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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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11 ROBERT BERG, On Behalf of Himself and
 All Others Similarly Situated,

Case No. 4:17-cv-3783-HSG

12

Plaintiff,

CLASS ACTION

13

v.

**STIPULATION OF DISMISSAL AND
ORDER**

14

15 XACTLY CORPORATION, CHRISTOPHER
 W. CABRERA, JOHN P. WARD, JR.,
 DAVID W. PIDWELL, NEAL DEMPSEY,
 16 GERALD S. CASILLI, EARL E. FRY,
 CAROL MILLS, LAUREN FLAHERTY,
 17 SCOTT MCGREGOR, EXCALIBUR
 PARENT LLC, EXCALIBUR MERGER
 18 SUB, INC., AND VISTA EQUITY
 PARTNERS FUND VI, L.P.,

Before: Hon. Haywood S. Gilliam
 Complaint Filed: June 30, 2017

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Defendants.

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WHEREAS, on May 30, 2017, Xactly Corporation (“Xactly” or the “Company”) and Vista
 23 Equity Partners Fund VI, L.P. (“Vista”) announced that they had entered into an agreement and
 24 plan of merger (the “Merger Agreement”) pursuant to which an affiliate of Vista would acquire all
 25 of the outstanding shares of Xactly for \$15.65 in cash per share (the “Transaction”);

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WHEREAS, on June 16, 2017, Xactly filed a Definitive Proxy Statement (the “Proxy”)
 with the United States Securities and Exchange Commission (“SEC”) in connection with the
 Transaction;

1 WHEREAS, on June 30, 2017, plaintiff Robert Berg (“Plaintiff Berg”), individually and on
2 behalf of all others similarly situated, commenced the above-captioned action (the “Berg Action”)
3 against defendants Xactly, Christopher W. Cabrera, John P. Ward, Jr., David W. Pidwell, Neal
4 Dempsey, Gerald S. Casilli, Earl E. Fry, Carol Mills, Lauren Flaherty, Scott McGregor (the
5 “Individual Defendants” and with Xactly, the “Xactly Defendants”), Excalibur Parent LLC,
6 Excalibur Merger Sub, Inc., and Vista Equity Partners Fund VI, L.P. (collectively, the “Vista
7 Defendants” and with the “Xactly Defendants,” “Defendants”);

8 WHEREAS, Plaintiff Berg alleges that the Xactly Defendants violated Section 14(a) of the
9 Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 14a-9 promulgated thereunder by
10 causing an allegedly materially incomplete and misleading Proxy to be filed with the United States
11 Securities and Exchange Commission (the “SEC”) on June 16, 2017, which recommended that
12 Xactly stockholders vote in favor of the Transaction;

13 WHEREAS, Plaintiff Berg further alleges that the Individual Defendants and the Vista
14 Defendants violated Section 20(a) of the Exchange Act by their participation in or awareness of the
15 issuance of the allegedly false statements contained in the Proxy;

16 WHEREAS, on July 6, 2017, plaintiff Steven DePalo (“Plaintiff DePalo” and, with
17 Plaintiff Berg, the “Plaintiffs”), individually and on behalf of all others similarly situated,
18 commenced an action in the United States District Court for the Northern District of California
19 captioned *DePalo v. Xactly Corporation et al.*, Case No. 3:17-cv-03838 (the “DePalo Action,” and
20 together with the Berg Action, the “Actions”) against the Xactly Defendants;

21 WHEREAS, Plaintiff DePalo alleges that the Xactly Defendants violated Section 14(a) of
22 the Securities Exchange and Rule 14a-9 promulgated thereunder by causing an allegedly
23 materially incomplete and misleading Proxy to be filed with the SEC on June 16, 2017, which
24 recommended that Xactly stockholders vote in favor of approving the Transaction;

25 WHEREAS, Plaintiff DePalo further alleged that the Individual Defendants violated
26 Section 20(a) of the Exchange Act by their participation in or awareness of the issuance of the
27 allegedly false statements contained in the Proxy;

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1 WHEREAS, on July 17, 2017, Defendants filed an unopposed Administrative Motion to
2 relate the DePalo Action to the earlier-filed Berg Action (Dkt. No. 7);

3 WHEREAS, the stockholder vote on the Transaction took place on July 28, 2017;

4 WHEREAS, on July 20, 2017, the parties to the Actions agreed on supplemental
5 disclosures related to the Transaction (the “Supplemental Disclosures”), which addressed and
6 mooted Plaintiffs’ claims regarding the disclosures in the Proxy;

7 WHEREAS, on July 20, 2017, the Company made the Supplemental Disclosures by filing
8 a Schedule 14A with the SEC;

9 WHEREAS, Plaintiffs’ counsel reserve the right to assert a claim for attorneys’ fees and
10 expenses in connection with the prosecution of the Actions and the issuance of the Supplemental
11 Disclosures, and have informed the Defendants of their intention to petition the Court for such fees
12 and expenses (the “Fee Petition”) if their claim cannot be resolved through negotiations between
13 counsel for Plaintiffs and Defendants;

14 WHEREAS, by entering into this Stipulation, Defendants do not admit that the
15 Supplemental Disclosures were material or that Plaintiffs are entitled to attorneys’ fees and
16 expenses, and reserve the right to oppose, in whole or in part, any claim by Plaintiffs for attorneys’
17 fees and expenses;

18 WHEREAS, no class has been certified in either of the Actions;

19 WHEREAS, for the avoidance of doubt, no compensation in any form has passed directly
20 or indirectly to Plaintiffs or their attorneys, and no promise, understanding, or agreement to give
21 any such compensation has been made, nor have the parties had any discussions concerning the
22 amount of any mootness fee petition or award;

23 WHEREAS, Defendants have denied and continue to deny any wrongdoing and contend
24 that no claim asserted in the Actions was ever meritorious; and

25 WHEREAS, the parties intend to meet and confer concerning the amount of any Fee
26 Petition, and in case the parties are unable to reach an agreement, Plaintiffs will make a Fee
27 Petition, to be noticed for hearing in accordance with Civil Local Rule 7-2;

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1 NOW THEREFORE, the parties agree as follows:

2 1. Plaintiff Berg hereby voluntarily dismisses the Berg Action with prejudice, as to
3 himself, pursuant to Federal Rule of Civil Procedure 41(a), and the Berg Action shall be so
4 dismissed. The dismissal is as to the named Plaintiff only and has no effect upon the absent
5 members of the putative class.

6 2. This Court retains jurisdiction over the parties to the Actions solely for the purposes
7 of further proceedings related to the adjudication of Plaintiffs' potential Fee Petition.

8 3. If Plaintiff Berg makes a Fee Petition, such Fee Petition will be made with the
9 cooperation of, and also on behalf of the plaintiff in the related De Palo Action and his counsel.

10 4. If the parties are unable to resolve Plaintiffs' counsel's claim for attorneys' fees and
11 expenses, Plaintiffs shall file a petition and supporting papers seeking such relief, with the hearing
12 to be noticed in accordance with Civil Local Rule 7-2.

13 Dated: August 3, 2017

LEVI & KORSINSKY, LLP

14 By: /s/ Rosemary M. Rivas

15 *Attorneys for Plaintiff*

16 Dated: August 3, 2017

**WILSON SONSINI GOODRICH &
ROSATI, Professional Corporation**

17 By: /s/ Catherine Moreno

18 Catherine Moreno

19 Attorneys for Defendants
20 Xactly Corporation, Christopher W.
21 Cabrera, Gerald S. Casilli, Neal Dempsey,
22 Lauren Flaherty, Earl E. Fry, Scott
McGregor, Carol Mills, David W.
Pidwell, and John P. Ward, Jr.

23 Dated: August 3, 2017

KIRKLAND & ELLIS LLP

24 By: /s/ Matthew Solum

25 Matthew Solum

26 Attorneys for Defendants
27 Excalibur Parent LLC, Excalibur Merger
Sub, Inc., and Vista Equity Partners Fund
28 VI, L.P.

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FILER’S ATTESTATION

Pursuant to Civil Local Rule 5-1 regarding signatures, I attest under penalty of perjury that the concurrence in the filing of this document has been obtained from all signatories.

/s/ Rosemary M. Rivas
Rosemary M. Rivas

1 **ORDER**

2 Based on the foregoing stipulation and good cause being shown, the Court hereby
3 GRANTS the parties' Stipulation. The Court hereby orders as follows:


4 1. Plaintiff Berg hereby voluntarily dismisses the Berg Action with prejudice, as to
5 himself, pursuant to Federal Rule of Civil Procedure 41(a), and the Berg Action shall be so
6 dismissed. The dismissal is as to the named Plaintiff only and has no effect upon the absent
7 members of the putative class.

8 2. This Court retains jurisdiction over the parties to the Actions solely for the purposes
9 of further proceedings related to the adjudication of Plaintiffs' potential Fee Petition.

10 3. If Plaintiff Berg makes a Fee Petition, such Fee Petition will be made with the
11 cooperation of, and also on behalf of the plaintiff in the related De Palo Action and his counsel.

12 4. If the parties are unable to resolve Plaintiffs' counsel's claim for attorneys' fees and
13 expenses, Plaintiffs shall file a petition and supporting papers seeking such relief, with the hearing
14 to be noticed in accordance with Civil Local Rule 7-2.

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16 **SO ORDERED** this 3rd day of August, 2017.

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19 By: 
20 HONORABLE HAYWOOD S. GILLIAM, JR.
21 UNITED STATES DISTRICT COURT JUDGE
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