UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNEAPOLIS FIREFIGHTERS' RELIEF ASSOCIATION, *et al*., Plaintiffs, v. MEDTRONIC, INC., *et al*., Defendants.	Civil No. 0:08-cv-06324-PAM-AJB

JOINT DECLARATION OF KARL L. CAMBRONNE, SALVATORE J. GRAZIANO, RAMZI ABADOU, JEFF A. ALMEIDA, AND JAMES M. HUGHES IN SUPPORT OF (A) LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS AND (B) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

KARL L. CAMBRONNE, SALVATORE J. GRAZIANO, RAMZI ABADOU, JEFF A. ALMEIDA, AND JAMES M. HUGHES declare under penalty of perjury as follows:

1. Karl L. Cambronne is a partner at the law firm of Chestnut Cambronne PA ("Chestnut Cambronne"). Salvatore J. Graziano is a partner at the law firm of Bernstein Litowitz Berger & Grossmann LLP ("BLB&G"). Ramzi Abadou is a partner at the law firm of Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"). Jeff A. Almeida is a director at the law firm of Grant & Eisenhofer P.A. ("G&E"). James M. Hughes is a member of the law firm of Motley Rice LLC ("Motley Rice"). Chestnut Cambronne, BLB&G, Kessler Topaz, G&E, and Motley Rice (together "Lead Counsel") represent Oklahoma Teachers' Retirement System ("OTRS"), Oklahoma Firefighters' Pension and

Retirement System ("OKFF Pension Fund"), Union Asset Management Holding AG ("Union"), Danske Invest Management A/S ("Danske") (together "Lead Plaintiffs") and the Class (as defined below). We have personal knowledge of the matters set forth herein based on our active participation in the prosecution and settlement of this Action.

2. We submit this Joint Declaration in support of Lead Plaintiffs' motion, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for final approval of the proposed Settlement that will resolve all claims asserted by Lead Plaintiffs and the Class[1] in this securities class action against Defendants[2] in return for the payment of $85 million in cash (the "Settlement Amount") which, on August 9, 2012, was deposited in an interest-bearing escrow account for the benefit of the Class.

3. We also submit this Joint Declaration in support of (a) Lead Plaintiffs' motion for approval of the proposed Plan of Allocation of the proceeds of the Settlement; and (b) Lead Counsel's motion for an award of attorneys' fees and reimbursement of

[1] Pursuant to the Court's December 12, 2011 Order certifying this Action as a class action (and the Court's July 23, 2012 amendment to the class definition), the "Class" consists of all persons or entities who purchased or otherwise acquired Medtronic common stock during the class period, from November 20, 2006 through November 17, 2008, and who were damaged thereby. Excluded from the Class are (i) Defendants; (ii) members of the Immediate Family of each of the Individual Defendants; (iii) any person who was a Section 16 officer and/or Medtronic board member during the Class Period; (iv) any subsidiary of Medtronic; (v) any firm, trust, corporation or entity in which any Defendant has a Controlling Interest; and (vi) the legal representatives, heirs, successors-in-interest, or assigns of any such excluded party.

[2] Defendants are Medtronic, Inc. ("Medtronic" or the "Company"), Arthur D. Collins ("Collins"), William A. Hawkins ("Hawkins"), and Gary L. Ellis ("Ellis") (collectively the "Individual Defendants").

Litigation Expenses (which includes Lead Plaintiffs' application for reimbursement of their costs and expenses incurred in connection with their representation of the Class).

4. For the reasons set forth below, Lead Plaintiffs and Lead Counsel respectfully submit that (a) the terms of the Settlement are fair, reasonable, and adequate in all respects and should be approved by the Court; (b) the proposed Plan of Allocation is fair and reasonable and should be approved by the Court; and (c) the motion for attorneys' fees and reimbursement of Litigation Expenses is supported by the facts and the law and should be granted.

I. INTRODUCTION AND OVERVIEW

5. Lead Plaintiffs have vigorously litigated this Action from its inception on December 10, 2008 through their achievement on March 28, 2012 of the agreement in principle to settle the Action. As the Court knows, and as set forth in detail below, at every stage of the litigation, Lead Plaintiffs and Lead Counsel were met with equally vigorous and tenacious opposition by Defendants. The parties reached the agreement in principle only after arduous negotiations following three separate mediations, the last of which involved the active participation and oversight of Chief Magistrate Judge Arthur J. Boylan. Indeed, even after the parties reached the agreement in principle to settle the Action, months of negotiations ensued before the parties finalized the terms of the Stipulation and the Settlement could be presented to the Court for its consideration.

6. The parties reached the Settlement at a time when Lead Plaintiffs and Lead Counsel had a clear understanding of the strengths and weaknesses of their case, including the substantial risks that they faced if they continued to litigate it. At the time

that the agreement in principle was reached, Lead Counsel had, among other things: (a) thoroughly reviewed and analyzed publicly-available information regarding Medtronic, including filings by Defendants with the Securities and Exchange Commission ("SEC") and the United States Food and Drug Administration ("FDA"), press releases and other public statements made by Defendants, analysts' reports, documents related to investigations by the United States Senate ("U.S. Senate"), the Department of Justice ("DOJ") and various state Attorneys General, and medical journal articles; (b) conducted approximately 100 investigative interviews of witnesses, including with numerous former Medtronic employees; (c) drafted and filed the detailed consolidated class action complaint; (d) successfully opposed Defendants' motion to dismiss;[3] (e) consulted with experts in the fields of market efficiency, loss causation and damages, healthcare economics and orthopedic surgery; (f) obtained class certification over Defendants' aggressive opposition;[4] (g) conducted extensive discovery, including reviewing and analyzing millions of pages of documents produced by Defendants and third parties; (h) responded to discovery propounded by Defendants; (i) litigated nine complex discovery motions; and (j) participated in three separate mediations before two different mediators, which included Lead Counsel's preparation of multiple mediation statements and analysis of the mediation statements and expert reports prepared by Defendants and their experts in connection with two of the three mediations. Thus, Lead Plaintiffs and Lead Counsel

[3] *Minneapolis Firefighters' Relief Ass'n v. Medtronic, Inc.*, 2010 U.S. Dist. LEXIS 10029 (D. Minn. Feb. 3, 2010).

[4] *Minneapolis Firefighters; Relief Ass'n v. Medtronic, Inc.*, 278 F.R.D. 454 (D. Minn. 2010).

actively assessed the strengths and weaknesses of their case (as well as Defendants') throughout the course of the litigation.

7. Throughout the Action, Lead Counsel also communicated on a regular basis with the Lead Plaintiffs regarding the status and direction of all aspects of the case. Additionally, Lead Counsel updated Lead Plaintiffs on all significant case developments and Lead Plaintiffs reviewed significant pleadings and briefs filed in the Action. Lead Plaintiffs were also kept apprised of all settlement negotiations with Defendants, and Lead Plaintiffs actively participated in the settlement negotiations and ultimately approved the Settlement.

8. While Lead Plaintiffs and Lead Counsel believe in the merit of their claims, they also appreciate the very significant risks that they would have faced if the Action had proceeded to trial. Thus, as discussed more fully below, they recognize the risk that if Defendants prevailed on any of their contentions that Lead Plaintiffs had failed to establish multiple elements of their cause of action, there was a real possibility of no recovery for the Class at all. For example, Defendants asserted that Lead Plaintiffs had failed to identify any actionable statements or omissions; could not demonstrate materiality; had failed to plead facts demonstrating *scienter*; could not establish loss causation for various reasons including because of a "truth-on-the-market" defense; and could not prove damages because other non-fraud factors caused the stock decline at issue.[5] Defendants also argued that they had no duty to disclose their alleged non-FDA

[5] On March 1, 2012, the U.S. Supreme Court granted certiorari in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, Case No. 11-1085, to address, in part, the

approved (*i.e.*, "off-label") sales, which was a key allegation in the claims asserted. While Lead Plaintiffs disagree with all of Defendants' contentions, there was a substantial risk of recovering limited or no damages if the Court or a jury agreed with Defendants' arguments.

9. In deciding to resolve this Action, Lead Plaintiffs weighed the evidence and legal arguments they believed supported their allegations against the evidence and legal arguments that Defendants believed undercut those allegations. All of these issues, and the risks attendant to them, were considered by Lead Plaintiffs and Lead Counsel in deciding to settle this Action on the agreed-upon terms.

10. This Settlement is the product of hard-fought litigation and was negotiated by experienced counsel with a solid understanding of the strengths and weaknesses of their respective cases, and with the determined assistance of Chief Magistrate Judge Boylan. In light of those considerations, Lead Plaintiffs and Lead Counsel believe that this Settlement represents an excellent result for the Class.

11. Lead Counsel have prosecuted this Action on a wholly contingent basis and have advanced or incurred all of the litigation expenses for which reimbursement is sought. By doing so, Lead Counsel shouldered the substantial risk of an unfavorable result, and they have not yet received any compensation for their effort. The application for attorneys' fees, which seeks 25% of the Settlement Fund, is both fair to the Class and Lead Counsel, and, we respectfully submit, warrants approval. This fee request is well

---

contours of the truth-on-the-market defense in securities class actions. The Court's ultimate ruling would have almost certainly been relevant to the parties' claims and defenses in this case had the parties not reached the instant Settlement.

within the typical range of percentage fees awarded in these types of actions in this Circuit, and, under the particular facts of this hard-fought case, is entirely justified in light of the substantial benefits conferred on the Class, the risks undertaken, the quality of representation, and the nature and extent of legal services performed. The reasonableness of the requested fee is also underscored by the fact that, while multipliers on attorneys' lodestar (*i.e.*, the number of hours expended on the case multiplied by counsel's hourly rates) are routinely awarded in this Circuit, the fee requested here calculates to a negative multiplier on Lead Counsel's lodestar. In other words, the attorneys' fee requested here represents a significant discount to (rather than a multiplier of) what counsel would have earned had counsel been compensated using counsel's hourly billable rates. Both the Settlement and fee request are supported by Lead Plaintiffs.

12. This Settlement, under any measure, is precisely the kind of result envisioned by Congress in enacting the PSLRA. Furthermore, the Lead Plaintiffs' active involvement in the prosecution and resolution of the Action, as well as their approval and support of the Settlement and the requested award of attorneys' fees and reimbursement of expenses, are additional factors that merit this Court's approval.

13. Lead Counsel also request reimbursement for expenses incurred in connection with the prosecution and resolution of the Action in the amount of $1,481,702.68. The expenses incurred – which covered, among other things, the cost of hosting and analyzing the 15 million-plus pages of documents that Defendants produced, legal research costs, and work of qualified experts – were critical to Lead Counsel's success in achieving the proposed Settlement. Also, as allowed under the PSLRA, Lead

Plaintiffs and additional certified Class Representative Westmoreland County Employee Retirement System ("Westmoreland") seek reimbursement for their costs in connection with their representation of the Class in the aggregate amount of $45,989.00.

II. FACTUAL SUMMARY OF LEAD PLAINTIFFS' CLAIMS

14. Lead Plaintiffs' Consolidated Complaint for Violations of the Federal Securities Laws (the "Complaint") alleged that throughout the Class Period (November 20, 2006 through November 17, 2008), Defendants violated the federal securities laws by making materially false and misleading public statements and omitting material facts concerning one of Medtronic's key products, the INFUSE® Bone Graft system ("INFUSE").[6] Lead Plaintiffs alleged that Defendants misleadingly touted INFUSE as an increasing source of material revenue and profit growth for Medtronic, repeatedly stated that increases in sales were driven by expanded "on-label" FDA-approved indications for the product, and falsely led investors to believe that Medtronic did not promote INFUSE for off-label uses and strictly complied with all applicable health regulations and a 2006 Corporate Integrity Agreement negotiated with the DOJ. Lead Plaintiffs further alleged that these alleged material misrepresentations and omissions caused the price of Medtronic's common stock to be artificially inflated throughout the Class Period and that the Class was damaged when the truth was revealed through a series of disclosures in November 2008.

[6] INFUSE is a surgically-implanted medical device containing a genetically-engineered protein designed to stimulate bone growth ("rhBMP-2") that was first approved by the FDA in 2002 to treat degenerative discs in the lower lumbar region of the spine.

15. Lead Plaintiffs alleged that beginning on November 12, 2008, investors began to learn the truth about the extent to which INFUSE sales were dependent on off-label promotion. That day, J.P. Morgan released results of a proprietary survey forecasting a 6% decline in INFUSE use following the FDA's issuance of a severe warning notification ("FDA Notification") in July 2008, warning doctors against off-label use of INFUSE. The J.P. Morgan forecast of decline in INFUSE use was driven by a forecast of a 57% reduction in off-label cervical applications and a 24% decline in lumbar use. Lead Plaintiffs alleged that this disclosure prompted the almost 6% decline in Medtronic's stock price that day, with an additional drop occurring on November 14, 2008, in response to another analyst's concerns about INFUSE sales. Lead Plaintiffs alleged that, on the morning of November 18, 2008, during the Company's quarterly earnings conference call, Defendant Hawkins discussed the problems with INFUSE and disclosed that Medtronic had received a subpoena from the DOJ looking into off-label use of INFUSE and that, as a result of these revelations, Medtronic's common stock price declined by an additional 13% on November 18, 2008.

16. The Complaint alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder.

III. HISTORY OF THE ACTION

A. Initial and Amended Complaints

17. On December 10, 2008, a client represented by BLB&G filed the first putative class action complaint arising out of the facts alleged here in the action captioned

Minneapolis Firefighters' Relief Association v. Medtronic, Inc., et al., No. 08-cv-06324 (D. Minn.).

18. On May 26, 2009, the Court consolidated that first-filed action with all other cases arising out of the same set of facts, appointed OTRS, OKFF Pension Fund, Union, and Danske as Lead Plaintiffs of the consolidated securities action pursuant to 15 U.S.C. § 78u-4(a)(3)(B), and approved BLB&G, Kessler Topaz, G&E, and Motley Rice as Lead Counsel and Chestnut Cambronne as Liaison Counsel for the Class. Dkt. 54, 57.[7]

19. On August 21, 2009, Lead Plaintiffs filed a comprehensive 148-page, 313-paragraph Complaint alleging violations of §§ 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder. Dkt. 68.

20. In preparation for the filing of the Complaint, Lead Counsel conducted a thorough and extensive investigation into the Defendants' alleged wrongdoing. The investigation included, among other things:

- contacting over 150 potential witnesses and conducting interviews with approximately 100 non-party witnesses, which included numerous former employees of Medtronic;

- reviewing thousands of pages of publicly-available documents, including Medtronic's SEC filings, transcripts of conference calls and analysts' reports, as well numerous articles from medical journals and other scientific and research materials;

[7] By Order dated January 18, 2012, the Court appointed Chestnut Cambronne as Lead and Liaison Counsel for purposes of coordinating litigation activities and, as required by Local Rule 83.5(d), to directly participate in the preparation and presentation of this Action. Dkt. 307.

- issuing numerous Freedom of Information Act ("FOIA") requests to the FDA and other government entities, pursuing these FOIA requests through negotiations with the government (and later appealing the denial of certain requests), and analyzing the materials received in response to the requests;

- obtaining and reviewing documents and discovery from other litigation relating to INFUSE, including deposition transcripts in malpractice claims;

- researching relevant FDA rules and regulations concerning off-label marketing;

- communicating with a whistleblower in a pending False Claims Act case against Medtronic;

- retaining and consulting with an expert in healthcare economics to assist in analyzing and quantifying the amount of off-label use of INFUSE, including through analysis of Medicare discharge data;

- retaining and consulting with a medical expert to assist Lead Counsel in understanding the science behind INFUSE, doctors' prescribing practices and surgical techniques used with INFUSE, among other things; and

- retaining and consulting with an expert on damages and loss causation.

Lead Counsel incorporated the results of this thorough investigation, including information from certain of the FOIA requests and statements from fifteen Confidential Witnesses ("CWs"), into the Complaint.

21. The Complaint alleged that Medtronic and the Individual Defendants violated § 10(b) of the Exchange Act and Rule 10b-5 by making false statements, omitting material facts and engaging in a fraudulent course of conduct, with *scienter*, in order to artificially inflate the market price of Medtronic's common stock. It alleged that Defendants' statements and omissions were intended to and did deceive the investing

public, including Lead Plaintiffs and members of the Class, and caused Lead Plaintiffs and other members of the Class to purchase Medtronic common stock at inflated prices. The Complaint alleged that, as a direct and proximate result of Defendants' wrongful conduct, Lead Plaintiffs and other members of the Class suffered damages in connection with their purchases of Medtronic common stock. The Complaint further alleged that the Individual Defendants violated § 20(a) of the Exchange Act based on their control of Medtronic, their executive positions, and their direct involvement in the day-to-day operations of the Company such that they possessed the power to influence and control, and did influence and control, the decision-making of Medtronic.

B. Defendants' Motion to Dismiss

22. On October 5, 2009, Defendants Medtronic, Hawkins, Collins, and Ellis moved to dismiss the Complaint. Dkt. 71. Defendants' motion raised more than 20 legal issues and sub-issues and argued that the Complaint suffered from a host of pleading defects. In particular, Defendants argued that: (a) Medtronic had no duty to disclose legal off-label sales; (b) Lead Plaintiffs failed to allege off-label promotion with the required particularity; (c) Lead Plaintiffs failed to identify any statements or omissions that were actionable; (d) any alleged misrepresentation or omission was not material; (e) Lead Plaintiffs failed to plead facts giving rise to a strong inference of *scienter*; and (f) Lead Plaintiffs could not plead loss causation for their allegations of off-label promotion. Dkt. 73.

23. More specifically, Defendants challenged Lead Plaintiffs' CW allegations, arguing, among other things, that: (a) the Court should disregard the statements by nine

CWs because they left Medtronic before the start of the Class Period; (b) allegations based on the remaining CWs also should be disregarded because they did not specify a timeframe for their allegations; and (c) nothing that the CWs said indicated that the Individual Defendants acted with *scienter* or that any of Medtronic's Class Period financial statements were false. Regarding the Complaint's alleged actionable statements and omissions, Defendants argued that: (a) statements about compliance with the law were too "soft" to be actionable; and (b) Medtronic's statements of accurate historic sales triggered no duty to disclose off-label promotion. Defendants also contended that: (a) any alleged misrepresentation or omission about off-label promotion was not material because Lead Plaintiffs failed to plead the extent of any unlawful conduct; and (b) any alleged omission about the extent of the off-label sales was not material because it allegedly resulted in only a trivial shortfall in revenue. Dkt. 73.

24. Regarding *scienter*, Defendants vigorously argued that: (a) the Complaint failed to establish the Individual Defendants' *scienter*; (b) Lead Plaintiffs failed to plead Medtronic's corporate *scienter*; and (c) in addition to the failure to allege facts specific to each Defendant, Lead Plaintiffs' allegations did not support a strong inference of conscious misbehavior or recklessness by any Defendant. Dkt. 73.

25. On November 19, 2009, Lead Plaintiffs filed their opposition to Defendants' motion to dismiss the Complaint. Dkt. 77. In their nearly 50-page opposition brief, Lead Plaintiffs argued that each of Defendants' arguments in favor of dismissal was meritless. Responding to the multiple issues and sub-issues raised by Defendants in their motion required extensive legal research on the part of Lead Counsel,

including research into FDA regulations concerning off-label promotion, and crafting the requisite arguments to refute Defendants' assertions also took considerable time and effort. Dkt. 77.

26. On December 17, 2009, Defendants filed their reply brief. Dkt. 85. On January 7, 2010, the Court heard oral argument on Defendants' motion to dismiss. On February 3, 2010, the Court denied in part and granted in part Defendants' motion to dismiss. Dkt. 88. The Court's order substantially denied Defendants' motion, upholding Lead Plaintiffs' claims with respect to three primary categories of alleged misrepresentations, including: (a) statements that attributed the growth in INFUSE sales to on-label uses; (b) statements predicting increased INFUSE sales from additional on-label uses; and (c) statements about Medtronic's compliance with the Corporate Integrity Agreement.

27. On July 30, 2010, Defendants filed their answer to the Complaint in which they asserted nine affirmative defenses. Dkt. 102.

C. Discovery

1. Initial Pre-Mediation Discussions Regarding Discovery

28. Following the Court's February 3, 2010 denial in large part of Defendants' motion to dismiss, Lead Plaintiffs began an extensive and what proved to be a highly-contentious merits discovery process. On March 4, 2010, Lead Counsel and Defendants' Counsel met to discuss the joint report required by Rule 26(f) of the Federal Rules of Civil Procedure. At that meeting, Defendants proposed that the parties engage in mediation rather than embark on a full discovery program. Lead Counsel and

Defendants' Counsel negotiated the terms of the Rule 26(f) report and the possibility of mediation for weeks. On the day before the Rule 26(f) report was filed, Defendants expressed their desire to bifurcate discovery in the Action and defer all merits discovery until completion of discovery of loss causation and damages.

29. On March 31, 2010, the parties filed the Rule 26(f) Joint Report. Defendants urged the Court to postpone all merits discovery unrelated to loss causation and damages. Dkt. 92. On April 8, 2010, the Court issued a Pretrial Scheduling Order, denying Defendants' request to bifurcate discovery. Defendants then again approached Lead Plaintiffs to request a mediation and a stay of discovery pending the mediation with experienced mediator Professor Eric D. Green. Lead Plaintiffs agreed to do so based on the understanding that, were the mediation to fail, good faith discovery would begin in earnest on July 20, 2010, and that Defendants would promptly produce documents that they had already gathered, reviewed, and produced to the government. On April 30, 2010, the parties filed a stipulation notifying the Court of the June 2010 mediation and revising the deadlines set in the April 8, 2010 Order. Dkt. 99. On May 3, 2010, the Court entered an Order approving the parties' stipulated schedule. Dkt. 100.

2. Negotiation of the Protective Order

30. Lead Plaintiffs also engaged in extensive negotiations with Defendants concerning a Protective Order for the confidentiality of information produced in discovery, through the exchange of numerous drafts as well as telephone discussions. Disputes encountered in the drafting of the Protective Order concerned the treatment of confidential documents and the permissible use of documents. On July 26, 2010, the

parties filed a stipulated Protective Order (Dkt. 101), which the Court signed on August 2, 2010. Dkt. 103.

3. Discovery Propounded by Lead Plaintiffs to Defendants

31. On April 8, 2010, prior to the June 2010 scheduled mediation, Lead Plaintiffs propounded their first set of requests for the production of documents to Defendants. After the mediation, which did not result in an agreement to settle, when, according to the agreement previously achieved, discovery was scheduled to begin in earnest, Defendants resisted producing documents, including documents that Lead Plaintiffs understood would be provided pursuant to their prior agreement to stay discovery in order to conduct the mediation. As set forth below, obtaining production of documents from Defendants required extensive letter writing, numerous meet and confers, and several motions to compel. This process involved significant disputes between the parties over Lead Plaintiffs' selection of custodians whose files were to be searched, search terms to be used, and Defendants' assertions of privilege. Lead Counsel's review of millions of pages of documents that Defendants ultimately produced enabled Lead Plaintiffs to propound additional targeted discovery requests to Defendants. On May 16, 2011, Lead Plaintiffs propounded their second set of requests for the production of documents to Defendants.

32. On May 20, 2011, Lead Plaintiffs served their first set of interrogatories on Defendants. On July 13, 2011, Lead Plaintiffs served their first set of requests for admissions on Defendants.

33. In response to Lead Plaintiffs' discovery requests and the successful resolution of Lead Plaintiffs' discovery motions discussed below, Defendants produced more than 15 million pages of documents. Because of the volume of the production, Lead Counsel established a document storage database with an outside vendor that enabled the electronic organization, coding, searching and retrieval of the documents. This database was necessary for Lead Counsel to be able to digest and synthesize the massive volume of documents produced by Defendants. Given the volume of documents produced, dozens of lawyers and paralegals had to be trained in the use of the database.

34. Careful examination and analysis of the documents required major expenditures of time and resources by Lead Counsel in order to analyze the contents of the millions of pages of documents produced, to organize the documents, to select the documents that supported Lead Plaintiffs' allegations, to identify relevant witnesses, and to establish procedures to identify additional documents and information that Defendants had still not produced. The review and organization of the productions continued every week for over one year.

4. Discovery Propounded by Lead Plaintiffs to Third Parties

35. Starting in May 2010, Lead Plaintiffs began issuing subpoenas for the production of documents to over 100 non-parties, including (a) surgeons who were consultants to Medtronic; (b) Wall Street analysts who covered Medtronic; (c) marketing and medical education companies that Medtronic used to carry out its marketing efforts; and (d) Medtronic distributors who were responsible for a very significant portion of Medtronic's INFUSE sales. Lead Counsel conducted numerous meet-and-confer

conferences with subpoenaed non-parties and exchanged letters to discuss non-parties' objections to the subpoenas, negotiate the scope of the subpoenas, and arrange for the production of responsive documents. This required extensive coordinated efforts and expenditures of time and money on Lead Counsel's part. Ultimately, many of these non-parties produced responsive documents to Lead Plaintiffs. The document productions from non-parties exceeded 190,000 pages. Lead Counsel reviewed and analyzed these documents.

5. Discovery Disputes

36. The parties litigated numerous complex disputes during the Action relating to the scope of discovery.

37. During the course of the Action, Lead Plaintiffs filed seven motions to compel and responded to two discovery motions filed by Defendants and third parties. Prior to filing their own motions, the details of which are outlined below, Lead Counsel spent a significant amount of time analyzing the documents already produced by Defendants in order to narrow the scope of the discovery disputes while aggressively continuing to pursue discovery. Lead Counsel also spent many hours preparing for meet-and-confer conferences with defense counsel, conducting those conferences, and preparing letters memorializing those conversations. A sampling of the motions in question is outlined below.

(a) Lead Plaintiffs' Motion to Compel Medtronic's Production of Documents It Previously Produced to the Government

38. Lead Plaintiffs' first set of requests for the production of documents, served April 8, 2010, requested, among other things, documents relating to INFUSE that Defendants had produced to, or that reflected Defendants' communications with, governmental agencies that were investigating Medtronic's alleged off-label promotion of INFUSE, which included the DOJ, members and/or committees of the U.S. Congress, the SEC, the Office of U.S. Senator Charles Grassley or any other members or committees of the U.S. Senate, the U.S. Army, the U.S. Attorney's Office for the District of Massachusetts, the U.S. Attorney's Office for the Northern District of Indiana, the Massachusetts Attorney General's Office, the New Jersey Attorney General, Division of Consumer Affairs or any other government entity ("Government Production Requests").

39. Lead Plaintiffs had agreed to participate in the June 2010 mediation on the understanding that Defendants would produce the documents responsive to Lead Plaintiffs' Government Production Requests immediately after the mediation if it were unsuccessful. However, after that mediation concluded with no agreement to settle, on July 30, 2010, Defendants served their responses and objections to Lead Plaintiffs' document requests, in which they indicated that they would only produce the most basic materials, which did not include the documents responsive to the Government Production Requests. On August 4, 2010, after reviewing Defendants' objections, Lead Plaintiffs contacted Defendants to request a meet-and-confer.

40. On August 23, 2010, the parties conferred telephonically and on September 17, 2010, Defendants served Lead Plaintiffs with their revised responses and objections, in which Medtronic remained unwilling to produce any documents responsive to the Government Production Requests.

41. On September 30, 2010, Lead Plaintiffs filed a motion to compel Defendants' production of documents responsive to the Government Production Requests, arguing that Defendants had already reviewed, compiled and produced the requested information to various government agencies and the Company should promptly produce this particularized set of documents. Dkt. 125, 127. On October 7, 2010, Defendants filed their opposition brief, arguing that Lead Plaintiffs' requests were impermissible and that they had not shown that the Government subpoenas were co-extensive with the issues relevant to this Action. Dkt. 134. On October 14, 2010, the Court heard oral argument on the motion and, on November 3, 2010, granted in part and denied in part Lead Plaintiffs' motion to compel the documents at issue. Dkt. 142.

42. Despite the Court's November 3, 2010 Order, Defendants continued to withhold documents responsive to the Government Production Requests. Lead Plaintiffs argued that Defendants were in violation of the November 3 Order, which provided that Defendants were required to produce Medtronic's correspondence with various government agencies. Dkt. 142, 167. On November 22, 2010, Defendants filed a motion seeking clarification of the Court's November 3, 2010 Order, to determine what documents were encompassed within Lead Plaintiffs' requests. Dkt. 155, 157. Lead Plaintiffs filed their opposition to the motion on November 29, 2010, again arguing that

Defendants were withholding highly relevant documents. Dkt. 160. The Court largely agreed with Lead Plaintiffs' position in an Order entered on December 21, 2010, and required Medtronic to produce its communications with the government. Dkt. 167.

(b) Defendants' Motion for a Protective Order to Restrict Their Production of Documents Outside the Class Period

43. On November 22, 2010, while continuing to litigate the scope of documents that they were required to produce in response to the Government Production Requests, Defendants filed a motion for a protective order seeking to limit the time period for discovery in the case, arguing that Medtronic should not be required to produce documents dating over four years prior to the beginning of the Class Period or from after the Class Period because documents from these periods were purportedly irrelevant to the claims and defenses in the litigation. Dkt. 155, 157. Defendants further argued that it would be too burdensome for Medtronic to collect and review documents for such a broad timeframe.

44. On November 29, 2010, Lead Plaintiffs filed their brief in opposition to Defendants' motion for a protective order. Dkt. 160. Lead Plaintiffs argued that Defendants' motion amounted to a motion for reconsideration of the Court's November 3, 2010 Order and that the motion failed to meet the stringent standard for reconsideration. Lead Plaintiffs further argued that Medtronic's unilaterally-proposed time restriction was an improper attempt to avoid producing highly relevant documents. For example, Lead Plaintiffs alleged that the off-label promotional techniques originated at the product launch of INFUSE prior to the start of the Class Period and the Company's

payments to key opinion leaders in the field of orthopedic surgery and other "paid consultant" surgeons continued unabated throughout the Class Period, even after Medtronic was forced to enter into a Corporate Integrity Agreement with the government in July 2006 to resolve allegations of improper marketing by its spinal division. Lead Plaintiffs also argued that the Defendants' motion ignored the numerous pertinent events that occurred after the close of the Class Period, such as press reports regarding Senate, U.S. Army, and DOJ investigations into Medtronic's payments to surgeons and the marketing of INFUSE.

45. On December 21, 2010, the Court granted in part and denied in part Defendants' motion for a protective order. While the Court ruled that documents that pre-dated and post-dated the Class Period must be produced, it did not extend the periods for as long as Lead Plaintiffs had requested. The Court denied all other aspects of Defendants' motion. Dkt. 167.

46. After twice briefing the issues and two Court Orders, Defendants continued to withhold documents that Lead Plaintiffs believed to be highly relevant. In light of this, on July 27, 2011, Lead Plaintiffs filed another motion to compel Defendants to produce documents concerning the Government Production Requests, arguing that Defendants were engaging in improper discovery tactics. Dkt. 200, 203. The parties came to an agreement regarding the issue and the Court subsequently denied as moot Lead Plaintiffs' motion based on the parties' agreement. Dkt. 241.

(c) Lead Plaintiffs' Motion to Compel Defendants' Production of Documents from Relevant Custodians

47. Another heavily contested discovery dispute concerned the parties' disagreement over which custodians' files the Defendants should search in response to Lead Plaintiffs' document requests. Defendants refused to search the custodial files of Medtronic employees whom Lead Plaintiffs believed had highly relevant documents and those of the CWs that Lead Plaintiffs had cited in the Complaint or to use search terms that Lead Plaintiffs had proposed that were designed to identify relevant documents. On August 2, 2011, Lead Plaintiffs filed a motion to compel Defendants' search of relevant custodial files and use of requested search terms. Dkt. 196, 217.

48. Lead Plaintiffs argued that Medtronic refused to include Lead Plaintiffs' requested custodians in its document production and refused to use Lead Plaintiffs' proposed search terms in order to prevent the production of highly-relevant documents. To aid the Court in better understanding the relevance of the files of each of the custodians in dispute, Lead Counsel analyzed internal Medtronic documents from the files of other custodians that mentioned or included communications from the custodians at issue, and set forth in detail in Lead Plaintiffs' brief the numerous specific details concerning the disputed custodians' roles in the alleged fraud, which could best be established through production of those individuals' own documents.

49. On August 30, 2011, Defendants opposed the motion to compel, arguing that Lead Plaintiffs' demands for additional custodial files should be denied as irrelevant, cumulative, and unduly burdensome. Dkt. 227. Defendants additionally argued that the

Court should deny Lead Plaintiffs' motion to compel the use of the requested search terms as duplicative and burdensome. Through negotiations between the parties, including in the courthouse on the day that the Court heard Lead Plaintiffs' motion, the parties agreed to production of documents from the files of 50 additional Medtronic sales custodians chosen by the Lead Plaintiffs, 27 additional search terms to be used in Medtronic's databases, and the search of the files of 12 custodians who were not a part of Medtronic's sales division. Dkt. 241, 242. The parties were thus able to resolve this motion in Lead Plaintiffs' favor, and the Court was able to dismiss Lead Plaintiffs' motion as moot. *Id.*

(d) Lead Plaintiffs' Motion to Compel the Defendants' Production of Safety-Related Documents

50. Another heavily-contested discovery issue was the Defendants' withholding of documents concerning the safety of INFUSE and the Company's promotion of INFUSE safety to generate sales growth. In other words, another way that Lead Plaintiffs alleged Medtronic marketed INFUSE off-label was to suppress and mischaracterize information about the risks and dangers of using INFUSE in off-label applications in order to influence surgeons' prescribing habits and increase sales. Defendants, however, withheld from Lead Plaintiffs documents relating to safety issues, arguing that the documents were not relevant and that producing them would impose an unreasonable burden on them. Throughout the parties' numerous meet-and-confers and letters exchanged on safety-related requests, the parties could not reach agreement.

51. On July 27, 2011, Lead Plaintiffs filed a motion to compel Defendants to produce documents concerning the promotion of INFUSE safety, arguing that they were relevant because Medtronic systematically marketed INFUSE off-label by promoting a misleading safety record. Dkt. 200, 203. On August 30, 2011, Defendants opposed Lead Plaintiffs' motion, arguing that the documents sought by Lead Plaintiffs were not relevant. Dkt. 225. After filing their briefs, the parties met and conferred, and reached agreements regarding certain issues raised in the motions, which the Court subsequently dismissed as moot. On September 21, 2011, the Court granted in part and denied in part the remainder of Lead Plaintiffs' motion to compel, ordering Defendants to produce documents regarding the safety of INFUSE during the relevant time period. Dkt. 241.

(e) Lead Plaintiffs' Motion to Compel the Testimony of a Former Medtronic Employee Who Invoked His Fifth Amendment Privilege Against Self-Incrimination

52. The parties also engaged in a heavily-contested dispute regarding a subpoena issued to a former Medtronic employee cited as a CW in the Complaint ("CW2") and his invocation of the Fifth Amendment privilege against self-incrimination. As discussed further below, on July 15, 2011, Defendants opposed Lead Plaintiffs' motion for class certification by submitting declarations that Defendants had obtained from certain of the CWs that Lead Plaintiffs had cited in their Complaint, which Defendants claimed undermined the allegations attributed to those CWs in the Complaint.

53. On August 24, 2011, Lead Plaintiffs served a subpoena for documents on CW2, and on September 21, 2011, CW2 responded to the subpoena by agreeing to produce certain documents and raised several objections, which included an assertion of

the Fifth Amendment privilege with respect to documents listed on a privilege log. The parties had multiple meet-and-confers regarding CW2's production of documents, but did not reach agreement. On November 23, 2011, Lead Plaintiffs filed a motion to compel the production of documents withheld by CW2 under the Fifth Amendment privilege. Dkt. 270, 272. Lead Plaintiffs argued that CW2 could not use the Fifth Amendment privilege as both a sword and a shield, on the one hand submitting a declaration on Medtronic's behalf in opposition to Lead Plaintiffs' motion for class certification testifying that neither CW2 nor Medtronic promoted INFUSE off-label, and on the other hand, invoking CW2's right against self-incrimination with respect to documents that Lead Plaintiffs had requested from CW2 concerning, among other things, Medtronic's alleged off-label marketing, promotion, or sale of INFUSE. In other words, the documents either tended to incriminate CW2 in illegal off-label promotion, or (according to CW2) off-label promotion did not occur at Medtronic. CW2 could not have it both ways.

54. On December 5, 2011, CW2 opposed Lead Plaintiffs' motion, arguing that CW2 had a valid Fifth Amendment privilege against the production of potentially-incriminating documents and that he had not waived this right through his declaration submitted on Medtronic's behalf. Dkt. 283. On December 30, 2011, the Court agreed with Lead Plaintiffs that CW2's declaration had waived his Fifth Amendment privilege and entered an Order directing CW2 to produce documents that were previously withheld under his claim of privilege. On January 17, 2012, CW2 filed a formal Objection to the Court's discovery ruling, arguing that the Order unnecessarily and erroneously found that

CW2 had waived the Fifth Amendment privilege. On February 1, 2012, the Court denied CW2's objection and affirmed the December 30, 2011 Order on the motion to compel. On February 2, 2012, CW2 produced documents pursuant to the February 1, 2012 Order.

55. After many months of rescheduling, on February 24, 2012, Lead Plaintiffs conducted the deposition of CW2. In preparation for this deposition, Lead Counsel reviewed thousands of documents, which required many hours of preparation.

(f) Additional Significant Discovery Disputes

56. The parties had numerous additional discovery disputes concerning the scope of their respective document productions. They were unable to resolve these disputes informally and required the Court's assistance to resolve them. Additional contested discovery issues that resulted in motion practice included:

a. Defendants' insistence that Lead Plaintiffs produce: (i) communications between named plaintiffs and class counsel prior to retention of counsel; (ii) advice, due diligence, or research analysis Lead Plaintiffs received regarding any company in the medical device or pharmaceutical industries; (iii) communications between class counsel and putative class members; (iv) retention or fee arrangements; and (v) documents reviewed in answering interrogatories. Dkt. 150, 152. Lead Plaintiffs opposed those requests as unduly burdensome and as seeking privileged and/or irrelevant information. Dkt. 163. After a December 6, 2010 hearing, the Court granted in part and denied in part Defendants' motion. Dkt. 166, 167.

b. Defendants' insistence that Lead Plaintiffs produce all correspondence between Lead Counsel and all putative class members or detailed privilege logs listing the identity of all such putative class members. Additionally, Defendants demanded that Lead Plaintiff Union conduct searches of its documents using certain search terms identified by Defendants and produce any responsive documents. The parties were able to reach agreement on these issues, and Defendants withdrew their motion. Dkt. 210, 212, 241.

c. Defendants' refusal to produce certain documents and responses to Lead Plaintiffs' interrogatories. Specifically, Defendants refused to produce documents or information responsive to the following discovery requests: (i) Lead Plaintiffs' interrogatory concerning financial information related to various off-label INFUSE procedures; (ii) Lead Plaintiffs' interrogatory concerning the identities and compensation of Medtronic's key opinion leaders ("KOLs"); (iii) Lead Plaintiffs' interrogatory concerning compensation paid to third-party consultants, medical organizations and affiliated entities involved in promotion of INFUSE; (iv) Lead Plaintiffs' interrogatory concerning third-party consulting contracts and agreements regarding INFUSE; (v) Lead Plaintiffs' interrogatory concerning facts supporting Defendants' affirmative defense regarding *scienter*; (vi) Lead Plaintiffs' first and second set of document requests concerning documents relating to Medtronic's consulting agreements with KOLs and other third parties; and (vii) documents related to multiple FDA warning letters and

meetings concerning Medtronic's serious issues regarding off-label promotional activities. Dkt. 259, 261. Defendants opposed Lead Plaintiffs' motion. Dkt. 292. The Court held a hearing on December 21, 2011, and on January 19, 2012, granted in part and denied in part Lead Plaintiffs' motion. Dkt. 298, 308.

d. Defendants' designation of virtually every document they produced to Lead Plaintiffs as "confidential" or "highly confidential." On November 23, 2011, Lead Plaintiffs filed a motion to unseal certain documents and certain discovery briefing, arguing that Defendants had violated the August 2, 2010 Protective Order in this Action by designating virtually every document they produced as "confidential" or "highly confidential." Dkt. 265, 267. The parties agreed to stay the motion pending additional discovery.

57. In addition to the issues identified above that culminated in motion practice, the parties engaged in numerous additional discovery disputes that were either resolved without Court intervention or had not yet proceeded to motion practice at the time the parties agreed to settle this Action. However, the foregoing summary provides several indicative examples of the complexity of the discovery disputes between the parties in this Action, the hard-fought nature of the disputes, and the lengths to which Lead Plaintiffs had to go in order to obtain highly-relevant discovery from Defendants that was instrumental in reaching the favorable resolution of this Action.

(g) The Parties' Disputes Over Defendants' Assertions of Privilege

58. Another example of the complexity and contested nature of this litigation is the parties' vigorous dispute over the Defendants' voluminous privilege logs, which spanned more than 1,000 pages and contained over 23,000 entries. For over six months, Lead Plaintiffs sent Defendants numerous comprehensive letters testing and challenging Defendants' various privilege assertions regarding thousands of individual entries and document categories on Defendants' logs. In addition to the numerous letters exchanged, the parties held numerous meet and confers and multiple conferences with Judge Boylan. Lead Plaintiffs argued that Defendants inappropriately asserted privilege over thousands of non-privileged documents. Defendants disputed Lead Plaintiffs' assertion, arguing that attorney-client privilege applied to the entries. Judge Magnuson proposed that Magistrate Judge Boylan serve as a special master to resolve the privilege issues if the parties were unable to resolve the disputes. The parties were in the middle of litigating those disputes when the parties reached the agreement in principle to settle the Action.

(h) Lead Plaintiffs' Discovery Disputes with Third Parties Who Refused to Produce Documents

59. In addition to disputes with Defendants, Lead Plaintiffs contended with the objections of numerous non-parties who refused to produce documents in response to Lead Plaintiffs' narrowly-tailored and highly-relevant discovery requests, which required many hours of attorney time for drafting correspondence, holding meet-and-confers, drafting and arguing motions to compel.

60. For example, 15 third-party doctors whom Lead Plaintiffs alleged were Medtronic consultants involved in the promotion of INFUSE ("Third-Party Doctors") refused to comply with subpoenas that Lead Plaintiffs served on them in May 2010. Despite attempts to meet and confer with their attorneys and resolve this issue without Court intervention, the Third-Party Doctors informed Lead Plaintiffs that they would not produce any documents. On August 31, 2010, Lead Plaintiffs filed a motion to compel, which argued that the Third-Party Doctors had more than three months to review the subpoenas and begin compiling responsive documents, and that most of the documents requested had most likely already been gathered, reviewed, and produced by the Third-Party Doctors pursuant to the parallel government investigations involving INFUSE. *See* Dkt. 109, 111.

61. On September 7, 2010, the Third-Party Doctors opposed Lead Plaintiffs' motion, arguing that Lead Plaintiffs sought to burden non-parties with the production of a broad range of documents, most of which should be produced by Medtronic rather than the Third-Party Doctors. Dkt. 115. On the same day, Defendants also filed a memorandum in support of the Third-Party Doctors' objections to Lead Plaintiffs' subpoenas, which argued that virtually all of the documents Lead Plaintiffs requested from the doctors were also requested from Medtronic itself. Dkt. 118. The Court heard oral argument on Lead Plaintiffs' motion to compel on September 14, 2010, and on November 3, 2010, the Court ordered the Third-Party Doctors to fully comply with the subpoenas, finding that a defendant's possession or production of documents related to a

third party does not absolve that third party of its own independent obligation to comply with a valid subpoena. Dkt. 143.

6. Lead Counsel's Preparations for Deposition Discovery

62. In addition to conducting the extensive written discovery discussed above, Lead Counsel devoted significant efforts to preparing for and scheduling depositions in this Action. Lead Plaintiffs first proposed a list of potential deponents to Defendants in July 2011. After Lead Plaintiffs received a response to their request for basic information concerning these witnesses (such as whether Medtronic considered them to be third-parties for purposes of Rule 45 of the Federal Rules of Civil Procedure) and proposed deposition dates from Defendants, in late 2011, Lead Plaintiffs identified 31 witnesses they would depose and noticed the depositions of many of these witnesses to occur in early 2012. As a result of a number of issues, including ongoing disputes over Defendants' broad assertions of privilege and deficiencies in Defendants' production of documents, only one of the depositions occurred before the agreement in principle to settle was reached.

D. Class Certification

63. On January 14, 2011, Lead Plaintiffs filed a motion for class certification, appointment of class representatives, and appointment of class counsel. Dkt. 171, 173. Lead Plaintiffs sought to certify a class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3) on behalf of all persons or entities who purchased or otherwise acquired Medtronic common stock during the Class Period, and who were damaged by Defendants' alleged misconduct. In connection with the motion, Lead Plaintiffs submitted an expert report

from their economic expert attesting to the efficiency of the market for Medtronic common stock and addressing Defendants' loss causation arguments. Dkt. - Ex. 175-20.

64. As discussed briefly above, on July 15, 2011, Defendants opposed Lead Plaintiffs' motion for class certification. Defendants' opposition brief consisted principally of an attack on Lead Counsel's adequacy and veracity, based on the submission of declarations that Defendants had obtained from certain of the CWs, which Defendants claimed undermined the allegations attributed to those CWs in the Complaint. In response, Lead Counsel gathered and submitted numerous internal Medtronic documents from Medtronic's own document production supporting the original allegations of the CWs as they were first relayed to Lead Counsel and their investigators (and contradicting the CWs' statements in the declarations provided to Defendants), contacted additional CWs who provided further support for Lead Plaintiffs' claims, and prepared declarations by Lead Counsel and their investigators refuting the Defendants' accusations. On November 11, 2011, Lead Plaintiffs filed their reply papers containing these additional materials supporting their original allegations in the Complaint. Dkt. 251. On December 12, 2011, the Court granted Lead Plaintiffs' motion for class certification (Dkt. 287) (which it subsequently amended on July 23, 2012, to conform the end date of the Class Period to the end date identified in the Complaint (Dkt. 326)).

65. The December 12, 2011 Order also required Lead Counsel to submit a litigation management plan within 30 days (Dkt. 287), and on January 11, 2012, Lead Plaintiffs filed their proposed litigation plan. Dkt. 301. On January 18, 2012, the Court adopted in part and amended in part Lead Plaintiffs' litigation management plan and

appointed Lead Counsel as class counsel to represent the Class certified in the December 12, 2011 Order, as amended. Dkt. 307.

E. Lead Counsel's Consultations and Work with Experts

66. To assist Lead Counsel in investigating and proving the complex issues in this matter, including the Class's damages, the services of several consultants and experts in multiple fields were required.

67. Lead Plaintiffs retained an expert in the economics of the healthcare industry to assist in drafting the Complaint. This expert, a professor of healthcare economics and policy, was retained to assist Lead Plaintiffs with quantifying the extent of off-label use of INFUSE through Medicare reimbursement orders and statistical analysis. This expert also provided background expertise on off-label promotion strategies in the healthcare industry, the regulation of off-label marketing, and other areas.

68. Lead Plaintiffs also retained an expert in loss causation and damages (the "Damages Expert"). The Damages Expert assisted Lead Counsel in the preparation of the Complaint and prepared a 50-page report establishing the efficiency of the market for Medtronic common stock that was submitted in connection with Lead Plaintiffs' motion for class certification. The Damages Expert also prepared detailed reports for both the June 2010 and February 2012 mediations that analyzed issues related to loss causation and the calculation of damages based on the event study approach he utilized to estimate the artificial inflation in Medtronic's stock price during the Class Period. Lead Counsel also worked with the Damages Expert in developing the Plan of Allocation for the proceeds of the Settlement.

69. Lead Plaintiffs also retained medical experts to assist in analyzing and understanding the science of INFUSE, the complex issues relating to INFUSE safety, the surgical techniques used in on- and off-label procedures involving INFUSE, the medical literature concerning INFUSE, including INFUSE clinical studies and medical journal articles authored by Medtronic-funded surgeon consultants, and industry protocols and customs concerning surgeon and medical device representatives' relationships and interactions as they relate to off-label promotion, among other issues. Lead Counsel consulted with these medical experts in the course of drafting the Complaint, preparing discovery requests and motions to compel discovery, interpreting the documents received, and in preparing for depositions.

IV. THE RISKS FACED BY LEAD PLAINTIFFS

70. It is well-recognized that actions for securities fraud are fraught with risks. In this Action, the risks were particularly significant. Lead Plaintiffs faced risks that they would not be able to establish that Defendants' key alleged misrepresentations or omissions were materially false and misleading, that Defendants acted with *scienter*, or that the declines in the price of Medtronic common stock in November 2008 were the result of revelations correcting the alleged misrepresentations and omissions.

71. The central allegations in the Complaint are that Defendants made false and misleading statements and material omissions concerning INFUSE during the Class Period, including false and misleading statements about whether Medtronic engaged in off-label promotion of INFUSE and material omissions about the level of off-label sales of INFUSE.

A. Risks of Establishing Actionable Misrepresentations

72. Lead Plaintiffs faced challenges in establishing that Defendants' statements and omissions about off-label marketing and sales of INFUSE were actionably false or misleading. For example, in their motion to dismiss, Defendants contended that their accurate statements of past earnings on sales of INFUSE were not misleading and that they had no duty to disclose how much of these sales related to off-label uses. Defendants also argued that general statements they made about Medtronic's compliance with the law were too "soft" to be actionable misstatements. These arguments would likely have been reiterated at summary judgment or at trial. Moreover, at these stages, Defendants would have vigorously contested the existence of any improper off-label marketing of INFUSE at all. Defendants repeatedly argued that Lead Plaintiffs would be unable to establish that Defendants engaged in improper off-label marketing, and pointed to the changes to off-label marketing regulations and FDA interpretations of those regulations over time. Among other things, Defendants contended that the evidence Lead Plaintiffs alleged reflected Defendants' alleged improper off-label promotion, in fact, reflected permissible legitimate business plans that contemplated the sales and marketing activities to be implemented when Medtronic eventually received additional FDA approvals for uses of INFUSE that were outside of the product's then current labeling.

B. Risks of Establishing Materiality

73. The parties also disagreed about whether the misstatements and omissions alleged by Lead Plaintiffs were material. Defendants asserted that the alleged misrepresentations about off-label promotion of INFUSE were not material because Lead

Plaintiffs failed to plead the extent of any unlawful conduct. They further contended that the alleged omissions about the extent of off-label sales were not material because the decline in sales that resulted from the FDA Notification cautioning against certain off-label uses of INFUSE represented only a trivial revenue difference to Medtronic. Finally, Defendants argued that the market already was aware of the significant off-label sales of INFUSE and safety issues with the off-label use of the product, making any incremental information allegedly omitted by Defendants immaterial. While Lead Plaintiffs believed that all of the alleged misstatements and omissions attributed to Defendants were material, there was a substantial risk to Lead Plaintiffs and the Class if the Court or a jury agreed with any of Defendants' arguments.

C. Risks of Establishing *Scienter*

74. In addition, Lead Plaintiffs considered the risks of establishing Defendants' *scienter* – *i.e.*, that Defendants had made the alleged false statements knowingly or recklessly. Defendants aggressively attacked Lead Plaintiffs' allegations of off-label promotion that were based on statements of Lead Plaintiffs' CWs and argued vehemently that any off-label promotion scheme was limited to rogue employees without the approval or awareness of Defendants. The fact that the DOJ and the U.S. Attorney for the District of Massachusetts announced an investigation into off-label marketing of INFUSE during the Class Period but ultimately did not pursue any charges against Medtronic or the Individual Defendants based on this investigation (and, in fact, in May 2012, announced that the investigation was closed) increased the challenges of establishing such *scienter* at summary judgment and at trial in this Action.

75. In addition, in certain respects, succeeding at trial would likely have required Lead Plaintiffs to prove that Medtronic engaged in widespread wrongdoing; that Medtronic's sales force carried out an established policy and practice of providing unsolicited information concerning off-label uses of INFUSE to doctors; and that these and/or other illegal marketing practices actually and materially contributed to the sales of INFUSE that were reported by the Company during the Class Period. While Lead Plaintiffs were optimistic that they could have demonstrated the existence of such off-label promotion – such as through statistical and/or documentary evidence or testimony, admissions by Company employees, and/or other evidence – establishing these highly fact-intensive matters with the requisite degree of proof at trial would have involved significant challenges and risks.

76. Further underscoring the difficulties faced by Lead Plaintiffs in proving their case is the result of the criminal action initiated by the DOJ against a Medtronic competitor, Stryker Biotech, LLC. The DOJ brought 13 felony charges against Stryker and several of its employees to trial relating to improper off-label promotion of a product similar to INFUSE, but the case quickly unraveled after trial began and the DOJ dropped all charges against the individuals and settled with Stryker for a misdemeanor plea and payment of only $15 million. *See* "Stryker Biotech: Case Dismissed Charges Dropped," POLICY & MEDICINE (Mar. 15, 2012), available at http://www.policymed.com/2012/03/stryker-biotech-case-dismissed-charges-dropped.html.

D. Risks of Establishing Loss Causation

77. Lead Plaintiffs also faced substantial challenges in establishing loss causation in this Action. Defendants contended that Lead Plaintiffs could not demonstrate loss causation because the information Lead Plaintiffs alleged was revealed by the November 2008 disclosures was already known by the market, and prior disclosures of this information had not impacted the price of Medtronic stock. For example, the FDA Notification cautioning against off-label uses of INFUSE was publicly disclosed in July 2008. Defendants claimed that this specific disclosure was not associated with an immediate decline in Medtronic's stock price, and that, therefore, the price declines in Medtronic stock months later, following the Company's disclosures in November 2008 (including problems with INFUSE sales following the July 2008 FDA Notification) were insufficient to establish loss causation. Defendants also argued that the market already knew the information allegedly revealed in the November 2008 disclosures (when the stock price declined) because that information had been disclosed previously, including in the original July 2008 disclosure. Specifically, Defendants argued that there was already significant information in the marketplace about the off-label use of INFUSE and Medtronic's allegedly improper marketing practices, and that the alleged corrective disclosures in November 2008 (concerning a reduction in INFUSE sales as a result of the July 2008 FDA Notification and the disclosure of the DOJ investigative subpoena regarding INFUSE) contained no information that was new to the market.

78. Defendants also argued, based on an analysis prepared by their damages expert, that none of the stock declines identified by Lead Plaintiffs were statistically significant. Defendants further argued that because the Company revealed unrelated adverse information to the market on November 18, 2008 (specifically, unfavorable general operating results) − in addition to disclosing the DOJ subpoena – Lead Plaintiffs would not be able to prove that the revelation of the alleged fraud, rather than this confounding information, was responsible for the decline in Medtronic's stock price. While Lead Plaintiffs disagreed with all of Defendants' contentions concerning loss causation and believe that they have meritorious responses to them, there was a substantial risk of recovering limited or no damages if the Court or a jury agreed with any of Defendants' arguments.

79. As discussed above, Lead Plaintiffs and Lead Counsel faced many significant hurdles to prove their claims of securities fraud against the Defendants. From the outset, Lead Counsel recognized that − notwithstanding Defendants' alleged fraud − the particular legal challenges associated with sustaining claims under the federal securities laws and recovering damages from Defendants with the resources to pay those damages might prove difficult. Notwithstanding the fact that Lead Plaintiffs' claims survived Defendants' motion to dismiss and that Lead Plaintiffs had succeeded in obtaining much of the discovery requested, they still faced the very real risk that the Court could have entered summary judgment, at least in part, in Defendants' favor; that a jury could have found in Defendants' favor, at least in part, particularly since a trial would have been a "battle of experts" on many issues; or that a favorable jury verdict

would not have been upheld on appeal. Lead Plaintiffs and the Class faced the very real risk that potential damages could have been dramatically reduced or eliminated. The risks inherent in this Action presented the real possibility that the Class would be unable to obtain a meaningful recovery or any recovery at all and that the ultimate resolution of the Action could take years.

80. Lead Plaintiffs and Lead Counsel considered these risks, as well the vigor and aggressiveness with which Defendants and their counsel had opposed the claims in the Action, and Medtronic's history of success in defeating actions relating to off-label use of INFUSE as well as securities class actions relating to other claims, in concluding that the Settlement was in the best interests of the Class.

V. THE SETTLEMENT NEGOTIATIONS AND TERMS OF THE SETTLEMENT

81. As discussed briefly above, shortly after the Court's decision on the motion to dismiss the Complaint, Defendants suggested that the parties engage in mediation. In June 2010, the parties participated in a two-day mediation session that was held in New York City under the auspices of Professor Eric D. Green, an experienced mediator of complex class actions. In connection with this mediation, both sides prepared and exchanged detailed mediation statements and reports from their respective experts on damages and loss causation. However, as became clear during the course of the mediation, the parties' positions were too far apart at that time and no agreement was reached during that mediation.

82. In January 2011, the parties again discussed the possibility of resolving the Action, with Medtronic's General Counsel personally meeting with Lead Plaintiffs' representatives in Minnesota, but no resolution could be reached at that time.

83. In addition, after Lead Plaintiffs filed their reply brief in support of their motion for class certification, and before the Court held oral argument on the motion, the possibility of another mediation was raised through a series of discussions with Professor Green. The parties then agreed to engage in a second two-day mediation session in New York City in January 2012 and the parties again prepared detailed mediation statements. Following lengthy negotiations at that mediation, the parties were still unable to reach a settlement.

84. Shortly after the second failed mediation, the Court ordered the parties to participate in a settlement conference before Judge Boylan on February 28 and 29, 2012 in Minnesota. The parties prepared confidential mediation statements for Judge Boylan that were ultimately shared with opposing counsel during the course of the mediation. Judge Boylan, who had closely overseen the litigation for several years, including through his involvement in the parties' discovery disputes and frequent status conferences, played an active role in mediating the parties' respective positions and promoting settlement at the two-day settlement conference in late February and at a third day of mediation that took place on March 7, 2012.

85. On March 28, 2012, after these extensive, hard-fought negotiations, Lead Plaintiffs agreed in principle to settle with Defendants for a settlement amount of $85,000,000, and the parties executed a Term Sheet. The parties worked diligently to

document the settlement, which included further extensive negotiations of the terms of the final documents. On July 20, 2012, the parties presented the preliminary approval papers to the Court. Dkt. 325. On July 23, 2012, the Court entered the Preliminary Approval Order granting preliminary approval of the Settlement, as well as approving the form and manner of providing notice of the Settlement to the Class. Dkt. 326**.**

VI. NOTICE

86. The Preliminary Approval Order required that notice be disseminated to Class Members; set October 18, 2012 as the deadline for Class Members to submit objections to the Settlement, the Plan of Allocation, and the motion for an award of attorneys' fees and reimbursement of Litigation Expenses, or to request exclusion from the Class; and set a final approval hearing date of November 8, 2012.

87. Pursuant to the Preliminary Approval Order, Lead Counsel instructed Rust, Consulting, Inc. ("Rust") the Claims Administrator for the Settlement, to begin disseminating copies of the Notice and Claim form (together the "Notice Packet") by mail and to publish the Summary Notice in accordance with the Preliminary Approval Order.

88. The Notice advised all recipients of, *inter alia*: (a) their right to exclude themselves from the Class; (ii) their right to object to any aspect of the Settlement, the Plan of Allocation and/or Lead Counsel's request for attorneys' fees and reimbursement of expenses; and (c) the manner for submitting a Proof of Claim in order to be eligible for a payment from the proceeds of the Settlement. The Notice informed Class Members of Lead Counsel's intent to apply for an award of attorneys' fees in an amount not to exceed

25% of the Settlement Fund, and for reimbursement of Litigation Expenses in an amount not to exceed $2 million (which amount may include the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Class).

89. To disseminate the Notice Packet, Rust obtained the names and addresses of potential Class Members from listings provided by Medtronic and from banks, brokers and other nominees pursuant to the Preliminary Approval Order. *See* Affidavit of Eric J. Miller Regarding (A) Mailing of the Notice and Proof of Claim and Release Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date ("Miller Aff."), Ex. 1 hereto, ¶¶ 4-5.

90. On August 10, 2012, Rust disseminated over 54,800 copies of the Notice Packet by first-class mail. Miller Aff. ¶ 6. Through September 28, 2012, Rust has disseminated more than 581,000 Notice Packets. *Id.* ¶ 9. In addition on August 23, 2012, the Summary Notice was published in *The Wall Street Journal* and in *Investors' Business Daily* and over the *PR Newswire*. *Id*. ¶ 10.

91. Rust also established a dedicated website, www.MDTSecurities LitigationSettlement.com, to provide Class Members with detailed information concerning the Settlement. The website contains links to the Notice and the Claim Form, as well as the Preliminary Approval Order and the Stipulation. Miller Aff. ¶ 12. The papers in support of final approval of the Settlement and the Plan of Allocation as well as Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses will also be posted on the website.

92. The deadline for Class Members to file objections to the Settlement, the Plan of Allocation and/or Lead Counsel's motion for attorneys' fees and reimbursement of expenses is not until October 18, 2012. To date, not a single objection to any aspect of the Settlement or the fee and expense request has been received. Should any objections be filed, Lead Counsel will address them in reply papers to be filed with the court on November 1, 2012.

VII. THE PLAN OF ALLOCATION

93. Pursuant to the Preliminary Approval Order, and as set forth in the Notice, all Class Members who want to participate in the distribution of the Settlement Fund must submit a valid Claim Form and all required information postmarked no later than December 11, 2012. As provided in the Notice, after deducting all appropriate taxes, administrative costs, attorneys' fees, and reimbursed litigation expenses, the balance of the Settlement Fund (the "Net Settlement Fund") will be distributed according to the plan of allocation approved by the Court.

94. The plan of allocation proposed by Lead Plaintiffs and Lead Counsel (the "Plan of Allocation") is set forth on pages 7 to 11 of the Notice. *See* Miller Aff. Ex. A. If approved, the Plan of Allocation will govern how the Net Settlement Fund will be distributed among Authorized Claimants.[8] The proposed Plan of Allocation is designed to achieve an equitable and rational distribution of the Net Settlement Fund to those Class Members who experienced economic losses as a result of the alleged violations of the

[8] An "Authorized Claimant" means a Class Member who submits a timely and valid Proof of Claim Form to the Claims Administrator, in accordance with the requirements established by the Court, that is approved for payment from the Net Settlement Fund.

federal securities laws as opposed to losses caused by market or industry factors or Company-specific factors unrelated to the alleged violations of law. The Plan of Allocation is not a formal damage analysis and the calculations made pursuant to the Plan of Allocation are not intended to be estimates of, nor indicative of, the amounts that Class Members might have been able to recover after a trial.

95. Lead Counsel developed the Plan of Allocation in consultation with Lead Plaintiffs' damages expert. Lead Counsel worked closely with their damages expert in developing the Plan of Allocation, and believe that the plan provides a fair and reasonable method to equitably distribute the Net Settlement Fund among Authorized Claimants.

96. In developing the Plan of Allocation, Lead Plaintiffs' damages expert calculated the estimated dollar amount of artificial inflation present in the per share closing price of Medtronic common stock throughout the Class Period that was purportedly caused by the alleged fraud. The estimated alleged artificial inflation amounts are derived from a well-accepted methodology known as an "event study" that isolates the price movements of a security after controlling for market factors on the dates identified as corrective disclosures. In calculating the estimated alleged artificial inflation amounts, Lead Plaintiffs' damages expert considered the price changes of Medtronic common stock in reaction to the alleged corrective disclosures that occurred prior to the opening of the market on November 12, 2008, November 14, 2008, and November 18, 2008, adjusted to eliminate the effects attributable to general market or industry conditions. In addition, Lead Plaintiffs' damages expert considered what portion

of these price changes were due to the alleged misrepresentations and omissions versus those that were caused by confounding Company-specific information unrelated to the allegations.

97. Rust, as the Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon the Claimant's "Recognized Claim," calculated in accordance with the Plan of Allocation. Calculation of the Recognized Claim will depend upon several factors, including when the Claimant's Medtronic common stock was purchased during the Class Period, and whether the Medtronic common stock was sold, and if so, when.

98. In sum, the proposed Plan of Allocation, developed in consultation with Lead Plaintiffs' damages expert, was designed to fairly and rationally allocate the Net Settlement Fund among Class Members based on the amount of alleged artificial inflation present in Medtronic common stock that was allegedly caused by the Company's alleged misrepresentations. Accordingly, Lead Counsel respectfully submit that the proposed Plan of Allocation is fair and reasonable and should be approved.

VIII. THE FEE APPLICATION

99. Lead Counsel are making an application for a fee award of 25% of the Settlement Fund (*i.e.*, 25% of the $85 million Settlement Amount and 25% of any interest earned on the Settlement Amount until the time of payment) (the "Fee Application"). As discussed below, the requested fee represents a negative multiplier; it is only 74.23% of Lead Counsel's lodestar of $28,627,636. Lead Counsel also request reimbursement of expenses they incurred in connection with the prosecution of the Action from the

Settlement Fund in the amount of $1,481,702.68. Lead Counsel further request reimbursement of $45,989.00 in costs and expenses incurred by certain Lead Plaintiffs and additional certified Class Representative Westmoreland directly related to their representation of the Class pursuant to 15 U.S.C. § 78u-4(a)(4). The legal authorities supporting the requested fees and expenses are set forth in Lead Counsel's separate memorandum of law. The primary factual bases for the requested fees and expenses are summarized below.

A. Lead Plaintiffs Support the Fee Application

100. Lead Plaintiffs, sophisticated institutional investors with substantial financial stakes in the Action, have evaluated the Fee Application and believe it to be fair and reasonable. In coming to this conclusion, Lead Plaintiffs – who were substantially involved in the prosecution of the Action and negotiation of the Settlement – considered the substantial recovery obtained, particularly in light of the risks of litigation, and the skill and efforts of Lead Counsel. *See* Declarations of Regina Switzer, Assistant Attorney General for the State of Oklahoma ("Switzer Declaration"), Robert E. Jones, Executive Director of Oklahoma Firefighters' Pension and Retirement System ("Jones Declaration"), Union Asset Management Holding AG ("Union Asset"), and Bo Spanding, Chief Consultant at Danske Invest Management A/S ("Spanding Declaration") in Support of (A) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses; and (C) Lead Plaintiffs' Request for Reimbursement of Costs and Expenses (collectively "Lead Plaintiffs'

Declarations") attached hereto as Exs. 2, 3, 4 and 5, respectively. Accordingly, Lead Plaintiffs endorse Lead Counsel's application for an award of attorneys' fees constituting 25% of the Settlement Fund. *See id.*; *see also* Declaration of Jeffrey Balzer, Secretary of the Board at Westmoreland County Employee Retirement System ("Balzer Declaration"), attached hereto as Ex. 6.

101. Consistent with Lead Plaintiffs' and Westmoreland's endorsement, the Notice informed Class Members of Lead Counsel's intent to apply for attorneys' fees in an amount not to exceed 25% of the Settlement Fund and for reimbursement of Litigation Expenses paid or incurred in connection with the prosecution and resolution of the Action, in an amount not to exceed $2,000,000, which may include the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Class. *See* Notice (Miller Aff. Ex. A). at ¶¶ 5, 66.

B. The Work and Experience of Counsel

102. Attached hereto as Exhibit 7 are declarations from Lead Counsel in support of the request for an award of attorneys' fees and reimbursement of Litigation Expenses.[9] Included with Lead Counsel's declarations are schedules that summarize the lodestar of the firm by individual as well as by category of work performed, and a schedule of the

[9] Additional counsel also performed work for the benefit of the Class and, pursuant to the provisions of the Stipulation, Lead Counsel will allocate attorneys' fees awarded in a manner which they believe reflects the contributions of such counsel to the prosecution and settlement of the Action. For purposes of demonstrating the reasonableness of the fee request, the cumulative lodestar of Lead Counsel, which alone results in a significant negative multiplier, is sufficient.

expenses incurred by category (the "Fee and Expense Schedules").[10] The Fee and Expense Schedules and attached declarations indicate the amount of time spent by attorneys and professional support staff employees of the respective Lead Counsel who were involved in this Action, and the lodestar calculations based on their current billing rates. As attested in each declaration, the declarations were prepared from contemporaneous daily time records regularly prepared and maintained by the respective firms, which are available at the request of the Court. The hourly rates for attorneys and paraprofessionals included in the schedule are commensurate with the hourly rates charged by lawyers and paraprofessionals performing similar services in the respective firm's communities. For personnel who are no longer employed by Lead Counsel, the lodestar calculations are based upon the billing rates for such personnel in his or her final year of employment.

103. As set forth in Exhibit 7, Lead Counsel have expended 71,722.85 hours in the prosecution and resolution of this Action. The resulting lodestar is $28,627,636.50. These figures do not include time spent on Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses. Under the lodestar approach, the requested fee equal to 25% of the Settlement Fund, or approximately $21,250,000, yields a multiplier of approximately 0.7423 – that is, a negative multiplier of the value of the time expended by Lead Counsel.

[10] The first and second pages of Exhibit 7 are a summary chart of the lodestars and expenses of all the Lead Counsel firms by individuals and by category of work.

104. Lead Counsel are experienced in prosecuting securities class actions, and worked diligently and efficiently in prosecuting this Action. Lead Counsel, as demonstrated by the respective firm resumes attached to their declarations, are among the most experienced and skilled firms in the securities litigation field and have a long and successful track record in such cases. Lead Counsel worked closely together to avoid duplication of effort and to ensure efficient prosecution.

C. Standing and Caliber of Defendants' Counsel

105. The quality of the work performed by Lead Counsel in attaining the Settlement should also be evaluated in light of the quality of the opposition. During the course of the litigation, Defendants were represented first by Wilmer Cutler Pickering Hale and Dorr; subsequently by Kirkland & Ellis LLP; and currently by Dorsey & Whitney LLP in addition to Kirkland & Ellis LLP, which are among the country's most prestigious law firms. These firms spared no effort in their vigorous defense of their clients. In the face of this experienced and formidable opposition, Lead Counsel were nonetheless able to persuade the Defendants to settle the case on terms that are highly favorable to the Class.

D. The Risks of Litigation and the Need to Ensure the Availability of Competent Counsel in High-Risk Contingent Securities Cases

106. This prosecution was undertaken by Lead Counsel entirely on a contingent-fee basis. The risks assumed by Lead Counsel in bringing these claims to a successful conclusion are described above. Those risks are also relevant to an award of attorneys'

fees. Here, the risks assumed by Lead Counsel, and the time and expenses incurred without any payment, as described in detail above, were substantial.

107. From the outset, Lead Counsel understood that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Lead Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable litigation costs that a case such as this requires. With an average lag time of several years for these cases to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. Indeed, Lead Counsel have received no compensation during the course of the Action and have incurred over $1,481,000 in litigation expenses in prosecuting the Action for the benefit of the Class.

108. Lead Counsel also bore the risk that no recovery would be achieved. As discussed herein, from the outset, this case presented multiple risks and uncertainties that could have prevented any recovery whatsoever. Despite the most vigorous and competent of efforts, success in contingent-fee litigation, such as this, is never assured.

109. Lead Counsel know from experience that the commencement of a class action does not guarantee a settlement. To the contrary, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win at trial, or to induce sophisticated defendants to engage in serious settlement negotiations at meaningful levels.

110. Moreover, courts have repeatedly recognized that it is in the public interest to have experienced and able counsel enforce the securities laws and regulations pertaining to the duties of officers and directors of public companies. As recognized by Congress through the passage of the PSLRA, vigorous private enforcement of the federal securities laws can only occur if private investors, particularly institutional investors, take an active role in protecting the interests of shareholders. If this important public policy is to be carried out, the courts should award fees that adequately compensate plaintiffs' counsel, taking into account the risks undertaken in prosecuting a securities class action.

111. Lead Counsel's extensive and persistent efforts in the face of substantial risks and uncertainties have resulted in a significant recovery for the benefit of the Class. In circumstances such as these, and in consideration of Lead Counsel's hard work and the excellent result achieved, the requested fee of 25% of the Settlement Fund is reasonable and should be approved.

E. The Reaction of the Class to the Fee Application

112. Over 581,000 Notices were mailed to potential Class Members advising them that Lead Counsel would request attorneys' fees in an amount not to exceed 25% of the Settlement Fund and that reimbursement of litigation expenses in an amount not to exceed $2,000,000 would also be requested. *See* Miller Aff. ¶ 9 and Ex. A ¶¶ 5, 66. Additionally, on August 23, 2012, the Summary Notice was published in *The Wall Street Journal* and in *Investor's Business Daily* and transmitted over the *PR Newswire*. *See* Miller Aff. ¶ 10. The Settlement documents have also been available on the settlement website maintained by Rust. *Id.* ¶¶ 11-12. While the deadline set by the Court for Class

Members to object to the requested fees and expenses has not yet passed, to date we are not aware of a single objection by any Class Member.

IX. REIMBURSEMENT OF THE REQUESTED LITIGATION EXPENSES IS FAIR AND REASONABLE

113. Lead Counsel seek reimbursement from the Settlement Fund of $1,481,702.68 in litigation expenses reasonably and actually incurred by Lead Counsel in connection with commencing and prosecuting the claims against the Defendants, as well as $45,989.00 for the costs and expenses incurred by certain Lead Plaintiffs and Westmoreland directly relating to their representation of the Class.

114. From the beginning of the case, Lead Counsel were aware that they might not recover any of their expenses, and, at the very least, would not recover anything until the Action was successfully resolved. Lead Counsel also understood that, even assuming that the case was ultimately successful, reimbursement for expenses would not compensate them for the lost use of the funds advanced by them to prosecute the Action. Thus, Lead Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the case.

115. As set forth in the Fee and Expense Schedules (provided in Exhibit 7 hereto), Lead Counsel have incurred a total of $1,481,702.68 in unreimbursed litigation expenses in connection with the prosecution of the Action. As attested to, these expenses are reflected on the books and records maintained by Lead Counsel, which are prepared from expense vouchers, check records, and other source materials, and are an accurate

record of the expenses incurred. Lead Counsel's expenses are set forth in detail in each firm's declaration, each of which identifies the specific category of expense, *e.g.*, court fees, service of process, experts' fees, electronic legal and factual research, travel costs, photocopying, telephone, fax and postage expenses, and other costs actually incurred for which Lead Counsel seek reimbursement. These expense items are billed separately by Lead Counsel, and such charges are not duplicated in the respective firms' billing rates. The expenses were reasonable and necessary to the prosecution of this Action, and are the type of expenses that counsel typically incur in complex litigation, and for which counsel are typically reimbursed when the litigation gives rise to a common fund.

116. Lead Counsel maintained strict control over the litigation expenses. Indeed, many of the litigation expenses were paid out of a litigation fund funded by Lead Counsel and maintained by BLB&G. Lead Counsel contributed $580,000 to the litigation fund. A schedule setting forth the payments from the litigation fund by category is attached hereto as Exhibit 8.

117. Of the total amount of expenses, $489,047.07, or approximately 33%, was expended on experts. As noted above, Lead Counsel retained and consulted with experts in the fields of market efficiency, loss causation and damages, healthcare economics, and orthopedic surgery to assist in the preparation of the Complaint, in Lead Plaintiffs' motion for class certification, in preparing discovery requests and motions to compel discovery, in interpreting documents received, in preparing for depositions, in preparing the multiple mediation statements, and in preparing the Plan of Allocation. These experts were essential to the overall prosecution of the Action.

118. Another very large component of the litigation expenses necessarily incurred in this Action relates to the size of the document production, and fact that much of the production here was in electronic format. Lead Counsel thus had to: (a) retain the services of a firm to maintain the electronic database through which the millions of pages of documents produced were reviewed; (b) get documents coded so that they would be in searchable format; and (c) incur charges in connection with printing hard copies of selected documents and making copies for use throughout the prosecution of the Action. Not including the charges incurred by Lead Counsel for in-house copying throughout the litigation, these charges amounted to more than $429,000, or 29% of the litigation costs incurred.

119. Another large component of the litigation expenses was for online legal and factual research. In addition to researching the law pertaining to such complex areas as *scienter*, loss causation, and FDA regulation of "off-label" marketing, Lead Counsel necessarily spent considerable time and expense performing factual research. Lead Counsel's factual research included out-of-pocket investigatory costs associated with identifying and locating witnesses and former employees of Medtronic using a variety of online fee-charging databases and service providers. The charges for on-line research amounted to $137,159.63, or approximately 9% of the litigation costs incurred.

120. The other expenses for which Lead Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, court fees, service of

process fees, costs of out-of-town travel, copying costs, mediation costs, long distance telephone and facsimile charges, postage and delivery expenses and overtime expenses.

121. All of the litigation expenses incurred, which total $1,481,702.68, were necessary to the successful prosecution and resolution of the claims against the Defendants. These expenses have been approved by Lead Plaintiffs and Westmoreland. *See* Switzer Declaration ¶ 8, Jones Declaration ¶ 8; Union Declaration ¶ 8, Spanding Declaration at ¶ 8, and Balzer Declaration ¶ 8.

122. Additionally, Lead Plaintiffs OTRS, OKFF Pension Fund, and Danske, and additional certified Class Representative Westmoreland seek reimbursement of their reasonable costs and expenses that they incurred directly in connection with their representation of the Class in the amounts of $19,039, $5,200, $13,000, and $8,750 respectively. *See* Switzer Declaration ¶ 11; Jones Declaration ¶ 11, Spanding Declaration ¶ 11 and Balzer Declaration ¶ 11.

123. The Notice apprised potential Class Members that Lead Counsel would be seeking reimbursement of expenses in an amount not to exceed $2,000,000 and that the costs and expenses of Lead Plaintiffs could be sought as part of the request for reimbursement of Litigation Expenses. The total amount sought by Lead Plaintiffs and additional Class Representative Westmoreland (*i.e.*, $45,989.00), when added to the request of Lead Counsel (*i.e.*, $1,481,702.68), is still significantly below the $2,000,000 that Class Members were advised could be sought. As noted above, to date, no objection has been raised as to Lead Counsel's request for reimbursement of litigation expenses.

124. In view of the complex nature of the Action, the expenses incurred were reasonable and necessary to pursue the interests of the Class. Accordingly, Lead Counsel respectfully submit that the expenses incurred by Lead Counsel and Lead Plaintiffs and Westmoreland should be reimbursed in full from the Settlement Fund.

X. CONCLUSION

125. In view of the significant recovery to the Class, the very substantial risks of this Action, the complexity of the case and the arm's-length settlement negotiations, Lead Counsel respectfully submit that the Settlement should be approved as fair, reasonable, and adequate, and that the proposed Plan of Allocation should be approved as fair and reasonable. In light of the foregoing factors, the substantial efforts of Lead Counsel, the quality of work performed, the contingent nature of the fee and the risks of litigation, and the standing and experience of Lead Counsel, Lead Counsel also respectfully submit that a fee in the amount of 25% of the Settlement Fund should be awarded to Lead Counsel; and that Lead Counsel's litigation expenses as well as Lead Plaintiffs' and Westmoreland's costs and expenses be reimbursed in full.

We each declare, under penalty of perjury, that the foregoing facts are true and correct.

Executed on October 4, 2012.

s/ Karl L. Cambronne
Karl L. Cambronne

s/ Salvatore J. Graziano
Salvatore J. Graziano

s/ Ramzi Abadou
Ramzi Abadou

s/ Jeff A. Almeida
Jeff A. Almeida

s/ James M. Hughes
James M. Hughes

#673517