# Exhibit F

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| WARREN F. REINHART and GERALD M. SMITH, on behalf of themselves and a class of persons similarly situated, Plaintiffs, v. LUCENT TECHNOLOGIES, et. al., Defendants. | : | Case No. 01-cv-3491<br><br>**OPINION** |

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PISANO, District Judge.

This is a class action brought on behalf of all persons who were participants or beneficiaries of the Lucent Savings Plan ("LSP") and/or the Lucent Long-Term Savings and Security Plan ("LTSSP") during any part of the Class Period (December 31, 1999 through March 27, 2003) [1] and who had Lucent Technologies, Inc. common stock allocated to their plan account at any time during the Class Period (hereinafter this group is referred to as the "Class" or "ERISA Class"). The parties have agreed to a settlement of four lawsuits on behalf of the ERISA Class alleging breaches of fiduciary duty in violation of Section 502 of ERISA.[2] The four ERISA

[1] The Class Period pleaded is December 31, 1999 through the present, which Plaintiffs refer to as the "ERISA Original Class Period." However, the Plaintiffs here and Defendant have stipulated for settlement purposes to a class period of December 31, 1999 through March 27, 2003 (hereinafter the "Class Period.")

[2] "ERISA" refers to the Employee Retirement Income Security Act of 1974, as amended.

lawsuits are: *Reinhart et. al. v. Lucent Technologies, Inc., et. al.,* No. 01-cv-3491 (D.N.J. filed July 19, 2001), *Reinhart et al. v. Lucent Pension & Benefits Investment Committee, et. al.*, No. 03-cv-88 (D.N.J. Jan. 6, 2003, ), *Dane v. Lucent Technologies, Inc., et. al.*, No. 03-cv-86 (D.N.J. filed Jan. 3, 2003) and *Dane v. Lucent Pension & Benefits Investment Committee, et. al.*, No. 03-cv-87 (D.N.J. filed Jan. 6, 2003).

Before the Court is the Class's motion to approve a settlement of this matter and the plan of allocation. Defendant Lucent Technologies, Inc. ("Lucent") does not oppose this motion. The parties have resolved this action as part of a global settlement of what were originally fifty-three separate lawsuits against Lucent and various current and former Lucent directors, officers, and employees. A Stipulation and Agreement of Settlement dated September 22, 2003 (the "Stipulation" or "Settlement") is the outcome of that global settlement and the painstaking efforts made in negotiating it. The Settlement requires Lucent, among other things, to provide three types of consideration: (a) a cash component in the amount of $750,000; (b) a stock component, under which Lucent shall have discretion to issue the balance of the settlement ($68,250,000) in either cash, stock, or a combination of both, and (c) a structural component, which includes changes to the handling and monitoring of two Lucent 401(k) plans.

On December 12, 2003, this Court held a fairness hearing on the settlements reached in five Lucent actions pending before this Court: *In re Lucent Technologies, Inc. Securities Litigation*, 00-cv-621 (JAP), *Laufer, et. al. v. Lucent Technologies, et. al.*, 01-cv-5229 (JAP), *Pallas v. Schact*, et. al., 02-cv-2460 (JAP), *Cooper v. Schact, et. al.*, 02-cv-4260 (JAP), and *Reinhart & Smith v. Lucent Technologies, Inc., et. al.*, 01-cv-3491 (JAP). In an Order and Final Judgment entered December 15, 2003, the Court approved the Settlement. Though the Court

executed a Final Judgment and Order, the Court informed the parties that it would subsequently enter this Opinion on the motion to approve the settlement and plan of allocation.[3] Accordingly, for the reasons explained below, the Court approves the Settlement for the ERISA Class under Rule 23(e) of the Federal Rules of Civil Procedure, consistent with this Court's Order and Final Judgment entered on December 15, 2003.

## I. Background

### A. The Parties

The Lead Plaintiffs are Warren F. Reinhart and Gerald M. Smith (collectively the "ERISA Plaintiffs"). The Court appointed as Co-Lead Counsel for the ERISA Class Berger & Montague, PC, Keller Rohrback, LLP and Stull, Stull & Brody. The Court also appointed Weber Gallagher Simpson Stapleton Fires & Newby LLP as Liaison Counsel for the ERISA Class. (Collectively, the Court refers to all of these firms as "Counsel for Plaintiffs".)

The Defendant is Lucent, a Delaware corporation with its principal place of business and chief executive offices located at 600 Mountain Avenue, Murray Hill, New Jersey. Lucent designs, builds, and installs a wide range of public and private networks, communications systems, data networking systems, business telephone systems and microelectronics components, and manufactures integrated circuits and optoelectronic components for the computer and telecommunications industries.

### B. The Litigation

#### 1. The Allegations Against the Defendant

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[3] At the hearing, the Court reserved on the issues of attorney's fees and reimbursement of costs and expenses. The Court does not address either of these issues here, but shall rule on fees and costs in a separate, subsequent opinion.

The ERISA Class members had Lucent common stock allocated to their Plan accounts from the Lucent Stock Fund, which consisted principally of Lucent common stock. The four ERISA lawsuits (the "ERISA Lawsuits") allege breaches of fiduciary duty under Section 502 of ERISA between December 31, 1999 and March 27, 2003. The ERISA Plaintiffs allege that Lucent and certain other individuals and entities breached fiduciary duties by allowing the Plans to purchase and hold Lucent stock as an asset of the Plans at a time when Lucent stock was an imprudent investment for the Plans. (Stip. & Agreement of Settlement at 2 ¶ D.) Plaintiffs allege that Lucent violated ERISA by misrepresenting to Plaintiffs and Plan participants the financial status of Lucent and, consequently, the true value of the stock. The ERISA Plaintiffs also allege, among other things, that Lucent and others violated a duty to provide the participants with complete and accurate information concerning Lucent stock as an investment option for the Plans. (*Id.*) Further, certain current and former Lucent directors and officers allegedly had a conflict of interest resulting from their alleged status as fiduciaries of the Plans and insiders of Lucent. (*Id.* at 2-3 ¶ D). The ERISA Lawsuits seek equitable and compensatory relief plus attorney's fees, expenses, and costs.

Lucent denies all claims and allegations of wrongdoing in the ERISA Lawsuits and has maintained substantive defenses. (*Id.* at 3 ¶ E). These defenses include that Lucent complied with ERISA at all times, that the governing plan documents mandated that Lucent stock be offered as investment option, that the Plans satisfied the requirements of ERISA Section 404 (c) and that the named Plaintiffs based their investment decisions on public statements that were not made in a fiduciary capacity. (*Id.*)

**2. The Efforts to Resolve this Case**

In September 2002, the Court stayed all further proceedings in this action and in related cases against Lucent and commenced, with each party's consent and voluntary participation, a global mediation involving several securities fraud litigations against Lucent and/or its officers and directors: *In re Lucent Technologies, Inc. Securities Litigation*, 00-cv-621 (JAP), *Laufer, et. al. v. Lucent Technologies, et. al.*, 01-cv-5229 (JAP), *Pallas v. Schact*, et. al., 02-cv-2460 (JAP), *Cooper v. Schact*, 02-cv-4260 (JAP), *Preferred Life Ins. of New York, et. al., v. Lucent Technologies, Inc.*, MRS-L-1306-02 (N.J. Super.); *Reinhart & Smith v. Lucent Technologies, Inc., et. al.,* 01-cv-3491 (JAP); *In re Winstar Communications Sec. Litig.*, 01-cv3014 (S.D.N.Y.) (Daniels, J.,) and *In re Lucent Technologies, Inc., Derivative Litig.*, Civ. Action 18608 (Chancery Ct., DE) (Lamb, V.C.) Counsel for Plaintiffs participated in the mediation and all related settlement conferences that the Court conducted. Given Lucent's precarious financial condition at all times relevant to the negotiations, the Company's actual ability to pay was a vital consideration for any settlement. Critical to the negotiations as well, Lucent agreed to settle this matter only if it could settle several related actions then pending against Lucent. To evaluate Lucent's financial status, the Court created an "Ability to Pay Committee," which retained experts to study and provide opinions on Lucent's financial capabilities. Counsel for Plaintiffs worked closely with their experts and fully understood the limits and constraints on any possible settlement.

On September 22, 2003, the parties entered into a Stipulation (the "Stipulation") and Agreement of Settlement (collectively referred to as the "Settlement"). The Stipulation, its exhibits, and the Cover Agreement reflect the entire agreement regarding settlement among the parties. The Settlement provides, among other things, that Lucent will pay or cause to be paid to

the ERISA Class $750,000 in cash and $68,250,000 in cash or Lucent stock and will make certain structural changes to the Plans. (*See* Sept. 24, 2003 Order ("Preliminary Approval Order" ¶¶ 6, 35-39)). These structural changes modify, for a period of not less than three years (Stip. & Agreement of Settlement ¶ 35), Lucent's Plans in meaningful respects:

> **LTSSP Diversification.** To the extent consistent with the collective bargaining agreement in place between Defendant and its work force, the LTSSP shall (a) invest any new company match funds that may be provided to LTSSP participants in the same proportion as the participants' current contributions, and (b) make available to participants the opportunity to invest their existing company match account among any funds offered under the LTSSP. (Stip. & Agreement of Settlement ¶ 36.)
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> **Contribution Percentage.** Subject to compliance with the Code, federal tax regulations, and collective bargaining agreements, Defendant shall take reasonable steps to increase the maximum employee contribution percentage (relating to employee-funded before-tax deferrals and after-tax contributions) currently permitted under the Plans above the current limit of 16% of compensation. (*Id.* ¶ 37.)
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> **Oversight of Plans.**
> Defendant shall include discussion in the standard enrollment materials provided to Plan participants advising them of the benefits of diversification of investments, the general risks of under-diversification of investments, and the particular risks of investment in a single stock, including a single stock fund of one's employer. Defendant shall agree to send a notification once a year to Plan participants who are invested in only one or two funds (other than asset allocation funds) as of a snapshot date prior to such notification stressing the importance of asset allocation and diversification. Additionally, Defendant shall include a message stressing the importance of asset allocation and diversification in at least one communication that is sent to all Plan participants annually. Defendant shall provide training to all newly appointed members of the Lucent Employee Benefit Committee (the "EBC") or the Pension and Benefits Investment Committee (the "PBIC"), and newly appointed professional Lucent Asset Management Corp. ("LAMCO") staff, on their fiduciary duties and shall provide periodic updates

(at least annually) to all EBC and PBIC members, and professional LAMCO staff, on material legal developments that clarify or impact their responsibilities. The EBC and the PBIC shall report annually to the Lucent Board, and LAMCO shall report annually to the PBIC, on their respective activities under this paragraph during the preceding year.
(*Id.* ¶ 38.)

**Communications Strategy.** Defendant shall continue to discuss and solicit input on its savings plan communication strategy with outside advisors. In developing such strategy, Defendant shall consider appropriate literature relating to the investment behavior of plan participants in a retirement plan.
(*Id.* ¶ 39.)

**3. The Court's Preliminary Approval Order and its Provisions**

In its Preliminary Approval Order, this Court preliminarily certified this litigation to proceed as a class action for settlement purposes under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. As defined, the Class is all persons who were participants or beneficiaries of the Lucent Savings Plan and/or the Lucent Long-Term Savings and Security Plan during any part of the Class Period (December 31, 1999 through March 27, 2003) and who had Lucent Technologies, Inc., common stock allocated to their Plan account at any time during the Class Period.

This Court also approved the terms of the proposed settlement between the Plaintiffs and Defendants. The Preliminary Approval Order scheduled a hearing to finally determine the fairness, reasonableness, and adequacy of the Settlement and directed the manner by which the Class should receive notice of the Settlement and fairness hearing.

**II. Discussion**

**A. Class Certification**

By its Preliminary Approval Order, this Court preliminarily certified this litigation to proceed as a class action for settlement purposes. Class actions created for the purpose of settlement are well recognized under Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., In re Prudential Ins. Co. Am. Sales Practices Litig.*, 962 F. Supp. 450 (D.N.J. 1997) ("*Prudential I*"), *aff'd*, 148 F.3d 283 (3d Cir. 1998) ("*Prudential II*"). This Court finds that class certification remains appropriate.

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. A party need not precisely enumerate the class members to proceed as a class action. "Impracticability" does not mean "impossibility". *See, e.g., Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J. 1990); *Vargas v. Calabrese,* 634 F. Supp. 910, 918 (D.N.J. 1986). Here, joinder of all Class Members is impracticable since the number is likely in the thousands or even in the tens of thousands, as Plaintiffs point out. *See, e.g., Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985). Rule 23(a)(1) is thus satisfied.

Rule 23(a)(2) requires that questions of law or fact common to the class exist. Rule 23(b)(3) requires that common questions predominate over individual questions. Both provisions are satisfied here. Rule 23 does not require that all class members be identically situated, just that substantial, common questions of either law or fact exist. *See Prudential II*, 148 F.3d at 310; *Hassine v. Jeffes,* 846 F.2d 169, 177 (3d Cir. 1988). Courts look to the "common nucleus of operative facts" to determine predominance of common questions. *Safran v. United Steelworkers of Am., AFL-CIO,* 132 F.R.D. 397, 401 (W.D. Pa. 1989). Indeed, predominance is "readily met" in certain cases alleging securities fraud. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

Here, the commonality requirement is easily satisfied because common questions of law and fact exist. The ERISA Plaintiffs allege that Lucent and certain other individuals and entities breached fiduciary duties by allowing the Plans to purchase and hold Lucent stock as an asset of the Plans when Lucent stock was an imprudent investment for the Plans. (Stip. & Agreement of Settlement at 2 ¶ D.) The ERISA Plaintiffs also allege, among other things, that Lucent and others violated a duty to provide the participants with complete and accurate information concerning Lucent stock as an investment option for the Plans. (*Id.*) Further, certain current and former Lucent directors and officers allegedly had a conflict of interest resulting from their alleged status as fiduciaries of the Plans and insiders of Lucent. (*Id.* at 2-3 ¶ D). Thus, the claims of all Class Members arise from the same nucleus of operative facts and involve the same legal theories. The relevant questions in this case are susceptible to class-wide proof. The commonality and predominance requirements of Rule 23 are thus satisfied.

Rule 23(a)(3) requires that the class representatives's claims be typical of each class member's claims. Factual differences between the class representatives and other class members do not preclude a finding of typicality. *See Prudential II*, 148 F.3d at 310. Here, the class representatives stand in the same position as other Class members. The allegations and the claims arising from them are based on the same legal theory and the same course of conduct. *See, e.g., E. Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Thus, the typicality requirement of Rule 23(a)(3) is satisfied.

Rule 23(a)(4) requires adequacy of representation. This is met if (1) the class representatives's interests are not antagonistic to those of other class members whom they seek to represent and (2) the class representatives's attorneys are qualified, experienced, and generally

able to conduct the litigation. *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975). These requirements are satisfied here. No evidence suggests that the Lead Plaintiffs are inappropriate Class representatives. No one has objected to the selection of the Lead Plaintiffs, and no one has contended that their interests are antagonistic to those of other Class members. In appointing the Lead Plaintiffs in this Action, the Court made a preliminary determination that Rule 23's adequacy and typicality requirements were satisfied. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii). Neither Lead Plaintiffs nor the other representatives has interests antagonistic to those of the Class. Second, the attorneys for the Class are highly experienced in the areas of complex litigation, class action litigation, and ERISA and securities laws litigation. They are more than competent to conduct this action. Counsel for Plaintiffs diligently and aggressively represented the Plaintiffs before this Court and in the negotiations that resulted in the Settlement. Thus, the Rule 23(a)(4) standard is met.

Rule 23(b)(3) also requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. The class mechanism is the best way of resolving all class members's claims and sparing the judicial system the expense and burden of dealing with duplicative lawsuits. *Zinberg,* 138 F.R.D. at 402. "[C]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'" *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (citation omitted). Judicial economy and sheer access to justice demonstrates that a class action here involves large numbers of Class Members with relatively small individual claims. The superiority requirement of Rule 23(b)(3) is met.

Accordingly, the Court grants class certification under Rule 23(a) and 23(b)(3). All persons or entities who satisfy the Class definition are members of the Class bound by the terms of the Settlement and the Order and Final Judgment, and they are entitled to share the benefits of the Settlement, subject to the terms and conditions of the Order and Final Judgment.

**B. Approval of the Settlement and Plan of Allocation**

This matter requires the Court to scrutinize the Settlement including the proposed method for allocating monies. A court is obliged to protect class members's interests, *see In re Ikon Office Solutions Inc. Sec. Litig.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000), despite that "[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re AremisSoft Corp. Secs. Litig.*, 210 F.R.D. 109, 119 (D.N.J. 2002) (quoting *In re Gen. Motors Corp. Pick Up Truck Fuel Tank Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*In re Gen. Motors Corp.*"). Federal law requires courts to approve the settlement of a class action lawsuit. Under Rule 23(e) of the Federal Rules of Civil Procedure, the Court should approve a class settlement if it is "fair, adequate, and reasonable." *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995) (citations omitted). The court enjoys considerable discretion to determine whether a proposed settlement satisfies this standard. *See id.* at 482 (citing *Walsh v. Great Atl. & Pac. Tea Co., Inc.,* 726 F.2d 956, 965 (3d Cir. 1983)). A district court must consider a number of factors when evaluating a settlement for its fairness and adequacy:

> (1) the complexity, expense and likely duration of the litigation ...; (2) the reaction of the class to the settlement ...; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability ...; (5) the risks of establishing damages ...; (6) the risks of maintaining the class

> action through the trial ...; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery ...; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

*Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) (quotation omitted).

**1. Complexity, Expense and Duration of the Litigation**

Importantly, this factor is "intended to capture the probable costs, in both time and money, of continued litigation. *In re Gen. Motors Corp.*, 55 F.3d at 811. Securities class actions are inherently complex, *see In re Ikon*, 194 F.R.D. 166, 179, and this case is no exception. Because this case has settled, the ERISA Class members will reap the benefits of relief, both financial and therapeutic, in the near future. Had the Settlement not been reached, this litigation, which began in July 2001, would have continued for several more years. This would have required the parties to engage in substantial, additional fact and expert discovery, motion practice including dispositive motions, a trial, and predictable appeals. "Avoiding this unnecessary and unwarranted expenditure of resources and time benefit[s] all parties." *Computron,* 6 F. Supp. 2d at 317; *see G.M. Trucks,* 55 F.3d at 812. Additionally, if the parties had settled, the Plaintiffs faced a grave risk that Lucent would be unable to pay an ultimately sizeable judgment. Moreover, the expense of further pursuing the litigation against Lucent would be considerable. Not only would a trial have significantly drained any potential recovery for the ERISA Class, it would have guaranteed only that the outcome was uncertain for the Class. Accordingly, the Settlement secures a substantial recovery without further litigation, delay, expense, or uncertainty, and this factor weighs in favor of the Settlement.

**2. Class Reaction to the Settlement**

"This factor attempts to gauge whether members of the class support the settlement." *Prudential II*, 148 F.3d at 318. Courts construe class members's failure to object to proposed settlement terms as evidence that the settlement is fair and reasonable. *See Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 631 (E.D. Pa. 1986) ("[U]nanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight."). However, courts must be cautious about "inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Corp.*, 55 F.3d at 812, particularly in securities cases where shareholders may have such minimal stock holdings that it is unwise to invest the time and resources to contest a settlement. *See id.; Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993).

Mindful of this caution, the Court notes that some objectors were not so deterred. One objector appeared at the Fairness Hearing to voice his objections to the Settlement. In writing, the Court has received about twenty-five objections, approximately twenty-three of which articulate complaints regarding the Settlement consideration on different grounds. This figure is modest, particularly given the number of notices disseminated. Plaintiffs, through their representatives, mailed by first class mail more than 135,000 individual notices concerning the Settlement to the ERISA Class members. Additionally, they published Notice of the Settlement in *USA Today* on October 16, 2003. The Notice explains the lawsuit, the proposed Settlement, the legal rights, available Settlement benefits and the means of gaining them, and eligibility for the Settlement. The Notice further advises that each member can object to any part or all parts of the Settlement. The Notice indicates that a website, www.lucent401ksuit.com, provides information regarding the Settlement and Class members. It also notifies that Counsel for

Plaintiffs will seek from the Court attorney fees of up to 25% of the Settlement Fund plus the expenses of litigation, notice, and settlement administration.

The Court finds that the Notice fully and fairly informed Class Members of the Settlement and their rights regarding that Settlement. When compared to the number of notices sent to Class members, the Court has received a minimal number of objections to the Settlement and/or the request for attorney's fees and costs. Additionally, the Court notes that not only did Plaintiffs distribute about 135,000 individual notices, but it also accomplished notice by national publication of the Settlement in the *USA Today*. The absence of objections from the overwhelming majority in response to the Notice to Class Members should be considered in approving the Settlement. *See AremisSoft*, 210 F.R.D. at 124; *see also Stoetzner*, 897 F.2d at 118-19 (concluding that where "only" 29 members of a class of 281 objected, the response of the class as a whole "strongly favors settlement"). Though the Court has received a number of other letters expressing opinions regarding the Lucent settlement and requesting to opt-out in some cases, these letters are written by individuals who are not Class Members. Even if these individuals were Class Members, their requests are untimely. In any event, these letters do not add anything new to the Court's analysis and do not change the Court's analysis in any way. Ever mindful of the caution about "inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Corp.*, 55 F.3d at 812, the Court still concludes that the favorable reaction of the Class is strong evidence that the Settlement is indeed fair, reasonable, and adequate and should be approved. This factor supports the Settlement.

**3. The Stage of Proceedings and Amount of Discovery Completed**

Parties should have an "'adequate appreciation'" of the merits in settling a case.

*Prudential II*, 148 F.3d at 319 (quoting *In re Gen. Motors Corp.*, 55 F.3d at 813). While the type and extent of discovery taken are relevant to the propriety of a settlement, settlements reached early are still favored. *Computron,* 6 F. Supp. 2d at 318; *see also Weiss v. Mercedes Benz of North Am., Inc.,* 899 F. Supp. 1297, 1301 (D.N.J.1995) (approving settlement while the "case is still in the early stages of discovery"), *aff'd,* 66 F.3d 314 (3d Cir. 1995).

Plaintiffs, through their Counsel, have conducted a thorough evaluation of the strengths and weaknesses of the case as well as Lucent's financial ability to fund a settlement or satisfy a judgment. Counsel for the Plaintiffs, in fact, served on the Court's Ability to Pay Committee. The briefing in this case and the lengthy settlement negotiations shed further light on the strengths and weaknesses of the case, the risks of litigation, and the issues the Class would face at trial. The parties had more than a sufficient basis for assessing the strengths and weaknesses of the claims when they submitted the Settlement to the Court for approval. This factor thus weighs in favor of settlement approval.

**4. The Risks of Establishing Liability and Damages**

**a. Liability**

A court must also "survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *Prudential II,* 148 F.3d at 319. In doing so, however, a court should not conduct a "mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel[.]" *In re Ikon,* 194 F.R.D. at 181 (citation omitted).

A decision to litigate rather than settle this case would have required Plaintiffs to take

great risks. When Plaintiffs filed this suit, they were essentially on "new ground" in pursuing this litigation. (Transcript of Dec. 12, 2003 at 115.) At the time, precedent offered little support for this lawsuit. In fact, only the *Ikon* case provided favorable rulings on a motion to dismiss and on a class basis for similarly situated plaintiffs. Here, Plaintiffs faced a number of proof hurdles including a showing of wrongdoing with respect to public disclosures regarding Lucent's operations (or fraud-on-the-market theory) and a showing that Lucent failed to disclose the truth about its status and/or operations. Additionally, Plaintiffs would have been required to prove at trial the factual breaches of fiduciary duties regarding the handling of the employees's 401K Plans. Again, the outcome of Plaintiffs's lawsuit was far from certain and, indeed, was even grim based on the lack of encouraging case precedent in this area. Based on all of these risks, the Settlement is reasonable.

**2. Damages**

In addition to defenses to liability, Plaintiffs would have had to overcome any defenses regarding damages that Defendants surely would have asserted. Plaintiffs take the position that the losses actually total billions of dollars. For example, Plaintiffs claim that much of the losses arises from the imprudent nature of the investment in Lucent stock. Plaintiffs acknowledge that the parties would dispute the point at which the investment, or the investment option, became imprudent. The outcome of that dispute would greatly impact the sum of damages involved. Ultimately, the parties's experts at trial would testify differently as to the damages calculation, and the trial would be a "battle of experts." The outcome of such battles is never predictable, and the Court recognizes the very real possibility that a jury could be swayed by defense experts, who would seek to minimize the Class Members's losses or to show that the losses were attributable to

other factors. *See also Robbins v. Koger Props. Inc.,* 116 F.3d 1441 (11th Cir.), *reh'g en banc denied,* (11th Cir. 1997) (finding no loss causation and overturning $81 million jury verdict); *see also Prudential I,* 962 F. Supp. at 539 (noting that divergent expert testimony leads inevitably to a battle of the experts). As a result, defense experts conceivably could have swayed a jury that damages should be reduced or that losses are attributable to factors unrelated to Lucent's allegedly unlawful conduct. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) (recognizing risks associated with jury being confronted with competing damage expert opinions). The Settlement thus eliminates the inherent, unavoidable risks of litigation of this nature. This factor favors the Settlement.

**5. The Risks of Maintaining the Class Action Through Trial**

Class certification influences the value of a class action. "[N]ot only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action." *In re Gen. Motors Corp.,* 55 F .3d at 817; *see also In re Ikon,* 194 F.R.D. 166, 180-81. Here, Defendants have made clear that they would mount a vigorous resistance to class certification and attack one of the lynchpins of Lead Plaintiffs' theory of class reliance, the fraud-on-the-market theory. However, no other facts or circumstances suggest a particular risk of decertification. Thus, consideration of this factor neither favors nor discourages the Settlement. *See In re Ikon,* 164 F.R.D. at 183.

**6. The Ability of the Defendants to Withstand a Greater Judgment**

Given that Lucent is unable to withstand a greater judgment, this factor supports the

Settlement. *See In re Ikon,* 194 F.R.D. at 183 (noting that the defendant's inability to pay a greater sum favored settlement). There is no question here that Lucent could not withstand a judgment of the magnitude of the damages in this Action. A judgment based purely on damages that did not account for Lucent's ability to pay could easily have reached billions of dollars, assuming that a jury found credible the damages experts for Plaintiffs. Lucent's financial condition substantially deteriorated during this litigation, and it simply could not have satisfied a judgment of this magnitude.

When settlement negotiations began, the Plaintiffs faced a slowly degenerating Company. The Company's underlying weakness and deteriorating financial condition of the Company was reflected in the stock price and the financial press. By October 2002, the stock price hit an all-time low of $0.58 per share. News articles in late 2002 reported that it was increasingly likely that Lucent would be forced into bankruptcy or reorganization, to the detriment of shareholders. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (citation omitted) ("The "'prospect of a bankrupt judgment debtor down at the end of the road does not satisfy anyone involved in the use of class action procedures.'")

To evaluate Lucent's financial status, the Court created an "Ability to Pay Committee," which retained experts to study and provide opinions on Lucent's financial capabilities. Counsel for Plaintiffs served on that Committee. They worked closely with their experts and fully understood the limits and constraints on any possible settlement. Ultimately, the Settlement provides, among other things, that Lucent will pay or cause to be paid to the ERISA Class $750,000 in cash and $68,250,000 in cash or Lucent stock and will make certain structural changes to the employees's ERISA plans. (*See* Sept. 24, 2003 Order ("Preliminary Approval

Order" ¶¶ 6, 35-39)).

While Lucent could not fund a cash settlement and could have filed bankruptcy at any moment during the litigation, the efforts and ingenuity of the Plaintiffs, through their counsel, resulted in an extremely valuable Settlement for the benefit of the Class. No doubt, this factor strongly supports approval of the Settlement.

**7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery**

The Court also must consider how the Settlement compares to the best possible recovery for the Class. "'[T]he present value of the damages the plaintiffs would likely recover if successful, appropriately discounted for the risks of not prevailing, should be compared with the amount of the proposed settlement.'" *In re Prudential,* 148 F.3d at 322 (quoting *In re Gen. Motors Corp.,* 55 F.3d at 806); *see also In re Ikon,* 194 F.R.D. 166, 183-84 (same).

The Settlement is reasonable in light of the best possible recovery and the attendant risks of litigation. The Settlement yields substantial and immediate benefits. Although the ERISA Class allegedly suffered billions of dollars in damages, the best possible recovery here depended entirely on Lucent's ability to pay. Based on Lucent's financial condition, it was impossible for Lucent to satisfy a judgment in the billions of dollars. Indeed, in September 2002, when settlement negotiations began, the stock price reached an all-time low of $0.58 per share and the Company had a market capitalization of less than $2 billion. The Company could not fund a cash settlement.

Importantly, too, Counsel for Plaintiffs exhausted all other possible sources of cash. In fact, they firmly took the position that they could not accept less than $69 million because that sum reflected the amount available from Lucent's insurance coverage on its fiduciary policy. Plaintiffs correctly point out that this position ensured that they fulfilled their own fiduciary duties to their clients.

In sum, Plaintiffs, through their counsel, evaluated Lucent's ability to pay through expert analyses. They determined that Lucent's cash position was extremely weak and that any substantial recovery would have to be based on alternative sources of consideration other than cash. They vigorously and aggressively pursued every possible source of value, even achieving meaningful therapeutic relief. The Settlement is reasonable in light of the best possible recovery and represents "a very substantial portion of the likely recovery in this case, and is unquestionably better than another 'possibility' -- little or no recovery at all." *In re Saxon Sec. Litig.,* Nos. 82-cv-3103 (MJL), 1985 WL 48177, at *13 (S.D.N.Y. Oct. 30, 1985) (emphasis in original).

Further, the Settlement must be balanced against all of the risks of further litigation. As noted above, Plaintiffs were embarking on "new ground" in pursuing this litigation. (Transcript of Dec. 12, 2003 at 115.) Plaintiffs could rely on only a single favorable case, *Ikon*, at the time. With little case law and challenging substantive proofs ahead, the outcome of the lawsuit was, at best, questionable. Making matters even more difficult, securities cases have been often lost at trial, on post-trial motion, or on appeal. *See Robbins,* 116 F.3d 1441 (overturning an $81 million jury verdict for the plaintiff class on loss causation grounds and dismissing the entire litigation). The factual and legal uncertainties of this case, the inherent unpredictability and delay of a lengthy and complex trial, and the appellate process that would surely follow any victory for Plaintiffs make

the Settlement both reasonable and appropriate.

**C. Allocation Plan**

Next, this Court must evaluate the Plan of Allocation. The Settlement includes a Plan of Allocation proposing how the Settlement Fund shall be distributed to Class Members who submit valid and timely Proofs of Claim. "Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable, and adequate." *Computron*, 6 F. Supp. 2d at 321 (citations omitted). A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable. *See id.*; *see also In re Ikon*, 194 F.R.D. 166, 183-84.

The Settlement contains a proposed Plan of Allocation establishing the method by which the Settlement cash and Securities will be distributed to Class Members submitting acceptable Proofs of Claim. This Plan, set forth in the Notice, was developed by Lead Counsel in consultation with their damages experts. No Class Member has objected to the Plan of Allocation. The Plan of Allocation reflects the allegations pleaded in the complaint. Accordingly, the plan is based on the estimated losses of the Class Members attributable to Lucent's unlawful conduct regarding the handling of the ERISA Plans. Though the Class Members have suffered varying losses, courts have routinely approved plans of allocation that provide different payments to class members. *See Cendant*, 264 F.3d at 248-49. "[W]hen real and cognizable differences exist between the 'likelihood of ultimate success' for different plaintiffs, 'it is appropriate to weigh 'distribution of the settlement . . . in favor of plaintiffs whose claims comprise the set' that was more likely to succeed.'" *PaineWebber*, 171 F.R.D. at 132 (citations omitted); *see also In re*

*Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054, at *2 (N.D. Cal. June 18, 1984) (approving a plan of distribution in which recovery for class members ranged from 10 to 100 percent of the damages calculated by the expert.)

The Claims Administrator shall determine each Authorized Claimant's pro rata share of the Settlement Securities based upon each Authorized Claimant's "Recognized Claim" as calculated in accordance with the formula set forth in the Plan of Allocation. Each Authorized Claimant will be allocated a pro rata share of the Net Settlement Fund based on the Recognized Claim, as compared to the total Recognized Claims of all Authorized Claimants.

The favorable reaction of the Class supports approval of the proposed Plan of Allocation. Despite that over more than 135,000 notices have been distributed, no Class Member has objected to the Plan of Allocation. The proposed Plan of Allocation is a fair, reasonable, and adequate method for allocating the Settlement among the various members of the Class.

**III. Conclusion**

For the reasons explained in this opinion, the Court approves the Settlement as just and reasonable. A Final Judgment and Order has been previously entered. This Opinion shall be read in conjunction with that Final Judgment and Order.

S/ JOEL A. PISANO, U.S.D.J.

Date: March 15, 2004