UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE HENRY SCHEIN, INC. SECURITIES LITIGATION	**Master File No. 1:18-cv-01428-MKB-VMS** **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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In accordance with Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, Miami General Employees' & Sanitation Employees' Retirement Trust ("Miami GESE" or "Lead Plaintiff"), on behalf of itself and the Class, respectfully submits this memorandum in support of its motion for: (1) final approval of the proposed settlement resolving the Action in exchange for payment of $35 million in cash for the benefit of the Class (the "Settlement"), and (2) 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 the Action in exchange for a cash payment of $35 million, which has been deposited into an escrow account. Lead Plaintiff respectfully submits that the proposed Settlement is fair, reasonable, and adequate and satisfies all the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure. As detailed in the accompanying Harrod Declaration and summarized below, the Settlement is an excellent result for the Class in light of the significant risks posed by ongoing litigation, including the substantial risks in proving the materiality and falsity of Defendants' statements, scienter, loss causation, and the amount of potential damages that would likely be proven at trial.[2] The Settlement was reached only after arm's-length settlement negotiations between experienced

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation of Settlement dated April 30, 2020 (ECF No. 70-1) (the "Settlement Agreement"), or in the Declaration of James A. Harrod in Support of (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (the "Harrod Declaration" or "Harrod Decl."), filed herewith. In this memorandum, citations to "¶ __" refer to paragraphs in the Harrod Declaration and citations to "Ex. __" refer to exhibits to the Harrod Declaration.

[2] The Harrod Declaration is an integral part of this submission and the Court is respectfully referred to it for a more detailed description of, among other things: the history of the Action (¶¶ 13-58); the nature of the claims asserted (¶¶ 13-14, 20); the negotiations leading to the Settlement (¶¶ 44-49); the risks and uncertainties of continued litigation (¶¶ 59-102); and the terms of the Plan of Allocation (¶¶ 111-120).

counsel, which included a two-day mediation facilitated by experienced class-action mediators.

Before the Settlement was agreed to, Lead Counsel had (i) conducted an extensive investigation into the claims asserted, including through a detailed review of public documents, documents obtained from the FTC's action against Schein and other litigation, and interviews with possible witnesses; (ii) researched and drafted a detailed consolidated complaint; (iii) researched, briefed, and defeated, in part, Defendants' motion to dismiss; (iv) fully briefed its opposition to Defendants' motion for partial reconsideration; and (v) consulted extensively with experts in damages and loss causation. ¶¶ 20-43.

The Settlement was reached after arm's-length settlement negotiations that were assisted by the Hon. Daniel Weinstein (Ret.) and Jed D. Melnick, Esq. of JAMS, two experienced class-action mediators. The mediation process included the exchange of detailed written mediation statements concerning liability and damages, and two full-day, in-person mediation sessions. ¶¶ 45-48. At the conclusion of the second day of mediation, Judge Weinstein made a mediator's recommendation that the parties settle the Action for $35,000,000, which the parties accepted, subject to various conditions, including the successful completion of due-diligence discovery by Lead Plaintiff. ¶¶ 48-49. Lead Counsel has completed this significant due-diligence discovery, which included obtaining and analyzing of over 680,000 pages of documents produced by Defendants and interviews with Defendant Timothy J. Sullivan and Schein's Executive Vice President, Chief Strategic Officer, and Director, Mark Mlotek. ¶¶ 54-58. Lead Counsel has found that the information and documents reviewed in the discovery process support its conclusion that the $35 million is fair and reasonable. ¶¶ 58, 74, 76, 79, 83-87, 92 n.5.

Lead Plaintiff and Lead Counsel believe that the $35 million Settlement is particularly favorable given the substantial risks of continued litigation. ¶¶ 59-102. This was not a case with

clearly false or restated financial statements or a parallel government enforcement action alleging securities fraud to support Lead Plaintiff's claims. On the contrary, the Action presented many significant risks to establishing both liability and damages through continued litigation that could have resulted in no recovery at all for the Class. *Id.*

As an initial matter, Lead Plaintiff faced substantial risks from Defendants' pending motion for partial reconsideration of the Court's ruling on Defendants' motion to dismiss. In partially denying Defendants' motion to dismiss, the Court held that Schein's scienter could be established by Mr. Sullivan's knowledge of the Company's alleged anticompetitive activities in the dental supplies market, and that Mr. Sullivan had sufficient control over Schein to be held liable as a controlling person for Schein's alleged primary securities law violations. ¶¶ 35, 39, 65. Defendants sought reconsideration of these holdings, contending that Lead Plaintiff had failed to plead facts showing Mr. Sullivan had participated in or controlled Schein's allegedly false and misleading statements. ¶¶ 39, 65. While Lead Plaintiff opposed Defendants' motion and believes it lacks merit, Defendants could have persuaded the Court to reconsider its rulings on the motion to dismiss. ¶ 66. If Defendants succeeded in convincing the Court that Schein's scienter could not be established through Mr. Sullivan's knowledge the entire case would be dismissed. ¶ 68.

Even if the Complaint survived Defendants' reconsideration motion, Lead Plaintiff would have faced substantial challenges in developing facts to survive summary judgment or establish Defendants' liability or damages at trial. ¶¶ 69-97. To start, Lead Plaintiff would have faced challenges in showing that Defendants' statements about the competition facing Schein, trends towards cost containment in the healthcare distribution space, and the emergence of buying groups—the only false statements to survive the Court's motion to dismiss opinion—were materially false and misleading. ¶¶ 72-80. For example, Defendants likely would have contended

that each of these categories of statements was factually true. ¶ 73. Such arguments likely grew significantly stronger in October 2019 when, following a full trial on the merits, an FTC administrative law judge exonerated Schein from the FTC's claims that Schein had violated several provisions of the federal antitrust laws. ¶¶ 41, 73. Defendants would also argue that many of the statements at issue, such as about the nature of Schein's competition, were non-actionable because they were "puffery" or statements of opinion. ¶ 75. Further, Defendants would have argued that investors were already aware of allegations of Schein's alleged anticompetitive behavior during the Class Period and, thus, the market could not have been misled by the alleged misstatements at issue, most of which were relatively generalized statements about Schein's competitive environment. ¶ 77.

Second, Lead Plaintiff would have faced additional challenges proving that Schein made the allegedly false statements with the intent to mislead investors or was reckless in making the statements. Other Schein executives previously named as defendants in the case had been dismissed from the Action based on insufficient allegations of their scienter. ¶¶ 33, 35, 81. To succeed on the remaining claims, Lead Plaintiff would have to prove that Mr. Sullivan was aware of the alleged anticompetitive behavior and also show that his scienter could be attributed to Schein. ¶ 82. Defendants would have continued to argue that scienter was not established as to any of the statements remaining in the case and that Sullivan's knowledge—even if it could be demonstrated—was not sufficient to establish Schein's scienter because Sullivan was not a senior executive and he was not directly involved in preparing Schein's public disclosures. ¶¶ 82-85.

Additionally, Lead Plaintiff would also face significant hurdles in establishing loss causation. The Court has already dismissed Lead Plaintiff's allegations of loss causation as to the August 2017 disclosure, and Defendants would likely have raised various arguments as to the two

disclosures remaining in the case. ¶¶ 36, 89-97. First, Defendants would likely have argued that the corrective disclosures did not reveal new, material facts to the market, because those facts were already well known, given that Schein was repeatedly accused of antitrust law violations before and during the Class Period, including in numerous lawsuits that were publicly filed by state regulators, competitors, and dental practices. ¶ 93. Second, with respect to the November 2017 corrective disclosure, Defendants would have argued that intraday stock pricing information demonstrated that Schein's stock price did not respond to the disclosure of two antitrust lawsuits against the Company, the only aspect of the corrective disclosure sustained by the Court, but rather declined in response to other Company news released that day. ¶ 92. Third, with regard to the February 2018 disclosure of the FTC's filing of an antitrust complaint against Schein, which was the only other corrective disclosure remaining in the case, Defendants likely would have strong arguments that the disclosure of a complaint is insufficient to reveal the truth about Defendants' alleged fraud—and the fact that Schein was exonerated after a trial in that case demonstrates the filing of the FTC complaint did not reveal any relevant "truth" to the market. ¶ 95. Fourth, Defendants would have meaningful arguments that Lead Plaintiff and the Class would not be able to prove any damages in connection with the November 2017 disclosure, and that damages associated with the February 2018 disclosure would have been substantially reduced if the effects of non-fraud related information about Schein were appropriately disaggregated. ¶¶ 89-97.

The delay of obtaining and collecting on a judgment is also a relevant consideration. If the litigation had continued, Lead Plaintiff would have to prevail at several additional stages. First, on Defendants' motion for partial consideration of the motion to dismiss order, then at class certification, summary judgment, and trial. Further, if it prevailed at trial, Lead Plaintiff would need to prevail on any appeals that would likely follow. This process would take years, and

presented risks at each stage. The Settlement avoids these risks and provides a substantial and certain benefit rather than the mere possibility of a recovery after additional years of litigation.

The Settlement has the full support of the Court-appointed Lead Plaintiff, a sophisticated institutional investor that took an active role in supervising the litigation and participated directly in settlement negotiations. *See* Declaration of Ron Silver on behalf of Miami GESE (Ex. 2) ("Silver Decl."), at ¶ 7. Further, although the deadline to request exclusion from the Class or object to the Settlement has not yet passed, to date, no Class Members have objected to the Settlement and just two requests for exclusion have been received. ¶ 110; Miller Decl. ¶ 12.[3]

Given these considerations and the other factors discussed below, Lead Plaintiff respectfully submits that the Settlement is fair, reasonable, and adequate and warrants final approval by the Court. Additionally, Lead Plaintiff requests the Court approve the Plan of Allocation, which was set forth in the Notice mailed to potential Class Members. The Plan of Allocation, which Lead Counsel developed in consultation with Lead Plaintiff's damages expert, provides a reasonable method for allocating the Net Settlement Amount among Class Members who submit valid claims based on damages they suffered on purchases of Schein common stock.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class-action claims. *See* Fed. R. Civ. P. 23(e). A class-action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

The Second Circuit has recognized that public policy favors the settlement of disputed

[3] The single objection received to date relates only to Lead Counsel's motion for attorneys' fees and expenses. Ex. 5. The deadline for filing of objections and receipt of requests for exclusion is August 26, 2020. Lead Plaintiff will address all requests for exclusion and any objections to the Settlement in its reply papers, which will be filed on September 9, 2020.

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.*, 2014 WL 2112136, at *2-3 (S.D.N.Y. May 20, 2014).

Rule 23(e)(2), as amended on December 1, 2018, provides that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

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

Fed. R. Civ. P. 23(e)(2). Historically, the Second Circuit has held that district courts should consider following factors set forth in *City of Detroit v. Grinnell Corp*. 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.

The Advisory Committee Notes to the 2018 amendments to the Federal Rules of Civil Procedure indicate that the four factors set forth in Rule 23(e)(2) are not intended to "displace"

any factor previously adopted by the Court of Appeals, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Advisory Committee Notes to 2018 Amendments.

Accordingly, Lead Plaintiff will discuss the fairness, reasonableness, and adequacy of the Settlement principally in relation to the factors set forth in Rule 23(e)(2), but will also discuss the application of relevant, non-duplicative *Grinnell* factors. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) ("The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors."). All of the Rule 23(e)(2) and applicable *Grinnell* factors strongly support approval of the Settlement here.

A. Lead Plaintiff and Lead Counsel Have Adequately Represented the Class

In determining whether to approve a class-action settlement, the court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A); *see In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *17 (E.D.N.Y. Dec. 16, 2019) ("Determination of adequacy typically 'entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation'") (citation omitted).

First, there is no antagonism or conflict between Lead Plaintiff and the proposed Class. Lead Plaintiff and the other Class Members all purchased or otherwise acquired Schein's common stock during the Class Period and were all allegedly damaged by the same false and misleading statements about Schein's business. If Lead Plaintiff proved its claims at trial, it would also prove the Class's claims. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013)

(the investor class "will prevail or fail in unison" because claims are based on common misrepresentations and omissions).

Moreover, Lead Plaintiff and Lead Counsel have adequately represented the Class in both their vigorous prosecution of the Action over two years and in the negotiation and achievement of the Settlement. In addition, Lead Counsel BLB&G is highly qualified and experienced in securities litigation, as set forth in its firm resume (*see* Ex. 4A-4 to the Harrod Declaration) and was able to successfully conduct the litigation against skilled opposing counsel. Accordingly, Lead Plaintiff and Lead Counsel have adequately represented the Class.

B. The Settlement Was Reached After Arm's-Length Negotiations with the Assistance of Experienced Mediators

In weighing approval of a class-action settlement, the Court must consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts have traditionally considered other related circumstances in determining the "procedural" fairness of a settlement, including (i) counsel's understanding of the strengths and weakness of the case based on factors such as "the stage of the proceedings and the amount of discovery completed,"[4] (ii) the absence of any indicia of collusion;[5] and (iii) the involvement of a mediator.[6] All of these circumstances strongly support the approval of the Settlement here.

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[4] *See Grinnell*, 495 F.2d at 463 (third factor); *see also In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015) ("the question is whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement"), *aff'd*, 674 F. App'x 37 (2d Cir. 2016).

[5] *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) ("the absence of any indication of collusion, the protracted settlement negotiations, the ability and experience of plaintiffs' counsel, [and] the extensive discovery preceding settlement . . . are important indicia of the propriety of settlement negotiations").

[6] *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure").

The Settlement was reached only after arm's-length negotiations between experienced counsel, conducted with the assistance of two highly respected mediators, Judge Weinstein (Ret.) and Jed D. Melnick, who are both experienced mediators of securities class actions and other complex litigation. *See* Declaration of Daniel H. Weinstein (Ex. 1), at ¶¶ 4, 6. The parties exchanged detailed written submissions concerning liability and damages, and engaged in two full-day sessions with the mediators. Ultimately, at the end of the second day, Judge Weinstein issued a mediator's recommendation that the parties settle the case for $35,000,000, which the parties accepted. *Id*. ¶ 10; Harrod Decl. ¶ 35.

The fact that the Settlement was reached following arm's-length negotiations between experienced counsel and with the assistance of experienced mediators supports a finding that Settlement is procedurally fair and without collusion. *See, e.g.*, *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) ("The participation of this highly qualified mediator [Mr. Melnick] strongly supports a finding that negotiations were conducted at arm's length and without collusion."); *In re FLAG Telecom Holdings, Ltd. Sec. Litig*., 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) ("The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation supervised by Judge Weinstein.").

As noted above, although formal discovery had not yet begun prior to the mediation, Lead Counsel had conducted an extensive investigation into the claims asserted before filing the Complaint by, among other things, reviewing SEC filings, analyst research reports, investor conference calls, press releases, media reports, documents from related litigation, and other public material, as well as documents obtained from the FTC; consulting with several experts; and contacting numerous potential witnesses. ¶¶ 21-24. Lead Counsel also performed extensive legal

(and factual) research in preparing the Complaint and the briefing in opposition to Defendants' motion to dismiss. ¶¶ 21, 29-31. After the motion to dismiss was partially denied, Defendants' motion for partial reconsideration was fully briefed by both parties. ¶¶ 38-40.

In addition, after the agreement in principle to settle was reached, Lead Plaintiff engaged in substantial discovery concerning the merits of the action, which included the review and analysis of 684,764 pages of relevant documents produced by Schein and interviews with Timothy J. Sullivan, the sole remaining officer defendant, and with Mark Mlotek, Schein's Executive Vice President and Chief Strategic Officer and a member of its Board of Directors. ¶¶ 54, 79, 84, 126. The documents reviewed and information obtained in this discovery confirmed Lead Plaintiff's conclusion that the proposed Settlement was fair and reasonable. ¶¶ 58, 102.

Thus, the conclusion of Lead Plaintiff and Lead Counsel that the Settlement is fair and reasonable and in the best interests of the Class strongly supports its approval. Further, Lead Plaintiff is a sophisticated institutional investor that took an active role in supervising this litigation, as envisioned by the PSLRA, and it has strongly endorsed the Settlement. *See* Silver Decl. at ¶¶ 2-7. 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.*, 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 Class is entitled to "great weight." *Shapiro v. JPMorgan Chase & Co.*, 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).

C. The Relief that the Settlement Provides for the Class is Adequate, Taking into Account the Costs and Risks of Further Litigation and All Other Relevant Factors

In determining whether a class action settlement is "fair, reasonable, and adequate," the Court must consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" as well as other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). This is generally the most important factor for the Court to consider in its analysis of the proposed settlement. *See Grinnell*, 495 F.2d at 455 ("The most important factor is the strength of the case for plaintiff on the merits, balanced against the amount offered in settlement.").[7]

"[I]n evaluating the settlement of a securities class action, federal courts 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *FLAG Telecom*, 2010 WL 4537550, at *15 (citation omitted). 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).

As discussed in detail in the Harrod Declaration and below, continued litigation of the Action presented a number of significant risks that Lead Plaintiff would be unable to establish liability, loss causation, or damages. ¶¶ 69-97. In addition, continuing the litigation through trial and appeals would impose substantial additional costs on the Class and would result in extended delays before any recovery could be achieved. ¶¶ 98-102. The Settlement, which provides a $35

[7] Indeed, this factor under Rule 23(e)(2)(C) essentially encompasses six of the nine factors of the traditional *Grinnell* analysis. *See Grinnell*, 495 F.2d at 463 ("(1) the complexity, expense and likely duration of the litigation; . . . (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; . . . (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") (citations omitted); *see also Payment Card*, 2019 WL 6875472, at *19.

million cash payment for the benefit of the Class, avoids those further costs and delays. Moreover, the Settlement is reasonable when considered in relation to the range of potential recoveries that might be obtained if Lead Plaintiff prevailed at trial, which was far from certain.

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

While Lead Plaintiff and Lead Counsel believe that the claims asserted against Defendants in the Action are meritorious, they recognize that this Action presented several substantial risks to establishing both liability and damages.

(a) Risks To Proving Liability

Motion to Reconsider. Lead Plaintiff would have faced substantial risks from Defendants' pending motion for partial reconsideration of the Court's ruling on Defendants' motion to dismiss. In partially denying Defendants' motion to dismiss, the Court held that Schein's scienter could be established by Defendant Sullivan's alleged knowledge of anticompetitive activities in the dental supplies market, and that Mr. Sullivan had sufficient control over Schein to be held liable as a controlling person for Schein's alleged primary securities law violations. ¶¶ 65-68. Defendants sought reconsideration of these holdings, contending (among other things) that Lead Plaintiff had failed to plead facts showing that Sullivan had participated in or controlled Schein's allegedly false and misleading statements and omissions. ¶ 65. While Lead Plaintiff opposed Defendants' motion and believes that it lacks merit, there was a risk that Defendants could have persuaded the Court to reconsider its rulings on the motion to dismiss. ¶ 66. Significantly, if Defendants had succeeded in convincing the Court that Sullivan's knowledge could not establish Schein's scienter, it necessarily would have led to a dismissal of the Section 10(b) claims, and thus, the entire case, since these claims serve as a predicate for the Section 20(a) control person claims. ¶ 68.

Falsity. Lead Plaintiff would also have faced challenges showing that Defendants'

statements were materially false. The core remaining allegations in this case were that Defendants made materially false and misleading statements during the Class Period about: (i) the competitive environment of Schein's North American Dental business; (ii) the sources of Schein's financial success; and (iii) the business risks Schein faced, including from the emergence of buying groups; and that Schein failed to make disclosures required by Item 303 of Regulation S-K, 17 C.F.R. §229.303. ¶ 72. Defendants would have argued that each of the challenged statements was factually true, and that Schein's disclosures satisfied Item 303's requirements. ¶ 73. Defendants likely would have argued that the truthfulness and material accuracy of their disclosures was confirmed by Schein's exoneration in the trial of the FTC action. ¶¶ 73-74. Defendants would also have continued arguing that the alleged misstatements in the Complaint were largely non-actionable statements of opinion or "puffery" or were not materially false or misleading in light of the fact that the buying groups that were the target of the allegedly anticompetitive conduct represented only a small portion of the Company's overall market. ¶¶ 75-76.

Further, Defendants were likely to continue to raise arguments based on the fact that allegations of anticompetitive conduct, both against Schein specifically and against several of its key competitors, were widely publicized before and during the Class Period. ¶ 77. Defendants were likely to argue that, in light of these widespread allegations, the alleged misstatements (which largely addressed more general issues of competition, business risk, and the reasons for Schein's positive results) could not have reasonably misled the market, and that reasonable investors would not have relied on them. *Id*. In further support of this argument, Defendants likely would have pointed to the fact that much of the evidence cited in the Complaint—including highly specific factual allegations concerning anticompetitive activities by Schein and others—was drawn from allegations that were concededly publicly available during the Class Period. *Id*. While Lead

Plaintiff defeated this "truth-on-the-market" argument in connection with Defendants' motion to dismiss, there was a significant risk that Defendants could have successfully reasserted this argument at summary judgment or trial or on appeal.

Scienter. Even if Lead Plaintiff succeeded in proving that Defendants' statements were actionably false, Lead Plaintiff would have faced additional challenges in proving that Defendants made the statements with the intent to mislead investors or were reckless in doing so. ¶¶ 81-87. As the Court is aware, the Complaint alleged several false and misleading statements made by Schein and Defendants Bergman and Paladino, but the Court dismissed Defendants Bergman and Paladino from the case on scienter grounds. The Court found scienter adequately pleaded as to Schein because Lead Plaintiff adequately pleaded (i) Defendant Sullivan's knowledge, and (ii) that his knowledge could be imputed to Schein, even though Defendant Sullivan was a non-speaker, by virtue of his senior role in managing the Company's day-to-day operations. ¶ 81. As discussed above, the question of imputing Defendant Sullivan's knowledge to Schein was the subject of Defendants' Reconsideration Motion. Even if Lead Plaintiff defeated the Reconsideration Motion, Defendants could have raised again their substantive arguments that Lead Plaintiff was required to establish Defendant Sullivan's participation in or responsibility for Schein's financial reporting in order for his knowledge to be imputed to Schein—and that, in any event, Lead Plaintiff would need to establish Sullivan's knowledge of alleged anticompetitive activities. ¶ 82.

The substantial due diligence discovery conducted by Lead Counsel confirmed that the risks presented by these arguments were significant. For example, some documents reviewed in the discovery supported Defendants' arguments that Schein had no blanket rule against negotiating with dental buying groups and that Sullivan was not directly involved in preparing Schein's public disclosures. ¶¶ 83-85. In short, it was far from certain that Lead Plaintiff would be able to prove

the falsity of Defendants' statements and Defendants' scienter through summary judgment and at trial.

(b) Risks To Proving Loss Causation and Damages

Even if Lead Plaintiff were able to prove falsity and scienter at trial, it still faced significant risks in proving loss causation and damages. Those issues played an important role in determining the reasonable value for the Settlement. ¶¶ 88-97.

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).

The Court has already dismissed Lead Plaintiff's allegations of loss causation as to the August 8, 2017 disclosure, and Defendants would likely have raised various arguments as to the two disclosures remaining in the case. First, Defendants would likely have argued that the corrective disclosures did not reveal new, material facts to the market concerning Schein's alleged anticompetitive conduct, because those facts were already well known, given that Schein was repeatedly accused of antitrust law violations before and during the Class Period. ¶¶ 93, 97.

Second, with respect to the November 6, 2017 corrective disclosure in the Complaint, Defendants would have argued that intraday stock pricing information demonstrated that Schein's stock price did not respond to the disclosure of two antitrust lawsuits against the Company, the only aspect of the corrective disclosure sustained by the Court, but rather declined in response to other Company news released earlier that day.[8] ¶ 92.

[8] The two lawsuits were mentioned in Schein's Form 10-Q filing, which was not filed until after 2:00 p.m. on November 6, 2017, so Defendants would argue that the drop in the stock price, which occurred earlier in the day, could not have resulted from any news about the two lawsuits, but must

Third, with respect to the February 12, 2018 disclosure of the FTC's filing of a complaint against Schein, the only other corrective disclosure remaining in the case, Defendants would likely have had a strong argument that the disclosure of a complaint is insufficient to reveal the truth about Defendants' alleged fraud—and the fact that Schein was exonerated after the FTC trial demonstrates the filing of the complaint did not reveal any relevant "truth" to the market. ¶ 95.

Fourth, Defendants would have had meaningful arguments that Lead Plaintiff and the Class would not be able to prove any damages in connection with the November 2017 disclosure, and that damages associated with the February 2018 disclosure would have been substantially reduced if the effects of confounding (non-fraud related) negative information about Schein were appropriately disaggregated. ¶¶ 89-97.

These disputed issues regarding damages and loss causation would have presented the prototypical "battle of the experts" at trial. Had the jury accepted some or all of Defendants' expert's views, damages would have been eliminated or significantly reduced. The Settlement eliminates those risks and provides a certain recovery for the Class. *See Facebook*, 2015 WL 6971424, at *5 ("[D]amages would be subject to a battle of the experts, with the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount Plaintiff's losses. Under such circumstances, a settlement is generally favored over continued litigation.") (citation omitted); *Veeco*, 2007 WL 4115809, at *9 ("a very lengthy and complex battle of the parties' experts likely would have ensued at trial, with unpredictable results.").

In short, these risks posed a real possibility that Lead Plaintiff and the Class would not be able to recover at all or would have recovered a lesser amount if the Action proceeded through

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have resulted from the earnings release that had been issued before the market opened (the allegations concerning which were dismissed by the Court).

summary judgment, trial, and appeals. In view of these risks, Lead Plaintiff and Lead Counsel respectfully submit that it is in the best interests of the Class to accept the immediate and substantial benefit conferred by the Settlement.

2. The Settlement Is Reasonable in Light of the Likely Recoverable Damages

Lead Plaintiff submits that the $35 million Settlement is also a very favorable result when considered in relation to the likely amount of damages that could realistically be established at trial and the risks of the litigation. Considering Defendants' arguments concerning damages and loss causation, Lead Counsel believes that the maximum likely damages to the Class are approximately $268 million—assuming, of course, Lead Plaintiff established liability, which was far from certain. ¶ 103. If Defendants succeeded on some or all of their other loss causation and damages arguments, damages would be reduced substantially below this amount. Accordingly, the Settlement represents approximately 13% of the realistic maximum recoverable damages that could be realistically established at trial. *Id*. And, even if Lead Plaintiff were successful at trial, Defendants could have challenged the damages of each large class member in post-trial proceedings, potentially further reducing any aggregate recovery. ¶ 100.

This level of recovery is above the norm is securities fraud class actions and supports approval of the Settlement. *See In re Canadian Superior Sec. Litig.*, 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011) (approving a settlement representing 8.5% of maximum damages, which the court noted "exceed[s] the average recovery in shareholder litigation"); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) ("the average settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses")..

3. The Costs and Delays of Continued Litigation Support Approval of the Settlement

The substantial costs and delays that would be required before any recovery could be obtained through litigation also strongly support approval of the Settlement. Courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks*, *Ltd*., 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007).

If the litigation had continued, Lead Plaintiff would have to prevail at several additional stages: first, on Defendants' motion for partial consideration of the motion to dismiss order; second, at class certification; third at summary judgment; and finally, at trial. Further, if Lead Plaintiff were to prevail at trial, it would also need to prevail on any appeal that would likely follow. This process would take years, and presented new risks at each stage. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 524, 533 (S.D.N.Y. 2011) (after a verdict for class plaintiff, district court granted judgment for defendants following change in law), *aff'd* 838 F.3d 223 (2d Cir. 2016). The Settlement avoids these risks and provides a substantial and certain benefit to the Class rather than the possibility of recovery after additional years of litigation.

4. All Other Factors Set Forth in Rule 23(e)(2)(C) Support Approval of the Settlement

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;" "the terms of any proposed award of attorney's fees, including timing of payment;" and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors also supports approval of the Settlement or is neutral and does not suggest any basis for inadequacy of the Settlement.

First, the procedures for processing Class Members' claims and distributing the proceeds of the Settlement to eligible claimants are well-established, effective methods that have been

widely used in securities class-action litigation. Here, the proceeds of the Settlement will be distributed to class members who submit eligible Claim Forms with required documentation to the Court-appointed Claims Administrator, A.B. Data, Ltd ("A.B. Data"). A.B. Data is an independent company with extensive experience handling the administration of securities class actions. A.B. Data will provide claimants with an opportunity to cure any deficiencies in their claims or request review of the denial of their claim by the Court, and will then mail or wire claimants their *pro rata* share of the Net Settlement Amount upon approval of the Court.[9] This type of claims processing is standard in securities class actions and has long been effective. Such claim filing and processing is necessary because neither Lead Plaintiff nor Schein possess the trading data for individual Class members that would otherwise allow for a "claims-free" process to distribute Settlement funds.

Second, the relief provided for the Class in the Settlement is also adequate when the terms of the proposed award of attorney's fees are taken into account. As discussed in the accompanying Fee Memorandum, the proposed attorneys' fees of 25% of the Settlement Fund, to be paid upon approval by the Court, are reasonable in light of the efforts of Lead Counsel and the risks in the litigation. Most importantly with respect to the Court's consideration of the fairness of the Settlement, is the fact that approval of attorneys' fees are entirely separate from approval of the Settlement, and neither Lead Plaintiff nor Lead Counsel may terminate the Settlement based on any ruling with respect to attorneys' fees. *See* Settlement Agreement § X.D.

Lastly, the amended Rule 23 asks the court to consider the fairness of the proposed settlement in light of any agreements required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). Here, the only such agreement (other than the Stipulation itself) is the

[9] The Settlement is not a claims-made settlement. If the Settlement is approved, Defendants will have no right to the return of any portion of Settlement based on the number or value of Claims submitted. *See* Settlement Agreement § III.B.7.

Parties' confidential Supplemental Agreement, which sets forth the conditions under which Defendants may terminate the Settlement if the requests for exclusion from the Class breach a quantitative threshold. *See* Settlement Agreement § XIV.C. "This type of agreement is a standard provision in securities class actions and has no negative impact on the fairness of the Settlement." *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *13 (S.D.N.Y. July 21, 2020).

D. The Settlement Treats Class Members Equitably Relative to Each Other

The proposed Settlement treats members of the Class equitably relative to one another. As discussed below in Part II, pursuant to the Plan of Allocation, eligible claimants approved for payment by the Court will receive their *pro rata* share of the recovery based on their purchases or acquisitions of Schein common stock during the Class Period. Lead Plaintiff will receive the same level of *pro rata* recovery as all other Class Members.

E. Additional *Grinnell* Factors

Two factors set forth in *Grinnell* that are not already encompassed in the discussion of the Rule 23(e)(2) factors are Defendants' ability to withstand a greater judgment and the reaction of the Class to the proposed Settlement

Ability to Withstand a Greater Judgment. Lead Plaintiff believes that Schein would be capable of sustaining a judgment larger than the Settlement. However, in light of the other factors, including the substantial risks of the litigation, Defendants' ability to pay a larger amount does not preclude a finding that the Settlement is fair. *See Payment Card*, 330 F.R.D. at 47 (defendants' ability to withstand a greater judgment "does not necessarily preclude a finding that the settlement is fair"); *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012) (same).

Reaction of the Class. The reaction of the Class is another important factor to be weighed in considering the Settlement's fairness and adequacy. *See, e.g.*, *Payment Card*, 2019 WL 6875472, at *16; *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d

259, 266 (S.D.N.Y. 2012). A.B. Data began mailing copies of the Notice and Claim Form (the "Notice Packet") to potential Class Members and nominees on May 29, 2020. *See* Declaration of Eric J. Miller (Ex. 3), at ¶¶ 3-5. As of August 11, 2020, A.B. Data had sent a total of 179,750 copies of the Notice Packet. *See id.* ¶ 8. The Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to opt out of the Class or object to any aspect of the Settlement, and the procedure for submitting Claim Forms.

While the deadline set by the Court for 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 just two requests for exclusion have been received. ¶ 110; Miller Decl. ¶ 12.[10]

* * *

In sum, all of factors to be considered under Rule 23(e)(2) support a finding that the Settlement is fair, reasonable, and adequate.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012); *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. In determining whether a plan of allocation is reasonable, courts give great weight to the opinion of experienced counsel. *See In re Giant Interactive*, 279 F.R.D.

[10] The deadline for submitting objections and requesting exclusion from the Class is August 26, 2020. As provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers by September 9, 2020 addressing the requests for exclusion and any objections that may be received.

151, 163 (S.D.N.Y. 2011).

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 Class Members who submit valid Claim Forms.

In developing the Plan of Allocation, Lead Plaintiff's expert calculated the amount of estimated artificial inflation in the price of Schein common stock which allegedly was proximately caused by Defendants' alleged false and misleading statements by considering the price changes in Schein common stock in reaction to the alleged corrective disclosures, adjusting for price changes attributable to market and industry factors and based on developments in the litigation.[11]

Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of Schein common stock during the Class Period that is listed in the Claim Form and for which adequate documentation is provided. Notice ¶ 55. In general, the Recognized Loss Amount 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, whichever is less. *Id.* ¶ 54. Claimants who purchased and sold all their Schein common stock before November 5, 2017 (or who purchased and sold all their stock between November 5, 2017 and February 12, 2018) will have no Recognized Loss Amount under the Plan of Allocation for those transactions because any loss suffered on those sales would not be the result of the alleged misstatements. *Id.* The Plan of Allocation also limits Claimants'

[11] Specifically, the Plan of Allocation does not consider price changes following the August 8, 2017 disclosures alleged in the Complaint, because the Court dismissed claims relating to that date, and the amount of artificial inflation considered to have been removed from the price of Schein common stock on November 6, 2017 has been reduced by 90% to reflect the Court's partial dismissal of the loss-causation allegations related to that alleged corrective disclosure and other difficulties that the Class would face in establishing that the alleged misstatements were responsible for the abnormal price decline on that date. *See* Notice ¶ 53.

recovery based on whether they had an overall market loss in their transactions in Schein common stock during the relevant time period. *Id*. ¶¶ 66-67.

Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as result of the conduct alleged in the Action. ¶¶ 112, 119. Moreover, as noted above, as of August 11, 2020, more than 179,000 copies of the Notice, which contains the Plan of Allocation, and advises Class Members of their right to object to the Plan of Allocation, had been sent to potential Class Members and their nominees. *See* Miller Decl. ¶ 8. To date, no objections to the proposed Plan of Allocation have been received. *See* Harrod Decl. ¶ 110.

III. THE CLASS SHOULD BE CERTIFIED FOR PURPOSES OF THE SETTLEMENT

In connection with the Settlement, the Parties have stipulated to the certification of the Class for purposes of the Settlement. As set forth in detail in Lead Plaintiff's motion for preliminary approval of the Settlement, the Class satisfies all the requirements of Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. *See* ECF No. 71 at 17-23. None of the facts regarding certification of the Class have changed since Lead Plaintiff submitted its motion for preliminary approval, and there has been no objection to certification. Accordingly, Lead Plaintiff respectfully request that the Court certify the Class under Rules 23(a) and (b)(3) for the reasons set forth in its earlier motion. See ECF No. 71 at 17-23.

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

The Notice to the 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). 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 Class satisfied these standards. As discussed in the Lead Plaintiff's brief in support of preliminary approval of the Settlement, the Notice includes all the information required by the PSLRA, the Federal Rules of Civil Procedure, and local rules. *See* ECF No. 71 at 23-24.

A.B. Data began mailing copies of the Notice Packet to potential Class Members on May 29, 2020. *See* Miller Decl. ¶¶ 3-5. As of August 11, 2020, A.B. Data has disseminated over 179,000 copies of the Notice Packet to potential Class Members and nominees. *See id*. ¶ 8. In addition, Lead Counsel caused the Summary Notice to be published in *The Wall Street Journal, Investor's Business Daily* and transmitted over the *PR Newswire*. *See id*. ¶ 9. Copies of the Notice, Claim Form, and Stipulation were made available on the settlement website maintained by A.B. Data beginning on May 29, 2020, and copies of the Notice and Claim Form were also made available on Lead Counsel's website. *See* Miller Decl. ¶ 11; Harrod Decl. ¶ 109. This combination of individual mail to all 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.*, *In re Advanced Battery Techs.*, 298 F.R.D. 171, 182-83 (S.D.N.Y. 2014).

CONCLUSION

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

Dated: August 12, 2020

Respectfully submitted,

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