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17 **Lead Counsel for Lead Plaintiff and the**
18 **Class**

Lead Counsel for Lead Plaintiff and
Class

19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**
21 **WESTERN DIVISION**

22 In re: U.S. AUTO PARTS NETWORK,
23 INC. SECURITIES LITIGATION

24) Master File No.: CV 07-2030-GW (JC)

25) CLASS ACTION

26) **NOTICE OF MOTION AND**
27) **MEMORANDUM OF POINTS**
28) **AND AUTHORITIES IN SUPPORT**
) **OF MOTION FOR FINAL**
) **APPROVAL OF SETTLEMENT**
) **AND PLAN OF ALLOCATION**

) Date: September 29, 2008

) Time: 8:30 a.m.

) Courtroom: 10

) Judge: Hon. George H. Wu

1 **NOTICE OF MOTION AND MOTION**

2 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

3 PLEASE TAKE NOTICE that, pursuant to the Court's Order of June 13,
4 2008, on September 29, 2008, at 8:30 a.m., or as soon thereafter as counsel may be
5 heard, at the United States Courthouse (312 N. Spring Street, Courtroom 10, Los
6 Angeles, CA 90012), before United States District Judge George Wu,

7 Lead Plaintiff Sasco Investments, LP ("Lead Plaintiff") will and hereby does
8 move for final approval of the settlement and the Plan of Allocation. This motion
9 is based on the Memorandum of Points and Authorities; the Declaration of Kim E.
10 Miller in Support of Final Approval of Settlement, Plan of Allocation, and the
11 Award of Attorneys' Fees and Expenses; the Stipulation of Settlement dated as of
12 May 1, 2008 ("Stipulation")¹; all other pleadings and matters of record; and, such
13 additional evidence or argument as may be presented at the hearing.

14
15 DATED: September 15, 2008

Respectfully submitted,
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18 By 
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27 ¹ This Motion and Memorandum of Points and Authorities incorporates by reference the
28 definitions in the Stipulation, and all terms used herein shall have the same meanings set forth in
the Stipulation.

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1 above cases as *In re U.S. Auto Parts Network, Inc.*, 2:07-cv-02030. On August 17,
2 2007, the Court entered a minute order appointing Sasco Investments, LP as Lead
3 Plaintiff pursuant to §21D(a)(3)(B) of the Securities Act of 1933 (the “Securities
4 Act”), as amended by the Private Securities Litigation Reform Act of 1995 (the
5 “PSLRA”), and approved its selection of Kahn Gauthier Swick, LLC (“KGS”) as
6 Lead Counsel in the consolidated action (the “Litigation”).

7 On September 5, 2007, a competing lead plaintiff movant that was not
8 appointed moved to intervene pursuant to Federal Rule of Civil Procedure 24. On
9 September 24, 2007, Lead Plaintiff filed a non-opposition to the motion to
10 intervene. On September 25, 2007, the motion to intervene was withdrawn.

11 In anticipation of filing a consolidated amended pleading, Lead Plaintiff
12 conducted an intensive investigation and filed the operative complaint in the
13 Litigation, the Amended Consolidated Class Action Complaint for Violation of
14 Federal Securities Laws (the “Complaint”), on October 4, 2007.

15 The Complaint alleged violations of Sections 11, 12 and 15 of the Securities
16 Act on behalf of a class of all purchasers of the publicly-traded securities of U.S.
17 Auto between February 9, 2007 (the date of the Company’s Initial Public Offering
18 (“IPO”)) and March 20, 2007, inclusive (the “Class Period”). The Complaint
19 alleged that at the time of the IPO there existed adverse conditions which were not
20 disclosed in the IPO Registration Statement and Prospectus and which adversely
21 affected the Company.

22 The allegations in the Complaint included that: 1) the Company had failed to
23 properly integrate the recently-acquired ThePartsbin.com, Inc. (“Partsbin”), 2) the
24 Company was unable or failed to fill customer orders, to keep the online catalogue
25 information current, or to retain key employees from Partsbin's catalog department
26 that were crucial to successfully integrating the two companies, 3) revenues were
27 inflated as a result of customer cancellations for improperly filled orders, 4) the
28 Company failed to disclose substantial credit risks associated with Partsbin’s drop-

1 ship order fulfillment system, 5) Partsbin had undisclosed credit programs which
2 inflated revenue reporting, 6) the Company failed to disclose materially decreased
3 profit margins and revenues in the period leading up to the IPO, 7) at the time of
4 the IPO, Defendants had not conducted an adequate due diligence into the
5 Company or the recently-acquired Partsbin, 8) the Company made material
6 misstatements as to its business plan, growth strategy, and the state of the
7 integration of Partsbin, 9) the IPO registration statement contained untrue
8 statements about the Company's order fulfillment system, available inventory, and
9 reserve for returns, 10) the Company failed to maintain adequate technology and
10 management systems, contrary to statements in the Registration Statement, 11) the
11 Company suffered from numerous Generally Accepted Account Principles
12 (GAAP) and Securities Exchange Commission (SEC) regulation violations, and
13 12) the registration statement failed to adequately disclose the internal control
14 issues at the Company.

15 On March 20, 2007, after Defendants announced results for the fourth
16 quarter and full year 2007 that were well below plan, over 18.33 million shares of
17 U.S. Auto Parts traded, more than 1.8 times the number of shares sold in the IPO,
18 and the stock subsequently fell over 50%. The Complaint alleges that upon the
19 publication of this news, the true undisclosed negative conditions that existed at the
20 time of the February 2007 IPO, and that continued to adversely impact the
21 Company after that time, finally came to light. As this adverse information became
22 known to investors, the artificial inflation was immediately eliminated from U.S.
23 Auto Parts' share price, and Class members who purchased shares of US Auto
24 Parts stock in the IPO or traceable thereto were damaged as a result of this related
25 share price decline.

26 On October 31, 2007 the Company and Individual Defendants moved the
27 Court to dismiss the Complaint. That same day, the Underwriter Defendants filed a
28 joinder thereto. In their motion to dismiss, Defendants argued that the Complaint's

1 allegations sounded in fraud and were therefore subject to—and failed to meet—
2 the requirements of Fed. R. Civ. P. 9(b), which requires allegations of fraud to be
3 pleaded with particularity. Defendants also argued that the Complaint failed to
4 allege actionable misstatements or omissions by Defendants; that Plaintiff failed to
5 allege adequately that the alleged misstatements and omissions had caused
6 Plaintiff’s losses; and that Plaintiff failed to adequately allege control person
7 liability against Oak Investment Partners XI, LP (“the Other Controlling
8 Defendant”). Defendants concluded that these arguments together rendered
9 Plaintiff’s allegations in the Complaint legally insufficient, and on that basis
10 moved the Court to dismiss the Complaint pursuant to Fed. R. Civ. Pr. 9(b) and
11 12(b)(6).

12 On November 27, Lead Plaintiff filed its memorandum of law in opposition
13 to Defendants’ motion to dismiss, responding to each of Defendants’ arguments.
14 Plaintiff contended that the allegations Complaint sounded in negligence, not in
15 fraud, and that, therefore, the pleading requirement was that of Fed. R. Civ. P. 8,
16 not the stricter requirements of 9(b). Plaintiff also argued that should the Court find
17 that the allegations sounded in fraud, that Plaintiff had complied with the
18 requirements of 9(b) by alleging the what, where, when, who, and why false of
19 each statement or omission. Plaintiff further argued that actionable misstatements
20 or omissions by Defendants in the IPO were adequately pled; that such alleged
21 omissions had caused Plaintiff’s losses; and that Plaintiff adequately alleged
22 control person liability against Oak Investment Partners XI, LP. Plaintiffs
23 concluded that the allegations in the Complaint were therefore legally sufficient,
24 and that Defendants’ motion to dismiss should be denied.

25 On December 13, 2007 Defendants filed their reply memorandum of law in
26 further support of their motion to dismiss the Complaint, and the next day the
27 Underwriter Defendants filed a Joinder to that reply.

28 A hearing on the motion to dismiss was initially set for December 20, 2007.

1 Pursuant to a scheduling stipulation filed by the parties, the Court continued to
2 February 4, 2008 in order to permit the parties to conduct a mediation.

3 On January 30, 2007, Lead Counsel, and Counsel for the Company and the
4 Individual Defendants met in Newport Beach, California to mediate the case
5 before a retired United States District Judge, the Honorable Layn R. Phillips. At
6 that time, the parties reached an agreement in principle to settle the Litigation. On
7 February 4, 2008, the Court ordered the Hearing on the Motion to Dismiss
8 continued to April 7, 2008 in light of the Parties' agreement in principle.

9 On or about February 8, 2008, as part of the confirmatory discovery process,
10 Defendants produced relevant emails from the files of the Chief Financial Officer,
11 Controller, Director of Finance and Sarbanes-Oxley Manager and Excel
12 spreadsheets and other attachments to the emails. On March 27, 2008, documents
13 from the Underwriter Defendants were produced. Lead Counsel carefully reviewed
14 and analyzed all documents in order to confirm the fairness, reasonableness, and
15 adequacy of the proposed settlement. In total, approximately 28,000 pages of
16 documents were produced by Defendants.

17 Pursuant to the Court's Order of June 13, 2008 preliminarily approving the
18 settlement, the Notice of Pendency and Proposed Settlement of Class Action
19 ("Notice") was mailed to nearly 4,000 potential Class Members beginning on June
20 24, 2008 Complete Claims Solutions, LLC ("Claims Administrator") also posted
21 the Notice on its website. See Declaration of Peter Craig re: Mailings of Notice
22 and Proof of Claim. In addition, a summary notice was published in *Investor's*
23 *Business Daily* on July 1, 2008. The last day for members of the Class to file
24 objections to any aspect of the settlement was August 27, 2008. As of the date of
25 the filing of the instant motion, no objections have been filed with respect to the
26 proposed settlement, proposed final judgment or Plan of Allocation.

27 **II. STANDARDS FOR APPROVAL OF CLASS ACTION**
28 **SETTLEMENTS**

1 It is well-established that “voluntary conciliation and settlement are the
2 preferred means of dispute resolution.” *Officers for Justice v. Civil Service*
3 *Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). The law has always favored
4 compromise of disputed claims, *Williams v. First Nat’l Bank*, 216 U.S. 582 (1910);
5 *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *Weinberger v.*
6 *Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (favoring compromise in stockholder
7 class actions), and recognizes that the essence of a settlement agreement is the
8 “yielding of absolutes and an abandoning of highest hopes.” *Officers for Justice*,
9 688 F.2d at 624 (citation omitted).

10 Class action suits readily lend themselves to compromise in light of the
11 difficulties of proof, uncertainties of the outcome, and the length of the litigation.
12 Courts are generally deferential “to the private consensual decision of the parties”
13 because of the “strong judicial policy that favors settlement, particularly where
14 complex class action litigation is concerned[.]” *Class Plaintiffs v. City of Seattle*,
15 955 F.2d 1268, 1276 (9th Cir. 1992). “[T]here is an overriding public interest in
16 settling and quieting litigation,” and this is “particularly true” in class action suits.
17 *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Util. Reform*
18 *Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989).

19 Any class action settlement must be “fair, reasonable, and adequate.” Fed.
20 R. Civ. Proc. 23(e)(2). To satisfy this requirement, the Ninth Circuit utilizes a
21 balancing approach, taking into consideration “some or all” of the following
22 factors (“Fairness Factors”):

- 23 (1) strength of the plaintiffs’ case; (2) the risk, expense, complexity,
- 24 and likely duration of further litigation; (3) the risk of maintaining
- 25 class action status throughout the trial; (4) amount of the settlement;
- 26 (5) extent of discovery completed and the stage of stage of the
- 27 proceedings; (6) experience and views of counsel; (7) presence of a
- 28 governmental participant; and, (8) reaction of class members to the
- proposed settlement.

Officers for Justice, 688 F.2d at 625; accord, *In re Mego Fin. Corp. Sec. Litig.*, 213

1 F.3d 454, 458 (9th Cir. 2000); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th
2 Cir. 1998); *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

3 The Ninth Circuit has mandated that in reviewing the Fairness Factors, “the
4 court’s intrusion upon what is otherwise a private consensual agreement negotiated
5 between the parties to a lawsuit ***must be limited*** to the extent necessary to reach a
6 reasoned judgment that the agreement is not the product of fraud or overreaching
7 by, or collusion between, the negotiating parties[.]” *Officers for Justice*, 688 F.2d
8 at 625; *Hanlon*, 150 F.3d at 1027. To effect this goal, a presumption of fairness
9 arises in class action settlements. *In re Immune Response Sec. Litig.*, 497 F.Supp.
10 2d 1166, 1171 (S.D. Cal. 2007); *Hughes v. Microsoft Corp.*, 98-1646C, 2001 U.S.
11 Dist. LEXIS 5976, at *21 (W.D. Wash. Mar. 26, 2001); *Duhaime v. John Hancock*
12 *Mut. Life. Ins. Co.*, 177 F.R.D. 54, 68 (D. Mass. 1997) (“In general, a settlement
13 arrived at after genuine arm’s length bargaining may be presumed to be fair.”). In
14 light of the foregoing, and in consideration of the Fairness Factors favoring
15 settlement, the settlement here warrants Court approval.

16 **III. THE BALANCE OF FACTORS FOR APPROVAL OF CLASS**
17 **ACTION SETTLEMENTS TIPS HEAVILY IN FAVOR OF**
18 **FINDING THAT THE SETTLEMENT IS FAIR, ADEQUATE,**
19 **AND REASONABLE**

20 **A. Strength of Lead Plaintiff’s Case; risk, expense, complexity,**
21 **and likely duration of further litigation**

22 To determine whether the proposed settlement is fair, reasonable, and
23 adequate, the Court balances the continuing risks of litigation against the benefits
24 afforded to Class members and the immediacy and certainty of a substantial
25 recovery. *Mego Fin.*, 213 F.3d at 458; *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir.
26 1975); *In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735, 741 (S.D.N.Y. 1985). In
27 other words, “it has been held proper to take the bird in hand instead of a
28 prospective flock in the bush.” *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*,
221 F.R.D. 523, 526 (C.D. Cal. 2004) (citations omitted). The balance here weighs

1 heavily in support of approval of the settlement and unquestionably outweighs
2 another distinct possibility: zero recovery for the Class.

3 Courts are ever mindful of the fact that securities class action litigation “is
4 notably difficult and notoriously uncertain.” *In re Sumitomo Copper Litig.*, 189
5 F.R.D. 274, 281 (S.D.N.Y. 1999) (quoting *In re Michael Milken and Assocs. Sec.*
6 *Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993)); *In re Ikon Office Solutions, Inc.*, 194
7 F.R.D. 166, 194 (E.D. Pa. 2000) (“securities actions have become more difficult
8 from a plaintiff’s perspective in the wake of the PSLRA”); *In re Mfrs. Life Ins. Co.*
9 *Premium Litig.*, MDL No. 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal.
10 Dec. 21, 1998). In this case, Lead Plaintiff is required to prove: “(1) that the
11 registration statement contained an omission or misrepresentation, and (2) that the
12 omission or misrepresentation was material, that is, it would have misled a
13 reasonable investor about the nature of his or her investment.” *In re Daou Sys.,*
14 *Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005).

15 Among the many key issues about which the Settling Parties do not agree
16 are: (1) whether any of the Defendants violated the securities laws or otherwise
17 engaged in any wrongdoing; (2) whether the statements and/or omissions made by
18 Defendants were materially untrue and/or misleading; (3) the method for
19 determining whether U.S. Auto’s publicly-traded securities were artificially
20 inflated during the relevant period; (4) the amount (if any) of such inflation; and
21 (5) the amount of damages (if any) that could be recovered at trial. Lead Plaintiff
22 is confident of succeeding in this suit, but this confidence must be tempered by the
23 numerous uncertainties associated with moving forward with the litigation. Lead
24 Plaintiff deems the claims asserted in this litigation to be meritorious and the
25 evidence adduced to date supports the claims. Nonetheless, it would be
26 “imprudent to presume ultimate success at trial and thereafter.” *In re Heritage*
27 *Bond Litig.*, No. 02-ML-1475, 2005 U.S. Dist. LEXIS 13555, at *25-*26 (C.D.
28 Cal. June 10, 2005) (collecting cases where the court rejected settlement and the

1 ultimate recovery to plaintiffs turned out to be lower than that in the proposed
2 settlement).

3 Heightened pleading requirements of the PSLRA, Fed. R. Civ. Proc. 9(b),
4 which could apply here if the court determined the Complaint “sounded in fraud,”
5 pose significant risks to Lead Plaintiff’s ability to survive the motion to dismiss
6 stage. *See In re Portal Software Secs. Litig.*, 2007 U.S. Dist. LEXIS 88886 at *8
7 (N.D. Cal. Nov. 26, 2007) (approving a settlement partly because even if a jury
8 found for the plaintiff, there were challenges involved with post-trial motions
9 practice and appeals). Even if Lead Plaintiff successfully maneuvered through the
10 motions to dismiss, the case remains in jeopardy with potential motions for
11 summary judgment looming, a jury trial, the potential for interlocutory appeals,
12 and subsequent appeals by both sides of any final judgments. In *In re Apple Comp.*
13 *Sec. Litig.*, No. C-84-20148(A), 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6,
14 1991), for example, the jury returned a verdict for plaintiffs, with damages
15 potentially exceeding \$100 million, but the court overturned the verdict on a
16 motion for j.n.o.v. *See also Robbins v. Kroger Props.*, 116 F.3d 1441, 1449 (11th
17 Cir. 1997) (reversing \$81 million jury verdict and dismissing securities action with
18 prejudice); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (reversing jury
19 verdict for plaintiffs and dismissing case); *Heritage Bond*, 2005 U.S. Dist. LEXIS
20 13555, at *25-*26.

21 Lead Plaintiff recognizes the potential length of continued prosecution and
22 the imposition of great expense and cost to the Class through the discovery, pre-
23 trial, trial, and appeals process. *See In re Veritas Software Corp. Sec. Litig.*, No.
24 03-0283, 2005 U.S. Dist. LEXIS 30880, at *15 (N.D. Cal. Nov. 15, 2005); *Milstein*
25 *v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984) (“[t]he expense and possible
26 duration of the litigation should be considered in evaluating the reasonableness of
27 settlement.”). Defendants are represented by two of the country’s premier law
28 firms— Sullivan & Cromwell and Wilson Sonisni Goodrich & Rosati—whose

1 attorneys have years of experience and who can marshal substantial resources to
2 fully defend the interests of their respective clients. The mounting of a vigorous
3 defense would necessarily increase the costs of litigation for Lead Plaintiff.
4 Moreover, a full trial would require the services of a number of attorneys for Lead
5 Plaintiff, encompassing many months of preparation and incurring costs to fully
6 prepare and litigate this case. Delay through the completion of the appeals process
7 could force Class Members to wait many more years to finally see any recovery,
8 further reducing present value versus the immediate settlement (which eliminates
9 the risk of no recovery at all). *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 260-61
10 (S.D.N.Y. 2003) (“Even if a shareholder or class member was willing to assume all
11 the risks of pursuing the actions through further litigation and trial, the passage of
12 time would introduce yet more risks in terms of appeals and possible changes in
13 the law and would in light of the time value of money, make future recoveries less
14 valuable than this current recovery.”); *In re “Agent Orange” Prod. Liab. Litig.*,
15 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985) (“[M]uch of the value of a settlement
16 lies in the ability to make funds available promptly.”)

17 In addition, both sides would more than likely engage the services of
18 multiple experts, including forensic accountants and economists, to assist in
19 preparation of the case and in damages calculations. Such expert evaluations are
20 based not only on stock price history but on other more elusive factors, including
21 corporate asset value, cash flow, income, and growth prospects for the future,
22 industry and economic trends, the quality of management, the nature and amount
23 of liabilities, and many other variables. At trial, Lead Plaintiff would likely have
24 faced a motion *in limine* by Defendants to preclude the experts, their testimony,
25 and their valuation models. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156
26 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
27 Defendants’ experts could also likely contend that all losses experienced by
28 Members of the Class were due to factors completely unrelated to any actionable

1 conduct, potentially eliminating any recovery. It is also impossible to predict with
2 any certainty which arguments would find favor with the jury. *See Warner*
3 *Comm.*, 618 F. Supp. at 744-45 (discussing the “battle of experts” and the damages
4 evaluations normally undertaken in a securities suit).

5 Lead Counsel also considered the risk that a Court would not find the full
6 drop in US Auto’s stock drop to be actionable. If that were the case, and the court
7 reduced the decline to \$8.78, damages would only amount to \$14.05 million – only
8 slightly more than the significant \$10 million settlement reached for the Class.

9 **B. Stage of the proceedings; procedure by which the settlement**
10 **was reached**

11 Stage of the proceedings is one factor to consider in determining the
12 fairness, reasonableness, and adequacy of settlement. *Mego Fin.*, 213 F.3d at 459;
13 *Hanlon*, 150 F.3d at 1026; *Girsh*, 521 F.2d at 157; *Ellis v. Naval Air Rework*
14 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980).

15 Although formal discovery was stayed pursuant to 15 U.S.C. § 78u-
16 4(b)(3)(B), Lead Counsel conducted an extensive and on-going investigation prior
17 to filing the Complaint, during the pendency of the motions to dismiss, and through
18 settlement; actively scoured through documents available in the public domain
19 regarding the Company; contacted former employees of the Company; thoroughly
20 researched the law on the complex issues inherently involved in securities
21 litigation; and, subsequently opposed the motions to dismiss filed by Defendants.
22 *See Immune Response*, 497 F. Supp. 2d at 1174. In addition, in connection with
23 the settlement, the parties agreed to the extensive production of documents by
24 Defendants for Plaintiff’s review and analysis to confirm the fairness,
25 reasonableness, and adequacy of the settlement. As the Ninth Circuit has
26 indicated, in class action settlements, “formal discovery is not a necessary ticket to
27 the bargaining table where the parties have sufficient information to make an
28 informed decision about settlement.” *Mego Fin.*, 213 F.3d at 459 (citation

1 omitted). Nevertheless, Lead Counsel conducted confirmatory discovery –
2 reviewing more than 28,000 pages of key internal documents – which allowed the
3 parties to develop the facts necessary to evaluate the claims and adequacy of the
4 settlement. *See, e.g., In re Sony SXR Rear Projection TV Class Action Litig.*, 06
5 Civ. 5173 (RPP), 2008 U.S. Dist. LEXIS 36093, at *19-21 (S.D.N.Y. May 1,
6 2008). Lead Counsel had a comprehensive understanding of the strengths and
7 weaknesses of the case and possessed sufficient information to make an informed
8 decision regarding the fairness of the settlement before presenting it to the Court.

9 Here, defendants filed motions to dismiss, Plaintiff filed its opposition, and
10 Defendants filed replies. The parties were fully prepared to argue the motions to
11 dismiss prior to reaching the settlement. Both sides had the opportunity to fully
12 assess the merits of their respective positions, and the strengths and weaknesses of
13 their case in the absence of a settlement.

14 **C. Risk of maintaining class action status throughout the trial**

15 There is a risk of maintaining class action status here (the third Fairness
16 Factor) because Lead Plaintiff had not yet moved for class certification. At such a
17 certification motion, members of the Class risk being excluded from this litigation.
18 *In re Omnivision Techs., Inc.*, No. 04-2297, 2007 U.S. Dist. LEXIS 95615, at *19
19 (N.D. Cal. Dec. 6, 2007) (“If the Court were to refuse certification, the
20 unrepresented potential plaintiffs would likely lose their chance at recovery
21 entirely. Even if the Court were to certify the class, there is no guarantee the
22 certification would survive through trial, as Defendants might have sought
23 decertification or modification of the class.”); *Heritage Bond*, 2005 U.S. Dist.
24 LEXIS 13555, at *35-*37. Moreover, there is only one lead plaintiff in this case
25 which creates even more of a risk here in light of the numerosity, commonality,
26 typicality and adequacy factors that must be analyzed under Fed. R. Civ. Proc.
27 23(a) (in addition to meeting any one of the three requirements of Fed. R. Civ.
28 Proc. 23(b)). Class certification is not guaranteed. *See, for example, Asher v.*

1 *Baxter Int'l, Inc.*, 505 F.3d 736, 741 (7th Cir. 2007) (noting that the district court
2 denied class certification three times); *In re CMS Energy Sec. Litig.*, No. 02-CV-
3 72004-DT, 2006 U.S. Dist. LEXIS 41459, at *4 (E.D. Mich. June 21, 2006)
4 (denying class certification as to a subset of securities purchasers); *In re*
5 *Healthsouth Corp. Sec. Litig.*, 213 F.R.D. 447, 451 (N.D. Ala. 2003) (denying
6 class certification motion). Here, however, the Settling Parties have incorporated a
7 large swathe of Class members who purchased publicly-traded securities of U.S.
8 Auto Parts during the Class Period. The settlement neither delves into nor creates
9 discrete subsets that could, if relevant, be excluded from obtaining recovery in this
10 litigation.

11 **D. Amount offered in settlement**

12 Under the Proposed Settlement, Defendants have agreed to pay \$10,000,000
13 in cash. Given the complexities of this litigation and the continued risks to the
14 Settling Parties if they proceed to trial, the settlement represents a reasonable
15 resolution of this action and eliminates the risk that the Class might not otherwise
16 recover.

17 Lead Counsel, working with a damages consultant, estimated potential
18 damages in this case to be approximately \$37.3 million for 3.3 million damaged
19 shares. The settlement represents approximately a 26.8% recovery of the full,
20 estimated damages amount. Although Lead Plaintiff contends that the aggregate
21 damages would be higher than the actual settlement amount, such a result assumes
22 that all significant liability and damage issues would have been resolved in favor of
23 the Class. In any event, “[i]t is well-settled law that a cash settlement amounting to
24 only a fraction of the potential recovery will not *per se* render the settlement
25 inadequate or unfair.” *Officers for Justice*, 688 F.2d at 628; *Detroit v. Grinnell*
26 *Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) (“In fact, there is no reason, at least in
27 theory, why a satisfactory settlement could not amount to a hundredth or even a
28 thousandth part of a single percent of the potential recovery.”).

1 **E. The Experience and Views of Counsel**

2 Recommendations of Lead Counsel should be given a presumption of
3 reasonableness. *Omnivision Techs.*, 2007 U.S. Dist. LEXIS 95615, at *23 (citing
4 *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). The presumption
5 of reasonableness is fully warranted here because the settlement is the product of
6 arm’s-length negotiations. *Hughes*, 2001 U.S. Dist. LEXIS 5976, at *17; *Ellis*, 87
7 F.R.D. at 18 (“the fact that experienced counsel involved in the case approved the
8 settlement after hard-fought negotiations is entitled to considerable weight”).

9 Lead Counsel all have significant experience in securities and other complex
10 class action litigation and have negotiated other class action settlements throughout
11 the country. It is Lead Counsel’s informed opinion that given the risks and
12 uncertainties inherent in securities class action litigation, the proposed settlement is
13 fair, reasonable, and adequate, and in the best interests of the Class. *See Immune*
14 *Response*, 497 F. Supp. 2d at 1174 (noting that the parties’ “mutual desire to adopt
15 the terms of the proposed settlement, while not conclusive, is entitled to great deal
16 of weight.”) (citing cases); *Nat’l Rural Telecom.*, 221 F.R.D. at 528 (“Great weight
17 is accorded to the recommendation of counsel, who are most closely acquainted
18 with the facts of the underlying litigation.”) (internal quotations omitted). This
19 factor thus weighs in favor of approval of the settlement.

20 **F. Reactions of Class Members**

21 Notice was mailed to nearly 4,000 potential Class Members and Lead
22 Counsel received over 1,500 additional requests from brokers and individual
23 claimants. Releases were made on PR Newswire on July 1, 2008 and September 2,
24 2008 and in *Investor’s Business Daily* on July 1, 2008. Lead Counsel’s Claims
25 Administrator made two rounds of follow-up calls to brokers to ensure that Class
26 members could ask questions, receive help completing their Proof of Claim if
27 needed, and timely return their Proof of Claim.

28 Investors had until August 27, 2008 to object and/or opt out of the

1 settlement. To date, no objections or opt-outs to the settlement have been filed. “It
2 is established that the absence of a large number of objections to a proposed class
3 action settlement raises a strong presumption that the terms of a proposed class
4 settlement action are favorable to the class members.” *Id.*, at 529. After receiving
5 notice of the proposed settlement, the Class in this suit has been nearly silent. By
6 any standard, the lack of objection of the Class members favors approval of the
7 settlement. *See, e.g., Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir.
8 2004) (affirming settlement with 45 objections out of 90,000 notices sent);
9 *Rodriguez v. West Publ. Corp.*, No. CV05-3222 R, 2007 U.S. Dist. LEXIS 74767,
10 at *33 (C.D. Cal. Sept. 10, 2007) (54 objections out of 376,000 notices); *Mfrs Life*
11 *Ins. Co.*, 1998 U.S. Dist. LEXIS 23217, at *23 (“miniscule number of objectors is
12 another factor favoring approval”); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115,
13 119 (3d Cir. 1990) (finding 10% of class objecting as insufficient to block
14 settlement).

15 **IV. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND**
16 **ADEQUATE AND SHOULD BE APPROVED BY THE COURT**

17 The Plan is outlined in detail in the Notice, attached as Exhibit A-1 to the
18 Stipulation of Settlement. In general, the \$10 million cash settlement amount and
19 the interest earned thereon, less all taxes, approved costs, fees, and expenses (the
20 “Net Settlement Fund”), shall be distributed to members of the Class who submit
21 acceptable Proofs of Claim and Release. (“Authorized Claimants”).

22 The Plan is based on the Class Period of February 9, 2007 and March 20,
23 2007 for those class members who purchased pursuant to the Prospectus issued in
24 connection with the IPO of February 9, 2007 and held on March 20, 2007 or shares
25 traceable to those issued pursuant to the prospectus and on the following share
26 prices: the closing price of \$6.49 on March 21, 2007 (the date the bad news was
27 disclosed) and the difference between the offering price (\$10) and the drop price
28 (\$6.49) – amounting to \$3.51. Excluded from the Class are Defendants, members

1 of the immediate families of the Individual Defendants, current or former directors
2 and officers of U.S. Auto and the legal representatives, heirs, successors, or assigns
3 of any such excluded Person. Also excluded from the Class are those Persons who
4 timely and validly request exclusion from the Class pursuant to the Notice of
5 Pendency and Proposed Settlement of Class Action.

6 The Claims Administrator, Complete Claim Solutions, LLC, shall determine
7 each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon
8 each Authorized Claimant's "Recognized Claim." The Recognized Claim formula
9 is the basis upon which the Net Settlement Fund will be proportionately allocated
10 to the Authorized Claimants.

11 The Plan reflects Plaintiffs' allegations that the price of U.S. Auto Parts'
12 common stock was inflated artificially throughout the Class Period. Moreover, the
13 Plan reflects Plaintiffs' allegations that the inflation finally ended on March 20,
14 2007 when investors began to learn the truth about the Company that Defendants
15 had actively concealed during the Class Period.

16 Recognized loss per share for those eligible claims that have not been sold prior
17 to the date of judgment is the lesser of: (i) the price paid less \$6.49, or (ii) \$3.51.
18 For shares sold prior to the date of judgment, recognized loss per share is the lesser
19 of: (i) the price paid less \$6.49, (ii) \$3.51, (iii) \$10 less the price received, (iv) the
20 price paid less the price received.

21 Because the Plan of Allocation takes into account the strengths and weaknesses
22 of the claims, as well as assessments of the manner in which the damages should
23 be allocated to the Class in light of those strengths and weaknesses, it should be
24 approved as fair and reasonable.

25 V. CONCLUSION

26 This settlement is fair, adequate, and reasonable given the presence of skilled
27 counsel for the Settling Parties, the complexity of the facts and legal questions at
28 issue, the possibility of substantial expense of this litigation if continued to trial

1 and on appeal, the risks attendant to actually prevailing fully on the merits, the
2 present benefit of recovery to the Class, and the arm's-length negotiations. For the
3 reasons discussed herein, Lead Plaintiff respectfully moves for the final approval
4 of the settlement and plan of allocation.

5
6 DATED: September 15, 2008

Respectfully submitted,
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