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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE BIOMARIN PHARMACEUTICAL
INC. SECURITIES LITIGATION

Case No. 3:20-cv-06719-WHO

**MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT**

Judge: Hon. William H. Orrick

Date: June 7, 2023

Time: 2:00 p.m.

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**NOTICE OF UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF SETTLEMENT**

PLEASE TAKE NOTICE that Lead Plaintiff Arbejdsmarkedets Tillægspension (“Lead Plaintiff”) hereby moves for an order pursuant to Federal Rule 23(e)(1) that will: (1) preliminarily approve the proposed Settlement of this Action; (2) provisionally certify a class for purposes of the Settlement only; (3) approve the form and manner of giving notice of the proposed Settlement to the Settlement Class; and (4) schedule a final settlement hearing before the Court to determine whether the proposed Settlement, proposed Plan of Allocation, and Lead Counsel’s motion for attorneys’ fees and Litigation Expenses should be approved.¹ Pursuant to Civil Local Rule 7-2 and Your Honor’s Standing Order for Civil Cases, the motion is noticed for a hearing on June 7, 2023, at 2:00 p.m. However, because the motion is unopposed, the Parties agree that it is appropriate for decision on the papers at this time and without a hearing—should the Court so desire. This motion is supported by the following memorandum of points and authorities in support thereof, and the Stipulation and the exhibits thereto, which embody the terms of the proposed Settlement between the Parties, the previous filings and orders in this case, and any further representations as may be made by counsel at any hearing on this matter.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the proposed \$39 million cash settlement of this Action is within the range of fairness, reasonableness, and adequacy to warrant the Court’s preliminary approval and the dissemination of notice of its terms to members of the proposed Settlement Class.

2. Whether a Settlement Class will likely be able to be certified for purposes of the Settlement.

3. Whether the proposed form of settlement notice and claim form and the manner for dissemination to the Settlement Class should be approved.

¹ Unless otherwise indicated, capitalized terms shall have their meaning as defined in the Stipulation and Agreement of Settlement, dated April 24, 2023 (the “Stipulation”), attached as Exhibit 1.

1 Lead Plaintiff submits that the Settlement represents a favorable result for the Settlement
2 Class and ultimately should be approved by this Court, given the substantial risks, costs, and delays
3 of continued litigation, including the significant risk that there might be no recovery for the
4 Settlement Class following Defendants’ anticipated motion for summary judgment, or after trial, or
5 after the appeals that would be taken from any verdict for the Settlement Class at trial. Lead Plaintiff
6 would have faced serious risks at summary judgment and trial in prevailing on its claims.

7 Lead Plaintiff respectfully requests that this Court enter the proposed Preliminary Approval
8 Order attached as Exhibit A to the Stipulation and as Exhibit 2 hereto. The Preliminary Approval
9 Order, among other things: (i) schedules a final hearing to consider the proposed Settlement, the
10 proposed Plan of Allocation of the Net Settlement Fund, and Lead Counsel’s motion for attorneys’
11 fees and expenses (the “Settlement Hearing”); (ii) preliminarily approves the Settlement as fair,
12 reasonable, and adequate to the Settlement Class, pending the Settlement Hearing; (iii) finds that the
13 Court “will be likely be able” to certify the Settlement Class for settlement purposes only;
14 (iv) approves the form and method of disseminating notice to the Settlement Class; (v) appoints the
15 claims administrator recommended by Lead Counsel to disseminate notice and administer the
16 Settlement; and (vi) establishes procedures and deadlines for Settlement Class Members to submit
17 Claim Forms for payments from the Net Settlement Fund, request exclusion from the Settlement
18 Class, or object to the terms of the Settlement, Plan of Allocation, and/or requested fees and expenses.

19 **II. FACTUAL BACKGROUND**

20 On September 25, 2020, this Action was filed as a putative class action against BioMarin
21 and certain executives alleging violations of the Securities Exchange Act of 1934 (the “Exchange
22 Act”). ECF No. 1. In accordance with the PSLRA, notice to the public was issued stating the
23 deadline by which putative class members could move the Court for appointment as lead plaintiff.

24 On December 22, 2020, the Court appointed Arbejdsmarkedets Tillægspension as Lead
25 Plaintiff and approved Bernstein Litowitz Berger & Grossmann LLP as Lead Counsel under the
26 Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4. ECF No. 40.

27 On February 22, 2021, Lead Plaintiff filed an Amended Complaint (the “Complaint”). ECF
28 No. 54. The Complaint asserted claims on behalf of all person and entities who purchased the

1 publicly traded common stock of BioMarin Pharmaceutical Inc. (“BioMarin” or the “Company”)
2 from March 3, 2020 through August 18, 2020, inclusive (the “Class Period”) and were damaged
3 thereby. *Id.* at 1. The Complaint alleged that Defendants made materially false and misleading
4 statements or omissions concerning BioMarin’s application to the FDA for approval of the
5 Company’s gene therapy for hemophilia called valrox. *Id.* ¶ 1. The Complaint asserted (i) claims
6 under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R.
7 § 240.10b-5, promulgated thereunder, against BioMarin, Jean-Jacques Bienaimé, and Henry J.
8 Fuchs (collectively, “Defendants”) and (ii) claims under Section 20(a) of the Exchange Act, 15
9 U.S.C. § 78t(a) against Bienaimé and Fuchs (the “Individual Defendants”).

10 On April 22, 2021, Defendants moved to dismiss the Complaint asserting (among other
11 things) that Lead Plaintiff failed to sufficiently allege: (i) any actionable misrepresentation, or
12 (ii) that Defendants acted with scienter in making any alleged misrepresentation. ECF No. 59. On
13 June 22, 2021, Lead Plaintiff filed its opposition, and on July 22, 2021 Defendants filed their reply.
14 ECF Nos. 63, 65.

15 The Court held oral argument on Defendants’ motion to dismiss on December 3, 2021. ECF
16 No. 73. On January 6, 2022, the Court denied Defendants’ motion to dismiss in its entirety. ECF
17 No. 77. Defendants filed a motion for reconsideration of the Court’s order sustaining the Complaint
18 on January 28, 2022, and the Court denied the motion on February 28, 2022. ECF Nos. 85, 88.
19 Defendants filed their answer to the Complaint on February 15, 2022. ECF No. 86.

20 Discovery in the Action commenced in January 2022. The Parties exchanged initial
21 disclosures, served requests for production of documents, and exchanged letters concerning
22 discovery issues. Lead Plaintiff also served document subpoenas on several third parties.
23 Defendants and third parties produced a total of over 675,000 pages of documents to Lead Plaintiff.

24 The Parties began exploring the possibility of a settlement in the summer of 2022. The
25 Parties agreed to engage in private mediation and retained Michelle Yoshida of Phillips ADR
26 Enterprises to act as mediator in the Action (the “Mediator”). On December 5, 2022, counsel for the
27 Parties participated in a full-day mediation session before the Mediator. In advance of that session,
28 the Parties exchanged and submitted detailed mediation statements to the Mediator. The session

1 ended without any agreement being reached, although the Parties continued their settlement
2 discussions with the Mediator.

3 On October 17, 2022, Lead Plaintiff filed a motion for class certification and appointment
4 of class representative and class counsel, which was accompanied by an expert report from Lead
5 Plaintiff's expert, Dr. Michael Hartzmark, on the efficiency of the market for BioMarin's common
6 stock and common damages methodologies. ECF No. 110. In connection with the motion,
7 Defendants deposed Dr. Hartzmark and two representatives of Lead Plaintiff. Defendants filed their
8 opposition to the class certification motion on January 27, 2023. ECF No. 119.

9 In January 2023, the Parties agreed to engage in a second full-day session before the
10 Mediator on March 8, 2023. At the conclusion of that mediation session, the Parties then reached
11 an agreement in principle to settle the Action. The agreement's terms were memorialized in a term
12 sheet executed on March 14, 2023 (the "Term Sheet"). The Term Sheet set forth, among other
13 things, the Parties' agreement to settle and release all claims against Defendants in the Action in
14 return for a cash payment of \$39,000,000 for the benefit of the Settlement Class, subject to certain
15 terms and conditions and the execution of a customary "long form" stipulation and agreement of
16 settlement and related papers.

17 On April 24, 2023, the Parties entered into the Stipulation, which sets forth the full terms
18 and conditions of the Settlement. On the same day, Lead Plaintiff and BioMarin also entered into a
19 confidential Supplemental Agreement, which gives BioMarin the right to terminate the Settlement
20 if valid requests for exclusion are received from persons and entities entitled to be members of the
21 Settlement Class in an amount that exceeds an amount agreed to by Lead Plaintiff and BioMarin.

22 **III. THE PROPOSED SETTLEMENT**

23 The Settlement provides that BioMarin, on behalf of Defendants, will pay or cause to be paid
24 \$39 million in cash into an interest-bearing escrow account. The Settlement Amount, plus accrued
25 interest, after the deduction of attorneys' fees and Litigation Expenses awarded by the Court, Notice
26 and Administration Costs, and Taxes and related expenses (the "Net Settlement Fund"), will be
27 distributed among Settlement Class Members who submit valid Claim Forms, in accordance with a
28 plan of allocation to be approved by the Court. The Settlement is not a claims-made settlement: if

1 the Settlement is approved, Defendants and their insurers will have no right to the return of any
2 portion of the Settlement Fund based on the number or value of Claims submitted. *See* Stipulation
3 ¶ 13.

4 The Settlement Class. The Parties have agreed to the certification of the Settlement Class
5 consisting of all persons who purchased or otherwise acquired BioMarin common stock from March
6 3, 2020 through August 18, 2020, inclusive (the “Class Period”), and who were damaged thereby
7 (the “Settlement Class”). Excluded from the Settlement Class are: (1) Defendants; (2) any current or
8 former Officers or directors of BioMarin; (3) the Immediate Family members of any Defendant or
9 any current or former Officer or director of BioMarin; (4) any entity that any Defendant owns or
10 controls, or owned or controlled, during the Class Period; and (5) the plaintiffs in *Alger Capital*
11 *Appreciation Fund et al. v. BioMarin Pharmaceutical Inc. at al.*, Case 3:23-cv-00826 (N.D. Cal.)
12 and any of their successors in interest. *See* Stipulation ¶ 1(pp). The Settlement Class is substantially
13 the same as the class proposed in the Complaint. *See* ECF No. 54, at p. 1, ¶ 162.

14 The Release Is Appropriate. In exchange for the payment of the Settlement Amount,
15 Settlement Class Members will release the “Released Plaintiffs’ Claims.” Stipulation ¶ 1(kk). The
16 Settlement’s release provision is tailored to the Settlement Class’s claims. Specifically, the release
17 is limited to (1) the actual claims asserted in the Action; or (2) unasserted claims that could have
18 been brought but only if they arise out, are based upon, or relate to the “allegations, acts,
19 transactions, facts, events, matters, representations or omissions involved, set forth, alleged or
20 referred to in the Action” *and* “the purchase or acquisition of BioMarin common stock during the
21 Class Period.” Stipulation ¶ 1(kk). In addition, the Settlement’s release provision does not release
22 (i) any claims asserted in *Berlinger v. BioMarin Pharmaceutical Inc. et al.*, No. 3:21-cv-08254-
23 MMC (N.D. Cal.) (a separate securities class action against BioMarin with an overlapping class
24 period that asserts claims related to a different gene therapy known as BMN 307); or (ii) any claims
25 asserted in any shareholder derivative action, including *Wang v. Bienaimé at al.*, No. 2023-0058-
26 NAC (Del. Ch.). *Id.* The Parties are not aware of any other pending cases that will be affected by
27 the Settlement or the proposed release.
28

1 The proposed release is, therefore, tailored to the conduct at issue in this Action and is
2 consistent with release provisions approved by courts in this District. *See, e.g., Hefler v. Wells Fargo*
3 *& Co.*, 2018 WL 6619983, at *3 (N.D. Cal. Dec. 18, 2018) (approving similar release); *In re*
4 *LendingClub Sec. Litig.*, 2018 WL 1367336, at *4 (N.D. Cal. Mar. 16, 2018) (approving release in
5 securities class action that was “anchored to ‘the purchase, acquisition, holding, sale, or disposition
6 of LendingClub common stock by Class Members during the [class] period’”), *aff’d*, 802 F. App’x
7 285 (9th Cir. 2020); *see generally Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 747-
8 48 (9th Cir. 2006) (a class release may release claims not asserted in the action as long as they arise
9 from the same set of factual allegations).

10 **IV. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL**

11 **A. Standards Governing Approval of a Class Action Settlement**

12 In the Ninth Circuit, there is a strong judicial policy in favor of voluntary settlement of
13 litigation, and particularly so in class actions. *See, e.g., Linney v. Cellular Alaska P’ship*, 151 F.3d
14 1234, 1238 (9th Cir. 1998); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992);
15 *In re Heritage Bond Litig.*, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005) (“There is an
16 overriding public interest in settling and quieting litigation, and this is particularly true in class
17 action suits.”). Settlements of complex cases greatly contribute to the efficient utilization of scarce
18 judicial resources and achieve the speedy resolution of justice. *See Elliott v. Rolling Frito-Lay Sales,*
19 *LP*, 2014 WL 2761316, at *3 (C.D. Cal. June 12, 2014) (“judicial policy favors settlement in class
20 actions and other complex litigation where substantial resources can be conserved by avoiding the
21 time, cost, and rigors of formal litigation”).

22 Federal Rule of Civil Procedure 23(e) requires judicial approval of class action settlements.
23 A district court’s review of a proposed class action settlement is a two-step process. First, the court
24 performs a preliminary review of the terms of the proposed settlement to determine whether to send
25 notice of the proposed settlement to the class. *See* Fed. R. Civ. P. 23(e)(1). Second, after notice and
26 a hearing, the Court determines whether to grant final approval of the settlement. *See* Fed. R. Civ.
27 P. 23(e)(2).

1 A court grants preliminary approval to authorize notice to the class upon a finding that it
 2 “will likely be able” to approve the Settlement as fair, reasonable, and adequate at the final hearing.
 3 Fed. R. Civ. P. 23(e)(1)(B). This standard effectively codifies prior case law, which provided that
 4 courts should grant preliminary approval after considering whether the settlement: (1) appears to be
 5 the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies;
 6 (3) does not grant improper preferential treatment to class representatives or segments of the class;
 7 and (4) falls within the range of possible approval. *See, e.g., Luz Bautista-Perez v. Juul Labs, Inc.*,
 8 2022 WL 307942, at *6 (N.D. Cal. Feb. 2, 2022).

9 At final approval, the Court will have to determine whether the Settlement is “fair,
 10 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). In considering whether a settlement is fair,
 11 reasonable, and adequate at final approval, Rule 23(e)(2) provides that the Court should consider
 12 whether:

13 (A) the class representatives and class counsel have adequately represented the
 14 class; (B) the proposal was negotiated at arm’s length; (C) the relief provided for
 15 the class is adequate, taking into account: (i) the costs, risks, and delay of trial and
 16 appeal; (ii) the effectiveness of any proposed method of distributing relief to the
 17 class, including the method of processing class-member claims; (iii) the terms of
 any proposed award of attorney’s fees, including timing of payment; and (iv) any
 agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats
 class members equitably relative to each other.

18 Fed. R. Civ. P. 23(e)(2). The Court also considers the factors identified by the Ninth Circuit in
 19 *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004), many of which
 20 overlap with the Rule 23(e) factors. Each of these factors supports approval of the Settlement and,
 21 thus, preliminary approval is appropriate here.

22 **B. The Court “Will Likely Be Able to” Approve the**
 23 **Proposed Settlement Under Rule 23(e)(2)**

24 **1. The Settlement Was Reached Through Arm’s-Length Negotiations**
 25 **Between Experienced Counsel and with the Assistance of an**
 26 **Experienced Mediator**

27 The fact that the Parties reached the Settlement after arm’s-length negotiations between
 28 experienced counsel with the assistance of an experienced mediator after meaningful discovery
 creates a presumption of its fairness. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4 (N.D.

1 Cal. Mar. 18, 2013) (“Courts have afforded a presumption of fairness and reasonableness of a
2 settlement agreement where that agreement was the product of non-collusive, arms’ length
3 negotiations conducted by capable and experienced counsel.”).

4 Here, counsel engaged in a mediation process with an experienced mediator, Michelle
5 Yoshida, which included the exchange of detailed mediation statements and two full-day mediation
6 sessions. As courts in this District and elsewhere have found, “[t]he assistance of an experienced
7 mediator in the settlement process confirms that the settlement is non-collusive.” *Satchell v. Fed.*
8 *Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *see also Chavez v. Converse,*
9 *Inc.*, 2020 WL 4047863, at *2 (N.D. Cal. July 8, 2020).

10 Courts have also given considerable weight to the opinion of experienced and informed
11 counsel who support settlement. In deciding whether to approve a proposed settlement of a class
12 action, “[t]he recommendations of plaintiffs’ counsel should be given a presumption of
13 reasonableness.” *Stewart v. Applied Materials, Inc.*, 2017 WL 3670711, at *6 (N.D. Cal. Aug. 25,
14 2017); *accord In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Here,
15 Lead Counsel has a thorough understanding of the merits and risks of the Action and extensive
16 experience in securities litigation.

17 In addition, Lead Plaintiff reached the agreement to settle only after conducting extensive
18 litigation, which included a thorough investigation of the claims and preparation of a detailed
19 Complaint, full briefing of Defendants’ motion to dismiss, and substantial document discovery.
20 Thus, Lead Plaintiff and Lead Counsel had ample information to ascertain the strengths and risks of
21 the claims asserted in the Action and for their conclusion that the \$39 million Settlement is fair and
22 reasonable.

23 In sum, the extent of the litigation, the arm’s-length nature of the negotiations, and the
24 participation of a mediator all support a finding that the proposed Settlement is fair, reasonable, and
25 adequate to justify notice to the Settlement Class and a hearing on final approval.

26 **2. The Settlement Is Within the Range of Possible Approval**

27 At the preliminary approval stage, the Court need only determine whether it “will likely be
28 able” to approve the Settlement, *see* Fed. R. Civ. P. 23(e)(1)(B), or, in other words, whether the

1 Settlement “falls within the range of possible approval.” *Reynolds v. Direct Flow Med., Inc.*, 2019
2 WL 1084179, at *4 (N.D. Cal. Mar. 7, 2019). Because the \$39 million Settlement represents a
3 favorable recovery for the Settlement Class in light of the risks of the litigation and the potential
4 outcomes at trial, the Settlement is well within the range of possible approval.

5 Lead Counsel agreed to settle this Action on these terms based on its careful investigation
6 and evaluation of the facts and law relating to the allegations in the Complaint and careful
7 consideration of the evidence developed in discovery. *See Louie v. Kaiser Found. Health Plan, Inc.*,
8 2008 WL 4473183, at *6 (S.D. Cal. Oct. 6, 2008) (“Class counsels’ extensive investigation,
9 discovery, and research weighs in favor of preliminary settlement approval.”).

10 The \$39 million Settlement is a favorable result for the Settlement Class in light of the
11 substantial risks that Lead Plaintiff and the Settlement Class would face in proving all of the
12 elements of the asserted claims. To defeat summary judgment and prevail at trial, Lead Plaintiff
13 would have been required to prove not only that Defendants’ statements were materially false, but
14 that Defendants knew that their statements were false when made or were deliberately reckless in
15 making the statements, and that the disclosures concerning Defendants’ false and misleading
16 statements caused declines in the price of BioMarin’s stock. In addition, Lead Plaintiff would have
17 had to establish the amount of per share damages.

18 Defendants would have had substantial arguments to make concerning each of these issues.
19 For example, Defendants would have argued that the timing of the FDA’s delay of the Pre-Approval
20 Inspection of BioMarin’s Novato facility, and the timing of the FDA’s indication that the inspection
21 would be indefinitely delayed, would justify dismissal of a substantial portion of the Class Period.
22 Defendants also would argue that while Lead Plaintiff alleged, based on Defendants’ own public
23 post-Class Period Statements, that BioMarin had “no dialogue whatsoever” with the FDA, that there
24 were, in fact, communications between BioMarin and the FDA throughout a large part of the Class
25 Period.

26 Lead Plaintiff would also have faced substantial challenges in proving that the revelation of
27 the truth about Defendants’ allegedly false and misleading statements caused the declines in the
28 price of BioMarin’s stock, and in establishing the amount of class-wide damages. Defendants would

1 have argued that the decline in BioMarin's stock price was not caused by revelation of the truth
2 about the alleged misstatements, but by other factors such as the FDA's denial of BioMarin's
3 application to license valrox. Defendants would have also argued that, even if some portion of the
4 price decline were caused by revelation of the truth about the alleged misstatements, it was small
5 compared to the decline resulting from other factors, and any purported damages to Lead Plaintiff
6 and the Settlement Class were minimal. Lead Plaintiff would have faced challenges in proving what
7 portion of the BioMarin's price decline on August 19, 2020 resulted from the revelation of the
8 alleged misstatements, rather than confounding non-fraud information. Had any of these arguments
9 been accepted in whole or in part, they could have eliminated or, at a minimum, drastically limited
10 any potential recovery.

11 Moreover, in order to obtain recovery, Lead Plaintiff would have to prevail at several
12 stages—on the pending motion for class certification, at summary judgment, at trial, and on appeal.
13 Thus, there were significant risks attendant to the continued prosecution of the Action, and there
14 was no guarantee that further litigation would have resulted in a higher recovery, or any recovery at
15 all. In light of these risks, the amount of the Settlement and the immediacy of recovery to the
16 Settlement Class, Lead Plaintiff and Lead Counsel believe that the proposed \$39,000,000 Settlement
17 is fair, reasonable, and adequate, and in the best interests of the Settlement Class.

18 The Settlement is also favorable to Settlement Class Members when considered in light of
19 the maximum damages that might be established at trial. To assess damages in this case, Lead
20 Plaintiff first estimated the theoretical maximum damages if investors were to prevail over all
21 liability and loss causation challenges noted above (including challenges in determining what
22 portion of BioMarin's stock price decline was attributable to the revelations of the lack of
23 cooperation or optimism from the FDA concerning the likelihood of approval of the application, as
24 opposed to other factors). That absolute maximum damages amount was approximately \$650
25 million. This amount corresponds to the \$41.68 per share artificial inflation included in the Plan of
26 Allocation, assumes that the entire Class Period would be sustained and that same level of artificial
27 inflation applied throughout the Class Period, and assumes that the entire stock price decline was
28 attributable to the corrective nature of the August 19, 2020 disclosures and was foreseeable.

1 However, Lead Plaintiff also faced real challenges to establishing the material falsity of Defendants'
2 statements concerning the status of BioMarin's application for FDA approval of valrox in the initial
3 part of the Class Period or, at the very least, would have been likely to show that level of artificial
4 inflation was substantially lower during that initial period, and increased during the latter part of the
5 Class Period. If Lead Plaintiff was unable to establish liability for that initial period and the Class
6 Period began in June 2020 rather than March 2020, the maximum damages would be approximately
7 \$395 million.² Moreover, all of these maximum damages estimates could have been still further
8 reduced if Lead Plaintiff could not prove that all of BioMarin's price decline on August 19, 2020
9 was attributable to the alleged misstatements concerning BioMarin's communications with the
10 FDA, as opposed to other factors.

11 Accordingly, the \$39 million Settlement Amount represents approximately 6% to 10% of
12 Lead Plaintiff's estimated maximum potential realistic class-wide damages, depending on the
13 assumptions noted above. This represents an excellent recovery for Settlement Class Members,
14 especially when considered in light of the real risk of no-or-lesser recovery and the typical level of
15 recovery in securities class actions. *See, e.g., In re Lyft, Inc. Sec. Litig.*, No. 2022 WL 17740302, at
16 *6 (N.D. Cal. Dec. 16, 2022) (finding the settlement equal to 3.2% to 4.7% of estimated maximum
17 damages was "well within the range of possible approval"); *Kendall v. Odonate Therapeutics, Inc.*,
18 2022 WL 1997530, at *5 (S.D. Cal. June 6, 2022) (approving settlement of "approximately 3.49%
19 of the maximum estimate damages"); *In re Aqua Metals, Inc. Sec. Litig.*, 2022 WL 612804, at *6
20 (N.D. Cal. Mar. 2, 2022) ("Class Counsel contends that this settlement offer constitutes 7.3% of the
21 most likely recoverable damages, assuming Plaintiffs were to prevail on all claims against the
22 Defendants. . . . The Court agrees that this recovery is in line with comparable class action
23 settlements."); *In re Biolase, Inc. Sec. Litig.*, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015)
24 (settlement representing "approximately 8% of the maximum recoverable damages . . . equals or
25 surpasses the recovery in many other securities class actions"); *IBEW Local 697 v. Int'l Game Tech.*,

26 _____
27 ² Defendants, of course, dispute that Lead Plaintiff or investors were damaged, contest Lead
28 Plaintiff's class-wide damage estimates, and believe Lead Plaintiff and investors are not entitled to
recover through this Action.

1 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving settlement representing “about 3.5%
2 of the maximum damages that Plaintiffs believe[d] could be recovered” and finding it “within the
3 median recovery in securities class actions settled in the last few years”).

4 **3. The Settlement Treats All Settlement Class Members Fairly**

5 The Settlement does not improperly grant preferential treatment to Lead Plaintiff or any
6 segment of the Settlement Class. All Settlement Class Members will be eligible to receive a
7 distribution from the Net Settlement Fund in accordance with a plan of allocation to be approved
8 by the Court. At the final Settlement Hearing, Lead Plaintiff will ask the Court to approve the
9 proposed Plan of Allocation, which provides a formula for the distribution of the Net Settlement
10 Fund to Settlement Class Members demonstrating a loss on their transactions in BioMarin common
11 stock related to the alleged fraud. As discussed further below, the Plan of Allocation was developed
12 by Lead Counsel based on a damages analysis prepared by Lead Plaintiff’s damages expert, and
13 Lead Counsel believes it provides a fair and equitable method for allocating the Net Settlement
14 Fund among injured Settlement Class Members.

15 **4. Lead Plaintiff Has Identified All Agreements** 16 **Made in Connection With the Settlement**

17 In addition to the Stipulation, Lead Plaintiff and BioMarin entered into a confidential
18 Supplemental Agreement that establishes the conditions under which BioMarin may terminate the
19 Settlement if requests for exclusion (“opt-outs”) exceed an agreed-upon threshold. *See* Stipulation
20 ¶ 35. “This type of agreement is a standard provision in securities class actions and has no negative
21 impact on the fairness of the Settlement.” *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468,
22 at *13 (S.D.N.Y. July 21, 2020); *see also Thomas v. MagnaChip Semiconductor Corp.*, 2017 WL
23 4750628, at *7 (N.D. Cal. Oct. 20, 2017) (such an agreement “does not render the settlement
24 unfair”). As is also standard in securities class actions, agreements of this kind are not made public
25 to avoid incentivizing individuals to leverage the opt-out threshold to exact individual settlements at
26 the class’s expense. *See, e.g., Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *7 (N.D. Cal.
27 Sept. 4, 2018) (“There are compelling reasons to keep this information confidential in order to
28 prevent third parties from utilizing it for the improper purpose of obstructing the settlement and

1 obtaining higher payouts.”). In accordance with its terms, the Supplemental Agreement may be
2 submitted to the Court *in camera* if required by the Court.

3 **V. THE PROPOSED SETTLEMENT CLASS SATISFIES RULE 23**

4 The Ninth Circuit has long recognized that courts may certify class actions for settlement
5 purposes only. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1018-19 (9th Cir. 1998). In connection
6 with final approval, the Court will be asked to certify the Settlement Class, for settlement purposes
7 only, under Rules 23(a) and 23(b)(3). At the preliminary approval stage, the Court need only
8 determine whether it “will likely be able to” grant certification at final approval. Fed. R. Civ. P.
9 23(e)(1)(B)(ii).

10 Courts routinely endorse the use of the class action device to resolve claims brought under
11 the federal securities laws. *See, e.g., Hodges v. Akeena Solar Inc.*, 274 F.R.D. 259, 266 (N.D. Cal.
12 2011). “[C]lass actions commonly arise in securities fraud cases as the claims of separate investors
13 are often too small to justify individual lawsuits, making class actions the only efficient deterrent
14 against securities fraud. Accordingly, the Ninth Circuit and courts in this district hold a liberal view
15 of class actions in securities litigation.” *In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 152-53
16 (N.D. Cal. 1991). This Action is no exception, and the proposed Settlement Class readily satisfies
17 the requirements of Rules 23(a) and 23(b)(3).

18 **A. The Settlement Class Meets the Requirements of Rule 23(a)**

19 **1. Numerosity**

20 Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is
21 impracticable. The Ninth Circuit has stated that “‘impracticability’ does not mean ‘impossibility,’
22 but only the difficulty or inconvenience of joining all members of the class.” *Harris v. Palm Springs*
23 *Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). “While no specific minimum number of
24 potential class members exists, a ‘proposed class of at least forty members presumptively satisfies
25 the numerosity requirement.’” *Hatamian v. Advanced Micro Devices, Inc.*, 2016 WL 1042502, at *4
26 (N.D. Cal. Mar. 16, 2016). “Numerosity ‘is generally assumed to have been met in class action suits
27 involving nationally traded securities.’” *Kendall v. Odonate Therapeutics, Inc.*, 2022 WL 188364,
28 at *3 (S.D. Cal. Jan. 18, 2022).

1 Here, the proposed Settlement Class includes many thousands of investors. Over 180 million
2 shares of common stock were outstanding during the Class Period. *See* Expert Report of Michael L.
3 Hartzmark (ECF No. 110-2), at ¶ 25. BioMarin common stock was actively traded on the NASDAQ
4 with over 182 million shares traded during the Class Period, at an average weekly trading volume of
5 9.28 million shares. *Id.* ¶¶ 26-27. The proposed Settlement Class consists of thousands of investors.
6 *See Akeena Solar*, 274 F.R.D. at 266; *In re UTStarcom, Inc. Sec. Litig.*, 2010 WL 1945737, at *4
7 (N.D. Cal. May 12, 2010) (numerosity can be assumed where the “stock traded on a national stock
8 exchange with daily volume in the millions of shares”). A class of this size is sufficiently numerous
9 to make individual joinder impracticable, and satisfy the numerosity element. *Id.*

10 2. Commonality

11 The commonality requirement of Rule 23(a)(2) is satisfied where the proposed class
12 representatives share at least one question of fact or law with the claims of the prospective class.
13 Commonality exists even if there are varying fact situations among class members so long as the
14 claims of the plaintiffs and other class members are based on the same liability theory. *See Blackie*
15 *v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975).

16 The common questions of fact and law in this Action are numerous and include: (i) whether
17 Defendants made false or misleading statements or omissions; (ii) whether Defendants acted with
18 scienter; (iii) whether Defendants’ misrepresentations and omissions caused the Settlement Class
19 Members losses; and (iv) whether the members of the Settlement Class sustained damages, and the
20 proper amount of their damages.

21 Courts routinely hold that securities actions containing such common questions are prime
22 candidates for class certification. *See, e.g., UTStarcom*, 2010 WL 1945737, at *4 (finding common
23 questions of law and fact as to whether “Defendants engaged in a fraudulent scheme and omitted or
24 misrepresented material facts,” the “publicly traded securities were artificially inflated,” and
25 “Defendants’ . . . omissions caused class members to suffer economic losses”).

26 3. Typicality

27 The typicality requirement of Rule 23(a)(3) is satisfied when the claims or defenses of the
28 party or parties representing the class are typical of the claims or defenses of the other class members.

1 “The test of typicality is whether other members have the same or similar injury, whether the action
2 is based on conduct which is not unique to the named plaintiffs, and whether other class members
3 have been injured by the same course of conduct.” *In re Twitter Inc. Sec. Litig.*, 326 F.R.D. 619, 629
4 (N.D. Cal. 2018). Typicality exists “even if there are factual distinctions between the claims of the
5 named plaintiffs and those of other class members.” *Gonzales v. Arrow Fin. Servs. LLC*, 489 F.
6 Supp. 2d 1140, 1155 (S.D. Cal. 2007), *aff’d*, 660 F.3d 1055 (9th Cir. 2011).

7 Here, Lead Plaintiff’s claims arise from the same events or course of conduct that give rise
8 to claims of other Settlement Class Members, and the claims asserted are based on the same legal
9 theory. The claims of all Settlement Class Members derive from the same legal theories and allege
10 the same set of operative facts. Lead Plaintiff alleges that the price of the BioMarin common stock
11 it purchased during the Class Period was artificially inflated as a result of Defendants’ alleged
12 misstatements and that it suffered damages when the truth was disclosed to the market, causing
13 BioMarin’s stock price to decline. Lead Plaintiff’s claims thus meet the typicality requirement. *See*
14 *Akeena Solar*, 274 F.R.D. at 266-67.

15 4. Adequacy

16 Rule 23(a)’s adequacy requirement is met when lead plaintiff and lead counsel will fairly
17 and adequately protect the interests of the Settlement Class. The proposed class representative must
18 be free of interests antagonistic to the other members of the class, and counsel representing the class
19 must be qualified, experienced and capable of conducting the litigation. *See Lerwill v. Inflight*
20 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Hanlon*, 150 F.3d at 1020.

21 Here, Lead Plaintiff has claims that are coextensive with those of the Settlement Class. In
22 addition, Lead Plaintiff has retained counsel highly experienced in securities class action litigation
23 who have successfully prosecuted many securities and other complex class actions.³ Thus, Lead
24 Plaintiff is an adequate representative of the Settlement Class, and its counsel is qualified,
25 experienced and capable of prosecuting this Action, in satisfaction of Rule 23(a)(4).

26
27
28 ³ *See* Declaration of Katherine M. Sinderson (“Sinderson Decl.”), attached hereto as Exhibit 3, at ¶¶ 8-10.

1 **B. The Settlement Class Meets the Requirements of Rule 23(b)(3)**

2 Rule 23(b)(3) requires that common questions of law or fact predominate over individual
3 questions, and that a class action is superior to other available methods of adjudication. *See Erica*
4 *P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011); *In re LDK Solar Sec. Litig.*, 255
5 F.R.D. 519, 525 (N.D. Cal. 2009).

6 Here, common questions of law and fact predominate over any individualized ones. As courts
7 have repeatedly recognized, “[t]he common questions of whether misrepresentations were made and
8 whether Defendants had the requisite scienter predominate[] over any individual questions of
9 reliance and damages.” *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 632, 642 (C.D. Cal. 2009).
10 Issues of falsity, materiality, scienter, and loss causation “affect investors alike,” and their proof
11 “can be made on a class-wide basis” because they “affect[] investors in common.” *Schleicher v.*
12 *Wendt*, 618 F.3d 679, 682, 685, 687 (7th Cir. 2010).

13 In addition, a class action is “superior” to individual actions here because individual class
14 member’s claims are too small to maintain a separate action. Indeed, Lead Plaintiff is unaware of
15 any individual actions brought on behalf of BioMarin common stock investors based on the same
16 allegations. Moreover, the broad geographical dispersion of Settlement Class Members makes it
17 desirable to concentrate the claims in one forum. *See In re VeriSign, Inc. Sec. Litig.*, 2005 WL
18 7877645, at *9 (N.D. Cal. Jan. 13, 2005) (“Class actions are particularly well-suited in the context
19 of securities litigation, wherein geographically dispersed shareholders with relatively small holdings
20 would have difficulty in challenging wealthy corporate defendants.”).

21 In sum, the requirements of Rules 23(a) and 23(b) are satisfied, and there are no issues that
22 would prevent the Court from certifying this Settlement Class, appointing Lead Plaintiff as class
23 representative, and appointing Lead Counsel as counsel for the Settlement Class.

24 **VI. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE**

25 Lead Plaintiff also seeks preliminary approval of the proposed Plan of Allocation of the
26 settlement proceeds, which is set forth in the Notice to be mailed to Settlement Class Members. The
27 Court’s review of the proposed Plan of Allocation is governed by the same standards of review
28 applicable to the settlement itself—the plan must be fair and reasonable. *See Class Plaintiffs*, 955

1 F.2d at 1284. The Plan of Allocation, which Lead Counsel developed based on the damages analysis
2 prepared by Lead Plaintiff’s expert, provides a fair, reasonable, and equitable basis to allocate the
3 Net Settlement Fund among Settlement Class Members who submit acceptable Claim Forms.

4 In developing the Plan of Allocation, Lead Plaintiff’s damages expert calculated the
5 estimated amount of alleged artificial inflation in the per-share price of BioMarin common stock
6 during the Class Period that was allegedly proximately caused by Defendants’ alleged materially
7 false and misleading statements and omissions. In calculating the alleged artificial inflation, Lead
8 Plaintiff’s damages expert considered the price change in BioMarin common stock in reaction to the
9 public disclosure that allegedly corrected the alleged misrepresentations, adjusting for factors that
10 were attributable to market or industry forces. *See* Notice ¶ 75. In addition, Lead Plaintiff alleges
11 that the gap between the Defendants’ statements about the FDA approval process for the valtrox and
12 the underlying truth widened substantially during the course of the Class Period. Accordingly, under
13 the proposed Plan, the amount of artificial inflation in BioMarin common stock increases threefold
14 after June 8, 2020. The estimated artificial inflation under the Plan from March 3, 2020 through June
15 8, 2020 is \$13.89 per share and from June 9, 2020 through August 18, 2020 is \$41.68 per share. *Id.*

16 The Plan of Allocation calculates a “Recognized Loss Amount” for each purchase of
17 BioMarin common stock during the Class Period that is listed in the Claim Form and for which
18 adequate supporting documentation is provided. Notice ¶ 77. Under the Plan, Claimants who
19 purchased shares during the Class Period but did not hold those shares through the alleged corrective
20 disclosure at the end of the Class Period will have no Recognized Loss Amount as to those
21 transactions because any loss they suffered would not have been caused by revelation of the alleged
22 fraud. *Id.* ¶¶ 76, 78.A. For shares sold in the 90-day period after the end of the Class Period, the
23 Recognized Loss Amount is the least of: (i) the estimated artificial inflation on the date of purchase,
24 (ii) the purchase price *minus* the sales price; or (iii) the purchase price *minus* the average closing
25 price of the stock from August 19, 2020 through the date of sale, consistent with the PSLRA. *Id.*
26 ¶ 78.B. For shares sold still held as of the close of trading on November 16, 2020 (the end of the 90-
27 day period following the end of the Class Period), Recognized Loss Amounts will be the lesser of
28

1 (i) the estimated artificial inflation on the date of purchase or (ii) the purchase price *minus* \$76.42,
2 the average closing price for BioMarin common stock during the 90-day period. *See Id.* ¶ 78.C.

3 The sum of a claimant’s Recognized Loss Amounts for all of his, her, or its Class Period
4 purchases is the Claimant’s “Recognized Claim.” Notice ¶ 79. The Plan of Allocation also limits
5 Claimants’ Recognized Claim based on whether they had an overall market loss in their transactions
6 in BioMarin common stock during the Class Period. *Id.* ¶¶ 86-87. The Net Settlement Fund will be
7 allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized
8 Claims. *Id.* ¶¶ 88-89.

9 One hundred percent of the Net Settlement Fund will be distributed to eligible Claimants.
10 Moreover, if any funds remain after an initial distribution to eligible Claimants, as a result of
11 uncashed or returned checks or other reasons, subsequent distributions will also be conducted as
12 long as they are cost effective. Notice ¶ 91. The Plan of Allocation also identifies the Investor
13 Protection Trust as the proposed *cy pres* recipient for any residual funds that may remain after all
14 cost-effective distributions of the Net Settlement Fund to all eligible Claimants have been completed.
15 *Id.* The Investor Protection Trust, a 501(c)(3) nonprofit organization devoted to investor education,
16 is an appropriate *cy pres* recipient because of the nature of the securities fraud claims at issue, and
17 courts in this District have approved it as a *cy pres* recipient in other similar actions. *See Hefler*,
18 2018 WL 6619983, at *11 (“the Court concludes that the Investor Protection Trust’s mission of
19 educating investors makes it an appropriate *cy pres* beneficiary”); *In re Volkswagen “Clean Diesel”*
20 *Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2018 WL 6198311, at *5 (N.D. Cal. Nov. 28, 2018) (“The
21 proposed *cy pres* recipient, the Investor Protection Trust, is a nonprofit organization focused on
22 investor education. A savvy, educated investor is hopefully more likely to identify signs of securities
23 fraud, which furthers the Exchange Act’s purpose of maintaining ‘fair and honest markets.’”).
24 Neither Lead Plaintiff nor Lead Counsel have a relationship with the Investor Protection Trust.

1 **VII. THE COURT SHOULD APPROVE THE PROPOSED FORM OF NOTICE**
2 **AND PLAN FOR PROVIDING NOTICE TO THE SETTLEMENT CLASS**

3 **A. Retention of A.B. Data, Ltd.**

4 Lead Plaintiff proposes that the notice and claims process be administered by A.B. Data, Ltd.
5 (“A.B. Data”), an independent settlement and claims administrator with extensive experience
6 handling the administration of securities class actions. *See* Declaration of Adam Walter (“Walter
7 Decl.”), attached hereto as Exhibit 4, at ¶ 2. A copy of A.B. Data’s firm resume is attached to the
8 Walter Decl. as Exhibit A and a discussion of its data security procedures is attached thereto as
9 Exhibit B. Lead Counsel selected A.B. Data after a competitive bidding process in which four firms
10 submitted proposals. *See* Sinderson Decl. ¶¶ 2-4. All of the proposals received involved comparable
11 methods of providing notice and claims processing, including the use of first-class mail and
12 identifying potential Settlement Class Members through brokers and nominee owners. *Id.* ¶ 4. Lead
13 Counsel has engaged A.B. Data to serve as notice or settlement administrator in 20 cases, including
14 *BioMarin*, in the past two years (as compared to a total of 40 such new engagements during the same
15 period, or one half of such cases). *Id.* ¶ 5. Lead Counsel has found A.B. Data to be a very reliable
16 administrator for these types of cases, with competitive pricing compared to similar claims
17 administrator firms. *Id.* ¶ 6.

18 **B. Proposed Form of Notice**

19 Lead Plaintiff respectfully submits that the Court should approve the form and content of the
20 proposed Notice and Summary Notice. *See* Stipulation, Exs. A-1 and A-3. The Notice is written in
21 plain language and clearly sets out the relevant information and answers to most questions that
22 Settlement Class Members will have. Consistent with Rules 23(c)(2)(B) and 23(e)(1), the Notice
23 apprises all Settlement Class Members of (among many other disclosures) the nature of the Action,
24 the definition of the Settlement Class, the claims and issues, that the Court will exclude from the
25 Settlement Class any Settlement Class Member who requests exclusion, and the binding effect of a
26 class judgment on Settlement Class Members under Rule 23(c)(3)(B).

27 The Notice also satisfies the separate disclosure requirements imposed by the PSLRA. *See* 15
28 U.S.C. § 78u-4(a)(7). It states the amount of the Settlement on an absolute and per-share basis;

1 provides a statement concerning the issues about which the Parties disagree; states the amount of
2 attorneys' fees and Litigation Expenses that Lead Counsel will seek; provides the name, address,
3 telephone number, and email of Lead Counsel, who will be available to answer questions from
4 Settlement Class Members; and provides a brief statement explaining the reasons why the Parties are
5 proposing the Settlement.

6 The Notice also meets the Northern District of California Procedural Guidance for Class
7 Action Settlements ("N.D. Cal. Guid.") in that it includes, among other things, (1) "contact
8 information for class counsel to answer questions"; (2) the web address for the settlement website;
9 and (3) "instructions on how to access the case docket." N.D. Cal. Guid. ¶ 3. The Notice also sets
10 out the procedures and deadlines for the submission of Claim Forms; for submission of objections to
11 any aspect of the Settlement, the Plan of Allocation, or attorneys' fees and expenses; and for requests
12 for exclusion from the Settlement Class.

13 **C. Proposed Notice Dissemination Procedures**

14 The proposed method for disseminating the notice, which is set forth in the Preliminary
15 Approval Order submitted herewith, also readily meets the standards under the Federal Rules and
16 due process. Rule 23(c)(2)(B) requires the court to direct to a class certified under Rule 23(b)(3) "the
17 best notice that is practicable under the circumstances, including individual notice to all members
18 who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Similarly, Rule
19 23(e)(1)(B) requires the court to direct notice of a class action settlement "in a reasonable manner to
20 all class members who would be bound" by a proposed settlement. Fed. R. Civ. P. 23(e)(1)(B).

21 If the Court preliminarily approves the Settlement, BioMarin will provide names and
22 addresses of the record purchasers of BioMarin common stock during the Class Period, for the
23 purpose of identifying and giving notice to the Settlement Class. A.B. Data will mail the Notice and
24 Claim Form (the "Notice Packet") to all such identified potential Settlement Class Members. A.B.
25 Data will also send notice to brokers and other nominees who purchased BioMarin common stock
26 during the Class Period on behalf of other beneficial owners. These nominee purchasers will be
27 required to either forward the Notice Packet to their customers or provide the names and addresses
28 of the beneficial owners to A.B. Data, which will then promptly send the Notice Packet by first-class

1 mail to such identified beneficial owners (or by email if provided). A.B. Data will also cause the
2 Summary Notice, which provides an abbreviated description of the Action and the proposed
3 Settlement and explains how to obtain the more detailed Notice, to be published once in *The Wall*
4 *Street Journal* and transmitted over the *PR Newswire*, a national business-oriented wire service, and
5 will publish the Notice and Claim Form and other materials on a website to be developed for the
6 Settlement.

7 In addition, the Parties have agreed that, no later than ten calendar days following the filing
8 of the Stipulation with the Court, Defendants shall serve the notice required under the Class Action
9 Fairness Act, 28 U.S.C. § 1715 *et seq.* (2005) (“CAFA”). *See* Stipulation ¶ 19. The Parties are not
10 aware of any other such required notices to government entities or others. *See* N.D. Cal. Guid. ¶ 10.

11 The proposed plan for providing notice is the same method that has been used in numerous
12 other securities class actions. Courts routinely find that comparable notice programs, combining
13 individual notice by first-class mail to all class members who can reasonably identified,
14 supplemented with publication notice, meet all the requirements of Rule 23 and due process. *See In*
15 *re RH, Inc. Sec. Litig.*, 2019 WL 5538215, at *2 (N.D. Cal. Oct. 25, 2019) (approving similar notice
16 plan in securities class action); *In re Portal Software, Inc.*, 2007 WL 1991529, at *7 (N.D. Cal. June
17 30, 2007) (holding that “notice by mail and publication is the ‘best notice practicable under the
18 circumstances’”).

19 **D. Claims Processing**

20 The net proceeds of the Settlement will be distributed to Settlement Class Members who
21 submit eligible Claim Forms with required documentation to A.B. Data. A.B. Data will review and
22 process the claims under the supervision of Lead Counsel, will provide claimants with an
23 opportunity to cure any deficiencies in their claim(s) or request review of the denial of their claim(s)
24 by the Court, and will then mail or wire claimants their *pro rata* share of the Net Settlement Fund
25 (as calculated under the Plan of Allocation) upon approval of the Court.

26 A.B. Data estimates that a total of 50,000 Notice Packets will be mailed based on A.B. Data’s
27 analysis of the trading volume of BioMarin common stock during the Class Period, and that
28 approximately 20,000 claims will be received, based on an estimated 40% response rate, which A.B.

1 Data finds reasonable and typical. *See* Walter Decl. ¶¶ 16-17. Summary information for three recent
2 cases in which BLB&G acted as lead counsel and A.B. Data acted as claims administrator is attached
3 to the Sinderson Decl. as Exhibit A. These cases were selected because they were all securities class
4 actions with roughly comparable settlements and class sizes.

5 **E. Estimated Notice and Administrative Costs**

6 A.B. Data's fees for administration of the Settlement are charged on a per-claim basis and
7 expenses will be billed separately (including expenses for printing and mailing the Notice Packet,
8 publishing the Summary Notice, establishing and maintaining the settlement website, and
9 establishing and operating the toll-free telephone helpline). Because the costs are highly dependent
10 on how many Notice Packets are ultimately mailed and how many Claims are ultimately received
11 and processed, at this time only an estimate of the total Notice and Administration Costs can be
12 provided. Based on the estimates of the number of Notice Packets expected to be mailed and claims
13 expected to be received discussed above, A.B. Data estimates that the total Notice and
14 Administration Costs for the Action, including broker and nominee fulfillment costs, will be
15 approximately \$250,000. *See* Walter Decl. ¶ 24. The Notice and Administration Costs are necessary
16 to effectuate the Settlement and are reasonable in relation to the value of the Settlement (the
17 estimated total administrative costs represent approximately 0.6% of the total Settlement Amount).
18 The Notice and Administration Costs will be paid from the Settlement Fund. *See* Stipulation ¶ 14.

19 **VIII. ATTORNEYS' FEES AND LITIGATION EXPENSES**

20 As explained in the Notice (¶¶ 5, 55), Lead Counsel intends to seek an award of attorneys'
21 fees of up to 19% of the Settlement Fund (*i.e.*, 19% of the Settlement Amount, plus interest earned
22 thereon), and payment of Litigation Expenses not to exceed \$650,000. Lead Counsel will provide
23 detailed information in support of its application in its motion for attorneys' fees and expenses, to
24 be filed with the Court 35 days before the Settlement Hearing.

25 For purposes of the Court's preliminary review in connection with this motion for
26 preliminary approval of the Settlement, Lead Counsel notes that the maximum fee that Lead Counsel
27 will request is below the 25% benchmark percentage for attorneys' fees in the Ninth Circuit, *see*
28 *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989), and is well within the

1 range of percentage fees awarded in comparable class securities class actions with significant
 2 contingency fee risks, *see, e.g., In re Volkswagen “Clean Diesel” Mktg, Sales Practices, and Prods.*
 3 *Liab. Litig.*, 2019 WL 2077847, at *5 (N.D. Cal. May 10, 2019) (awarding 25% of \$48 million
 4 settlement); *Hatamian v. Advanced Micro Devices, Inc.*, 2018 WL 8950656, at *1 (N.D. Cal. Mar.
 5 2, 2018) (awarding 25% of \$29.5 million settlement).

6 Moreover, Lead Counsel has thus far devoted over 12,900 hours to this Action, with a
 7 lodestar of approximately \$6.8 million, and anticipates that the lodestar multiplier for the fee
 8 requested will be very close to 1.0. Such a multiplier is well within the range commonly awarded.
 9 *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (affirming 28% fee award
 10 representing 3.65 multiplier). If preliminary approval is granted, Lead Counsel will present detailed
 11 information on its lodestar in connection with its fee application at final approval.

12 Lead Counsel also intends to seek payment for Litigation Expenses in an amount not to
 13 exceed \$650,000, which includes costs of retaining experts (of over \$270,000), mediation fees,
 14 online legal and factual research, and document management, among other costs. In addition, this
 15 amount may include a request for reimbursement of Lead Plaintiff’s costs and expenses, as permitted
 16 in under the PSLRA, in an amount not to exceed \$140,000.

17 **IX. PROPOSED SCHEDULE OF EVENTS**

18 In connection with preliminary approval of the Settlement, the Court must set a final approval
 19 hearing date, dates for mailing and publication of the Notice and Summary Notice, and deadlines for
 20 submitting claims or for objecting to the Settlement.⁴ The Parties respectfully propose the schedule
 21 set forth in Appendix A, as agreed to by the Parties and set forth in the proposed Preliminary
 22 Approval Order. Lead Plaintiff requests that the Court schedule the Settlement Hearing for a date
 23 110 calendar days after entry of the Preliminary Approval Order, or at the Court’s earliest
 24 convenience thereafter. As this motion is unopposed, the Parties request the Court consider this
 25 motion for preliminary approval on the papers at this time.

26
 27
 28 ⁴ The blanks for certain deadlines currently contained in the agreed-upon form of Notice will be filled in once the Court sets those dates and prior to mailing to Settlement Class Members.

1 **X. CONCLUSION**

2 For the foregoing reasons, Lead Plaintiff respectfully requests that this Court grant the
3 unopposed motion for preliminary approval of the Settlement, approve the forms and methods of
4 notice, and enter the proposed Preliminary Approval Order. Attached as Appendix B is a checklist
5 demonstrating the Parties' compliance with the Northern District of California Procedural Guidance
6 for Class Action Settlements.

7 Dated: April 28, 2023

Respectfully submitted,

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9 **GROSSMANN LLP**

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26 *Lead Counsel for Lead Plaintiff*
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28

Appendix A

Proposed Schedule of Settlement Events

<u>Event</u>	<u>Time for Compliance</u>	<u>Example Dates</u> ⁵
Deadline to mail Notice and Claim Form to the potential Settlement Class Members identified by BioMarin and to Nominees (“Notice Date”)	20 business days after entry of Preliminary Approval Order (Preliminary Approval Order ¶ 7(b))	July 7, 2023
Deadline for publishing Summary Notice	10 business days after Notice Date (<i>Id.</i> ¶ 7(d)).	July 21, 2023
Deadline for filing final approval papers	35 calendar days prior to Settlement Hearing (<i>Id.</i> ¶ 27)	August 21, 2023
Deadline for exclusion requests and objections	21 calendar days prior to Settlement Hearing (<i>Id.</i> ¶¶ 14, 17, 18)	Sept. 5, 2023
Deadline for filing reply papers	7 calendar days prior to Settlement Hearing (<i>Id.</i> ¶ 27)	Sept. 18, 2023
Settlement Hearing	110 days after entry of Preliminary Approval Order, or at the Court’s earliest convenience thereafter (<i>Id.</i> ¶ 5)	Sept. 25, 2023
Deadline for submitting Claim Forms	120 calendar days after Notice Date (<i>Id.</i> ¶ 11)	Nov. 4, 2023

⁵ The “Example Dates” are representative dates that would apply if the Court entered the Preliminary Approval Order on June 7, 2023 and set the Settlement Hearing for September 25, 2023.

Appendix B

N.D. Cal. Procedural Guidance for Class Action Settlements Items to Address at Preliminary Approval	Where Procedural Guidance is Addressed in Papers
1. INFORMATION ABOUT THE SETTLEMENT	
(a) Any differences between the settlement class and the class proposed in the operative complaint (or, if a class has been certified, the certified class) and an explanation as to why the differences are appropriate.	Motion at 6:4-13
(b) Any differences between the claims to be released and the claims in the operative complaint (or, if a class has been certified, the claims certified for class treatment) and an explanation as to why the differences are appropriate.	Motion at 6:14 – 7:9
(c) The class recovery under the settlement (including details about and the value of injunctive relief), the potential class recovery if plaintiffs had fully prevailed on each of their claims, claim by claim, and a justification of the discount applied to the claims.	Motion at 5:23-24, 9:26 – 13:3; Proposed Notice pp. 1-2, ¶¶ 26-29
(d) Any other cases that will be affected by the settlement, an explanation of what claims will be released in those cases if the settlement is approved, the class definitions in those cases, their procedural posture, whether plaintiffs’ counsel in those cases participated in the settlement negotiations, a brief history of plaintiffs’ counsel’s discussions with counsel for plaintiffs in those other cases before and during the settlement negotiations, an explanation of the level of coordination between the two groups of plaintiffs’ counsel, and an explanation of the significance of those factors on settlement approval. If there are no such cases, counsel should so state.	Motion at 6:26-27; 17:14-16
(e) The proposed allocation plan for the settlement fund.	Motion at 17:24 – 19:24 Proposed Notice Appx. A
(f) If there is a claim form, an estimate of the expected claim rate in light of the experience of the selected claims administrator and/or counsel based on comparable settlements, the identity of the examples used for the estimate, and the reason for the selection of those examples.	Motion at 22:26 –23:4; Walter Decl. (Motion Ex. 4), ¶ 17
(g) In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the expected and potential amount of any such reversion, and an explanation as to why a reversion is appropriate.	Motion at 5:28 – 6:3; Stipulation ¶ 13
2. SETTLEMENT ADMINISTRATION	
(a) Identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel’s firms’ history of engagements with the settlement administration over the last two years.	Motion at 20:4-17; Sinderson Decl. (Motion Ex. 3), ¶¶ 2-6; Walter Decl. ¶¶ 2, 6
(b) Address the settlement administrator’s procedures for securely handling class member data (including technical, administrative, and physical controls; retention; destruction; audits; crisis response; etc.), the settlement administrator’s acceptance of responsibility and maintenance of insurance in case of errors, the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs.	Motion at 20:7-9; 23:5-18; Walter Decl. ¶¶ 3-5, 24-25 & Ex. B

N.D. Cal. Procedural Guidance for Class Action Settlements Items to Address at Preliminary Approval	Where Procedural Guidance is Addressed in Papers
3. NOTICE	
<ul style="list-style-type: none"> The parties should ensure that the class notice is easily understandable, in light of the class members' communication patterns, education levels, and language needs. The notice should include the following information: 	<i>See generally</i> Proposed notices
<ul style="list-style-type: none"> a. Contact information for class counsel to answer questions. 	Proposed Notice ¶¶ 6, 72; Proposed Summary Notice p. 3
<ul style="list-style-type: none"> b. The address for a website, maintained by the claims administrator or class counsel, that lists key deadlines and has links to the notice, a claim form (if any), preliminary approval order, motions for preliminary and final approval and for attorneys' fees, and any other important documents in the case. 	<i>See generally</i> Proposed notices
<ul style="list-style-type: none"> c. Instructions on how to access the case docket via PACER or in person at any of the court's locations. 	Proposed Notice ¶ 72
<ul style="list-style-type: none"> d. The date and time of the final approval hearing, clearly stating that the date may change without further notice to the class. 	Proposed Notice p. 3 & ¶¶ 62-63; Proposed Summary Notice pp. 1-2
<ul style="list-style-type: none"> e. A note to advise class members to check the settlement website or the Court's PACER site to confirm that the date has not been changed. 	Proposed Notice p. 3 & ¶ 62 Proposed Summary Notice p. 2
<ul style="list-style-type: none"> The parties should explain how the notice distribution plan is effective. Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of text messages and social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit. 	Motion at 21:13 – 22:18; Walter Decl. ¶¶ 7-15
<ul style="list-style-type: none"> The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of notice distribution plan, notice envelope should be designed to enhance the chance that it will be opened. 	Motion at 21:13 – 22:18; Walter Decl. ¶¶ 7-15
<ul style="list-style-type: none"> Inclusion of suggested language in class notices: This notice summarizes the proposed settlement. For the precise terms of the settlement, please see the settlement agreement available at www._____.com, by contacting class counsel at _____, by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.cand.uscourts.gov, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, [insert appropriate Court location here], between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays. PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS. 	Proposed Notice ¶ 72

N.D. Cal. Procedural Guidance for Class Action Settlements Items to Address at Preliminary Approval	Where Procedural Guidance is Addressed in Papers
4. OPT-OUTS	
<ul style="list-style-type: none"> The notice should instruct class members who wish to opt out of the settlement to send a letter, setting forth their name and information needed to be properly identified and to opt out of the settlement, to the settlement administrator and/or the person or entity designated to receive opt outs. It should require only the information needed to opt out of the settlement and no extraneous information or hurdles. The notice should clearly advise class members of the deadline, methods to opt out, and the consequences of opting out. 	Proposed Notice ¶¶ 57-58
5. OBJECTIONS	
<ul style="list-style-type: none"> Objections must comply with Federal Rule of Civil Procedure 23(e)(5). 	Proposed Notice ¶¶ 65-66
<ul style="list-style-type: none"> The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket, and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections. 	Proposed Notice ¶¶ 64-66
<ul style="list-style-type: none"> Below is suggested language for inclusion in class notices: “You can ask the Court to deny approval by filing an objection. You can’t ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you should object. Any objection to the proposed settlement must be in writing. If you file a timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number (_____ v. _____, Case No. _____), (b) be submitted to the Court either by filing them electronically or in person at any location of the United States District Court for the Northern District of California or by mailing them to the Class Action Clerk, United States District Court for the Northern District of California, <i>[insert appropriate Court location here]</i>, and (c) be filed or postmarked on or before _____.” 	Proposed Notice ¶¶ 64-65
6. ATTORNEYS’ FEES AND COSTS	
<ul style="list-style-type: none"> Class Counsel should include information about the fees and costs (including expert fees) they intend to request, their lodestar calculation (including total hours), and resulting multiplier. 	Motion at 23:19 – 24:16; Proposed Notice ¶¶ 5, 55-56; Proposed Summary Notice p. 2
<ul style="list-style-type: none"> In a common fund case, the parties should include information about the relationship between the amount of the common fund, the requested fee, and the lodestar. 	Motion at 24:6-11

N.D. Cal. Procedural Guidance for Class Action Settlements Items to Address at Preliminary Approval	Where Procedural Guidance is Addressed in Papers
<ul style="list-style-type: none"> To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class. 	N/A
7. SERVICE AWARDS	
<ul style="list-style-type: none"> The parties should include information about the service awards they intend to request as well as a summary of the evidence supporting the awards. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the named plaintiffs or class representatives. 	Motion at 24:14-16
8. CY PRES AWARDEES	
<ul style="list-style-type: none"> If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members' claims. 	Motion at 19:12-24; Proposed Notice Appx. A, ¶ 91
<ul style="list-style-type: none"> The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. 	Motion at 19:24
9. TIMELINE	
<ul style="list-style-type: none"> The parties should ensure that class members have at least thirty-five days to opt out or object to the settlement and the motion for attorney's fees and costs. 	Motion at 24:17-25 and Appendix A
10. CLASS ACTION FAIRNESS ACT (CAFA) AND SIMILAR REQUIREMENTS	
<ul style="list-style-type: none"> The parties should address whether CAFA notice is required and, if so, when it will be given. In addition the parties should address substantive compliance with CAFA. 	Motion at 22:7-9; Stipulation ¶ 19
<ul style="list-style-type: none"> In addition, the parties should address whether any other required notices to government entities or others have been provided, such as notice to the Labor & Workforce Development Agency (LWDA) pursuant to the Private Attorneys General Act (PAGA). 	Motion at 22:9-10
11. COMPARABLE OUTCOMES	
<ul style="list-style-type: none"> Lead class counsel should provide information about comparable cases, including settlements and litigation outcomes. Lead counsel should provide the following information for as many as feasible (and at least one) comparable class settlement (i.e. settlements involving the same or similar claims, parties, issues): <ul style="list-style-type: none"> a. The claims being released, the total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to cy pres recipients, the administrative costs, the attorneys' fees and costs, the total exposure if the plaintiffs had prevailed on every claim. 	Motion at 23:1-4; Sinderson Decl. ¶ 7 & Ex. A

N.D. Cal. Procedural Guidance for Class Action Settlements Items to Address at Preliminary Approval	Where Procedural Guidance is Addressed in Papers
<ul style="list-style-type: none"> b. Where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. c. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class. • Counsel should summarize this information in easy-to-read charts that allow for quick comparisons with other cases, supported by analysis in the text of the motion. 	
12. ELECTRONIC VERSIONS	
<ul style="list-style-type: none"> • Electronic versions (Microsoft Word or WordPerfect) of all proposed orders and notices should be submitted to the presiding judge's Proposed Order (PO) email address when filed. Most judges in this district used Microsoft Word, but counsel should check with the individual judge's Courtroom Deputy. 	To be done upon filing
13. OVERLAPPING CASES	
<ul style="list-style-type: none"> • Within one day of filing of the preliminary approval motion, the defendants should serve a copy on counsel for any plaintiffs with pending litigation, whether at the trial court or appellate court level, whether active or stayed, asserting claims on a representative (e.g., class, collective, PAGA, etc.) basis that defendants believe may be released by virtue of the settlement. 	N/A