

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

BRADLEY COOPER, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiffs,

v.

THORATEC CORPORATION, GERHARD  
F. BURBACH, TAYLOR C. HARRIS

Defendants.

Case No. 4:14-cv-00360-CW

**STIPULATION OF SETTLEMENT**

Honorable Claudia Wilken

This Stipulation and Agreement of Settlement dated January 30, 2019 (“Stipulation”) is submitted pursuant to Federal Rule of Civil Procedure 23 and Federal Rule of Evidence 408. Subject to the Court’s approval, this Stipulation is entered into between and among Class Representative Todd Labak, individually and on behalf of each member of the proposed Class (defined below), and Defendants Thoratec Corporation (“Thoratec ” or the “Company”); Gerhard F. Burbach, Taylor C. Harris and David V. Smith (together with Thoratec, the “Defendants”), by and through their respective counsel, and sets forth a settlement (the “Settlement”) of the above-captioned action (the “Action”).<sup>1</sup> The Settlement is intended to fully, finally, and forever resolve, discharge, and settle the Action and the Settled Claims (including Unknown Claims) upon and subject to the terms and conditions set forth herein.

## **I. THE LITIGATION**

### ***This Action***

The initial complaint in this action was filed on January 24, 2014. On March 25, 2014, Plaintiff Bradley Cooper filed a motion and supporting papers seeking appointment by the Court to serve as lead plaintiff under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4. On April 21, 2014, the Court entered an Order appointing Bradley Cooper to serve as Lead Plaintiff and appointing his choice of counsel, Pomerantz LLP, to serve as Lead Counsel and Glancy Prongay & Murray LLP to serve as Liaison Counsel.

An Amended Complaint was filed on June 20, 2014. Defendants moved to dismiss, arguing that, among other things, the challenged statements were neither false nor actionable, and the Amended Complaint failed to plead scienter. On November 20, 2014, after completion of briefing, the District Court held oral argument on Defendants’ Motion to Dismiss. By Order dated November 26, 2014 the District Court granted without prejudice Defendants’ motion to dismiss. Pursuant to the Court’s November 26, 2014 Order, Lead Plaintiff filed a Second Amended Complaint (“SAC”) on January 20, 2015, adding Todd Labak as named Plaintiff (together with

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<sup>1</sup> All terms with initial capitalization not otherwise defined herein shall have the meanings ascribed to them in ¶ 1 below.

Lead Plaintiff “Plaintiffs”), in an attempt to comply with the Court’s previous order to specify the false statements, why they were false, and when Defendants’ knew or should have known of the increasing thrombosis rates. Lead Plaintiff and Plaintiff Labak also filed a Notice of Substantive Changes, outlining the amended allegations in the SAC, which included a shorter Class Period. On March 23, 2015, Defendants moved to dismiss the SAC. On November 10, 2015, the Court dismissed Plaintiffs’ SAC with prejudice, and entered final judgment in favor of Defendants. Plaintiffs filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals on December 2, 2015. The Parties fully briefed the issues on appeal. The Ninth Circuit held oral argument on September 14, 2017. On October 4, 2017, the Ninth Circuit reversed and remanded the Action back to the District Court for further proceedings.

On January 15, 2017, Plaintiffs filed their motion for class certification. Plaintiffs produced documents to Defendants in connection with class certification, and also defended the depositions of Mr. Labak and Plaintiffs’ expert, Dr. Zachary Nye. On March 29, 2018, Defendants filed their opposition to class certification. Plaintiffs then took the deposition of Defendants’ expert, Professor Allen Ferrell, and filed their reply in support of class certification, and on May 1, 2018, the District Court heard oral argument. On May 8, 2018, the Court issued its Order Granting Class Certification, appointing Mr. Labak as Class Representative and appointing Pomerantz as Class Counsel.

### ***The Mediation***

Counsel for Plaintiffs and Defendants have engaged in extensive settlement negotiations, while Plaintiffs pursued discovery in the Action. Settlement negotiations included one full day mediation session on June 5, 2018 in New York before Michelle Yoshida of Phillips A.D.R., and continued negotiations through mediator Yoshida for several weeks following the mediation. On August 29, 2018, an understanding in principle was reached to settle the Action and to fully resolve all pending claims of Plaintiffs, and the proposed Class in exchange for creation of a \$11,900,000 Settlement Fund (defined below) and the giving of mutual releases as described herein. Thereafter,

Class Counsel and counsel for Defendants negotiated a Memorandum of Understanding, executed on October 29, 2018.

## **II. PLAINTIFFS' CLAIMS AND BENEFITS OF SETTLEMENT**

Class Counsel has conducted a thorough investigation relating to the claims and the underlying events and transactions alleged in the Action. Specifically, the investigation included, among other things: (i) interviews with former Thoratec employees and/or consultants; (ii) extensive consultation with, and analysis by, damages experts; (iii) detailed reviews of Thoratec's public filings, annual reports, press releases, and other publicly available information; (iv) review of analysts' reports and articles relating to Thoratec; (v) research of the applicable law with respect to the claims asserted in the complaints filed in the litigation and the potential defenses thereto; (vi) the review of documents produced by Defendants and third parties; and (vii) depositions of Plaintiffs' and Defendants' experts with respect to market efficiency, loss causation and damages.

Plaintiffs and Class Counsel believe that the claims asserted in the Action have merit and that the evidence developed to date supports the claims asserted therein. However, Plaintiffs and Class Counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute this Action against Defendants, such as motions for summary judgment, trial, and appeals. Plaintiffs are entering into this Settlement in view of, among other things, the significant funds the Settlement will provide to Class Members and the avoidance of the uncertainties, burden, risk, and expense of further litigation against the Defendants. Plaintiffs and Class Counsel are mindful of the inherent problems of proof of, and possible defenses to, the federal securities law violations asserted in the Action. Based on the foregoing, and in acknowledgement of this Court's rulings to this point, Plaintiffs and Class Counsel have concluded that the terms and conditions of this Stipulation confer substantial benefits upon the Class; are fair, reasonable, and adequate to the Class; and that it is in the best interests of the Class to settle the claims asserted in the Action against the Defendants.

As set forth herein, and pursuant to the Federal Rules of Evidence, this Stipulation shall in no event be construed as or deemed to be evidence of any admission or concession by the Plaintiffs or any Class Member or Class Counsel that any of the claims lack merit, that any of the Defendants' defenses to the claims have merit, or that damages recoverable in the action would not have exceeded the Settlement Fund amount.

**III. DEFENDANTS' DENIALS OF LIABILITY**

The Defendants have denied and continue to deny each and all of the claims, contentions, and allegations made in the Action. They have expressly denied and continue to deny that they have violated the federal securities laws or any other laws or have otherwise misled investors as alleged in the Action. Each Defendant has denied and continues to deny specifically each and all of the claims alleged in the Action; all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts, or omissions, alleged in the Action; the allegations that any of the Defendants made any material misstatements or omissions; and that any member of the Class has suffered damages resulting from the conduct alleged in the Action. In addition, the Defendants maintain that they have meritorious defenses to the claims alleged in the Action.

Nonetheless, the Defendants have concluded that further conduct of the Action could be protracted, burdensome, expensive, and distracting. The Defendants also have considered the uncertainty, risks, and costs inherent in any litigation, especially in complex cases such as this Action. The Defendants have, therefore, determined that it is desirable and beneficial to them that the Action be fully, finally, and forever resolved, discharged, and settled in the manner, and upon the terms and conditions, set forth in this Stipulation.

As set forth herein, and pursuant to the Federal Rules of Evidence, this Stipulation shall in no event be construed as or deemed to be evidence of any admission or concession by the Defendants with respect to any claim of any fault or liability or wrongdoing or damage whatsoever.

**IV. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT**

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiffs (for themselves and all Class Members), on the one hand, and the Defendants, on the

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

other hand, by and through their respective counsel or attorneys of record, that, subject to the approval of the Court, in consideration of the benefits flowing to them from the Settlement set forth herein, the Action and the Settled Claims shall be finally and fully compromised, settled, and released, and the Action shall be dismissed with prejudice, as to the Defendants, upon and subject to these terms and conditions set forth herein:

### **DEFINITIONS**

1. In addition to the other defined terms herein, the following definitions shall apply in this Stipulation:

(a) “Action” means *Cooper v. Thoratec Corporation*, No. 4:14-cv-00360-CW (N.D. Cal.).

(b) “Second Amended Complaint” means the Second Amended Complaint for Violations of the Federal Securities Laws (Dkt. No. 49) filed in the Action on January 20, 2015.

(c) “Authorized Claimant” or “Authorized Claimants” means a Class Member who submits a timely and valid Proof of Claim to the Settlement Administrator, in accordance with the requirements established by the Court, which is approved for payment from the Settlement Fund.

(d) “Claimant” or “Claimants” means a Class Member who submits a Proof of Claim to the Settlement Administrator seeking to be eligible to share in the proceeds of the Settlement Fund.

(e) “Class” means the following class certified by the Court in its May 8, 2018 order (Dkt. No. 119):

All persons and entities that purchased or otherwise acquired Thoratec common stock between May 11, 2011 and August 6, 2014, inclusive (“Class Period”).

Excluded from the Class are any parties who are or have been Defendants in this litigation, the present and former officers and directors of Thoratec and any subsidiary thereof, members of their immediate families and their legal representatives, heirs successors or assigns and any entity in which any current or former Defendant has or had a controlling interest.

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

(f) “Defendant Claims” means any and all claims, rights, causes of action, and liabilities of every nature and description, whether known or Unknown Claims, that arise out of or relate in any way to the institution, prosecution, or settlement of the claims asserted in the Action against the Defendants, which any of the Defendants could pursue against the Plaintiffs, Class Counsel, or any Class Member or their attorneys, agents, experts, or investigators. Defendant Claims do not include any claims relating to the enforcement of the Settlement or any claims against any Person who submits a request for exclusion from the Class that is accepted by the Court.

(g) “Defendants” means Thoratec Corporation (“Thoratec” or the “Company”); Gerhard F. Burbach, Taylor C. Harris and David V. Smith.

(h) “Defendants’ Counsel” means Latham & Watkins LLP.

(i) “Effective Date” means the first date by which all of the events and conditions specified in ¶ 49 below have been met and have occurred, at which time the Settlement contemplated by this Stipulation shall become effective.

(j) “Escrow Account” means the escrow account or accounts to be established by Class Counsel at Huntington National Bank, into which the Settlement Consideration shall be wired, transferred, or otherwise paid pursuant to ¶ 9 below.

(k) “Escrow Agent” means Huntington National Bank.

(l) “Final” means, with respect to any order of court, including, without limitation, the Judgment, that such order represents a final and binding determination of all issues within its scope and is not subject to further review on appeal or otherwise. Without limitation, an order becomes “Final” when: (i) no appeal has been filed and the prescribed time for commencing any appeal has expired; or (ii) an appeal has been filed and either (a) the appeal has been dismissed and the prescribed time, if any, for commencing any further appeal has expired, or (b) the order has been affirmed in all material respects and the prescribed time, if any for commencing any further appeal has expired. For purposes of this definition of “Final,” an “appeal” includes any motion to alter or amend under Rule 52(b) or Rule 59(e) of the Federal Rules of Civil Procedure,

any appeal as of right, discretionary appeal, interlocutory appeal, petition for writ of *certiorari*, or other proceeding involving writs of *certiorari* or mandamus, and any other proceedings of like kind. Any appeal or other proceeding pertaining solely to an order or the part of an order adopting or approving a Plan of Allocation or solely to any order or the part of an order issued solely with respect to an application for attorneys' fees and expenses pursuant to ¶¶ 41-44 herein shall not in any way delay or preclude the Judgment from becoming Final.

(m) "Individual Defendants" means Gerhard F. Burbach, Taylor C. Harris and David V. Smith.

(n) "Judgment" means the Judgment and Order of Final Approval to be entered by the Court following the settlement fairness hearing ("Settlement Hearing") approving the Settlement, substantially in the form attached hereto as Exhibit E.

(o) "Class Counsel" means Pomerantz LLP.

(p) "MOU" means the Memorandum of Understanding executed by the parties on October 29, 2018.

(q) "Net Settlement Fund" means the Settlement Fund, less (i) any taxes; (ii) any Notice and Administration Costs; and (iii) any attorneys' fees, litigation expenses, and Plaintiff compensatory awards awarded by the Court.

(r) "Notice" means the Notice of Pendency and Proposed Settlement of Class Action, Motion for Attorneys' Fees and Expenses, and Settlement Hearing, in all material respects in the form attached hereto as Exhibit A.

(s) "Notice and Administration Costs" means the costs, fees, and expenses that are incurred by the Settlement Administrator and/or the Escrow Agent in connection with administering the Settlement, including but not limited to: (i) providing notices to the Class; (ii) administering the claims process, (iii) engaging in Settlement-related communications with Class Members, and (iv) overseeing the administration of the Escrow Account.

(t) "Person" or "Persons" means an individual, corporation, limited liability company, professional corporation, partnership, domestic partnership, limited partnership, limited



liability partnership, marital community, association, joint stock company, joint venture, joint venturer, estate, legal representative, trust or trustee, unincorporated association, government or any political subdivision or agency thereof, or any other business or legal entity.

(u) “Plan of Allocation” means the plan for allocating the Net Settlement Fund as set forth in Exhibit B, or such other plan of allocation as the Court may approve.

(v) “Preliminary Approval Order” means the order, substantially in the form attached hereto as Exhibit B, to be entered by the Court preliminarily approving the Settlement and directing that notice be provided to the Class.

(w) “Proof of Claim” means the Proof of Claim and Release Form, substantially in the form attached hereto as Exhibit D, which a putative Class Member must complete and timely submit to the Settlement Administrator if that Class Member seeks to be eligible to share in a distribution of the Net Settlement Fund.

(x) “Publication Notice” means the Summary Notice of Pendency and Proposed Settlement of Action and Settlement Hearing, substantially in the form attached as Exhibit C, which is to be published in USA Today, as in the normal course of class action settlement notices, and be posted also on the Settlement Administrator’s website.

(y) “Recognized Claim” means the amount of an Authorized Claimant’s loss that is determined by the Settlement Administrator to be compensable under the Plan of Allocation.

(z) “Released Defendants’ Claims” shall mean all claims and causes of action of every nature and description, whether known claims or Unknown Claims (as defined herein), whether arising under federal, state, common or foreign law, against all current and former lead plaintiffs, named plaintiffs, or Class representatives in the Second Amended Complaint, their respective attorneys, and all other members of the Class, relating in any way to the institution, prosecution, or settlement of the claims in the Second Amended Complaint against Defendants, except for claims relating to the enforcement of the Settlement. Released Defendants’ Claims do not include: (i) any claims relating to the enforcement of the Settlement; or (ii) any claims against

any person or entity who or which submits a request for exclusion from the Class that is accepted and approved by the Court.

(aa) “Released Defendant Parties” or “Released Defendant Party” means collectively Defendants and Defendants’ present and former (i) parents, subsidiaries, affiliates, predecessors, successors, joint ventures and assigns, and (ii) each of their respective officers, directors, employees, partners, controlling shareholders, principals, trustees, attorneys, auditors, accountants, investment bankers, underwriters, consultants, agents, insurers, re-insurers, spouses, estates, related or affiliated entities, in their capacities as such, any entity in which a Defendant has a controlling interest, any members of any Defendant’s immediate family, any trust of which any Defendant is the settlor or which is for the benefit of any Defendant and/or member(s) of his family and each of the heirs executors, administrators, predecessors, successors and assigns of the foregoing, in their capacities as such.

(bb) “Released Parties” means Released Defendant Parties and Released Plaintiff Parties together.

(cc) “Released Plaintiffs’ Claims” shall mean all claims, demands, losses, rights, and causes of action of any nature whatsoever, that have been or could have been asserted in this action or could in the future be asserted in any forum, whether foreign or domestic, whether arising under federal, state, common, or foreign law, by the Class Representative, any member of the Class, or their successors, assigns, executors, administrators, representatives, attorneys, and agents, in their capacities as such, whether brought directly or indirectly against any of the Released Defendant Parties, which (a) arise out of, are based upon, or relate to in any way any of the allegations, acts, transactions, facts, events, matters, occurrences, representations or omissions involved, set forth, alleged or referred to, in this Action, or which could have been alleged in this Action, and (b) arise out of, are based upon, or relate to in any way the purchase, acquisition, holding, sale, or disposition of any Thoratec common stock during the Class Period. Released Plaintiffs’ Claims do not include: (i) any claims relating to the enforcement of the Settlement; and

(ii) any claims of any person or entity who or which submits a request for exclusion from the Class that is accepted and approved by the Court.

(dd) “Released Plaintiff Parties” or “Released Plaintiff Party” means the former Lead Plaintiffs, Class Representative, Class Counsel and any other counsel for Plaintiffs and Class Members.

(ee) “Settlement” means this Stipulation and Agreement of Settlement and the settlement contained herein.

(ff) “Settlement Administrator” means the firm of A.B. Data which, subject to Court approval, shall administer the Settlement, including sending a mailed Notice to Class Members in the form of Exhibit A hereto, arranging for publication of the Notice in the form of Exhibit C hereto, processing claims, and performing such other administrative functions as are required under this Stipulation.

(gg) “Settlement Administration Account” means an interest-bearing account to be maintained by Class Counsel with the Escrow Agent for payment of the expenses incurred by the Settlement Administrator in administering the Settlement.

(hh) “Settlement Amount” means eleven million nine-hundred thousand dollars (\$11,900,000.00).

(ii) “Settled Claims” means the Class Claims and the Defendant Claims.

(jj) “Class Claims” means all claims, rights, liabilities, and causes of action of every nature and description, including Unknown Claims, whether contingent or absolute, mature or unmature, discoverable or undiscoverable, liquidated or unliquidated, accrued or unaccrued, including those that are concealed or hidden, regardless of legal or equitable theory, that Plaintiffs or any other member(s) of the Class asserted or could have asserted in any forum (i) that arise out of, are based upon, or are related in any way directly or indirectly, in whole or in part to, the allegations, transactions, facts, matters, occurrences, representations, or omissions referred to in

the Action and that relate to the purchase, sale, or acquisition of Thoratec common stock; or (ii) that are related to the administration of the Settlement.

(kk) “Class Member” or “Class Members” means a Person who is a member of the Class that does not exclude himself, herself, or itself by filing a request for exclusion in accordance with the requirements set forth in the Notice.

(ll) “Settlement Consideration” means the Settlement Amount that the Defendants shall cause to be paid into an interest-bearing Escrow Account controlled by Class Counsel by the later of (a) twenty (20) business days of entry of an order granting preliminary approval and (b) the timely receipt of the appropriate wiring instructions and W-9 information.

(mm) “Settlement Fund” means the Settlement Consideration plus any and all interest accrued thereon in the Escrow Account.

(nn) “Settlement Fund Distribution Order” means an order entered by the Court authorizing and directing distribution, in whole or in part, of the Net Settlement Fund to the Authorized Claimants.

(oo) “Settling Parties” or “Settling Party” means Plaintiffs, on behalf of themselves and the Class Members, and the Defendants.

(pp) “Taxes” means: (i) all federal, state, and/or local taxes of any kind on any income earned by the Settlement Fund; (ii) any taxes or tax detriments that may be imposed upon the Defendants, their insurers, or their counsel with respect to any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a “qualified settlement fund” for federal or state income tax purposes, provided that any such taxes or tax detriments are reported to Class Counsel and the Escrow Agent at least fourteen (14) days before distribution of the Net Settlement Fund to the Class Members; and (iii) the reasonable and necessary costs and expenses incurred in connection with determining the amount of, and paying, any taxes owed by the Net Settlement Fund (including, without limitation, the reasonable and necessary costs and expenses of tax attorneys and accountants).

(qq) “Unknown Claims” means collectively, any and all Class Claims that any Plaintiff or any other Class Member does not know or suspect to exist in his, her, or its favor, and any Defendant Claims that any Defendant does not know or suspect to exist in his, her, or its favor, which, if known by him, her, or it, might have affected his, her, or its decision to enter into this Settlement, execute this Stipulation, and agree to all the various releases set forth herein, or might have affected his, her, or its decision not to object to this Settlement or not exclude himself, herself, or itself from the Class. Unknown Claims include, without limitation, those claims in which some or all of the facts composing the claim may be unsuspected or undisclosed, concealed, or hidden. The parties stipulate and agree that this provision is to be interpreted to the broadest extent permitted by any applicable law, regulation, or rule.

**CAFA NOTICE**

2. Pursuant to the Class Action Fairness Act (“CAFA”), no later than ten (10) calendar days after this Stipulation is filed with the Court, the Defendants shall complete service on the appropriate federal and state government officials of all notices required under the Class Action Fairness Act, 28 U.S.C. § 1715, and shall thereafter notify Class Counsel as to completion of such service.

**CLASS CERTIFICATION**

3. On May 8, 2018, the Court certified the Class (Dkt. No. 119). Following the execution of this Stipulation, Plaintiffs, with the consent of Defendants, shall apply to the Court for entry of the Preliminary Approval Order in the form attached as Exhibit B hereto, which will include the Class.

**RELEASES AND BAR ORDER**

4. The obligations incurred pursuant to this Stipulation shall be in full and final disposition of the Action as to the Defendants, and shall fully and finally release any and all Settled Claims (including Unknown Claims) against the Released Defendant Parties.

5. Upon the Effective Date, Plaintiffs and each of the other Class Members, on behalf of themselves and their respective spouses, heirs, executors, beneficiaries, administrators,

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

successors, assigns, and any Person(s) (claiming now or in the future) through or on behalf of any of them directly or indirectly, regardless of whether such Plaintiff or Class Member ever seeks or obtains by any means (including, without limitation, by submitting a Claim to the Settlement Administrator) any distribution from the Net Settlement Fund: (a) shall be deemed by this Settlement to have, and by operation of law and of the Judgment shall have, fully, finally, and forever released, relinquished, waived, dismissed, and discharged each and all of the Class Claims (including Unknown Claims), against each and all of the Released Defendant Parties, and shall have covenanted not to sue any Released Defendant Party with respect to any Class Claims (including any Unknown Claims) except to enforce the releases and other terms and conditions contained in this Stipulation or the Judgment entered pursuant hereto and (b) shall be forever permanently barred, enjoined and restrained from commencing, instituting, asserting, maintaining, enforcing, prosecuting, or otherwise pursuing, either directly or in any other capacity, any of the Class Claims (including any Unknown Claims) against any Released Defendant Party in the Action or in any other action or any proceeding, in any state, federal, or foreign court of law or equity, arbitration tribunal, administrative forum, or other forum of any kind. The foregoing provisions shall not apply to any Person who would be a member of the Class and timely excludes himself, herself, or itself.

6. By entering into this Stipulation, Plaintiffs represent and warrant that they have not assigned, hypothecated, conveyed, transferred, or otherwise granted or given any interest in the Class Claims to any other Person, and the Defendants represent and warrant that they have not assigned, hypothecated, conveyed, transferred, or otherwise granted or given any interest in the Defendant Claims to any other Person.

7. The Proof of Claim form to be executed by Claimants shall release all Class Claims (including Unknown Claims) against all Released Defendant Parties and shall be substantially in the form attached hereto as Exhibit D.

8. Upon the Effective Date, Defendants, for themselves and on behalf of each of their respective spouses, heirs, executors, beneficiaries, administrators, successors, assigns, and any

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

Person(s) (claiming now or in the future) through or on behalf of any of them directly or indirectly: (a) shall be deemed to have, and by operation of law and of the Judgment shall have, fully, finally and forever released, relinquished, waived, discharged, and dismissed each and all of the Defendant Claims (including Unknown Claims) against all current and former lead plaintiffs, named plaintiffs or Class representatives in the Action, Class Counsel and their attorneys, and all other Class Members, the members of each Class Member's immediate family, any entity in which any member of any Class Member's immediate family has or had a controlling interest (directly or indirectly), any estate or trust of which any Class Member is the settlor or which is for the benefit of any Class Member and/or members of his or her family and (b) shall be forever permanently barred, enjoined, and restrained from commencing, instituting, asserting, maintaining, enforcing, prosecuting, or otherwise pursuing, either directly or in any other capacity, any of the Defendant Claims (including any Unknown Claims) against current and former lead plaintiffs, named plaintiffs or Class representatives in the Action, Class Counsel and their attorneys, and all other Class Members in the Action or in any other action or any proceeding, in any state, federal, or foreign court of law or equity, arbitration tribunal, administrative forum, or other forum of any kind.

### **SETTLEMENT CONSIDERATION**

9. As full and complete consideration for the Settlement, the Defendants or their insurers shall cause to be paid the Settlement Amount, \$11,900,000.00 in cash, into the Escrow Account within twenty (20) business days of the later of (i) the Court granting preliminary approval of the settlement, and (ii) receipt by Thoratec's counsel from Class Counsel of complete and accurate wiring instructions, payment address, and a complete and accurate W-9 form.

10. Other than the obligation of the Defendants or their insurers to cause to be paid the Settlement Amount into the Escrow Account, under no circumstances will any Released Defendant Party have any obligation to make any payment pursuant to this Settlement set forth herein, and no responsibility for, or liability or obligation whatsoever, to anyone, with respect to the Settlement Fund, the Net Settlement Fund, the Escrow Account, the Settlement Administrator, the Settlement

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

Administrator's actions, any transaction executed or approved by the Escrow Agent, the maintenance, administration, investment, or distribution of the Settlement Fund or the Net Settlement Fund, the establishment or administration of the Plan of Allocation, the determination, administration, or calculation of claims, the payment or withholding of Taxes, the administration of the Settlement, or any losses incurred in connection with such matters. The Released Defendant Parties shall have no further or other liability or obligations to Plaintiffs, Class Counsel, or any Class Member with respect to the Class Claims, except as expressly stated herein.

11. The interest earned on the Settlement Fund pursuant to ¶ 13 below shall be for the benefit of the Class if the Settlement and Judgment become Final. If the Judgment does not become Final or the Settlement is terminated, the interest earned on the Settlement Fund shall be returned to the Defendants or their insurers.

**USE OF SETTLEMENT FUND AND ADMINISTRATION OF ESCROW ACCOUNT**

12. Prior to any distribution of the Net Settlement Fund, the Settlement Fund shall be used to pay: (i) any Taxes; (ii) any Notice and Administration Costs; and (iii) any attorneys' fees, litigation expenses, and Plaintiff compensatory awards awarded by the Court. Under no circumstances shall Defendants, Plaintiffs, or any Class Member or Class Counsel have any responsibility for payment of such costs.

13. Except as provided herein or pursuant to orders of the Court, the Net Settlement Fund shall remain in the Escrow Account prior to the Effective Date. All funds held by the Escrow Agent shall be deemed to be in the custody of the Court and shall remain subject to the jurisdiction of the Court until such time as the funds shall be distributed or returned pursuant to the terms of this Stipulation and/or further order of the Court. At the written direction of Class Counsel, the Escrow Agent shall invest the Settlement Fund exclusively in instruments or accounts backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof, including a U.S. Treasury Fund or a bank account that is either (a) fully insured by the Federal Deposit Insurance Corporation ("FDIC") or (b) secured by instruments backed by the full faith and credit of the United States Government. The Escrow

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW



Agent shall reinvest the proceeds of these instruments or accounts as they mature in similar instruments or accounts at their then-current market rates. Defendants shall not bear any responsibility for or liability related to the investment of the Settlement Fund by the Escrow Agent.

14. The Escrow Agent will bear all responsibility and liability for managing the Settlement Fund for the benefit of the Class, and cannot assign or delegate its responsibilities without approval of Class Counsel. Statements of account will be provided to Class Counsel on a monthly basis until the Judgment becomes Final.

15. The Escrow Account will, to the extent possible, be a “Qualified Settlement Fund” within the meaning of Treasury Regulation § 1.468B-1. The Settlement Administrator, as administrator of the Settlement Fund within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall be solely responsible for ensuring that the Escrow Account complies with the requirements and regulations governing Qualified Settlement Funds, for filing all informational and other tax returns (including, without limitation, the returns described in Treasury Regulation § 1.468B-2(k)) for the Settlement Fund, and for paying all Taxes owed with respect to the Settlement Fund. The Released Defendant Parties shall not have any liability or responsibility for any such Taxes. Upon written request, the Defendants will provide to the Escrow Agent the statement described in Treasury Regulation § 1.468B-1(j). The Escrow Agent shall timely make such elections as may be advisable to carry out this paragraph, including making a “relation back election” as described in Treasury Regulation § 1.468B-2(k)(3), to cause the Qualified Settlement Fund to come into existence at the earliest allowable date, and shall take or cause to be taken all such actions as may be necessary or appropriate in connection therewith.

16. In the event the Judgment does not become Final or the Settlement is terminated as provided herein, within ten (10) business days of entry of the order rendering the Settlement and Judgment non-Final or notice of the Settlement being terminated, all monies then held in the Escrow Account, including interest earned but less any costs or expenses properly incurred as set forth herein, shall be returned to the Defendants or their insurers. Plaintiffs and the Class Members

shall have no responsibility for the return of such consideration. Once the Settlement and Judgment become Final, no monies shall revert to the Defendants.

**USE AND ADMINISTRATION OF SETTLEMENT ADMINISTRATION ACCOUNT**

17. Notwithstanding the fact that the “Effective Date” has not yet occurred, Class Counsel may cause to be paid from the Escrow Account up to \$200,000 in actual costs of notice and settlement administration without further order of the Court or approval by Defendants. Additional sums for this purpose may be paid prior to the Effective Date from the Escrow Account upon agreement of the Parties or order of the Court. After the “Effective Date,” notice and settlement administration costs in excess of the \$200,000 referenced above may be paid only upon order of the Court.

18. After the Judgment becomes Final, any remaining monies in the Settlement Administration Account shall be transferred back to the Escrow Account. In the event the Judgment does not become Final or the Settlement is terminated as provided herein, within ten (10) business days of entry of the order rendering the Settlement and Judgment non-Final or notice of the Settlement being terminated, all monies then held in the Settlement Administration Account, including interest earned, shall be returned to the Defendants or their insurers except for any monies already paid, or then due to be paid for work already performed, for administration costs, including notice costs and Taxes. Plaintiffs and the Class shall have no responsibility for the return of such consideration. Once the Settlement and Judgment become Final, no monies shall revert to the Defendants.

**PLAN OF ALLOCATION**

19. The Settlement Administrator shall administer the Settlement subject to the jurisdiction of the Court and pursuant to this Stipulation and the Plan of Allocation. Class Counsel will formulate the Plan of Allocation, subject to Court approval.

20. The Plan of Allocation proposed in the Notice, as set forth in Exhibit A hereto, is not a necessary term of this Stipulation or the Settlement, and any change, modification, or alteration to the Plan of Allocation by the Court shall not be grounds for termination of the

Settlement. The Plan of Allocation is to be considered by the Court separately from its determination of the fairness, reasonableness, and adequacy of the Settlement as set forth in this Stipulation.

**ADMINISTRATION OF THE SETTLEMENT**

21. As part of the Preliminary Approval Order, Class Counsel shall seek appointment of A.B. Data as the Settlement Administrator. The Settlement Administrator shall administer the Settlement, including but not limited to the process of receiving, reviewing, and approving or denying Proofs of Claim, subject to the jurisdiction of the Court. Other than the Defendants' obligation to cooperate in the production of information with respect to the identification of Class Members, no Released Defendant Party shall have any involvement in, responsibility for, or liability or obligation whatsoever with respect to the selection of the Settlement Administrator, the Plan of Allocation, the administration of the Settlement, the management, disposition, investment, distribution, allocation, or disbursement of the Settlement Fund or the Net Settlement Fund, the determination, administration, calculation or payment of claims, the payment or withholding of Taxes, any nonperformance of the Settlement Administrator or any losses incurred in connection with any such matters. No Person shall have any claim against the Released Defendant Parties or the Defendants' counsel arising from or relating to any of the foregoing, and Class Representative, Class Counsel, and each Class Member hereby fully, finally, and forever releases, relinquishes, and discharges the Released Defendant Parties and Defendants' counsel from any and all such liability.

22. Thoratec shall cooperate in the production of information with respect to the identification of Class Members from Thoratec's shareholder transfer records.

23. In accordance with the terms of the Preliminary Approval Order to be entered by the Court, Class Counsel shall cause the Settlement Administrator to mail the Notice, in substantially the form as is appended as Exhibit A, as the Court shall order, and the Proof of Claim form, in substantially the form as is appended as Exhibit D hereto, as the Court shall order, to those members of the Class as may be identified through reasonable effort. Also, in accordance with the

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

terms of the Preliminary Approval Order to be entered by the Court, Class Counsel shall cause the Settlement Administrator to publish the Publication Notice, in substantially the form appended as Exhibit C hereto, as the Court shall order.

24. The Settlement Administrator shall, among other duties and obligations, receive Proofs of Claim and determine whether they present valid claims in whole or part, work with Class Members as needed to help them supplement or clarify their Proofs of Claim, and determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's Recognized Claim compared to the total Recognized Claims of all Authorized Claimants (as set forth in the Plan of Allocation, or in such other plan of allocation as the Court approves).

25. Any Class Member who does not submit a timely and valid Proof of Claim will not be entitled to receive any of the proceeds from the Net Settlement Fund, but will otherwise be bound by all of the terms in this Stipulation and the Settlement, including the terms of the Judgment to be entered in the Action and the releases provided for herein, and will be barred from bringing any action against the Released Defendant Parties concerning the Class Claims.

26. For purposes of determining the extent, if any, to which a Class Member shall be entitled to be treated as an Authorized Claimant, the following conditions (subject to Court order) shall apply.

27. Each Class Member shall be required to submit a valid Proof of Claim, supported by such documents as are designated therein, including proof of the transactions claimed and the losses incurred thereon, or such other documents or proof as the Settlement Administrator, in its discretion, may deem acceptable.

28. All Proofs of Claim must be submitted by the date specified in the Notice. Any Class Member who fails to submit a Proof of Claim by such date shall be forever barred from receiving any payment pursuant to the Settlement and this Stipulation, but shall in all other respects be bound by all of the terms of this Stipulation and the Settlement, including the terms of the Judgment to be entered in the Action and the releases provided for herein, and will be barred from

bringing any action against the Released Defendant Parties with respect to any of the Class Claims. Provided that it is received before the motion for the Settlement Fund Distribution Order is filed, a Proof of Claim shall be deemed to have been submitted when posted, if received with a postmark indicated on the envelope and if mailed by First-Class mail and addressed in accordance with the instructions provided in the Notice. In all other cases, the Proof of Claim shall be deemed to have been submitted when actually received by the Settlement Administrator.

29. Each Proof of Claim shall be submitted to and reviewed by the Settlement Administrator, who shall determine in accordance with this Stipulation and the Plan of Allocation the extent, if any, to which each Claimant is an Authorized Claimant.

30. The administrative determinations of the Settlement Administrator accepting or rejecting claims shall be presented to the Court on notice to the Settling Parties, for approval by the Court in the Settlement Fund Distribution Order.

31. The Settling Parties submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement embodied in this Stipulation.

32. Each Claimant shall be deemed to have submitted to the jurisdiction of the Court with respect to the Claimant's claim, and the claim will be subject to investigation and discovery under the Federal Rules of Civil Procedure, provided that such investigation and discovery shall be limited to that Claimant's status as a Class Member and the validity of the amount of the Claimant's claim. No discovery shall be allowed on the merits of the Action or Settlement in conjunction with the processing of the Proofs of Claim.

33. Payment pursuant to this Stipulation shall be deemed final and conclusive against all Class Members. All Class Members whose claims are not approved by the Court shall be barred from participating in the distribution from the Settlement Fund, but otherwise shall be bound by all of the terms of this Stipulation and the Settlement, including the terms of the Judgment to be entered in this Action and the releases provided for herein, and will be barred from bringing any action against the Released Defendant Parties concerning the Class Claims.

34. All proceedings with respect to the administration, processing, and determination of claims and all controversies relating thereto, including disputed questions of law and fact with respect to the validity of claims, shall be subject to the jurisdiction of this Court.

**DISTRIBUTION OF THE SETTLEMENT**

35. The Settlement Administrator shall determine and allocate to each Authorized Claimant that Authorized Claimant's proportionate share of the Settlement Fund based on each Authorized Claimant's Recognized Claim compared to the total Recognized Claims of all Authorized Claimants. The Defendants and the Released Defendant Parties shall have no involvement in reviewing, challenging, or approving the Proofs of Claim or in distributing the Net Settlement Fund.

36. After the Effective Date, Class Counsel shall apply to the Court for the Settlement Fund Distribution Order.

37. After the initial distribution of the Net Settlement Fund, the Settlement Administrator shall make reasonable and diligent efforts to have Authorized Claimants cash their distribution checks. To the extent any monies remain in the fund six (6) months after the initial distribution, if Class Counsel, in consultation with the Settlement Administrator, determines that it is cost-effective to do so, the Settlement Administrator shall conduct a re-distribution of the funds remaining after payment of any unpaid fees and expenses incurred in administering the Settlement per the instructions of Class Counsel. At such time as it is determined that the re-distribution of funds remaining in the Net Settlement Fund is not cost-effective, upon approval of the Court, the remaining balance shall be contributed to the American Heart Association.

**TAXES**

38. After the Judgment becomes Final, all costs and Taxes shall be paid out of the Escrow Account, and neither the Defendants nor any of the Released Defendant Parties, nor their counsel, shall have any supervisory authority or responsibility with respect to such payments. Any remaining reasonable and necessary costs of administration, costs of notice to the Class, and Taxes shall be paid out of the Settlement Administration and Escrow Accounts without further order of

the Court. Under no circumstances shall Defendants, Plaintiffs, or any Class Member or Class Counsel have any responsibility for such costs or Taxes.

39. All Taxes shall be paid out of the Settlement Fund, and shall be timely paid by the Escrow Agent pursuant to the terms herein, and without prior Order of the Court. Any tax returns prepared for the Settlement Fund (as well as the election set forth therein) shall be consistent with the previous paragraph and in all events shall reflect that all Taxes (including any interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided herein. Further, Taxes and all related expenses shall be treated as, and considered to be, a cost of administration of the Settlement Fund, and the Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to Authorized Claimants any funds necessary to pay such amounts, including the establishment of adequate reserves for any Taxes (as well as any amounts that may be required to be withheld under Treas. Reg. § 1.468B-2(1)(2)); neither the Defendants nor their counsel nor any other Released Defendant Party is responsible therefor, nor shall they have any liability whatsoever with respect thereto, nor shall they be liable for any reporting requirements that may relate thereto.

40. In all events, neither the Defendants nor their counsel, nor any other Released Defendant Party, shall have any responsibility for or liability whatsoever with respect to the Taxes or the filing of any tax returns or other documents with the Internal Revenue Service or any state or local taxing authority in connection with the Settlement Fund. The Settlement Fund shall indemnify and hold all Released Defendant Parties harmless for any Taxes and related expenses on the Settlement Fund after deposit into the Settlement Fund Account of any kind whatsoever (including, without limitation, taxes payable by reason of any such indemnification). Defendants shall notify the Escrow Agent promptly if Defendants receive any notice of any claim for Taxes relating to the Settlement Fund.

#### **ATTORNEYS' FEES AND EXPENSES**

41. Class Counsel may submit an application for distributions from the Settlement Fund for (i) an award of attorneys' fees from the Settlement Fund; (ii) the reimbursement of actual

costs and expenses, including the fees and expenses of any experts or consultants, reasonably and actually incurred in connection with prosecuting the Action; and (iii) an reimbursement award for the Class Representative for his contributions to prosecuting the Action (collectively, the “Fee and Expense Award”).

42. Class Counsel’s attorneys’ fees and expenses, as awarded by the Court, shall be payable immediately upon the entry of the Court’s order awarding fees and expenses, notwithstanding any appeals that may be taken, subject to the obligation of all counsel who receive any award of attorneys’ fees and costs to make full refunds or repayments to the Escrow Account plus interest earned thereon if the award is lowered or the Settlement is disapproved by a final order not subject to further review. The Settlement is not conditioned upon any award of attorneys’ fees and costs, and any objection to or appeal from such an award shall not affect the finality of the Settlement or the judgment of dismissal. Defendants and their insurance carriers shall have no responsibility for, and no liability with respect to, the allocation of any attorneys’ fees or costs among any counsel or to any other person or any obligation of Class Counsel to make appropriate refunds or repayments to the Settlement Fund or interest earned thereon.

43. If the Effective Date does not occur or if this Stipulation is terminated, then any Fee and Expense Award is no longer payable. In the event that any portion of the Fee and Expense Award has already been paid from the Settlement Fund, Class Counsel shall within ten (10) business days from the event which precludes the Effective Date from occurring or the termination of this Stipulation, refund to the Settlement Fund the Fee and Expense Award paid to Class Counsel.

44. If the Fee and Expense Award is reduced or reversed on appeal, Class Counsel shall within ten (10) business days from the date of a Final order by the Court of Appeals or the Supreme Court directing such reduction or reversal, make such refunds as are required by such Final order, and such funds shall be distributed by the Escrow Agent to the Class in the manner directed in the Final order.



45. The procedure for and the allowance or disallowance by the Court of any application by Class Counsel for attorneys' fees and expenses to be paid out of the Settlement Consideration is not a necessary term of the Settlement or this Stipulation, and it is not a condition of this Stipulation that any particular application for attorneys' fees or expenses be approved.

**TERMS OF ORDER FOR NOTICE AND HEARING**

46. Class Counsel shall apply to the Court for entry of the Preliminary Approval Order within ten (10) business days of the execution of this Stipulation by submitting the fully executed Stipulation together with its Exhibits to the Court and shall request that the Court enter the Preliminary Approval Order, and approve the mailing and publication of the Notice and Publication Notice, substantially in the form of Exhibits A, B, and C annexed hereto.

47. Any Class Member who fails to comply with any of the provisions of ¶¶ 27-28 of this Stipulation shall waive and forfeit any and all rights he, she, or it may otherwise have to appear separately at the Settlement Hearing and/or to object to the Settlement or to this Stipulation, and shall be bound by all the terms of the Settlement and this Stipulation, and by all proceedings, orders, and judgments in the Action.

**TERMS OF ORDER AND JUDGMENT**

48. If the Settlement contemplated by this Stipulation is approved by the Court, counsel for the Settling Parties shall request that the Court enter the Judgment.

**EFFECTIVE DATE OF SETTLEMENT, WAIVER, OR TERMINATION**

49. The Effective Date of Settlement shall be the date when all of the following shall have occurred:

(a) This Stipulation, and such other documents as may be required to obtain final Court approval of this Stipulation in a form satisfactory to the Settling Parties, have been duly executed;

(b) The Court has entered the Preliminary Approval Order, substantially in the form attached hereto as Exhibit B;

(c) The Court has approved the Settlement substantially as described herein, following the period set forth for notice under CAFA, and following notice to the Class and the Settlement Hearing, as prescribed by Federal Rule of Civil Procedure 23;

(d) The Court has entered the Judgment, substantially in the form attached hereto as Exhibit E, which has become Final, or in the event that the Court enters an order of judgment not in all material respects in the form of the Judgment and none of the Settling Parties elects to terminate the Settlement, the date that such alternative judgment becomes Final;

(e) The Defendants have not exercised their option to terminate the Settlement pursuant to the provisions of this Stipulation (including pursuant to the side agreement described in ¶ 53 below);

(f) Plaintiffs have not exercised their option to terminate the Settlement pursuant to the provisions of this Stipulation.

50. Upon the occurrence of all of the events referenced herein, any and all remaining interest or right of the Defendants in or to the Settlement Fund shall be absolutely and forever extinguished. Without limiting the foregoing, each Defendant shall have, in his or its sole and absolute discretion, the option to terminate the Settlement in its entirety in the event that the Judgment, upon becoming Final, does not provide for the dismissal with prejudice of the Action against him or it.

51. Plaintiffs, provided they unanimously agree, and Defendants shall each have the right to terminate his, her, or its participation in the Settlement by providing written notice of his, her, or its election to do so (“Termination Notice”) to counsel for the other Settling Parties hereto within thirty (30) days of any of the following:

(a) The Court enters an order expressly declining to enter the Preliminary Approval Order in any material respect without reasonable leave to amend;

(b) The Court refuses to approve this Stipulation in any material respect without reasonable leave to amend;

(c) The Court declines to enter the Judgment in any material respect; provided, however, that this Settlement is expressly not conditioned on the Court's approval of the proposed Plan of Allocation, nor on the Court's approval of Class Counsel's application for attorneys' fees or expenses, nor on the Court's approval of any compensatory or incentive award to Plaintiffs, and any change in the Judgment relating to these items shall not be considered a material change; or

(d) The Judgment does not become Final.

52. In the event of a termination as provided herein, this Stipulation and releases provided for therein shall become null and void, and the Settling Parties shall be deemed to have reverted to their respective positions as they existed prior to the execution of the MOU, the execution of this Stipulation, and the entry of any orders pursuant to this Stipulation. The Settling Parties shall thereafter proceed in all respects as if this Stipulation and any related orders had not been entered and shall work together to arrive at a mutually agreeable schedule for resuming litigation of the Action in light of such developments.

**OPT-OUT TERMINATION RIGHT, CONFIDENTIALITY**

53. Plaintiffs and Thoratec, by and through their respective counsel, are simultaneously executing a side agreement, which sets forth certain conditions under which this Stipulation may be withdrawn or terminated at the sole discretion of Thoratec and which shall not be filed with the Court, except that it may be brought to the attention of the Court, *in camera*, in the event of a dispute between Plaintiffs and Thoratec or if so requested or as otherwise ordered by the Court. If the Court requires that the side agreement be filed, the Settling Parties shall jointly petition the Court to file it under seal and/or to redact the threshold set forth in its "blow provision" for the termination contemplated by this paragraph, with such protections deemed to be important by the Settling Parties, among other reasons, so as to not encourage or induce actions in opposition to the Settlement by serial objectors or their counsel.

54. The Settling Parties will otherwise keep confidential the terms of the side agreement.

**NOT A CLAIMS-MADE SETTLEMENT**

55. This is not a claims-made settlement; there will be no reversion of any of the Settlement Fund to Defendants or their insurance carriers should the Settlement and Judgment become Final.

**LIMITATIONS ON USE OF THIS STIPULATION**

56. This Settlement compromises claims that are contested and, as such, shall not be deemed an admission by any Settling Party as to the merits of any claim or defense. Plaintiffs acknowledge that the Defendants have denied and continue to deny each and all claims of alleged wrongdoing, while the Defendants acknowledge that Plaintiffs continue to maintain the validity of their lawsuit and the merits of their claims. The Parties acknowledge that Defendants make no admission of liability or wrongdoing.

57. This Stipulation, whether or not consummated and whether or not the Settlement is approved by the Court, and all negotiations, discussions, drafts, and proceedings made or taken pursuant to or in connection with the Settlement are not, shall not be deemed to be, and may not be argued to be, offered or received:

(a) Against any of the Released Defendant Parties as evidence of, or construed as evidence of, any presumption, concession, or admission by any of the Released Defendant Parties with respect to the truth of any fact alleged by the Plaintiffs in the Second Amended Complaint or the Action, or the validity of any claim that has been or could have been asserted against any of the Defendants in the Second Amended Complaint or the Action, or the deficiency of any defense that has been or could have been asserted in the Action, or of any wrongdoing or liability by any of the Defendants, or any liability, fault, misrepresentation, or omission with respect to any statement or written document approved or made by any of the Defendants;

(b) Against the Plaintiffs or any Class Member or Class Counsel as evidence of, or construed as evidence of, any infirmity of the claims alleged by the Plaintiffs in the Second Amended Complaint or the Action or of any lack of merit to the claims or the Action or of any bad faith, dilatory motive, or inadequate prosecution of the claims or the Action;

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

(c) Against any of the Defendants, the Plaintiffs, or any Class Member, or their respective legal counsel, as evidence of, or construed as evidence of, any presumption, concession, or admission by any of the Defendants, the Plaintiffs, or any Class Member, or their respective legal counsel, with respect to any liability, negligence, fault, or wrongdoing as against any of the Defendants, the Plaintiffs, or any Class Member, or their respective legal counsel, in any other civil, criminal, or administrative action or proceeding, other than such actions or proceedings as may be necessary to effectuate the provisions of this Stipulation, provided, however, that if this Stipulation is approved by the Court, the Defendants, the Plaintiffs, and any Class Member, or their respective legal counsel, may refer to it to effectuate the liability protection and releases granted them hereunder;

(d) Against any of the Defendants as evidence of, or construed as evidence of, any presumption, concession, or admission by any of them that the Settlement Consideration represents the amount which could or would have been received after trial of the Action against them;

(e) Against the Plaintiffs or any Class Member as evidence of, or construed as evidence of, any presumption, concession, or admission by any of the Plaintiffs or any Class Member that any of their claims are without merit, or that any defenses asserted by the Defendants have any merit, or that damages recoverable in the Action would not have exceeded the Settlement Fund; and

(f) As evidence of, or construed as evidence of, any presumption, concession, or admission that the modifications to the class definitions as contemplated herein are appropriate in this Action, except for purposes of this Settlement.

#### **MISCELLANEOUS PROVISIONS**

58. All of the Exhibits attached hereto are hereby incorporated by reference as though fully set forth herein. Notwithstanding the foregoing, in the event of a conflict or inconsistency between the terms of this Stipulation and the terms of any Exhibit attached hereto, the terms of this Stipulation shall prevail.

59. Unless required by law, no press release or public statements in connection with the settlement may be made without the approval of counsel for all Parties, which approval shall not be unreasonably withheld. A party intending to issue a press release or public statement in connection with the settlement, even if required by law, shall provide a draft of such statement to counsel for the other Parties at least twenty-four (24) hours in advance of such statement.

60. The Settling Parties intend the Settlement to be a final and complete resolution of all disputes which have been asserted, could have been asserted, or could be asserted by Plaintiffs or the Class Members against the Defendants and all Released Defendant Parties concerning the Class Claims and against the Plaintiffs and Class Members by the Defendants concerning the Defendant Claims. Accordingly, the Settling Parties agree not to assert in any forum that the litigation was brought by Plaintiffs or defended by the Defendants in bad faith or without a reasonable basis. The Settling Parties shall assert no claims of any violation of Fed. R. Civ. P. 11 relating to the prosecution, defense, or settlement of this Action. Moreover, none of the Settling Parties shall seek any cost-shifting claims against the others. The Settling Parties agree that the Settlement Consideration and the other terms of the Settlement were negotiated at arm's length in good faith by the Settling Parties, including during a mediation session, as described herein above, and reflect a settlement that was reached voluntarily after consultation with experienced legal counsel.

61. This Stipulation may not be modified or amended except by a writing signed by all signatories hereto or their successors-in-interest, nor may a Settling Party be deemed to have waived any provision (including this provision) except by a writing signed by that Settling Party or its successor-in-interest.

62. Neither the Class Members nor the Defendants shall be bound by this Stipulation if the Court modifies material terms hereof, provided, however, that it shall not be a basis to terminate the Settlement if the Court modifies any proposed Plan of Allocation or criteria for allocation of the Net Settlement Fund amongst Class Members, or the Plan of Allocation is modified on appeal. Nor shall it be a basis to terminate this Stipulation if the Court disapproves of or modifies the terms

STIPULATION OF SETTLEMENT  
Case No. 14-cv-000360-CW

of this Stipulation with respect to the distribution of the Net Settlement Fund. Nor shall it be a basis to terminate this Stipulation if the Court denies, in whole or in part, Class Counsel's application for attorneys' fees and expenses or Plaintiffs' application for a compensatory award.

63. Class Counsel, on behalf of the Class, is expressly authorized by Plaintiffs to take all appropriate action required or permitted to be taken by the Class pursuant to this Stipulation to effectuate its terms and also is expressly authorized to enter into any modifications or amendments to this Stipulation on behalf of the Class which Class Counsel deems appropriate.

64. Plaintiffs and Class Counsel represent and warrant that none of Plaintiffs' claims or causes of action referred to in this Action or this Stipulation has been assigned, encumbered, or in any manner transferred in whole or in part.

65. Each counsel or other Person executing this Stipulation or any of its Exhibits on behalf of any party hereby warrants and represents that such Person has the full authority to do so and that he, she, or it has the authority to take appropriate action required or permitted to be taken pursuant to this Stipulation to effectuate its terms.

66. The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

67. The administration and consummation of the Settlement as embodied in this Stipulation shall be under the authority of the Court, and the Court shall retain jurisdiction for the purpose of, among other things, entering orders providing for the implementation and enforcement of the terms of this Stipulation, including, without limitation, the releases provided for herein, and any awards of attorneys' fees and expenses to Class Counsel, and enforcing the terms of this Stipulation.

68. The waiver by one Settling Party of any breach of this Stipulation by any other Settling Party shall not be deemed a waiver by the waiving Settling Party of any other prior or subsequent breach of this Stipulation or a waiver by any other Settling Party of any breach of this Stipulation. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of this Stipulation, unless such extensions

conflict with an Order of the Court, in which case the Settling Parties shall move the Court to amend any such Order.

69. Other than the side agreement discussed in ¶ 53, this Stipulation and its Exhibits constitute the entire agreement among the Settling Parties concerning this Settlement, and no representations, warranties, or inducements have been made by any Settling Party concerning this Stipulation and its Exhibits other than those contained and memorialized in such documents.

70. This Stipulation may be executed in one or more counterparts, and the counterparts when executed may be made into a composite which shall constitute one integrated original agreement.

71. This Stipulation shall be binding upon, and inure to the benefit of, the Settling Parties hereto and their successors, heirs, and assigns, including any corporation or other entity into or with which any Settling Party or Released Defendant Party merges, consolidates, or reorganizes.

72. This Stipulation shall not be construed more strictly against one Settling Party than another merely by virtue of the fact that this Stipulation, or any part of it, may have been prepared by counsel for one of the Settling Parties, it being recognized that it is the result of arm's-length negotiations between the Settling Parties, and all Settling Parties have contributed substantially and materially to the preparation of this Stipulation.

73. The Settling Parties warrant that, in entering into this Settlement, they have relied solely upon their own knowledge and investigation, and not upon any promise, representation, warranty, or other statement by any other Settling Party, not expressly contained in this Stipulation or any of the incorporated Settlement documents. It is understood by the Settling Parties that, except for the matters expressly represented herein, the facts or law with respect to which this Stipulation is entered into may turn out to be other than or different from the facts and law now known to each Settling Party or believed by such party to be true; each Settling Party therefore expressly assumes the risk of the facts or law turning out to be so different, and agrees that this



Stipulation shall be in all respects effective and not subject to termination by reason of any such different facts or law.

74. Class Counsel and the Defendants' counsel agree to cooperate fully with one another in seeking Court approval of the Preliminary Approval Order, this Stipulation and the Settlement, and to use best efforts to promptly agree upon and execute all such other documentation as may be reasonably required to obtain final approval by the Court of the Settlement.

75. Pending preliminary and final approval of the Court of the Settlement, as set forth in this Stipulation and its attached Exhibits, all proceedings in the Action shall be stayed.

76. No part of the Settlement Consideration shall be allocated to the settlement of any other action arising from the facts and circumstances at issue in the Action.

77. No Person shall have any claim against Plaintiffs, Class Counsel, the Settlement Administrator, the Escrow Agent, or any other agent designated by Class Counsel based on distribution determinations or claim rejections made substantially in accordance with this Stipulation and the Settlement, the Plan of Allocation, or further orders of the Court, except in the case of fraud or willful misconduct. No person shall have any claim under any circumstances against the Defendants or the Released Defendant Parties, based on any distributions, determinations, claim rejections, or the design, terms, or implementation of the Plan of Allocation.

78. The construction, interpretation, operation, effect, and validity of this Stipulation and any ancillary documents necessary to effectuate it shall be governed by, construed, and enforced in accordance with the internal, substantive laws of the State of California without giving effect to that State's choice-of-law or conflicts-of-laws principles, except to the extent that federal law requires that federal law governs. Subject to the provisions of ¶¶ 34, 71, any dispute relating to this Stipulation shall be brought exclusively in the United States District Court for the Northern District of California, and each of the Settling Parties agrees not to contest subject matter jurisdiction or personal jurisdiction, or assert that such forum is inconvenient for any such dispute brought in this Court.

Dated: January 30, 2019

**POMERANTZ LLP**

By: \_\_\_\_\_

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*Class Counsel*

Dated: February 1, 2019

**LATHAM & WATKINS LLP**

By: \_\_\_\_\_

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