UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SALIX PHARMACEUTICALS, LTD.	)	Case No. 14 Civ. 8925 (KMW)
	)	CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, PWCM Master Fund Ltd., Pentwater Equity Opportunities Master Fund Ltd., Oceana Master Fund Ltd., Pentwater Merger Arbitrage Master Fund Ltd., and LMA SPC for and on behalf of the MAP98 Segregated Portfolio (collectively, "Lead Plaintiff" or the "Pentwater Funds"), on behalf of itself and the Settlement Class, respectfully submits this memorandum of law in support of its motion for final approval of the proposed settlement resolving all claims asserted in the Action in return for the payment of $210 million in cash for the benefit of the Settlement Class (the "Settlement"), and for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

Subject to Court approval, Lead Plaintiff has agreed to settle all claims in the Action in exchange for a cash payment of $210 million, which has been deposited into an escrow account. Lead Plaintiff respectfully submits that the proposed Settlement is an excellent result for the Settlement Class and satisfies the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure. As detailed in the accompanying Graziano Declaration[2] and as set forth herein,

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated March 24, 2017 (ECF No. 216-1) (the "Stipulation") or in the Declaration of Salvatore J. Graziano in Support of (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Graziano Declaration" or "Graziano Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Graziano Declaration.

[2] The Graziano Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action (¶¶ 14-49); the nature of the claims asserted (¶¶ 10-13, 19-20); the negotiations leading to the Settlement (¶¶ 46-48); the risks and uncertainties of continued litigation (¶¶ 50-68); the terms of the Plan of Allocation for the Settlement proceeds (¶¶ 75-83); and a description of the services Lead Counsel provided for the benefit of the Settlement Class (¶¶ 5, 14-48).

the Settlement represents a substantial percentage of likely recoverable damages as estimated by Lead Plaintiff's damages expert, and is a very favorable recovery given the significant risks inherent in this litigation with respect to liability, damages, and loss causation.

At the time the agreement to settle was reached, Lead Plaintiff and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the Action. Before the Settlement was agreed to, Lead Counsel had: (i) conducted an extensive investigation into Defendants' alleged fraud including a thorough review of SEC filings, analyst reports, conference call transcripts, press releases, company presentations, media reports and other public information; (ii) drafted a detailed consolidated complaint based on its investigation; (iii) successfully opposed Defendants' motions to dismiss; (iv) engaged in extensive and highly contested fact discovery efforts, which included obtaining and reviewing more than 2.7 million pages of documents produced by Defendants and third parties; taking, defending, or participating in 13 depositions; and litigating a number of significant discovery disputes; (v) moved for class certification, including conducting related discovery, preparing an expert report on market efficiency, and opposing a motion by Defendants to exclude the testimony of Lead Plaintiff's expert; (vi) consulted extensively with experts concerning loss causation and damages, accounting issues, and the pharmaceutical industry throughout the litigation; and (vii) engaged in a vigorous arm's-length settlement negotiations to achieve the Settlement. ¶¶ 5, 17-48.

The Settlement is an outstanding result in light of the substantial risks of continued litigation. As detailed in the Graziano Declaration and discussed further below, Defendants vigorously disputed any liability, including raising numerous arguments that they did not make materially misleading misstatements or act with scienter. ¶¶ 51-56. For example, Defendants would contend that their alleged misstatements concerning Salix's wholesale inventory levels were

general estimates or targets, rather statements of present fact, that they lacked reliable information on the precise amount of the inventory levels held by third-party wholesalers, and that the calculation of those inventory levels was imprecise and based on uncertain, judgmental estimates regarding future sales patterns, and, thus, any errors in their statements concerning Salix's wholesalers' inventory were not intended. ¶¶ 52-54. In addition, Defendants had vigorously opposed class certification in this case, arguing that Lead Plaintiff and additional named plaintiff City of Fort Lauderdale General Employees' Retirement System were inadequate class representatives, subject to unique defenses, and that Plaintiffs had not established sufficiently that the fraud-on-the-market presumption of reliance was applicable. ¶¶ 57-58.

Moreover, Defendants also disputed loss causation and damages. Defendants would have contested the amount of damages that could be attributed to the revelation of allegedly false statements, as opposed to new information about Salix that was unrelated to the alleged fraud, and would have challenged Plaintiffs' ability to prove what part of the damages were caused by the disclosure of the fraud. ¶¶ 61-63. Defendants also would have argued that a large portion of the class was not harmed because the price of Salix common stock quickly rebounded from its price following the corrective disclosure, and because the Company was acquired relatively shortly after the revelation of the fraud at a price that significantly exceeded the share price at the end of the Class Period. ¶ 64. Absent the Settlement, the Parties faced the prospect of protracted litigation through costly expert discovery, additional contested motions, a trial, post-trial motion practice, individual class member loss causation and damages challenges, and likely ensuing appeals. The Settlement avoids these risks and delays while providing a substantial, certain and immediate benefit to the Settlement Class in the form of a $210 million cash payment.

In light of these considerations, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement warrants final approval by the Court.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 154 (S.D.N.Y. 2013); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013).

Public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*") ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted). In ruling on final approval of a class settlement, the court should examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Visa*, 396 F.3d at 116; *In re Citigroup Inc. Sec. Litig.*, No. 09 MD 2070 (SHS), 2014 WL 2112136, at *2-*3 (S.D.N.Y. May 20, 2014); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011).

A. The Settlement Was Reached After Extensive Arm's-Length Negotiations and Is Procedurally Fair

A settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arms's length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116; *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. 2016).

The Settlement here merits a presumption of fairness because it was achieved after extensive arm's-length negotiations between well-informed and experienced counsel after a substantial amount of discovery. The Parties and their counsel were knowledgeable about the strengths and weaknesses of the case prior to reaching the agreement to settle. For example, Lead Counsel had conducted a thorough investigation prior to filing the Complaint; prepared a detailed Complaint and briefing in opposition to Defendants' motion to dismiss; and obtained a very significant amount of fact discovery, including 2.7 million pages of documents produced by Defendants and third parties and though taking the depositions of ten fact witnesses. ¶¶ 17-38. Lead Counsel also consulted extensively with experts in damages, accounting and the pharmaceutical industry; fully briefed a vigorously contested class certification motion; and engaged in extensive settlement negotiations with Defendants' Counsel. ¶¶ 39-48. As a result, Lead Plaintiff and Lead Counsel had an adequate basis for assessing the strength of the Settlement Class's claims and Defendants' defenses when they entered into the Settlement.

The conclusion of Lead Plaintiff and Lead Counsel that the Settlement is fair and reasonable and in the best interests of the Settlement Class further supports its approval. Lead Plaintiff is a sophisticated institutional investor that took an active role in supervising this litigation, as envisioned by the PSLRA, and has strongly endorsed the Settlement. *See* Declaration of Francis J. Strezo, attached as Exhibit 2 to the Graziano Declaration at ¶¶ 4-7. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

In addition, the judgment of Lead Counsel, which is highly experienced in securities class action litigation, that the Settlement is in the best interests of the Settlement Class is entitled to

"great weight." *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation omitted).

B. Application of the *Grinnell* Factors Supports Approval of the Settlement as Substantively Fair, Reasonable and Adequate

The Settlement is also substantively fair, reasonable, and adequate. The standards governing approval of class action settlements are well established in this Circuit. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following factors should be considered in evaluating a class action settlement:

> (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.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Visa*, 396 F.3d at 117; *In re Advanced Battery Techs. Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014); *Citigroup Bond*, 296 F.R.D. at 155; *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265-66 (S.D.N.Y. 2012).

"In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)); *see Advanced*

Battery Techs., 298 F.R.D. at 175 (same). Additionally, in deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

Here, the Settlement satisfies the criteria for approval articulated in *Grinnell*.

1. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation omitted). Indeed, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006).

This case was no exception. Although the case settled at the very end of an extensive fact discovery process, achieving a litigated verdict in the Action for Lead Plaintiff and the class would have required substantial additional time and expense. In the absence of the Settlement, the continued litigation of the Action would have required the conclusion of fact discovery (including the depositions of the two Individual Defendants and two other Salix officers that had been postponed); conducting complex and expensive expert discovery on issues such as loss causation, damages and accounting; the resolution of Plaintiffs' motion for class certification and a potential

Rule 23(f) appeal (particularly given pending cases before the Second Circuit raising issues regarding class certification that likely would affect the Court's decision in this case); an expected motion for summary judgment; a trial, and individual claims practice. Finally, whatever the outcome at trial, it is virtually certain that appeals would be taken from any verdict. The foregoing would pose substantial expense for the Settlement Class and delay the class's ability to recover – assuming, of course, that Lead Plaintiff and the Settlement Class were ultimately successful on their claims.

In contrast to costly, lengthy and uncertain litigation, the Settlement provides an immediate, significant and certain recovery of $210 million for members of the Settlement Class. Accordingly, this factor supports approval of the Settlement.

2. The Reaction of the Settlement Class to the Settlement

The reaction of the class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g., Bear Stearns*, 909 F. Supp. 2d at 266-67; *FLAG Telecom*, 2010 WL 4537550, at *16; *Veeco*, 2007 WL 4115809, at *7.

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Epiq Systems, Inc. ("Epiq"), began mailing copies of Notice Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and nominees on April 27, 2017. *See* Declaration of Stephanie A. Thurin Regarding (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Exhibit 1 to the Graziano Declaration ("Thurin Decl."), at ¶¶ 2-4. As of June 16, 2017, Epiq had mailed a total of 68,694 copies of the Notice Packet to potential Settlement Class Members and nominees. *See id*. ¶ 7. In addition, the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire* on May 12, 2017. *See id*. ¶ 8. The Notice set out the essential terms of the Settlement and informed potential Settlement Class Members of, among

other things, their right to opt out of the Settlement Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Settlement Class Members to exclude themselves or object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation and no requests for exclusion have been received. The deadline for submitting objections and requesting exclusion from the Settlement Class is July 5, 2017. As provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers no later than July 17, 2017 addressing any requests for exclusion and objections that may be received.

3. The Stage of the Proceedings and the Amount of Information Available to Counsel Support Approval of the Settlement

Lead Counsel spent significant time and resources analyzing and litigating the legal and factual issues in this Action. Lead Counsel conducted a substantive investigation into these issues prior to filing the consolidated complaint. Among other things, Lead Counsel reviewed SEC filings, research reports by securities and financial analysts, investor conference calls, press releases, media reports, and other public material, and analyzed the movement and pricing data associated with Salix publicly traded common stock and options with the assistance of a damages expert. ¶¶ 17-18.

Lead Plaintiff also had the benefit of extensive discovery. ¶¶ 30-38. In connection with this discovery, Lead Counsel obtained and analyzed more than 2.7 million pages of documents from Defendants and third parties that were responsive to Lead Plaintiff's document requests and had taken the depositions of ten fact witnesses, including employees of pharmaceutical wholesalers, a partner at Salix's outside auditor, and high-level employees and a Board member of Salix. ¶¶ 32, 34. Lead Counsel had also reviewed relevant documents and was fully prepared to take the depositions of the remaining four witnesses scheduled, including Defendants

Derbyshire and Logan. ¶ 35. Lead Counsel had also consulted extensively with experts while investigating and prosecuting the Action, including experts in the areas of the damages, loss causation and market efficiency, accounting and the pharmaceutical industry, to assist it in evaluating the claims asserted. ¶ 18, 38, 44-45. Finally, Lead Counsel also learned about Defendants' defenses through briefing of the motion to dismiss; Defendants' opposition to the motion for class certification; and through the settlement negotiation. ¶¶ 21-23, 41-43, 46-48.

Thus, at the time the agreement in principle to settle was reached, Lead Plaintiff and Lead Counsel clearly had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *see also Advanced Battery Techs.*, 298 F.R.D. at 177 (this factor "focuses on whether the plaintiffs 'obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal'").

Indeed, based on the substantial amount of information developed, Lead Plaintiff and Lead Counsel believe that the Settlement represents a resolution that is highly favorable to the Settlement Class. Accordingly, this factor supports approval of the Settlement.

4. The Risks of Establishing Liability and Damages Support Approval of the Settlement

In assessing the fairness, reasonableness and adequacy of a settlement, courts should consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463 (citations omitted). While Lead Plaintiff had prevailed at the motion to dismiss stage, Lead Plaintiff and the class nonetheless faced real risks in proving both liability and damages at trial, as explained below.

(a) Risks To Proving Liability

While Lead Plaintiff and Lead Counsel believe that the claims asserted against Defendants in the Action are meritorious, they recognize that Defendants had meaningful defenses to liability in this case. In particular, Lead Plaintiff faced vigorous challenges from Defendants in proving that Defendants made actionable false statements and acted with *scienter*.

As the Court is aware, the central allegations of the case are that Defendants made false statements about Salix's wholesaler inventory levels during the Class Period. Defendants argued that their statements about Salix's wholesale inventory levels were estimates or targets or otherwise forward-looking statements (thus, not actionable), were not false when they were made, and, in any event, that the Individual Defendants did not know the precise inventory levels held by third-party wholesalers and thus their statements were not intended to deceive investors. ¶¶ 21, 52, 54. While these arguments were not successful at the motion to dismiss stage, Defendants continued to raise and could have succeeded in these arguments at subsequent stages of the litigation when allegations in the Complaint would need to be supported by admissible evidence. ¶ 56.

For example, Defendants would have continued to argue that the alleged misstatements concerning Salix's wholesale inventory levels were not statements of present fact but were estimates or targets. ¶ 52. Defendants would argue that these statements were therefore protected as forward-looking statements or were not actionable as expressions of corporate optimism. Defendants would also have contended, in opposition to Plaintiffs' allegations, that they lacked reliable information on the precise amount of the inventory levels (which were maintained by third-party wholesalers, not Salix). *Id*.

Defendants would also have maintained that they had not engaged in any improper "channel-stuffing" activities such as creating fictitious sales or making unwanted shipments, and

had engaged only in appropriate sales efforts such as offering incentives for purchases. ¶¶ 21, 53. As such, Defendants argued that their statements concerning quarterly product revenues (which reflected actual historical sales) were not misleading because they had not engaged in an undisclosed improper channel stuffing, which Defendants asserted was demonstrated by the lack of any material restatement after a thorough post-Class Period investigation. ¶ 53.

If Lead Plaintiff were able to overcome these risks and prove material falsity, they would have faced significant additional challenges in proving scienter. Defendants would contend that Lead Plaintiff could not establish any intent to defraud because the calculation of Salix's wholesaler inventory levels was imprecise and based on uncertain estimates, and any errors in their statements concerning this metric were not intended. ¶ 54. Defendants would have argued that they did not know the precise levels of Salix's wholesale inventories when they made the challenged statements and that those levels fluctuated and rose significantly during the Class Period based on future sales patterns so that any inaccuracies in their statements were due to their failure to promptly detect those changes, rather than any intent to deceive investors. *Id*.

Defendants would also have continued to assert that they had no motive to engage in fraud. Defendants argued that Lead Plaintiff's theory of motive – the substantial compensation the Individual Defendants would receive if Salix were acquired by another company – did not withstand scrutiny because any potential acquirer of Salix would have reviewed the wholesale inventory levels, thus depriving Individual Defendants of any financial benefit. ¶ 55. Indeed, this argument was supported by the fact that two potential acquirers of Salix in late summer and fall of 2014 quickly detected the inventory levels when given access to Salix's internal information in the course of their due diligence. *Id*.

(b) Risks To Proving Damages and Loss Causation

Assuming that Lead Plaintiff successfully developed the evidence needed to defeat all of the above risks and successfully established liability at trial, it still faced very significant risks in proving damages and loss causation. Although questions concerning loss causation and the extent of damages were not before the Court on the motion to dismiss, those issues played an important role in determining the reasonable value for the Settlement. Defendants would have vigorously asserted that damages in this case were greatly minimized, if not eliminated, by substantial difficulties in establishing loss causation and damages based on the alleged November 6, 2014 corrective disclosure. ¶¶ 60-64.

As the Court is aware, Lead Plaintiff bears the burden of establishing loss causation – that is, that "plaintiff's losses were caused by the disclosure of the truth that Defendants had previously allegedly misrepresented." *Fort Worth Emp'rs' Ret. Fund v. Biovail Corp.*, 615 F. Supp. 2d 218, 229 (S.D.N.Y. 2009); *see, e.g., Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 36 (2d Cir. 2009).

Defendants would have contended that Lead Plaintiff could not carry its burden of proving what portion of the decline in price of Salix common stock on November 7, 2014 (immediately after the end of the Class Period) was attributable to revelation of the allegedly false statements about Salix's wholesaler inventory levels, as opposed to the other, non-fraud-related news that was disclosed at the same time. ¶¶ 62-63. In support of this argument, Defendants could point to the fact that the November 6, 2014 disclosure contained other negative information about Salix, including a significant quarterly earnings miss. ¶ 62.

Defendants would have argued that Plaintiffs bore the burden of proof in "disaggregating" the impact of this "confounding," non-fraud information. *See Flag Telecom*, 574 F.3d at 36 ("to establish loss causation, *Dura* requires plaintiffs to disaggregate those losses caused by 'changed

economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events,' from disclosures of the truth behind the alleged misstatements"). Defendants would have argued that this disaggregation could not be done by Lead Plaintiff's expert in this case. ¶ 63. Moreover, even if this disaggregation could be done, it would have substantially reduced damages. *Id*.

In addition, Defendants would have argued that a large portion of the class suffered little or no damages from the alleged fraud because the price of Salix common stock quickly rebounded from its price following the corrective disclosure, and because the Company was acquired relatively shortly thereafter at a price that significantly exceeded the share price at the end of the Class Period. ¶ 64. Defendants would have argued that class members who retained their shares after the end of the Class Period and who benefited from the price rebound by selling their shares purchased during the Class Period for a gain had no recoverable damages in the Action. *Id*.

Finally, in order to resolve these disputed issues regarding damages and loss causation, the parties would have had to rely on expert testimony. While Lead Counsel had worked with Lead Plaintiff's damages expert with a view towards prevailing on these matters at trial, there is no doubt that Defendants would have been able to present a well-qualified expert who would opine that the class had little or no damages. As Courts have long recognized, the uncertainty as to which side's expert's view might be credited by the jury presents a substantial litigation risk. *See IMAX*, 283 F.R.D. at 193 ("[I]t is well established that damages calculations in securities class actions often descend into a battle of experts."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008) (in this "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. Nov. 24, 2004) ("[P]roof of

damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury.").

In light of all of these risks with respect to both liability and damages, Lead Plaintiff and Lead Counsel respectfully submit that it is in the best interests of the Settlement Class to accept the immediate and substantial benefit conferred by the Settlement, instead of incurring the significant risk that the Settlement Class might recover a lesser amount, or nothing at all, after protracted and arduous litigation.

5. The Risks of Certifying the Class Support Approval of the Settlement

At the time the Settlement was reached, Plaintiffs' motion for class certification was fully briefed, but the class had not yet been certified. While Lead Plaintiff believes this Action is appropriate for class treatment, Defendants had strongly opposed the motion for class certification. ¶¶ 41-42, 57-58.

In their opposition to class certification, Defendants had contend that class should not be certified because Lead Plaintiff and Fort Lauderdale were inadequate class representatives. ¶¶ 41, 57. Among other things, Defendants claimed that Lead Plaintiff was subject to unique defenses because it was an active trader in various Salix securities during the Class Period and because it had purchased a large stake in Salix after the corrective disclosure occurred. *Id*. Defendants also argued that, as an "event-driven" hedge fund, Lead Plaintiff was not relying on the integrity on Salix's market price, but on the possibility of Salix's acquisition by another company when it made its decision to purchase Salix securities, and thus was atypical and subject to unique defenses for that reason as well. *Id*.

In addition, Defendants had argued that the class should not be certified because Plaintiffs had not established that the fraud-on-the-market presumption of reliance was applicable. ¶¶ 41, 58. In connection with this argument, Defendants mounted an attack on Lead Plaintiff's expert,

claiming that his report establishing market efficiency should be excluded because the methodology he used was unreliable. ¶¶ 42, 58. Defendants also challenged the certification of a class including traders in Salix options, arguing that each of over 900 different series of Salix options (each with different strike prices and expiration dates) that traded during the Class Period had to be treated as a separate security and that Plaintiffs had not established the efficiency for each of these separate markets, or that the number of investors who traded in any one of these options was sufficient to establish numerosity. ¶¶ 41, 58. Finally, Defendants noted three pending Rule 23(f) appeals currently before the Second Circuit on similar matters which threatened to change or increase Plaintiffs' burden in certifying the class. ¶ 58.

Defendants' vigorous opposition to class certification created a risk that the class would not be certified for one of these reasons and, accordingly, this factor supports approval of the Settlement.

6. The Ability of Defendants to Withstand a Greater Judgment

Although Defendants may have been able to pay a judgment in excess of the Settlement Amount, "defendants' ability to withstand a higher judgment . . . standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). A "defendant is not required to 'empty its coffers' before a settlement can be found adequate." *IMAX*, 283 F.R.D. at 191 (citation omitted). Indeed, Courts have repeatedly recognized that this factor, standing alone, does not weigh against approval of a settlement where, as here, the other factors weigh in favor of approving the Settlement. *See id.*; *FLAG Telecom*, 2010 WL 4537550, at *19 ("the mere ability to withstand a greater judgment does not suggest the settlement is unfair") (citation omitted); *McBean v. City of New York,* 233 F.R.D. 377, 388 (S.D.N.Y. 2006) ("the ability of defendants to pay more, on its own, does not render the settlement unfair, especially where the other *Grinnell* factors favor approval"). In addition, given Salix's acquisition after the end of the

Class Period by Valeant, which has since suffered declining performance in the market, there was risk and uncertainty regarding Salix's ability to fully satisfy a judgment after trial.

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and all the Attendant Risks of Litigation Support Approval of the Settlement

The last two substantive factors courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. In analyzing these factors, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. The court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462 (citations omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citation and internal quotations omitted), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Lead Plaintiff submits that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. Indeed, when weighed against the risks of continued litigation, the proposed Settlement for $210 million in cash is a very favorable result.

Lead Plaintiff's damages expert, in consultation with Lead Counsel, carefully evaluated all of Defendants' arguments concerning damages and loss causation. Based on that analysis, Lead Plaintiff's expert concluded total damages that Lead Plaintiff would be reasonably likely to be able to prove at trial, assuming that liability was established, would be approximately $600 million. ¶ 66. Notably, however, had Defendants' loss causation arguments been accepted in full or even

in part at summary judgment or trial, damages could have been significantly lower than that amount, or eliminated entirely. *Id*. And, even if Plaintiffs were successful at trial, Defendants could have challenged the damages of each and every large class member in post-trial proceedings, substantially reducing any aggregate recovery by Plaintiffs. *Id*. Accordingly, the $210 million Settlement – representing roughly a third of the total damages that Plaintiffs could reasonably be expected to be proved at trial – represents a very favorable resolution of the Action for Settlement Class Members, in light of all of the litigation risks discussed above,.

* * *

In sum, the *Grinnell* factors – including the expense and delay of further litigation, Lead Plaintiff's well-developed understanding of the strengths and weaknesses of the case, and the significant risks of the litigation – support a finding that the Settlement is fair, reasonable and adequate.

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

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate. *See IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as it has a "rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See IMAX*, 283 F.R.D. at 192. A plan of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *PaineWebber*, 171 F.R.D. at 133. In determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See Giant Interactive*, 279 F.R.D. at 163 ("[i]n determining whether a plan of allocation is fair, courts look

primarily to the opinion of counsel") (citation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (same).

Here, the proposed plan of allocation (the "Plan of Allocation"), which was developed by Lead Counsel in consultation with Lead Plaintiff's damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who submit valid Claim Forms. In developing the Plan of Allocation, Lead Plaintiff's damages expert calculated the amount of estimated artificial inflation in the per share closing prices of Salix common stock and Salix Call Options (and the amount of estimated artificial deflation in Salix Put Options) which allegedly was proximately caused by Defendants' alleged false and misleading statements. In calculating this estimated alleged artificial inflation, Lead Plaintiff's damages expert considered the price change in Salix common stock in reaction to the announcement made after the close of trading on November 6, 2014, adjusting for price changes attributable to market and industry factors. ¶ 78.

Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of Salix common stock or Salix Call Option (or sale of a Salix Put Option) during the Settlement Class Period that is listed in the Claim Form and for which adequate documentation is provided. Notice ¶ 52. In general, the Recognized Loss Amount calculated will be the difference between the estimated artificial inflation on the date of purchase and the estimated artificial inflation on the date of sale, or the difference between the actual purchase price and sales price of the stock, whichever is less. ¶ 79. Claimants who purchased and sold all their Salix Securities before the alleged corrective disclosure occurred at 4:30 p.m. on November 6, 2014 will have no Recognized Loss Amount because any loss suffered on those transactions would not be the result of the alleged misstatements in the Action. *Id*.

Recognized Loss Amounts for shares of Salix common stock sold (and Salix Options closed) during the 90-day period after the end of the Class Period are further limited to the difference between the purchase price and the average closing price of the security during that period. ¶ 80. For Salix Securities still held as of February 4, 2015, the end of the 90-day period, claimants will receive a Recognized Loss Amount of 50% of the lesser of (a) the amount of artificial inflation (or deflation) in the security at the time of purchase or (b) the difference between the purchase price and the average closing price for the security during that 90-day period. *Id*. The 50% reduction applied to these retained shares reflects the substantial increase in the price of Salix common stock that occurred by and shortly after that date, including as a result of Salix's acquisition by Valeant at a substantial premium to its trading price, and the increased risks of proving damages for these shares. *Id*.

The Plan of Allocation also limits Claimants based on whether they had an overall market loss in their transactions in Salix common stock or Salix Options during the Class Period. A Claimant's Recognized Claim based on transactions in Salix common stock will be limited to his, her or its market loss in common stock transactions during the Class Period; and his, her or its Recognized Claim based on Salix Options will be limited to his, her or its market loss in Salix Options transactions during the Class Period. ¶ 81.

Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as result of the conduct alleged in the Action. ¶¶ 76, 82. Moreover, as noted above, as of June 16, 2017, more than 68,000 copies of the Notice, which contains the Plan of Allocation, and advises Settlement Class Members of their right to object to the proposed Plan of Allocation, have

been sent to potential Settlement Class Members and their nominees. *See* Thurin Decl. ¶ 7. To date, no objections to the proposed Plan of Allocation have been received. ¶ 83.

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

The Notice to the Settlement Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114.

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

As noted above, in accordance with the Court's Preliminary Approval Order, Epiq, the Court-approved Claims Administrator, began mailing copies of the Notice Packet to potential Settlement Class Members on April 27, 2017. *See* Thurin Decl. ¶¶ 3-4. As of June 16, 2017, Epiq

had mailed 68,694 copies of the Notice Packet by first-class mail to potential Settlement Class Members and nominees. *See* Thurin Decl. ¶ 7. In addition, Lead Counsel caused the Summary Notice to be published in *The Wall Street Jounral* and transmitted over the *PR Newswire* on May 12, 2017. *See* Thurin Decl. ¶ 8. Copies of the Notice, Claim Form, and Stipulation were made available on the settlement website maintained by Epiq beginning on April 27, 2017, and copies of the Notice and Claim Form were also made available on Lead Counsel's website. *See* Thurin Decl. ¶ 10; Graziano Decl. ¶ 73. This combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., Advanced Battery Techs.*, 298 F.R.D. at 182-83; *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *12-*13 (S.D.N.Y. Dec. 23, 2009).

CONCLUSION

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

Dated: June 19, 2017

Respectfully submitted,

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