**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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

**MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS**

Dated: October 4, 2012

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Lead Plaintiffs Oklahoma Teachers' Retirement System, Oklahoma Firefighters' Pension and Retirement System, Union Asset Management Holding AG, and Danske Invest Management A/S (collectively, "Lead Plaintiffs"), on behalf of themselves and the Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement of this securities class action (the "Action") against defendants Medtronic, Inc. ("Medtronic" or the "Company"), Arthur D. Collins, William A. Hawkins, and Gary L. Ellis (together, the "Individual Defendants"; and together with Medtronic, the "Defendants"), and for approval of the proposed plan of allocation of the settlement proceeds (the "Plan of Allocation").[1]

## PRELIMINARY STATEMENT

The Settlement achieved by Lead Plaintiffs – which provides for payment of $85,000,000 in cash – is an excellent result for the Class. The Settlement is the second largest securities class action recovery ever in this District and the fifth largest in the Eighth Circuit. It is the product of more than three years of hard-fought litigation by Lead Plaintiffs and Lead Counsel, which included a detailed investigation into Defendants' alleged misconduct, including their alleged false statements and omissions concerning the off-label promotion of Medtronic's INFUSE bone graft system, successful

[1] Unless otherwise noted, capitalized terms used herein have the meanings set out in the 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 (the "Joint Declaration" or "Joint Decl."), filed herewith, or the Stipulation and Agreement of Settlement dated July 20, 2012 (Dkt. 325) (the "Stipulation").

opposition to Defendants' multipronged motion to dismiss, a successful motion for class certification over Defendants' aggressive opposition, and an extensive and contentious discovery process. The Settlement is also the result of prolonged, arm's-length negotiations, including three separate mediations, the last of which was conducted with the active participation and oversight of Chief Magistrate Judge Arthur J. Boylan.

While Lead Plaintiffs believe their claims are meritorious, Defendants had asserted and aggressively pursued numerous defenses at every stage of the Action. Lead Plaintiffs recognized that there would be substantial challenges in establishing liability and damages in the Action – including proving that Defendants made actionable material misstatements or omissions and had acted with *scienter*, and, perhaps most significantly, in establishing that the revelation of Defendants' alleged misstatements about INFUSE caused the declines in Medtronic's stock price in November 2008. It is Lead Plaintiffs' and Lead Counsel's informed opinion that the Settlement is an excellent result for the Class in light of the $85 million recovery, as well as these significant risks and the delay, expense, and uncertainty of pursuing the Action through trial and any subsequent appeals.[2]

[2] The Court certified the Class in its Order dated December 12, 2011 (Dkt. 287). The Order Preliminarily Approving Proposed Settlement and Providing for Notice dated July 23, 2012 (Dkt. 326) (the "Preliminary Approval Order") amended the Class definition to reflect an end date for the Class Period of November 17, 2008. The certified Class is: "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 *(Cont'd)*

The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement dated July 20, 2012, which the parties previously submitted to the Court. Dkt. 325. Pursuant to the terms of the Stipulation, Medtronic has deposited $85 million in cash into the Escrow Account for the benefit of the Class. If the Settlement is approved, it will resolve this Action against all Defendants.

As described in more detail in the accompanying Joint Declaration, Lead Plaintiffs vigorously pursued this litigation for over three years and conducted extensive discovery before successfully negotiating the Settlement for the Class.[3] The Settlement was reached at a point in time at which Lead Plaintiffs and Lead Counsel had a well-developed understanding of the facts of the case and the challenges posed by the claims and defenses in the Action. As detailed in the Joint Declaration, this understanding was informed by: (i) Lead Counsel's detailed factual investigation, including a thorough review of publicly available information and information obtained through Freedom of Information Act requests, and investigative interviews with approximately 100 non-party

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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. Also excluded from the Class are any persons or entities who exclude themselves by filing a request for exclusion that is accepted by the Court." Preliminary Approval Order ¶ 1.

[3] The Joint Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of the history of the Action through the submission of the Settlement to the Court; the nature of the claims asserted in the Action; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Lead Counsel provided for the benefit of the Class.

witnesses, which included numerous former Medtronic employees (Joint Decl. ¶ 20); (ii) consultation with experts in the fields of market efficiency, loss causation, healthcare economics, and orthopedic surgery (*id*. ¶¶ 20, 66-69); (iii) preparation of the comprehensive Consolidated Complaint for Violations of the Federal Securities Laws (the "Complaint") (*id*. ¶¶ 19-21); (iv) researching and briefing the opposition to Defendants' motion to dismiss (*id*. ¶¶ 22-26); and (v) successfully moving for class certification (*id*. ¶¶ 63-64). Lead Counsel also conducted extensive discovery in the Action following the resolution of the motion to dismiss in February 2010, which included the review and analysis of millions of pages of documents produced by Defendants and third parties as well as numerous hard-fought discovery disputes occasioned by Defendants' refusal to produce requested documents and aggressive assertions of confidentiality and privilege. Joint Decl. ¶¶ 28-62.

Substantial arm's-length negotiations were undertaken before the Settlement could be reached. The parties first engaged in mediation in June 2010, shortly after the Court's decision on the motion to dismiss. Joint Decl. ¶ 81. The first mediation was a two-day session held before Professor Eric D. Green, an experienced mediator, in New York City. *Id*. However, given the parties' vastly different positions, no settlement was reached during that mediation. *Id*. Following Class certification, the parties participated in another two-day mediation in January 2012 before Professor Green. *Id*. ¶ 83. In late February 2012, pursuant to the Court's Order, the parties engaged in a third mediation before Judge Boylan, who has directly overseen the discovery process and other aspects of this Action for several years. *Id*. ¶ 84.

During these mediations, the parties prepared and exchanged several detailed mediation statements as well as statements by their respective experts on damages and loss causation. *Id*. ¶¶ 81-84. Extensive settlement negotiations also occurred between and following the formal mediation sessions and, with the substantial assistance of Judge Boylan, ultimately resulted, on March 28, 2012, in an agreement in principle to settle the Action. *Id*. ¶ 85. Lead Plaintiffs' and Lead Counsel's understanding of the strengths and weaknesses of the case were enhanced by this mediation process, which included the opportunity to review and assess mediation statements and expert reports prepared by Defendants in connection with two of the three mediations as well as receive valuable input from Judge Boylan on his views of the issues in the litigation and the proposed settlement. *Id*. ¶¶ 6, 81-84.

In agreeing to the Settlement, Lead Plaintiffs and Lead Counsel considered the information obtained from discovery and the mediation process and weighed the benefits of the $85 million Settlement against the substantial risks associated with continuing the litigation. As discussed in greater detail in the Joint Declaration and on pages 11 to 15 of this Memorandum, Lead Plaintiffs and Lead Counsel recognized that there were substantial hurdles to establishing liability and damages in this Action. First, Defendants had argued and would continue to argue that they had made no actionable misstatements about off-label promotion or sales of INFUSE and that they had no duty to disclose the amount of off-label sales. Joint Decl. ¶ 72. Second, Defendants contended that any alleged misrepresentations or omissions were not material. *Id*. ¶ 73. While Lead Plaintiffs believed that all of the alleged misstatements and omissions attributed to

Defendants were actionable and material, there was a substantial risk that the Court or a jury could agree with Defendants' myriad arguments at summary judgment or trial.

Lead Plaintiffs also had the burden of proving that Defendants made the alleged misstatements with either knowledge of their falsity or with reckless disregard for their truth. Joint Decl. ¶ 74. The challenge of establishing *scienter* in this Action was heightened given that the Department of Justice ("DOJ") and the U.S. Attorney for the District of Massachusetts had initiated an investigation into off-label marketing of INFUSE during the Class Period but later announced in May 2012 that the investigation was closed. *Id*.

Finally, and perhaps most importantly, Defendants had powerful arguments concerning loss causation and damages that had the potential to preclude or substantially reduce any recovery even if all other elements of the claim were established. Joint Decl. ¶¶ 77-78. Defendants contended that the November 2008 disclosures were already known by the market, and prior disclosures of this information had not impacted the price of Medtronic stock. *Id*. ¶ 77. For example, the FDA notice cautioning against off-label uses of INFUSE was publicly disclosed in July 2008, but was not associated with an immediate decline in Medtronic's stock price. *Id*. Defendants also argued that there was already significant information in the marketplace concerning the off-label use and alleged off-label marketing of INFUSE, so that the disclosures in November 2008 contained no information that was new to the market. *Id*. Defendants also suggested that other adverse news released by Medtronic on November 18, 2008 was responsible for the stock decline on that date and Defendants' expert was prepared to testify that none of the

stock declines alleged by Lead Plaintiffs was statistically significant. *Id*. ¶ 78. While Lead Plaintiffs disagreed with this analysis and were prepared to present their own expert testimony to the contrary, Lead Plaintiffs and Lead Counsel were aware that they faced significant risks in overcoming these arguments and establishing all the elements of Lead Plaintiffs' claims against Defendants.

In light of these significant risks, and the substantial time and expense that continued litigation would require, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement – which provides an immediate substantial benefit of $85 million for the Class – is an outstanding result for the Class, and should be approved as fair, reasonable, and adequate. Lead Plaintiffs also seek approval of the proposed Plan of Allocation, which was prepared by Lead Counsel in consultation with Lead Plaintiffs' damages' expert, as fair and reasonable.

## ARGUMENT

## I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

### A. Legal Standards for Final Approval of Class Action Settlement

A class action settlement requires Court approval, and a settlement should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999); *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988). In determining whether to approve a settlement, the district court acts as a fiduciary, serving as a guardian of the rights of

absent class members. *See Wireless Tel.*, 396 F.3d at 932; *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975).

Public policy strongly favors the voluntary settlement of disputed claims, and courts should approach settlements with a presumption in their favor. *See Petrovic*, 200 F.3d at 1148 ("[a] strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor"); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990) (same). This policy is "particularly strong in the class action context." *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 2512750, at *7 (D. Minn. June 29, 2012); *White v. NFL*, 822 F. Supp. 1389, 1416 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

In this Circuit, district courts are required to consider four factors in determining whether a class action settlement is fair, reasonable, and adequate: (i) the merits of the plaintiffs' case, weighed against the terms of the settlement; (ii) the defendants' financial condition; (iii) the complexity and expense of further litigation; and (iv) the amount of opposition to the settlement. *See Wireless Tel.*, 396 F.3d at 932; *Van Horn*, 840 F.2d at 607; *Grunin*, 513 F.2d at 124. These four factors are not exclusive; courts may also consider factors such as the arm's-length nature of the settlement negotiations, the use of an independent mediator, and the stage of development of the case. *See, e.g.*, *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995); *Buckley v. Engle*, No. 8:07CV254, 2011 WL 2161135, at *2 (D. Neb. June 2, 2011); *White*, 822 F. Supp. at 1417.

Courts should not "substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel," *Petrovic*, 200 F.3d at 1148-49 (citation omitted), but may rely on and give "great weight" to "the judgment of experienced counsel in its evaluation of the merits of a class action settlement," *Uponor*, 2012 WL 2512750, at *7; *see also DeBoer*, 64 F.3d at 1178 ("the views of counsel are to be accorded deference"). Indeed, Courts have found that a presumption of fairness, reasonableness, and adequacy should attach when a settlement has been negotiated at arm's length by experienced counsel after meaningful discovery. *See In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1997)); *accord Uponor*, 2012 WL 2512750, at *7; *In re Charter Commc'ns, Inc. Sec. Litig.*, No. MDL 1506, 3:02-CV-1186 CAS, 2005 WL 4045741, at *5 (E.D. Mo. June 30, 2005).

Finally, in considering whether a settlement should be approved, the Court does not need to resolve disputed issues and should not convert the approval hearing into a trial on the merits, as the purpose of a settlement is to avoid such a trial. *See*, *e.g.*, *Wireless Tel.*, 396 F.3d at 932-33; *DeBoer*, 64 F.3d at 1178; *Grunin*, 513 F.2d at 123-24; *Uponor*, 2012 WL 2512750, at *7.

### B. The Settlement is Fair, Reasonable and Adequate

The proposed Settlement easily satisfies the criteria for approval.

#### 1. The Merits of Plaintiffs' Case, Weighed Against the Benefits of the Settlement

"The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *Wireless*, 396 F.3d at 933. Under this factor, courts balance the continuing risks of litigation against the benefits afforded to members of the class and the immediacy and certainty of the recovery. *See Grunin*, 513 F.2d at 124; *In re UnitedHealth Grp. Inc. PSLRA Litig*., 643 F. Supp. 2d 1094, 1099 (D. Minn. 2009).

In evaluating settlements of securities class actions, federal courts "have long recognized that such litigation is notably difficult and notoriously uncertain." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation and internal quotation marks omitted). Courts recognize that "[p]roof of both liability and damages in securities cases is complex and difficult and generally requires a significant amount of expert accounting or statistical evidence." *Desert Orchid Partners, L.L.C. v. Transaction Sys. Architects, Inc.*, No. 8:02CV553, 2007 WL 703515, at *2 (D. Neb. Mar. 2, 2007); *In re Gilat Satellite Networks, Ltd*., No. 02-cv-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007) ("[s]ecurities class actions are generally complex and expensive to prosecute"); *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D 688, 698 (M.D. Fla. 2005) (noting the

"overriding public interest in favor of settlement" because it is "common knowledge that class action suits have a well-deserved reputation as being most complex").

While Lead Plaintiffs and Lead Counsel believe that the claims asserted against Defendants in this Action have merit, they also recognize that there were significant risks as to whether they would ultimately be able to prove liability and establish damages on their claims in this Action, which were brought under §§ 10(b) and 20(a) of the Exchange Act and Rule 10b-5. These risks included serious challenges in (i) proving that there were actionable misrepresentations and omissions; (ii) proving that the alleged misrepresentations and omissions were material; (iii) proving that Defendants acted with *scienter*; and (iv) proving loss causation. Joint Decl. ¶ 70.

First, Lead Plaintiffs faced challenges in establishing that Defendants' statements and omissions about off-label marketing and sales of INFUSE were false, misleading, or otherwise actionable. Joint Decl. ¶ 72. For example, 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. *Id*. Defendants would have continued to vigorously contest the existence of any improper off-label marketing of INFUSE. 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. *Id*. Among other things, Defendants contended that the evidence Lead Plaintiffs believed reflected 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. *Id*.

Second, Lead Plaintiffs would also have had to show that any misstatements or omissions were material. Defendants contended that any misstatements about unlawful promotion of INFUSE were not material in the context of the Company's overall finances, because (i) Lead Plaintiffs could not establish the extent of any alleged improper off-label promotion; (ii) 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; and (iii) the market was already aware of significant off-label sales of INFUSE and of safety issues with its off-label use. Joint Decl. ¶ 73. While Lead Plaintiffs believed that 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 had agreed with any of Defendants' arguments. *Id*.

Third, Lead Plaintiffs would also have the burden of establishing that Defendants acted with *scienter*. Establishing Defendants' knowledge of the falsity of their misstatements is often a significant obstacle in Section 10(b) cases, *see, e.g.*, *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004) (approving settlement where "Plaintiffs faced significant obstacles in establishing scienter"), and this case was no exception. The challenges of establishing *scienter* were heightened here in light of the fact that the DOJ and the U.S. Attorney had initiated an investigation into Medtronic's alleged off-label marketing but ultimately closed their investigation without bringing any

charges. Joint Decl. ¶ 74. Moreover, establishing the existence of improper off-label promotion at Medtronic would have been highly fact-intensive and proof could have required either very strong statistical or documentary evidence or testimony, admissions by Medtronic employees that they violated the law on off-label promotion, and/or cooperation of outside physicians to testify that Medtronic provided them with unsolicited off-label information about INFUSE. *Id.* ¶ 75. While Lead Plaintiffs believed they could have demonstrated the existence of such off-label promotion at trial, establishing the degree of proof necessary would have involved significant challenges and risks. *Id.*[4]

Finally, Defendants also have argued throughout this Action that Lead Plaintiffs cannot establish "loss causation," which requires Lead Plaintiffs to prove that the identified disclosures at the end of the Class Period (concerning declining INFUSE sales following the FDA Notification and the disclosure of the DOJ investigative subpoena) were in fact "corrective" of the Defendants' prior alleged misstatements and were responsible for the decline in Medtronic's stock price. Joint Decl. ¶¶ 77-78. Defendants

[4] An example of the difficulties that would be faced in proving improper off-label marketing at trial was provided by the DOJ criminal action 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. In contrast, as noted above, no charges were even filed by the DOJ against Medtronic relating to the allegations in this Action.

argued that the fact that Medtronic's stock price did not immediately react when the FDA Notification cautioning against off-label uses of INFUSE was publicly disclosed in July 2008 supported their assertion that the November 2008 disclosures about INFUSE were not material. Defendants also contended 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 contained no information that was new to the market. *Id.* ¶ 77.

Defendants argued that none of the stock price declines identified by Lead Plaintiffs are statistically significant, and that other adverse news (unrelated to INFUSE) released by the Company on the date of the final alleged corrective disclosure was the cause of the stock price decline on that date. *Id.* ¶ 78. While Lead Plaintiffs had responses to these arguments, there was a risk that either the Court or a jury might have found them plausible. *See, e.g.*, *Charter Commc'ns*, 2005 WL 4045741, at *7 (risks faced in proving loss causation supported approval of settlement); *IBP*, 328 F. Supp. 2d at 1064 (approving settlement where plaintiffs faced obstacles in proving the amount of stock price depreciation related to the fraud as distinguished from other factors). Additionally, as in any securities class action, the calculation of damages would be vigorously contested here.

Finally, proof of loss causation and damages would ultimately have required expert testimony before the jury. While Lead Plaintiffs would have been able to present cogent and persuasive expert testimony establishing loss causation and damages, Defendants' damages expert would have opined against a finding of loss causation.

Because Lead Plaintiffs could not be certain which expert's view would be credited by the jury, this "battle of the experts" posed an additional litigation risk. *See Charter Commc'ns*, 2005 WL 4045741, at *7, 16 (establishing loss causation in a securities class action was "subject to a battle of experts"); *FLAG Telecom*, 2010 WL 4537550, at *18 ("Undoubtedly, in this action, establishing the amount of damages at trial would have resulted in a 'battle of experts.' The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses").

Lead Plaintiffs weighed the evidence and legal arguments that they believed supported their allegations against the evidence and legal arguments that Defendants believed undercut those allegations. Joint Decl. ¶¶ 9, 79. Lead Plaintiffs also considered the vigor and aggressiveness with which Defendants and their counsel had opposed the claims in the Action to date 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. *Id*. ¶ 80. All of these issues, and the risks attendant to them, were considered by Lead Plaintiffs and Lead Counsel in deciding to settle the Action on the agreed upon terms. On balance, considering all the circumstances and risks faced if Lead Plaintiffs continued the litigation through dispositive motions and trial, Lead Plaintiffs and Lead

Counsel concluded that the Settlement – which provides an immediate and certain payment of $85 million – was in the best interests of the Class.

**2. Defendants' Financial Condition**

The $85 million Settlement Amount has already been deposited in escrow for the benefit of the Class. While Lead Plaintiffs believe that Defendant Medtronic has the resources to pay more than the $85 million Settlement Amount, there could be no certainty that the Company would be able to pay a judgment equal to or larger than $85 million after the conclusion of a trial and any appeals, possibly years in the future. Moreover, in light of the other factors favoring the Settlement – including the substantial benefits of the Settlement to the Class as compared to the risks of litigation – Defendants' ability to pay an amount greater than the Settlement Amount does not suggest that the Settlement is inadequate. *See Petrovic*, 200 F.3d at 1152 ("While it is undisputed that [defendant] could pay more than it is paying in this settlement, this fact, standing alone, does not render the settlement inadequate."); *UnitedHealth*, 643 F. Supp. 2d at 1099 (same); *IBP*, 328 F. Supp. 2d at 1064 (same).

**3. The Complexity and Expense of Further Litigation**

Courts must also weigh the immediate benefits of a settlement against the additional time and expense of achieving a litigated verdict. *See, e.g.*, *Wireless Tel.*, 396 F.3d at 933 ("barring settlement, this case would 'likely drag on for years, require the expenditure of millions of dollars, all while the class members would receive nothing'"); *UnitedHealth*, 643 F. Supp. 2d at 1100.

Lead Plaintiffs would have had to overcome numerous hurdles in order to achieve a litigated verdict in this Action. As set forth in the Joint Declaration, Lead Plaintiffs had overcome a motion to dismiss the Complaint, successfully moved for certification of the Class, and conducted extensive merits discovery, including obtaining the production of more than 15 million pages of documents from Defendants and third parties and litigating numerous discovery motions. *See* Joint Decl. ¶¶ 22-65. However, in the absence of the Settlement, continued litigation of the Action would have required substantial additional factual discovery (including numerous depositions) and the resolution of the parties' disputes concerning Defendants' voluminous privilege log entries, substantial expert discovery, and most likely a motion for summary judgment, and would have culminated in a trial that would have required substantial expert and factual testimony. Finally, whatever the verdict in any eventual trial, it is virtually certain that appeals would be taken. All of the foregoing would pose substantial expense for the Class and delay the Class's ability to recover – assuming, of course, that Lead Plaintiffs were ultimately successful on their claims.

Lead Plaintiffs and Lead Counsel recognized that if the Class were to prevail on its claims at trial they would have to marshal and analyze a great deal of complex information and work closely with experts to present the claims to a jury in a simple and comprehensible manner. Lead Counsel was prepared to do so, but the multiple defenses that Defendants could be expected to interpose, as previewed in their motion to dismiss, would also have added to the complexity of the case. In addition, Defendants' aggressive and uncompromising approach to the litigation, exemplified by the need for repeated

litigation over discovery disputes (*see* Joint Decl. ¶¶ 36-58), also provided a preview of the extensive time, effort, and resources it would take to achieve a litigated outcome in this Action.

In contrast to complex, lengthy, and uncertain litigation, the Settlement provides an immediate, significant and certain recovery of $85 million. Accordingly, this factor supports approval of the Settlement.

**4. The Amount of Opposition to the Settlement**

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Rust Consulting, Inc., began mailing copies of the Notice and Claim Form to potential Class Members and nominees on August 10, 2012. *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 Exclusions Received to Date, Ex. 1 to the Joint Declaration ("Miller Aff.") ¶ 6. Through September 28, 2012, more than 581,000 copies of the Notice and Claim Form had been mailed to potential Class Members or their nominees. *See id*. ¶ 9. In addition, the Summary Notice was published in *The Wall Street Journal* and *Investor's Business Daily* and transmitted over the *PR Newswire* on August 23, 2012. *See id*. ¶ 10. The Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to opt out of the Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms.

While the deadline set by the Court for Class Members to exclude themselves or object to the Settlement has not yet passed, to date, Lead Counsel have received no

objections to the Settlement or the Plan of Allocation and, through September 28, 2012, only 28 requests for exclusion, all from small, individual investors representing a tiny fraction of the Class. The deadline for submitting objections and requesting exclusion from the Class is October 18, 2012. As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers on November 1, 2012 addressing any objections that may be received and the requests for exclusion.

**5. Other Factors**

The four factors enumerated by the Eighth Circuit are not an exclusive list of factors that may be considered in weighing the fairness, reasonableness, and adequacy of a proposed class action settlement. The experience and opinion of counsel on both sides should be considered, as well as whether a settlement resulted from arm's-length negotiations, and whether a skilled mediator was involved. *See, e.g.*, *DeBoer*, 64 F.3d at 1178; *Buckley*, 2011 WL 2161135, at *2. A court may also consider the settlement's timing in the litigation and the extent of discovery conducted. *See Buckley*, 2011 WL 2161135, at *2; *White*, 822 F. Supp. at 1417. All of these additional factors also strongly support approval of the Settlement in this Action.

In considering approval of a settlement, courts should give substantial weight to the judgment of the parties and counsel who have negotiated the settlement. *See Petrovic*, 200 F.3d at 1148-49 ("[j]udges should not substitute their own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel"); *DeBoer*, 64 F.3d at 1178 ("the views of counsel are to be accorded deference"); *Uponor*, 2012 WL 2512750, at *7 (the Court may give "great weight" to "the judgment of

experienced counsel in its evaluation of the merits of a class action settlement); *White*, 822 F. Supp. at 1420 ("The court . . . affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved.").

Here, Lead Counsel, who have extensive experience prosecuting complex securities class actions and are closely familiar with the facts of this case, believe that the Settlement is not only fair and adequate, but an excellent result for Lead Plaintiffs and the Class. Joint Decl. ¶ 10. The recommendation of Lead Plaintiffs, each of which is a sophisticated institutional investor, also supports the fairness of the Settlement. Lead Plaintiffs took an active role in supervising this litigation, as envisioned by the PSLRA, and have each endorsed the Settlement as fair and reasonable. *See* Lead Plaintiffs' Declarations, attached as Exs. 2, 3, 4, and 5 to the Joint Declaration. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

Approval of the Settlement is also strongly supported by a consideration of the negotiating process by which the Settlement was reached. Here, the Settlement is the product of arduous arm's-length negotiations between Lead Counsel and Defendants' counsel, which included multiple in-person mediation sessions conducted first under the auspices of experienced mediator Professor Eric D. Green and later under the supervision of Judge Boylan. Joint Decl. ¶¶ 81-84. Judge Boylan was extremely familiar with the

case, having overseen discovery issues and other matters in the Action for several years. *Id*. ¶ 84. The arm's-length nature of the negotiations and the active involvement of an independent mediator such as Judge Boylan provide strong support for approval of the Settlement. *See DeBoer*, 64 F.3d at 1178 (the fact that "a Magistrate Judge presided over the settlement negotiations" helped rebut any suggestion of collusion or bad faith in the negotiation process); *IBP*, 328 F. Supp. 2d at 1064 (approving a settlement that was "was vigorously negotiated at arms-length over several months with the assistance of a mediator").

Finally, the advanced stage of the litigation and the extensive discovery conducted prior to the negotiation of the Settlement provide further assurance of the fairness and reasonableness of the Settlement, because they assure that the parties had sufficient information on which to base their assessments of the strengths and weaknesses of their case. *See White*, 822 F. Supp. at 1421; *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1423 (D. Minn. 1987). As discussed above and in the Joint Declaration, this Action had passed through the class certification stage and millions of pages of documentary discovery had been produced and reviewed prior to the parties' agreement to settle.

In sum, all of the factors considered by Courts in the Eighth Circuit support approval of the Settlement as fair, reasonable and adequate.

## II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

Lead Plaintiffs have proposed a plan of allocation to distribute the proceeds of the Settlement among members of the Class who submit Claim Forms that are approved for

payment. The objective of the proposed Plan of Allocation, which is set forth in the Notice, is to equitably distribute the Settlement proceeds to Class Members who experienced economic losses as a result of the alleged violations of the federal securities laws, as opposed to losses caused by market or industry factors or Company-specific factors unrelated to the alleged misconduct. Joint Decl. ¶ 94; Notice ¶ 41.

Approval of a plan of allocation in a class action is governed by the same standard of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Charter Commc'ns*, 2005 WL 4045741, at *10; *UnitedHealth*, 643 F. Supp. 2d at 1101. "There is no rule that a settlement benefit all class members equally." *Charter Commc'ns*, 2005 WL 4045741, at *10; *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). A plan that allocates settlement funds to class members based on the extent of their injuries or the strength of their claims is fair and reasonable. *See Charter Commc'ns*, 2005 WL 4045741, at *10 ("it is appropriate for interclass allocations to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of purchases and sales of the securities at issue"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strength and values of different categories of claims.").

The general rule is that an allocation formula need only have a "reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Charter Commc'ns*, 2005 WL 4045741, at *10; *see also In re Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Indeed, in assessing a proposed plan

of allocation, courts give great weight to the opinion of informed counsel. *See In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel."); *FLAG Telecom*, 2010 WL 4537550, at *21 ("Counsel's conclusion here that the Plan of Allocation is fair and reasonable is . . . entitled to great weight.").

Here, the Plan of Allocation, which was prepared by Lead Counsel with the assistance of Lead Plaintiffs' damages expert, provides for the distribution of the Net Settlement Fund to Authorized Claimants on a *pro rata* basis based on a formula tied to the timing of a Claimant's purchases and sales of Medtronic common stock and the amount of alleged artificial inflation present in Medtronic common stock that was allegedly caused by the Company's alleged misrepresentations. *See* Joint Decl. ¶¶ 96-98. 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. *Id*. ¶ 96. The damages expert's analysis entailed studying the declines in the price of Medtronic common stock associated with alleged corrective disclosures, adjusted to eliminate the effects attributable to general market or industry conditions and Company-specific news unrelated to the allegations. *Id.* Under the Plan of Allocation, Claimants' Recognized Loss Amounts will generally be calculated based on the difference between the amount of artificial inflation at the time of purchase and the amount of artificial inflation at the time of sale. *See Desert Orchid*, 2007 WL 703515, at *3 ("The Plan provides a pro rata distribution of the Net Settlement Fund among all class members based on the timing of

their purchase and sale of shares, taking into account the relative amounts of allegedly artificial price inflation at various times during the class period. The court finds such an allocation is equitable and reasonable.").[5]

The proposed Plan of Allocation tracks the theories of damages in the Action, is recommended by Lead Counsel, and, to date, there have not been any objections from any Class Members to it. Accordingly, for all of the reasons set forth herein and in the Joint Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

## III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *Grunin*, 513 F.2d at 122; *see also Petrovic*, 200 F.3d at 1153

[5] Persons and entities who purchased Medtronic common stock during the Class Period but did not hold that that stock through the date of one of the disclosures alleged to have removed artificial inflation from the price of Medtronic stock will not be eligible for recovery under the Plan of Allocation based on those shares. *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 258-60 (E.D. Va. 2009) (approving similar plan). Thus, an investor who sold all the Medtronic stock he, she, or it purchased during the Class Period before the first alleged corrective disclosure on November 12, 2008, or who purchased and sold stock between two of the alleged corrective disclosure dates in November 2008 will not be eligible for a recovery under the Plan. Notice ¶ 43.

("the notice of the settlement must be sufficiently detailed to permit class members to determine the potential costs and benefits involved, or at least whether additional investigation into the matter would be an efficient use of their time").

Both the substance of the Notice and the method of its dissemination to potential Class Members satisfy these standards. The Court-approved Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the action and claims; (ii) a definition of the Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of the right to opt-out of the Class or object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, since August 10, 2012, the Claims Administrator has mailed over 581,000 copies of the Notice by first-class mail to potential Class Members and to brokers and nominees. *See* Miller Aff. ¶¶ 6-9. In addition, Lead Plaintiffs caused the Summary Notice to be published in *The Wall Street Journal* and *Investor's Business Daily* and transmitted over the *PR Newswire* on August 23, 2012, and copies of the Notice and Claim Form were made available on a dedicated website maintained by the Claims Administrator. *See* Miller Aff. ¶¶ 10-12.

This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by publication notice in two appropriate and widely-circulated newspapers, over *PR Newswire* and on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Ray v. TierOne Corp.*, No. 8:10-cv-199, 2012 WL 2866577, at *5 (D. Neb. July 12, 2012) (approving plan of notice in securities class action settlement that entailed mailed notice to class members who could be identified with reasonable effort and to brokerage firms and publication in *Investor's Business Daily* and over an electronic newswire); *UnitedHealth*, 643 F. Supp. 2d at 1098 (notice of securities class action settlement was mailed to potential class members and published in *The Wall Street Journal* and *Investor's Business Daily*).

## CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement as fair, reasonable, and adequate and approve the Plan of Allocation as fair and reasonable.

Dated: October 4, 2012

Respectfully submitted,

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