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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ERVIN DERR, and PETER
SHOEMAKER, Individually and on
Behalf of All Others Similarly
Situated,

Plaintiff,

v.

RA MEDICAL SYSTEMS, INC.,
DEAN IRWIN, ANDREW JACKSON,
MELISSA BURSTEIN, MARTIN
BURSTEIN, RICHARD HEYMAN,
MAURICE BUCHBINDER, MARTIN
COLOMBATTO, RICHARD MEJIA,
JR., MARK E. SAAD, and WILLIAM
ENQUIST, JR.,

Defendants.

Case No.: 19-cv-1079-LAB-AHG

ORDER:

**1) GRANTING MOTION FOR
FINAL APPROVAL OF CLASS
SETTLEMENT [Dkt. 87]; and**

**2) GRANTING IN PART
MOTION FOR ATTORNEY
FEES AND REIMBURSEMENT
OF LITIGATION EXPENSES
[Dkt. 88]**

Plaintiffs Ervin Derr and Peter Shoemaker (collectively, “Plaintiffs”) were investors in Ra Medical Systems, Inc. (“Ra Medical”). They filed this putative class action against Ra Medical, Dean Irwin, Andrew Jackson, Melissa Burstein, Martin Burstein, Richard Heymann, Maurice Buchbinder, Martin Colombatto, Richard Mejia, Jr., Mark E. Saad, and William Enquist, Jr. (collectively, the “Individual Defendants,” and together with Ra Medical, “Defendants”), asserting claims under

1 Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange
2 Act”), Rule 10b-5 under that Act, and Sections 11 and 15 of the Securities Act of
3 1933 (the “Securities Act”). Plaintiffs now move for final approval of the class
4 settlement with Defendants (the “Settlement”) and of payments to the Settlement
5 Class, the Plaintiffs, and Class Counsel. (Dkt. 87; Dkt. 88).

6 The Court has considered:

- 7 • Plaintiffs’ Motion for Final Approval of Class Settlement and Plan of
8 Allocation and Memorandum of Points and Authorities in Support
9 Thereof (“Final Approval Motion”), (Dkt. 87);
- 10 • Plaintiffs’ Motion for Attorney Fees and Reimbursement of Litigation
11 Expenses and Memorandum of Law in Support Thereof (“Fee
12 Motion”), (Dkt. 88);
- 13 • The declarations and exhibits submitted in support of each Motion and
14 the Settlement;
- 15 • The Stipulation of Settlement (“Stipulation”), (Dkt. 73-2);
- 16 • This Court’s experiences, observations, and file developed in
17 presiding over the resolution of this matter;
- 18 • The relevant law; and
- 19 • The entire record in this proceeding, namely the briefing, declarations,
20 and exhibits submitted in support of preliminary approval of the
21 Settlement in its various iterations, including:
 - 22 ○ The Notice Plan for providing full and fair notice to the
23 Settlement Class;
 - 24 ○ The lack of any Class Member objections to or requests for
25 exclusion from the Settlement;
 - 26 ○ The absence of any objection or response by any official after
27 the provisions of all notices required by the Class Action
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1 Fairness Act of 2005 (“CAFA”) § 3, 28 U.S.C. § 1715; and

- 2 ○ Counsel’s oral presentations at the two hearings on the
3 Settlement’s fairness.

4 Based upon these considerations and the Court’s findings of fact and
5 conclusions of law as set forth in the Amended Preliminary Approval Order, (Dkt.
6 81), and as discussed below, **IT IS ORDERED** that:

- 7 1) The Motion for Final Approval of Class Settlement, the terms of which are
8 set forth in the Stipulation, (Dkt. 73-2), is **GRANTED**;
9 2) The Settlement Class is **CERTIFIED**;
10 3) Plaintiffs Ervin Derr and Peter Shoemaker are appointed as Class
11 Representatives and the incentive awards requested in the Fee Motion
12 are **APPROVED**;
13 4) Glancy Prongay & Murray LLP is appointed as Class Counsel and, subject
14 to this Order’s modification (*infra* Section VI), the attorneys’ fees and
15 expenses requested in the Fee Motion are **APPROVED**; and
16 5) Plaintiffs’ claims are **DISMISSED WITH PREJUDICE** in accordance with
17 the terms of this Order.

18 **DISCUSSION**

19 **I. Definitions**

20 Except as otherwise specified herein, the Court adopts all defined terms set
21 forth in the Stipulation for purposes of this Final Approval Order.

22 **II. Jurisdiction**

23 This Court has subject matter jurisdiction over this action pursuant to
24 28 U.S.C. § 1331; Section 22 of the Securities Act, 15 U.S.C. § 77v; and Section
25 27 of the Exchange Act, 15 U.S.C. § 78aa. The Court also has original jurisdiction
26 over this civil action pursuant to CAFA §§ 3–5, 28 U.S.C. §§ 1332(d)(2), 1453,
27 1711–1715, as: (1) the action involves 100 or more potential class members;
28 (2) any class members are citizens of a state different from any Defendant; and

1 (3) the aggregate amount-in-controversy exceeds \$5,000,000, exclusive of costs
2 and interest. 28 U.S.C. § 1332(d)(2), (d)(6), (d)(11)(B)(i).

3 The Court also has personal jurisdiction over the parties. As discussed in
4 greater detail below and in the Court's Amended Preliminary Approval Order, (Dkt.
5 81), the Class Members received adequate notice, had the right to opt out, and
6 were adequately represented by Plaintiffs. Accordingly, the Court can and does
7 exercise jurisdiction over those Class Members' claims. See *Phillips Petroleum*
8 *Co. v. Shutts*, 472 U.S. 797, 811–12 (1986) (adequate notice and opportunity to
9 be heard permits courts to exercise jurisdiction over claims of absent class
10 members).

11 **III. Findings and Conclusions**

12 **A. Definition of Settlement Class and Class Members**

13 The Court adopts the Amended Preliminary Approval Order's definitions of
14 the Settlement Class, comprised of the Class Members. (Dkt. 81). The definitions
15 of Settlement Class and Class Period are reproduced below:

- 16 • "Settlement Class" means all persons and entities that purchased or
17 otherwise acquired Ra Medical common stock: (a) pursuant and/or
18 traceable to Ra Medical's IPO; and/or (b) between September 27, 2018,
19 and November 27, 2019, inclusive. Excluded from that Settlement Class
20 would be: (a) persons and entities who or which suffered no
21 compensable losses; and (b)(i) Defendants and the Underwriters; (ii) any
22 person who served as a partner, control person, executive officer, and/or
23 director of Ra Medical or the Underwriters during the Settlement Class
24 Period, and their Immediate Family Members; (iii) present and former
25 parents, subsidiaries, assigns, successors, affiliates, and predecessors
26 of Ra Medical and the Underwriters; (iv) any entity in which the
27 Defendants or Underwriters have or had a controlling interest; (v) any
28 trust of which any Individual Defendant is the settler or which is for the

1 benefit of any Individual Defendant and/or their Immediate Family
2 Members; (vi) Defendants' liability insurance carriers; and (vii) the legal
3 representatives, heirs, successors, and assigns of any person or entity
4 excluded under provisions (i) through (vi) hereof. Also excluded from the
5 Settlement Class are any persons and entities who or which submit a
6 request for exclusion from the Settlement Class that is accepted by the
7 Court. For the avoidance of doubt, (a) any Investment Vehicle shall not
8 be excluded from the Settlement Class; and (b) "affiliates" are persons or
9 entities that directly, or indirectly through one or more intermediaries,
10 control, are controlled by or are under common control with one of the
11 Defendants.

- 12 • "Class Period" means the period from September 27, 2018, to November
13 27, 2019, inclusive.

14 As noted, no Class Members requested exclusion from the Settlement
15 Class. (Dkt. 92-1 ¶ 5).

16 **B. Class Certification**

17 Before approving a settlement of Class Claims, the Court must confirm that
18 the Class Form is appropriate to the case. Rule 23(a) requires a class to satisfy
19 four prerequisites, generally referred to as numerosity, commonality, typicality,
20 and adequacy of representation. If these are satisfied, the Court must confirm that
21 the action meets one of the class action types enumerated in Rule 23(b)—as
22 relevant here, subsection (3) of that Rule requires that the common questions
23 predominate over individual ones, and that a class action be superior to other
24 available methods for fairly and efficiently adjudicating the controversy. Because
25 the Court finds that each of these requirements is met, the Court grants final
26 certification of the Settlement Class. All Class Members are subject to this Final
27 Approval Order and the Final Judgment to be entered by the Clerk of Court in
28 accordance herewith.

1 **1. Numerosity**

2 The Claims Administrator, Epiq Class Action & Claims Solutions, Inc.
3 (“Epiq”), has received 822 claims, of which at least 347 appear to be valid.
4 (Dkt. 95-1 ¶ 5). Epiq expects this number to increase after the claimants who
5 submitted invalid claims have had the opportunity to correct deficiencies. (*Id.*) This
6 is sufficiently numerous that joinder of all Class Members is impracticable, so Rule
7 23’s numerosity requirement is satisfied. Fed. R. Civ. P. 23(a)(1).

8 **2. Commonality**

9 A properly certified class must also have questions of law or fact common
10 to the class members. Fed. R. Civ. P. 23(a)(a). Each Class Member purchased
11 stock at prices that Plaintiffs allege were artificially inflated by Defendants’ failure
12 to make required disclosures. Whether Defendants had a duty to make such
13 disclosures, whether they failed make those disclosures, and what effect such
14 failures had on Ra Medical’s stock price are questions common to each Class
15 Member.

16 **3. Typicality**

17 A class can be certified only if the class representative’s claims are typical
18 of the class’s claims. Fed. R. Civ. P. 23(a)(3). A representative’s claims are typical
19 “if they are reasonably co-extensive with those of absent class members; they
20 need not be substantially identical.” *Hanlon v. Chrysler Co.*, 150 F.3d 1011, 1020
21 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564
22 U.S. 338 (2011). Like the other Class Members, each Plaintiff purchased shares
23 of Ra Medical during the period before Ra Medical disclosed, on
24 November 29, 2019, that it was facing a U.S. Department of Justice criminal
25 investigation, a disclosure that caused a substantial decline in Ra Medical’s share
26 price. The Court finds that Plaintiffs’ claims are reasonably co-extensive with
27 those of the other Class Members.

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4. Adequacy of Class Representatives

1 The next prerequisite to class certification, adequacy of representation,
2 “serves to uncover conflicts of interest between named parties and the class they
3 seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997);
4 Fed. R. Civ. P. 23(a)(4). No party or objector contends that the Settlement Class
5 lacks adequate representation, and Class Counsel has fully and completely
6 prosecuted all claims available to the Settlement Class. Plaintiffs possess no
7 apparent interests adverse to the Settlement Class. Class Counsel and the named
8 Plaintiffs are adequate to represent the Settlement Class.

5. The Settlement Class Meets Rule 23(b)(3)’s Requirements

9 Having met Rule 23(a)’s prerequisites for class certification, Plaintiffs
10 contend that the Settlement Class can be certified under Fed. R. Civ. P. 23(b)(3).
11 (See Dkt. 53 ¶¶ 57–58). This requires the Court to find that questions of law or
12 fact common to Class Members predominate over any questions affecting only
13 individual members and that class treatment is the superior means to adjudicate
14 Plaintiffs’ claims. Fed. R. Civ. P. 23(b)(3). These requirements are satisfied.

15 Predominance can be established by the existence of a companywide policy
16 or practice. See, e.g., *Duque v. Bank of America*, Case No. SA CV 18-1298
17 (MRWx), 2018 WL 10483813, at *3–4 (C.D. Cal. Dec. 10, 2018). Here, the
18 Settlement Class’s claims arise from Defendants’ alleged failure to make
19 disclosures required under federal securities laws. The common questions
20 surrounding the lack of disclosures predominate over any individual questions, so
21 the predominance requirement is met.

22 The Court must also confirm that the class form is superior to other methods
23 of litigation before certifying a class under Rule 23(b). This inquiry “requires
24 determination of whether the objectives of the particular class action procedure
25 will be achieved in the particular case.” *Hanlon*, 150 F.3d at 1023. The
26 “dominant[]” objective of the class form is “vindication of the rights of groups of
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1 people who individually would be without effective strength to bring their
2 opponents into court at all The policy at the very core of the class action
3 mechanism is to overcome the problem that small recoveries do not provide the
4 incentive for any individual to bring a solo action prosecuting his or her rights.”
5 *Amchem*, 521 U.S. at 617 (internal quotation marks and citations omitted). If the
6 final Settlement Class consists of 347 actual Class Members, the average claim
7 would be around \$28,818. Individual cases would likely consume a significant
8 amount of time, effort, and resources, and would also likely deter individual Class
9 Members from pursuing individual claims. The Court finds that class treatment
10 here is superior to other methods of litigation.

11 With the requirements of Rules 23(a) and (b)(3) satisfied, the Court grants
12 final certification of the Settlement Class for settlement purposes only.

13 **IV. The Settlement**

14 “Federal Rule of Civil Procedure 23(e) requires district courts to review
15 proposed class action settlements for fairness, reasonableness, and adequacy.”
16 *Roses, 1–2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019). Because
17 named Plaintiffs, Class Counsel, and Defendants’ Counsel may have incentives
18 inconsistent with the interests of absent class members, the Court must take care
19 to protect the due process rights of those absent class members. And because
20 this incongruity is most pronounced where the settlement comes prior to class
21 certification, “settlement approval requires a higher standard of fairness and a
22 more probing inquiry than may normally be required under Rule 23(e).” *Id.* at
23 1048–49 (internal quotation marks and citation omitted). The Court must look
24 particularly for evidence of collusion or other conflicts of interest to protect absent
25 class members. *Id.*

26 Applying this standard, the Court finds that the Settlement is fair,
27 reasonable, and adequate to the Settlement Class in light of the complexity,
28 expense, and likely duration of the litigation (including appellate proceedings), as

1 well as the risks involved in establishing liability, damages, and the
2 appropriateness of class treatment through trial and appeal. *See Rodriguez v.*
3 *West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). The Settlement appears to
4 be the result of arm's-length negotiation, and the record doesn't support a
5 conclusion that the Settlement is the result of either: (1) collusion among Plaintiffs
6 and Class Counsel, and Defendants; or (2) conflicts of interest between Plaintiffs
7 and Class Counsel, on the one hand, and the Class Members, on the other.

8 **A. Generally**

9 Plaintiffs and Class Counsel have fairly and adequately represented the
10 Settlement Class, reaching the proposed Settlement after diligently pursuing the
11 Settlement Class's claims. The Settlement was the result of arm's-length
12 negotiations conducted by the parties in good faith and after consultation with
13 competent legal counsel, and with the assistance of an experienced mediator,
14 Jed D. Melnick, Esq. of JAMS. The action was filed in good faith, not frivolous,
15 and in compliance with Rule 11 of the Federal Rules of Civil Procedure. Based on
16 the negotiations between counsel for the parties, the parties fully understood the
17 nature, strength, and weaknesses of each other's claims and defenses.

18 Plaintiffs and Defendants were fully informed of the legal bases for the
19 claims and defenses herein and capable of balancing the risks of continued
20 litigation and the benefits of the Settlement. Class Counsel and Defendants'
21 Counsel are experienced civil litigation lawyers with specialized knowledge in
22 complex class action litigation generally. Class Counsel and Defendants' Counsel
23 are capable of properly assessing the risks, expenses, and duration of continued
24 litigation.

25 **B. The Settlement Affords Meaningful Relief**

26 Under the terms of the Stipulation, Defendants will pay a total of
27 \$10,000,000. (Dkt. 89 ¶ 8) The Settlement Fund represents 15.9% of the total
28 maximum damages available. (*Id.*). After deducting all payments of Court-

1 approved attorney fees and expenses and class representative service awards
2 from the Settlement Fund, the remaining amount will be divided by the number of
3 Class Members on a *pro rata* basis according to the size of each Class Member's
4 claim. This is a reasonable recovery for the Settlement Class's claims. See, e.g.,
5 *Gudimetla v. Ambow Educ. Holding*, 2015 WL 12752443, at *5 (C.D. Cal. Mar. 16,
6 2015) (approving securities fraud class action settlement where recovery of \$1.5
7 million was 5.6% of estimated damages).

8 On the other side of the ledger and as described in further detail *infra*,
9 Section VII, participating Class Members will release the claims actually brought
10 and other claims that could have been brought under federal and state law arising
11 out of the allegations of the operative complaint, but excluding all other claims,
12 including derivative claims asserted by Ra Medical shareholders in a related
13 shareholder derivative lawsuit not before the Court. (Dkt. 73-2 ¶ (1)(mm)).

14 The Court finds the release reasonable in scope and, in light of the risks,
15 costs, and duration of continued litigation, the amount paid to Plaintiffs and the
16 Settlement Class fair, reasonable, and adequate consideration for that release.

17 **C. No Collusion or Conflicts of Interest**

18 The Court finds no evidence to support a conclusion that Plaintiffs and
19 Defendants colluded. To the contrary, up to and through the Settlement, the
20 parties vigorously litigated and negotiated this action, as evidenced by the docket.

21 There is one agreement falling within Federal Rule of Civil Procedure
22 23(e)(2)(C)(iv): Ra Medical has the unilateral right to terminate the Settlement if a
23 certain number of Class Members, specified in a confidential supplemental
24 agreement between Ra Medical and Plaintiffs, request exclusion from the
25 Settlement Class. (Dkt. 73-2 ¶ 35). This agreement reflects Defendants' desire for
26 finality and doesn't impact the fairness of the settlement.

27 Because the Settlement Class's benefit from the Settlement is fair,
28 reasonable, and adequate, the Settlement withstands scrutiny, and the Court finds

1 no apparent collusion.

2 **D. Response of the Settlement Class**

3 The Settlement Class's responses after full, fair, and effective notice, see
4 *infra* Section V, favor final approval of the Settlement. At least 4,856 Class
5 Members received notice. (See Dkt. 95-1 ¶ 5). None filed an objection to or
6 requested exclusion from the Settlement.

7 **V. Notice**

8 Pursuant to the Amended Preliminary Approval Order, Epiq sent the Notice
9 Packet to 4,856 Class Members by mail. (See Dkt. 95-1 ¶ 5). Epiq also posted
10 downloadable versions of the Notice Packet on the settlement website. (See
11 Dkt. 89 ¶ 63). The Notice Packet informed Class Members of the terms of the
12 Settlement, as well as their right to receive a Settlement Share, comment on or
13 object to the Settlement and/or the attorneys' fees and costs, elect not to
14 participate in the Settlement and pursue their own remedies, and appear in person
15 or by counsel at the final approval hearing and be heard regarding approval of the
16 Settlement. Adequate periods of time were provided by each of these procedures.

17 The notice procedure afforded adequate protections to Class Members and
18 provides the basis for the Court to make an informed decision regarding approval
19 of the settlement based on the response of Class Members. The Notice Packet
20 provided in this case was the best notice practicable, satisfying the requirements
21 of law and due process.

22 **VI. Costs and Fees**

23 The requested attorneys' costs and class representative service payments
24 are fair and reasonable. The Court grants final approval to and orders that the
25 payment of \$5,000 to each of the two Plaintiffs for class representative service
26 payments and \$43,131.77 for reimbursement of costs be paid out of the
27 Settlement Fund in accordance with the Stipulation.

28 The Fee Motion requests an award of attorneys' fees of 27.5% of the

1 Settlement Fund, an award greater than the Ninth Circuit's 25% benchmark.
2 (See Dkt. 88 at 2–3). The Court has read, heard, and considered Class Counsel's
3 arguments in favor of deviating from the 25% benchmark. The Court recognizes
4 the strong result in this case but doesn't find a sufficient reason to deviate from
5 the benchmark. Accordingly, the Court awards attorneys' fees of 25% of the
6 Settlement Fund and orders \$2,500,000 for attorneys' fees to Class Counsel be
7 paid out of the Settlement Fund.

8 **VII. Release**

9 Upon entry of final judgment, Class Members, including Plaintiffs, will fully
10 release and forever discharge Defendants and the Released Parties of all claims
11 that were or reasonably could have been alleged based on the facts in the
12 operative complaint and relate to the purchase or acquisition of Ra Medical
13 common stock during the Class Period and expressly excluding claims related to
14 enforcement of the Settlement, claims by any person who, or entity which, submits
15 a request for exclusion that is accepted by the Court, and derivative claims
16 asserted by Ra Medical shareholders in a related shareholder derivative lawsuit
17 not before the Court. Nothing in this order shall preclude any action to enforce the
18 parties' obligations under the Settlement or under this order, including the
19 requirement that Defendant make payment in accordance with the Stipulation.

20 If, for any reason, the Effective Date (as defined in the Stipulation) does not
21 occur, this Order will be vacated; the parties will return to their respective positions
22 in this action, as those positions existed immediately before the parties executed
23 the Stipulation; and nothing stated in the Stipulation or any other papers filed with
24 this Court in connection with the Settlement will be deemed an admission of any
25 kind by any of the parties or used as evidence against, or over the objection of,
26 any of the parties for any purpose in this action or in any other action.

27 The parties represent that they entered into the Settlement solely for the
28 purpose of compromising and settling disputed claims. Defendant expressly

1 denies any violation of law or any liability whatsoever to Plaintiffs and/or the
2 Settlement Class, individually or collectively.

3 **CONCLUSION**

4 The Settlement is ordered finally approved, and all terms and provisions of
5 the Settlement are ordered to be consummated. Participating Class Members will
6 be bound by the Settlement. The parties are hereby ordered to comply with the
7 terms of the Stipulation.


8 The action is **DISMISSED WITH PREJUDICE**, and final judgment is
9 entered. Each side will bear its own costs and attorneys' fees except as provided
10 by the Settlement and this Order.

11 The parties have consented to the continued jurisdiction of United States
12 Magistrate Judge Allison H. Goddard or any Magistrate Judge who may later be
13 assigned over all matters relating to the interpretation, administration,
14 implementation, effectuation and enforcement of this Order and the Settlement.

15 The Clerk is directed to close the case.

16 **IT IS SO ORDERED.**

17 Dated: September 23, 2022

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19 **Hon. Larry Alan Burns**
20 United States District Judge
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