notice, substantially in the form approved by the Court, was published in accordance with the Preliminary Order;

WHEREAS, on the 12th day of January, 2023, following issuance of notice of the Settlement to the Settlement Class, the Court held its Fairness Hearing to determine: (1) whether the terms and conditions of the Stipulation of Settlement are fair, reasonable and adequate for the settlement of all claims asserted by the Settlement Class against the Settling Defendants, as well as the release of all Released Claims as against the Released Defendant Persons and the release of all Released Defendants' Claims as against the Released Plaintiff Persons, and should be approved; (2) whether judgment should be entered dismissing, with prejudice, all claims asserted in the Action against the Settling Defendants; (3) whether to approve the proposed Plan of Allocation as a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members; (4) whether and in what amount to award Plaintiffs' Counsel attorneys' fees and expenses; and (5) whether and in what amount to grant any awards to any Plaintiffs pursuant to 15 U.S.C. §78u-4(a)(4); and

WHEREAS, the Court has considered all matters and papers submitted to it at or in connection with the Fairness Hearing and otherwise;

NOW, THEREFORE, based upon the Stipulation of Settlement and all of the findings, records, and proceedings had herein, and it appearing to the Court upon examination, following the duly-noticed Fairness Hearing, that the Settlement is fair, reasonable, and adequate and should be finally approved, that the Judgment attached as Exhibit B to the Stipulation of Settlement should be entered, and that the proposed Plan of Allocation provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Order and Final Judgment incorporates by reference the definitions in the Stipulation of Settlement, and all capitalized terms used herein shall have the same meanings as set forth therein.

2. The Court has jurisdiction over the subject matter of the Action, Plaintiffs, all Settlement Class Members, and the Settling Defendants.

3. The Court finds that, for settlement purposes only, the prerequisites for a class action under Rule 23(a) of the Federal Rules of Civil Procedure have been satisfied in that:

(a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable;

(b) there are questions of law and fact common to the Settlement Class;

(c) the claims of the Plaintiffs are typical of the claims of the Settlement Class they seek to represent; and

(d) Plaintiffs and Plaintiffs' Counsel have and will fairly and adequately represent the interests of the Settlement Class.

4. The Court further finds that, for settlement purposes only, the requirements for certification of a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure have also been satisfied in that:

(a) questions of law and fact common to the members of the Settlement Class predominate over any questions affecting only individual members of the Settlement Class; and

(b) a class action is superior to other available methods for the fair and efficient adjudication of the claims at issue, considering:

(i) the class members' (lack of) interests in individually controlling the prosecution or defense of separate actions;

(ii) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(iii) the desirability or undesirability of concentrating the litigation of the claims in this particular forum; and

(iv) the (lack of) likely difficulties in managing a class action (given, *inter alia,* that the proposed class here would be certified in the context of a settlement).

5. Accordingly, the Court certifies this action as a class action, solely for purposes of the Settlement, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of all persons or entities who purchased or otherwise acquired Vaxart common stock (ticker: VXRT) between June 15, 2020 and August 19, 2020, inclusive (the "Class Period"), and were damaged thereby. Excluded from the Settlement Class are all Defendants and all Armistice Entities; their respective successors and assigns; the past and current officers, directors, partners and managing partners of Vaxart, Armistice, and any Armistice Entity; the members of the immediate families of the Individual Defendants; the legal representatives, heirs, parents, wholly-owned subsidiaries, successors, and assigns of any excluded Person; and any entity in which any excluded Persons have or had a majority ownership interest, or that is or was controlled by any excluded Persons.[2] Also excluded from the Settlement Class are those Persons or entities listed on Exhibit A hereto that the Court finds have timely and validly requested exclusion from the Settlement Class in accordance with the Court's Preliminary Approval Order.

6. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, for the purposes of this Settlement only, (a) Plaintiffs Wei Huang, Langdon Elliot and Ani Hovhannisyan are appointed as class representatives of the Settlement Class and (b) the law firms Hagens Berman

[2] For the avoidance of doubt, as set forth in the Stipulation of Settlement, "Vaxart" means "Vaxart, Inc."; "Armistice" means Armistice Capital LLC; and "Armistice Entities" means and includes (a) any fund or other investment vehicle, whether structured as a partnership, corporation, joint venture, limited liability company, or otherwise (and including any of such entity's predecessors, successors or assigns) managed or advised by Armistice, any affiliate of Armistice, Steven J. Boyd and/or Keith Maher (and including but not limited to Armistice Capital Master Fund Ltd.), or in which Armistice, Boyd or Maher had or have a controlling interest; and (b) any investment advisor or management firm, whether structured as a partnership, corporation, joint venture, limited liability company, or otherwise (and including any of such entity's predecessors, successors or assigns), controlled by, and/or directly or indirectly majority owned by, Armistice, Boyd and/or Maher.

Sobol & Shapiro LLP and Scott+Scott Attorneys at Law LLP are appointed as counsel for the Settlement Class ("Class Counsel").

7. In accordance with the Preliminary Order, the Court finds that the forms and methods of notifying the Settlement Class of the Settlement and its terms and conditions and the rights of Settlement Class Members in connection therewith (a) constituted the best notice practicable under the circumstances; (b) constituted due and sufficient notice of these proceedings and the matters set forth herein (including the Settlement and Plan of Allocation) to all persons and entities entitled to such notice; and (c) met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and Section 21D(a)(7) of the Exchange Act, 15 U.S.C. § 78u-4(a)(7) (as amended by the Private Securities Litigation Reform Act of 1995). No Settlement Class Member is or shall be relieved from the terms and conditions of the Settlement, including the releases provided for in the Stipulation of Settlement, based upon the contention or proof that such Settlement Class Member failed to receive actual or adequate notice. A full opportunity has been offered to the Settlement Class Members to object to the proposed Settlement (and to participate in the hearing thereon), or to exclude themselves from the Settlement Class. The Court further finds that the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, were fully discharged. Thus, it is determined that all Settlement Class Members are bound by this Order and Final Judgment, except for those persons listed on Exhibit A hereto.

8. The Court finds that the Settlement is fair, reasonable and adequate under Rule 23 of the Federal Rules of Civil Procedure, and in the best interests of the Settlement Class. This Court further finds that the Settlement is the result of good faith, arm's-length negotiations; and that all Settling Parties have been represented throughout by experienced and competent counsel. The Court further finds that the Settlement was reached only after, *inter alia*: (a) Plaintiffs' Counsel had conducted an extensive pre-filing investigation; (b) the filing of a consolidated class action complaint; (c) full briefing and oral argument on the Settling Defendants' motions to dismiss that complaint; (d) the filing by Plaintiffs, after the Court had granted leave to amend, of a further detailed First Amended Consolidated Class Action Complaint (the "Amended

Complaint"); (e) full briefing and oral argument on the Settling Defendants' renewed motions to dismiss the Amended Complaint (which the Court granted in part and denied in part in its December 22, 2021 Decision and Order (the "MTD Order")); (f) the service of requests for production of documents on the Settling Defendants, and completion of a substantial initial production of documents by the Settling Defendants; (g) the Plaintiffs' production of documents in response to the Settling Defendants' various Requests for Production of Documents; (h) Plaintiffs' and the Settling Defendants' preparation and exchange of comprehensive pre-mediation briefs and participation in a day-long Zoom mediation session on April 11, 2022 (which concluded without reaching an agreement) under the auspices of a highly experienced mediator of complex commercial cases (Layn Phillips, U.S.D.J., ret.); (i) the Settling Parties' participation in further settlement discussions, which eventually led to the mediator making an independent "mediator's proposal;" and (j) the Settling Parties' negotiation and drafting of the detailed terms of the Stipulation of Settlement based on the mediator's proposal. Accordingly, the Court also finds that all Settling Parties were well-positioned to evaluate benefits of the proposed Settlement against the risks of further and uncertain litigation.

9. The Court further finds that its conclusions as to the fairness, reasonableness and adequacy of the proposed Settlement are further supported by the fact that, as noted above, the terms of Settlement are consistent with the "mediator's proposal" recommended by a highly experienced mediator.

10. The Court further finds that if the Settlement had not been achieved, the Settling Parties faced the expense, risk, and uncertainty of extended litigation in connection with the claims asserted against the Settling Defendants. The Court takes no position on the merits of either Plaintiffs' or Settling Defendants' liability positions, but notes that the existence of substantial arguments both for and against their respective positions further supports approval of the Settlement.

11. Accordingly, the Court approves the Stipulation of Settlement, and directs the Settling Parties to consummate the Settlement in accordance with the terms and provisions of the Stipulation of Settlement.

12. All claims asserted against the Settling Defendants are dismissed with prejudice as against each of the Settling Parties. The Settling Parties shall bear their own costs, except as otherwise provided in the Stipulation of Settlement.

13. Plaintiffs and each of the Settlement Class Members, on behalf of themselves and their Related Persons, shall be deemed to have, and by operation of this Order and Final Judgment shall have, fully, finally, and forever released, waived, relinquished and discharged, and shall forever be enjoined from prosecuting, all Released Claims against each Released Defendant Person, whether or not such Plaintiff or Settlement Class Member executes and delivers a Proof of Claim. For the avoidance of doubt, however, nothing herein is intended to, or should be construed or interpreted as, releasing, waiving, relinquishing, discharging, enjoining or otherwise limiting any claim by the Plaintiffs or the Settlement Class Members against (a) Armistice, (b) the Armistice Entities, (c) Armistice's or the Armistice Entities' respective Related Persons in their capacities as such (including Boyd and Maher in their Armistice capacities); (d) Floriou, Latour, Davis, Finney, Yedid, Tucker, Boyd or Maher, except in their capacities as current or former Vaxart officers or directors; or (e) Floroiu's, Latour's, Davis's, Finney's, Yedid's, Tucker's, Boyd's and Maher's respective Related Persons, insofar as such Related Person's liability to any Settlement Class Member derives from or is based upon acts or omissions of Floroiu, Latour, Davis, Finney, Yedid, Tucker, Boyd or Maher that were made in any capacity other than their respective capacities as a Vaxart officer or director.

14. Settling Defendants and each of the Released Defendant Persons (other than defendants Maher and Boyd and their Related Persons in their capacities as such) shall be deemed to have, and by operation of this Order and Final Judgment shall have, fully, finally, and forever released, waived, relinquished and discharged, and shall forever be enjoined from prosecuting, each and every one of the Released Defendants' Claims against each Released Plaintiff Person.

15. Nothing contained herein shall, however, bar any Settling Party, Released Defendant Persons, or Released Plaintiff Persons from bringing any action or claim to enforce the terms of the Stipulation of Settlement or this Order and Final Judgment.

16. To the maximum extent allowed by applicable state or federal law (including the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4):

(a) all Released Defendant Persons shall be and hereby are discharged from any and all Barred Claims, where Barred Claims are defined as claims for contribution or indemnification, however styled, by any Person or entity, whether arising under state, federal, statutory or common law, or any other law, rule or regulation, that are based upon, arise out of or relate to the Released Claims and the alleged injury to such Person or entity is based on, arises from, or relates to that Person's or entity's alleged liability to the Settlement Class or any Settlement Class Member, provided, however, that "Barred Claims" does not mean or include:

(i) any claims that may not be barred or discharged under applicable state or federal law;

(ii) claims, if any, under the terms of any agreements or contractual arrangements among or between any of the Released Defendant Persons (including any Released Defendant Person's insurers), or arising out of Vaxart's corporate by-laws or charter, or arising out of common law fiduciary duties owed by any Released Defendant Person, except to the extent that such claims are barred or discharged, or required to be barred or discharged, under applicable state or federal law; or

(iii) any claims for contribution or indemnification against Floriou, Latour, Davis, Finney, Yedid, Tucker, Boyd and Maher except in their capacities as current or former Vaxart officers or directors,

except to the extent that such claims are barred or discharged, or required to be barred or discharged, under applicable state or federal law; and

(b) all Persons shall be and hereby are permanently enjoined, barred and restrained from bringing, commencing, prosecuting or asserting any Barred Claims.

17. For purposes of paragraph 16 only, but only if and to the extent necessary to render the provisions of paragraph 16 compliant with applicable state or federal law (including the Private Securities Litigation Reform Act, 15 USC § 78u-4), "Released Defendant Persons" shall also include Floriou, Latour, Davis, Finney, Yedid, Tucker, Boyd and Maher generally, without being limited to their capacities as current or former Vaxart officers or directors.

18. To the extent required by the Exchange Act at Section 21D, as amended by the Private Securities Litigation Reform Act, Non-Settling Defendants Armistice, Boyd and Maher shall be entitled to a reduction of any judgment that may be entered against them in this Action (including any subsequent action that may be re-filed against them predicated on the same claims that have previously been asserted against them in this Action) that is equal to the greater of: (i) the Settlement Amount; or (ii) the Released Defendant Persons' proportionate share of the fault.

19. The Court finds that the proposed Plan of Allocation is a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members, and Plaintiffs' Counsel and the Claims Administrator are directed to administer the Plan of Allocation in accordance with its terms and the terms of the Stipulation of Settlement.

20. The Court finds that the Settling Parties and their counsel have complied with all requirements of Rule 11 of the Federal Rules of Civil Procedure and the Private Securities Litigation Record Act of 1995 as to all proceedings had herein.

21. Neither this Order and Final Judgment, the Stipulation of Settlement, nor any of the terms and provisions of the Stipulation of Settlement, nor any of the negotiations or proceedings in connection therewith, nor any of the documents or statements referred to herein or therein, nor

the Settlement, nor the fact of the Settlement, nor the Settlement proceedings, nor any statement in connection therewith:

(a) is or may be deemed to be, or may be used as an admission, concession, or evidence of the validity or invalidity of any Released Claims, the truth or falsity of any fact alleged by Plaintiffs, the sufficiency or deficiency of any defense that has been or could have been asserted in the Action, or any wrongdoing, liability, negligence or fault of the Settling Defendants, their Related Persons, or any of them;

(b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or misrepresentation or omission with respect to any statement or written document attributed to, approved or made by any of the Settling Defendants or their Related Persons in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal;

(c) is or may be deemed to be or shall be used, offered or received against any Settling Party or any of their Related Persons as an admission, concession or evidence of the validity or invalidity of any Released Claim or Released Defendants' Claims, the infirmity or strength of any claim raised in the Action, the truth or falsity of any fact alleged by Plaintiffs or the Settlement Class, or the availability or lack of availability of meritorious defenses to the claims raised in the Action; and

(d) is or may be deemed to be or shall be construed as or received in evidence as an admission or concession against the Settling Defendants, or their Related Persons, or any of them, that any of Plaintiffs' or the Settlement Class Members' claims are with or without merit, that a litigation class should or should not be certified, that damages recoverable in the Action would have been greater or less than the Settlement Amount or that the consideration to be given pursuant to the Stipulation of Settlement

represents an amount equal to, less than or greater than the amount which could have or would have been recovered after trial.

22. Notwithstanding the immediately preceding paragraph, however, the Settling Parties and the other Released Defendant Persons and Released Plaintiff Persons may file the Stipulation of Settlement and/or this Order and Final Judgment in any other action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, full faith and credit, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim. The Settling Parties may also file the Stipulation of Settlement and/or this Order and Final Judgment in any proceedings that may be necessary to consummate or enforce the Stipulation of Settlement, the Settlement, or this Order and Final Judgment.

23. Except as otherwise provided herein or in the Stipulation of Settlement, all funds held by the Escrow Agent shall be deemed to be held *in custodia legis* and shall remain subject to the jurisdiction of the Court until such time as the funds are distributed or returned pursuant to the Stipulation of Settlement and/or pursuant to further order of the Court.

24. Without affecting the finality of this Order and Judgment in any way, this Court retains continuing exclusive jurisdiction over the Settling Parties and the Settlement Class Members for all matters relating to the Action, including the administration, interpretation, effectuation or enforcement of the Stipulation of Settlement, and including any application for fees and expenses incurred in connection with administering and distributing the Settlement proceeds to the Settlement Class Members.

25. Absent further order of the Court, the Court hereby sets the following schedule for completing the administration of the Settlement in this matter:

(a) the Claims Administrator shall complete its review of submitted Proofs of Claim in this matter and calculation of Recognized Claim Amounts for Authorized Claimants within 180 days of the Court's existing deadline for putative Settlement Class Members to submit completed Proofs of Claim;

(b) within twenty-one (21) days of the later of (i) the Claims Administrator's completion of its review of submitted claims or (ii) the date on which each of the conditions set forth in ¶4.14 of the Stipulation of Settlement (including the occurrence of the Effective Date) has been met, Plaintiffs' Counsel shall submit a distribution motion (the "Settlement Class Distribution Motion") to the Court, which shall seek entry of an Order (the "Distribution Order") approving the Claims Administrator's claims determinations and resolving, pursuant to ¶¶4.7-4.10 of the Stipulation of Settlement, any unresolved disputes raised by any Claimants relating to the Claims Administrator's administrative determinations;

(c) unless the Distribution Order provides for a later date, the Claims Administrator shall mail checks distributing settlement fund payments to eligible Settlement Class Members within 30 days of entry of the Distribution Order, which checks shall request that recipients cash them within 60 days;

(d) within 120 days of the mailing of distribution checks, Plaintiffs' Counsel shall file a Post-Distribution Accounting containing all of the information set forth at page 17 of this Court's "Standing Order for Civil Cases Before Judge Vince Chhabria," except that such report shall also advise the Court whether, in accordance with ¶4.15 of the Stipulation, Plaintiffs' Counsel have determined that a second distribution of unclaimed settlement funds (whether due to uncashed checks or otherwise) should be pursued, or whether any then-remaining unclaimed settlement funds should be contributed to a non-sectarian, non-profit Section 501(c)(3) organization as may be deemed appropriate by the Court;

(e) Except as provided in sub-paragraphs (a)-(d) above, without further order of the Court the Settling Defendants and Plaintiffs may agree to reasonable

extensions of time to carry out any of the provisions of the Stipulation of Settlement.

26. There is no just reason for delay in the entry of this Order and Final Judgment, and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

27. The finality of this Order and Final Judgment shall not be affected, in any manner, by rulings that the Court may make on Plaintiffs' Counsel's Fee and Expense Application.

28. If the Settlement is not consummated in accordance with the terms of the Stipulation of Settlement, then the Stipulation of Settlement and this Order and Final Judgment (including any amendment(s) thereof, and except as expressly provided in the Stipulation of Settlement or by order of the Court) shall be null and void, of no further force or effect, and without prejudice to any of the Settling Parties, and may not be introduced as evidence or used in any action or proceeding by any Person against the Settling Parties, and each of the Settling Parties shall be restored to his, her or its respective litigation positions as they existed immediately prior to the date of the execution of the Stipulation of Settlement.

Dated: _____, 2023

_____
HON. VINCENT CHHABRIA
United States District Judge