UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BIOSCRIP, INC. SECURITIES LITIGATION	Civil Action No. 13-cv-6922-AJN

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

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Pursuant to Fed. R. Civ. P. 23(e), Lead Plaintiff Fresno County Employees' Retirement Association ("Lead Plaintiff"), for 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 this securities class action (the "Action") and for approval of the proposed plan of allocation of the Settlement proceeds (the "Plan of Allocation").[1]

INTRODUCTION

Subject to Court approval, Lead Plaintiff has agreed to settle all claims in this Action in exchange for a cash payment of $10.9 million, which has been deposited into an escrow account. Lead Plaintiff respectfully submits that the proposed Settlement is very favorable for the Settlement Class and satisfies the standards for final approval under Rule 23. The Settlement is especially beneficial to the Settlement Class given the many risks in this litigation with respect to liability and damages, as well as the particularly significant risk faced by Lead Plaintiff in recovering from Defendants due to BioScrip's weak financial condition and limited amount of available insurance. The $10.9 million Settlement represents approximately 17%–28% of the Settlement Class's estimated maximum recoverable damages and compares favorably with the Government's $15 million settlement with BioScrip in January 2014.

At the time the agreement to settle was reached, Lead Plaintiff and Lead Counsel had a well-developed understanding of this case's strengths and weaknesses. Indeed, Lead Counsel had,

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[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated December 18, 2015 (the "Settlement Stipulation") (ECF No. 104-5) or in the accompanying Declaration of Hannah G. Ross (the "Ross Declaration" or "Ross Decl."). The Ross Declaration is an integral part of this submission, and for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; the risks and uncertainties of continued litigation; and the terms of the Plan of Allocation for the Settlement proceeds. All citations to "¶" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and Exhibits to, the Ross Declaration.

among other things, (i) conducted a wide-ranging investigation concerning the claims asserted in the Action, which included 72 interviews with former BioScrip employees and employees of brokers for BioScrip, a comprehensive review of SEC filings, press releases, news reports, and other public information, and consultation with damages and industry experts; (ii) researched and drafted the detailed 110-page consolidated complaint, filed with the Court on February 19, 2014 (the "Complaint"); (iii) briefed Defendants' motions to dismiss the Complaint and for reconsideration of the Court's ruling on the motions to dismiss; and (iv) engaged in discovery, including exchanging initial disclosures and reviewing and analyzing approximately 800,000 pages of documents produced by Defendants. ¶¶19–41. Lead Plaintiff's and Lead Counsel's understanding of the case's strengths and weaknesses was further enhanced by an intensive mediation process overseen by former U.S. District Judge Layn Phillips, which involved the exchange of written submissions concerning liability, damages, and loss causation, a full-day formal mediation session, and additional arm's-length settlement negotiations over the course of several weeks that culminated in a mediator's recommendation by Judge Phillips that the case be settled for $10.9 million, a recommendation that was accepted by the Parties. ¶¶42–46.

The Settlement is a favorable result in light of the substantial risks of continued litigation. As described in further detail in the Ross Declaration, Lead Plaintiff alleged in the Action that Defendants violated the securities laws by making materially false and misleading statements and failing to disclose material facts regarding two separate deceptive schemes relating to BioScrip's business. First, Lead Plaintiff alleged—and the Court sustained—claims that Defendants made false and misleading statements relating to BioScrip's sale of the pharmaceutical drug Exjade in violation of the Securities Act of 1933 (the "'33 Act") and the Securities Exchange Act of 1934 (the "'34 Act") (the "Exjade Scheme"). Second, Lead Plaintiff alleged—and the Court sustained—

claims that Defendants made false and misleading statements about BioScrip's pharmacy benefit management ("PBM") business segment in connection with a public offering of BioScrip common stock in April 2013 in violation of the '33 Act (the "PBM Scheme").

While Lead Plaintiff believes that the claims asserted against Defendants are meritorious, it recognizes that the Action presented a number of significant risks to establishing both liability and damages. As detailed in the Ross Declaration and discussed further below, Defendants had serious arguments with respect to liability, including numerous arguments that they did not make materially misleading misstatements or act with scienter. ¶¶50–54. Defendants also had significant arguments regarding loss causation and damages. For example, Defendants would have continued to argue that the declines in BioScrip's stock price were not attributable to corrections of the alleged misstatements and omissions concerning the Exjade and PBM Schemes, but rather were the result of other negative news concerning the Company. Also, even if Lead Plaintiff were able to establish that some portion of the price declines was caused by the alleged corrective disclosures, Defendants would have continued to argue that damages in this case were minimal. ¶¶55–60.

Furthermore, there are serious ability-to-pay issues in this case. Even if Lead Plaintiff succeeded at trial in proving liability, it faced a real risk that Defendants would be unable to satisfy a judgment because of BioScrip's weak financial condition and the limited amount of available directors' and officers' ("D&O") insurance. Indeed, as discussed below, the Government's settlement agreement with BioScrip confirms the Company's weakened financial state and ability-to-pay issues. Further, the D&O insurance would have continued wasting if this case had not been settled. ¶¶61–65. Absent the Settlement, there would have been further costly fact and expert discovery, additional contested motions, a trial, post-trial motion practice, and likely ensuing

appeals. ¶66. The Settlement avoids those risks while providing a substantial, certain, and immediate benefit to the Settlement Class in the form of the $10.9 million cash payment.

In light of all of these considerations, Lead Plaintiff respectfully submits that the Settlement warrants final approval by the Court. In addition, Lead Plaintiff believes that the Plan of Allocation is a fair and reasonable method for allocating the Net Settlement Fund to eligible Settlement Class Members and also warrants the Court's approval. Finally, Lead Plaintiff respectfully requests that the Court finally certify the Settlement Class for purposes of the Settlement.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) provides that a class-action settlement must be presented to the Court for approval, and 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, 116–17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context.").[2] Moreover, in ruling on final approval of a class settlement, "the Court should consider both the process by which the settlement agreement was negotiated and the substantive fairness of the agreed-upon terms in light of the circumstances of the litigation." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 330 (E.D.N.Y. 2010); *see also Wal-Mart*, 396 F.3d at 116; *In re Citigroup Inc. Sec. Litig.*, No. 09 Civ 7359, 2014 WL 2112136, at *2–3 (S.D.N.Y. May 20, 2014).

[2] Unless otherwise noted, all emphasis is added and internal quotation marks and citations are omitted in quotations.

A. The Settlement Is Presumptively Fair, Reasonable, and Adequate

A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart*, 396 F.3d at 116; *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) ("[A] strong presumption of fairness attaches to a class action settlement reached in arm's length negotiations among able counsel.").

Here, the Settlement is the result of arm's-length negotiations between well-informed, experienced counsel under the auspices of an extremely experienced mediator. Specifically, following the Court's decisions on Defendants' motions to dismiss and for reconsideration and the start of discovery, the Parties explored the possibility of settlement through mediation and selected Judge Phillips, a highly experienced mediator of securities class actions, as mediator. ¶42. As part of the mediation process facilitated by Judge Phillips, the Parties exchanged opening and reply mediation briefs concerning liability and damages, which included damages analyses conducted by the Parties' respective experts. ¶¶43–44. The Parties also responded to a series of detailed confidential questions posed by Judge Phillips in advance of the formal mediation session. ¶43.

On September 25, 2015, the Parties engaged in the full-day formal mediation session. ¶46. Counsel for the Parties and Judge Phillips extensively discussed the merits of the case, the risks that each side faced at summary judgment and trial, loss causation, and damages. The issues over which counsel argued included (i) whether Defendants made materially false and misleading statements; (ii) whether the facts supported any inference of Defendants' scienter; (iii) loss causation, including the extent of confounding information on the alleged corrective-disclosure dates; and (iv) the appropriate measures of damages. *Id*. However, despite their best efforts, the Parties were unable to reach an agreement to settle the Action at the mediation. *Id*.

Following the formal mediation session, Judge Phillips continued to work with the Parties towards a resolution of the Action. After additional arm's-length settlement negotiations conducted over the course of many weeks, Judge Phillips made a mediator's recommendation that the Action be settled for $10.9 million, which the Parties accepted. ¶46.

The extensive, arm's-length settlement negotiations and the involvement of an experienced mediator support the conclusion that the Settlement is presumptively fair, reasonable, and adequate and that it was achieved free of collusion. *See 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"); *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding a settlement fair where the parties engaged in "arm's length negotiations," including mediation before "retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *In re Giant Interactive Grp. Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (settlement was presumptively fair where it was the product of "arms-length negotiation" facilitated by Judge Phillips, "a respected mediator").

Moreover, the Parties and their counsel were knowledgeable about the case's strengths and weaknesses before agreeing to settle. Lead Plaintiff had, among other things, made an extensive investigation of its claims, which included 72 interviews with former BioScrip employees and employees of brokers for BioScrip's PBM business and a thorough review of publicly available information about BioScrip; prepared the detailed Complaint and briefing in opposition to Defendants' motions to dismiss and for reconsideration; consulted a damages expert and an expert on the PBM industry; reviewed and analyzed approximately 800,000 pages of documents produced by Defendants; and had the benefit of in-depth discussions and review of Defendants' mediation

briefs and damages analysis. ¶¶19-46. The knowledge gleaned from the litigation and mediation and Lead Counsel's substantial experience prosecuting complex securities class actions further strengthen the presumption that the Settlement is fair and reasonable. *See D'Amato*, 236 F.3d at 85 (presumption of fairness applies where "the settlement resulted from arm's-length negotiations and . . . plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests"); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) ("[G]reat weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.").

Finally, Lead Plaintiff, a sophisticated institutional investor, played an active role in the litigation and supports the Settlement. *See* Ex. 4. Lead Plaintiff closely monitored the litigation, was knowledgeable about the risks faced in this case, and provided input during the mediation process. 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, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). Accordingly, the Settlement is entitled to a strong presumption of fairness.

B. Application of the *Grinnell* Factors Demonstrates That The Settlement Is Substantively Fair, Reasonable, And Adequate

In *City of Detroit v. Grinnell Corporation*, the Second Circuit identified nine factors that courts should consider when determining whether to finally approve a 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), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). "[N]ot every factor must weigh in favor of settlement[;] rather [a] court should consider the totality of these factors in light of the particular circumstances." *IMAX*, 283 F.R.D. at 189. Additionally, in reviewing 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, 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007). The Settlement merits approval under *Grinnell*.

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

"The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). "[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *Citigroup*, 296 F.R.D. at 155. When applying this factor to "the settlement of a securities class action, federal courts . . . have long recognized that such litigation is notably difficult and notoriously uncertain." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02 CV 3400, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010). Courts also acknowledge 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). This case was no exception.

Achieving a litigated verdict for Lead Plaintiff and the Settlement Class would have required additional, substantial expenditures of time and money, and there would still be a significant risk that the Settlement Class would obtain a result far less beneficial than the one provided by the Settlement. As discussed in the Ross Declaration, at the time the Settlement was

reached Lead Plaintiff had already prevailed (in part) on the motions to dismiss, and fact discovery was ongoing. If not for the Settlement, Lead Counsel would have expended sizeable amounts of time and money conducting further factual discovery, expert discovery, motion practice (including expected motions for class certification and summary judgment and *Daubert* motions), and trial. Even if Lead Plaintiff could recover an equally large judgment after a trial—which was far from certain given the risks discussed below—the additional delay through post-trial motions and appeals could deny the Settlement Class any recovery for years, further reducing its value. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

The $10.9 million all-cash Settlement at this juncture results in an immediate and substantial recovery without the considerable risk, expense, and delay of continued litigation, a trial, and likely appeals. Thus, Lead Plaintiff respectfully submits that the Court should find that this factor weighs heavily in favor of the proposed Settlement. *See Strougo*, 258 F. Supp. 2d at 258 ("[I]t is beyond cavil that continued litigation in this multi-district securities class action would be complex, lengthy, and expensive, with no guarantee of recovery by the class members.").

2. The Reaction of the Settlement Class to the Settlement to Date

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

In accordance with the Preliminary Approval Order (ECF No. 106), the Court-appointed Claims Administrator, A.B. Data, Ltd., began mailing copies of the Notice and Claim Form (together, the "Notice Packet") on March 11, 2016. *See* Ex. 3, ¶¶3–5. As of May 5, 2016, A.B. Data has disseminated a total of 31,155 Notice Packets to potential members of the Settlement Class and nominees. *Id*. ¶8. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on March 24, 2016. *Id*. ¶9. The Notice contains, among other things, a description of the Action and the Settlement and information about Settlement Class Members' rights to participate in the Settlement by submitting a Claim Form, to object to the Settlement, the Plan of Allocation, and Lead Counsel's motion for attorneys' fees and expenses, or to exclude themselves from the Settlement Class. While the deadline set by the Court for members of the Settlement Class to object to the Settlement or exclude themselves from the Settlement Class has not yet passed, to date, no objections and only one request for exclusion have been received. *Id*. ¶12; ¶75. Thus, the Settlement Class's reaction to date also supports approving the Settlement.[3] *See Wal-Mart Stores,* 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

3. The Substantial Amount of Discovery Completed Supports Approval of the Settlement

When courts "look . . . to the stage of the proceedings and the amount of discovery completed," they "focus[] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014); *see also*

[3] The deadline for submitting objections and requesting exclusion is May 23, 2016 (21 calendar days before the June 13 settlement hearing). As provided in the Preliminary Approval Order, Lead Counsel will file reply papers on or before May 30, 2016 that will address the requests for exclusion and objections received. *See* ECF No. 106.

Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982); *Bear Stearns*, 909 F. Supp. 2d at 267 ("In considering this factor, 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.").

When the Parties agreed to the Settlement, this litigation had reached a stage where Lead Plaintiff and Lead Counsel thoroughly understood the strengths and weaknesses of the claims and defenses asserted and could make informed appraisals regarding the chances of success. As noted above and in the Ross Declaration, this case was settled after more than two years of hard-fought litigation. Lead Counsel spent significant time and resources analyzing and litigating the legal and factual issues in the Action and were well-informed with respect to the core issues of this case, as a result of, among other things, its (i) extensive investigation into the claims asserted in the Action, including the review of voluminous publicly available information and interviews with numerous former BioScrip employees; (ii) preparation of the detailed 110-page Complaint; (iii) opposition to the motions to dismiss and the motion for reconsideration filed by Defendants; (v) review and analysis of approximately 800,000 pages of documents produced by Defendants in fact discovery; and (vi) extensive work with multiple experts on the issues germane to the litigation. ¶¶19–41. In addition, before reaching the agreement to settle, Lead Counsel had the benefit of an extensive mediation process through which it gained additional knowledge regarding the defenses to the claims asserted in the Action, which provided counsel with a better understanding of the significant risks to establishing both liability and damages in this case. ¶¶42–46.

In light of the extensive amount of information obtained and analyzed by Lead Counsel, Lead Plaintiff and Lead Counsel clearly possessed sufficient information to understand the

strengths and weaknesses of the Action and were well-positioned to negotiate the Settlement. Consequently, this factor strongly supports final approval of the Settlement. Similarly, in a securities class action where Lead Counsel reviewed and analyzed approximately one million pages of documents produced by defendants and third parties, Judge Forrest noted in finally approving the $15.25 million settlement that "there was significant work done in this case by all parties, including very active motion practice, lots of documents." *McKenna v. Smart Techs., Inc.*, No. 11 CV 7673, Tr. at 7–8, 41 (S.D.N.Y. Sept. 17, 2013), ECF No. 201 (Ex. 7). Indeed, courts find that this factor supports approval of settlements where counsel have adequate information from informal investigations even without conducting substantial merits discovery, as Lead Counsel did here. *See Advanced Battery Techs.*, 298 F.R.D. at 177 (finding that even where "no merits discovery occurred," counsel that had conducted its own investigation, engaged in detailed briefing, and conducted targeted confirmatory discovery was "knowledgeable with respect to possible outcomes and risks in this matter and, thus, able to recommend the Settlement"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002) (same).

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. This analysis involves weighing the risks of continued litigation against "the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004). In so doing, the Court need not "decide the merits of the case[,] resolve unsettled legal questions," *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981), or "foresee with absolute certainty the outcome of the case." *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331, 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014).

While Lead Counsel believe that Lead Plaintiff's claims are meritorious, they also recognize that they faced substantial obstacles to proving liability and establishing loss causation and damages. When compared to the certainty of the significant recovery achieved by the Settlement, these risks militated against further litigation, and informed Lead Plaintiff's and Lead Counsel's belief that the Settlement is fair, reasonable, and adequate.

(a) Risks of Establishing Liability

Defendants here had strong defenses to liability. In particular, Lead Plaintiff faced significant challenges in proving that Defendants made materially misleading statements or acted with scienter in the Exjade Scheme or made materially misleading statements in the PBM Scheme.

First, proving liability with respect to the Exjade Scheme was fraught with risk. At the motion-to-dismiss stage, Defendants strenuously argued that none of their alleged misstatements regarding the Exjade Scheme were materially misleading. Even though the Court sustained the Complaint's Exjade claims, it noted that Lead Plaintiff would have a more difficult time proving the Exjade Scheme at summary judgment and trial. In particular, although the Government's settlement—which related only to the Exjade Scheme, not the PBM Scheme—included factual admissions by BioScrip that it received performance rebates from Novartis for selling Exjade, it did not include any admission of wrongdoing, and BioScrip did not admit that it made false statements or any of the other elements of Lead Plaintiff's securities-law claims. To the contrary, the Government's settlement stipulation with BioScrip stated that the Government first notified BioScrip of possible civil claims against the Company on September 11, 2013 (after the last alleged Exjade-related false statements in this Action), a fact that the Court noted was a "significant consideration" that "may very well seriously undermine" Lead Plaintiff's allegation that Defendants' legal-compliance statements were false or misleading. *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 731 (S.D.N.Y. 2015).

Thus, this was not a case where private securities plaintiffs could rely on a Government action for proof of their claims; instead, the Government's statements in its settlement risked undermining Lead Plaintiff's claims. And Defendants had other arguments that their statements were not materially false or misleading. For example, Defendants argued that any misrepresentations or omissions about the Exjade Scheme were immaterial because BioScrip had sold the specialty-pharmacy business that distributed Exjade in May 2012, six months before the Government began to investigate that business and 16 months before the Government first told BioScrip that it was contemplating civil claims against the Company. Then when BioScrip announced in January 2013 that it had reached a settlement with the Government, its stock price actually increased. Thus, Defendants would have had a substantial argument that the Exjade Scheme was immaterial because, as several securities analysts noted when the investigation was disclosed, it involved a long-divested business, did not reveal any problems in BioScrip's ongoing business, and would not affect the Company's future earnings. While Lead Plaintiff would have argued that the Exjade Scheme was material because it jeopardized the Company's ongoing participation in Medicare and Medicaid, there would have been no assurance of success with that argument (and indeed, BioScrip was not removed from those programs).

If Lead Plaintiff were able to overcome these risks and prove material falsity, it faced significant additional challenges in proving scienter. It is undisputed that Defendants disclosed the Government's Exjade investigation promptly after the Government first informed BioScrip in September 2013 that it was contemplating civil claims against the Company. While Lead Plaintiff would have argued (and the Court accepted for purposes of the motions to dismiss) that BioScrip was on notice of the investigation's seriousness much earlier, when it received a Civil Investigative Demand in October 2012, that argument might not have prevailed at summary judgment or trial.

Moreover, just as the Court observed that the timing of the Government's notice to BioScrip of the possible charges might "seriously undermine" Lead Plaintiff's allegations about the falsity of Defendants' legal-compliance statements, that timing could have undermined Lead Plaintiff's scienter arguments. *BioScrip*, 2015 WL 1501620, at *14. Defendants also challenged scienter because there was no large insider selling, admissions, executive terminations, or witnesses claiming that the Individual Defendants knew the Company was a target of the investigation.

Second, proving liability with respect to the PBM Scheme was also highly risky. Defendants would have had a substantial argument that the PBM Scheme was immaterial because they had long disclosed that the PBM segment was a non-core, non-growth business that the Company was contemplating divesting to fund investments in other, growing businesses. Furthermore, the lost PBM client and reduced broker spending that Lead Plaintiff alleged were not adequately disclosed accounted for only approximately 5% of BioScrip's revenues for the relevant quarter—just at the edge of a commonly used "rule of thumb" for materiality. Lead Plaintiff would have argued that the PBM segment provided a material portion of BioScrip's revenues (approximately 17% in 2012), but again, that argument might not have prevailed.

Thus, although Lead Plaintiff was successful in defeating Defendants' motion to dismiss the Complaint with respect to certain of the alleged misstatements, and believed that the evidence it had obtained in discovery and the controlling case law supported those claims, there was a risk that the Court or a jury would conclude otherwise. Had this been the case, Lead Plaintiff and the Settlement Class would have recovered nothing.

(b) Risks of Establishing Loss Causation and Damages

Lead Plaintiff also faced substantial risk in proving the existence and the amount of the Settlement Class's damages. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345–46 (2005) (holding that plaintiffs bear the burden of proving "that the defendant's misrepresentations caused

the loss for which the plaintiff seeks to recover"). Lead Plaintiff ultimately would have had to prove (through expert testimony) that corrections of the alleged misstatements and omissions concerning the Exjade and PMB Schemes proximately caused the declines in BioScrip's stock price, and that other negative information released to and absorbed by the market played little or no role in the price declines. *See Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 282 (S.D.N.Y. 2012) ("[a] decline in stock price following a public announcement of 'bad news' does not, by itself, demonstrate loss causation").

This would not be an easy task. Defendants have made, and would have continued to make, credible arguments disputing Lead Plaintiff's loss causation and damages theories concerning each of the four days in 2013 when there were relevant declines in BioScrip's stock price—August 8, September 23, September 24, and November 7. In particular, the August 8 drop was in response to disclosures concerning the PBM Scheme, for which only Securities Act claims survived Defendants' motions to dismiss, and the closing price on August 8 was above the April 2013 offering price, such that Defendants could argue that there were no statutory damages. The September 23 and 24 drops followed the Company's September 23 disclosure of possible Exjade-related civil charges, and Defendants argued that there was no new news on September 24. Thus, they argued that there were no recoverable damages on September 24 because "a recharacterization of previously disclosed facts cannot qualify as a corrective disclosure." *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 552 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 501 (2d Cir. 2010). As for the November 7 drop, Defendants argued that it gave rise to no Securities Act damages because statutory damages under that Act were capped as of the date when this Action was originally filed—September 30, 2013—and that any Exchange Act damages related to that drop could be at

most—and likely much less than—$15 million, the amount of BioScrip's Exjade-related reserve announced that day.

Moreover, in complex securities cases such as this, it is axiomatic that both Lead Plaintiff and Defendants would rely on expert testimony to assist the jury in determining damages at trial. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 576-78 (2d Cir. 1982). Although Lead Plaintiff would have been able to present a cogent expert's view establishing loss causation and damages, there is little doubt that Defendants would have been able to present a well-qualified expert who would opine against a finding of loss causation with respect to most or all of the price declines. Lead Plaintiff could not be certain which expert's view would be credited by the jury and who would prevail at trial in this "battle of the experts." Had Defendants' damages and loss-causation arguments been accepted, damages in this case could have been greatly reduced or even eliminated. *See In re Bear Stearns*, 909 F. Supp. 2d at 267 ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured."); *FLAG Telecom*, 2010 WL 4537550, at *18 ("The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *Maley*, 186 F. Supp. 2d at 365 (there was a risk that a "jury could be swayed by experts for the Defendants, who would minimize the amount of Plaintiffs' losses").

For all these reasons, this factor weighs heavily in favor of approving the Settlement.

5. The Ability of Defendants to Withstand a Greater Judgment

Even if Lead Plaintiff overcame the significant risks described above and was successful at trial, it faced the very real risk that Defendants would be unable to satisfy any judgment obtained due to BioScrip's weak financial condition and the limited amount of available insurance.

In January 2014, BioScrip settled the governmental enforcement action concerning the alleged Exjade kickback scheme, which involved tens of millions of dollars of purportedly

fraudulent Medicare and Medicaid reimbursement claims, for $15 million. ¶62. In announcing this settlement, the Government stated that this was the most BioScrip could afford to pay. *Id*. Specifically, in the Government's settlement stipulation with BioScrip, the parties stated that "BioScrip has submitted records and information regarding its financial circumstances, and has demonstrated to the United States that BioScrip lacks the financial wherewithal to pay certain damages and penalties sought by the United States . . . ." Ex. 2, at 2.

Since it settled with the Government, BioScrip's financial condition has only worsened. The Company's Form 10-Q for the second quarter of 2015 (ended June 30, 2015—the most recent quarterly report that was available when the Parties agreed in principle on the Settlement) revealed that the Company had cash and cash equivalents of only $1.2 million, long-term debt of over $418 million, and a stockholders' deficit of $43.3 million. ¶63. Also, in the second quarter of 2015, the Company had a net loss of $244.8 million, and its stock was trading at less than $2 per share at the time that the Parties' accepted the mediator's recommendation to settle the Action. *Id*.[4]

In addition, while the Underwriter Defendants are presumably able to pay any judgment against them, they can only be held liable for the claims based on the two offerings under the Securities Act, and those claims account for a minority of the Settlement Class's damages.

Thus, the only significant source for a cash recovery was the Company's limited D&O insurance coverage, which was a wasting asset that had already been depleted by defense costs in this and other pending litigation. Indeed, had the Action proceeded through trial and appeals, this insurance would likely have been fully exhausted. Instead of risking the loss of the available insurance, as would most likely be the case if the Action were not settled, Lead Plaintiff has

[4] As of March 31, 2016, the date of its most recent public financial statements, BioScrip had cash and cash equivalents of $8.1 million, long-term debt of $391.7 million, a stockholders' deficit of $91.5 million, and a quarterly net loss of $9.5 million. ¶63, n. 5.

achieved an immediate and substantial recovery in the form of the $10.9 million Settlement, without the considerable risk, expense, and delay of continued litigation. Accordingly, this factor strongly supports approval of the Settlement.

6. 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

Courts commonly analyze the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. In doing so, courts "consider[] and weigh[] 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." *Id.* at 462. This is not a "mathematical equation yielding a particularized sum." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11 CV 05669, 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Instead, "there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also Shapiro*, 2014 WL 1224666, at *11 (settlement fund must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case").

Lead Plaintiff submits that the Settlement is well within the range of reasonableness in light of the possible recovery and all the risks of litigation. Had Lead Plaintiff overcome all the obstacles noted above to proving liability and loss causation, there would still have been a strong possibility, if not probability, that the Defendants could successfully challenge Lead Plaintiff's damages theories for some of the relevant stock drops, as discussed above. Based on Defendants' many credible challenges to Lead Plaintiff's damages theories and on discussions with Lead Plaintiff's financial expert, Lead Plaintiff estimates the Settlement Class's maximum recoverable damages at approximately $39 to $64 million. ¶60. Under that realistic scenario, the $10.9 million Settlement

represents approximately 17%-28% of the Settlement Class's maximum damages. This is a substantial percentage recovery. *Id.*

According to Cornerstone Research, the median settlement in all securities class actions from 2006 to 2015 was approximately 1.8%–2.9% of estimated damages, and the median settlement in securities class actions during those years with estimated damages less than $50 million was 11.4% of estimated damages.[5] *See also In re Giant Interactive Grp, Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("the average settlement in securities class actions ranges from 3% to 7% of the class' total estimated losses"); *Kurzweil v. Philip Morris Cos.*, No. 94 Civ. 2373,1999 WL 1076105, at *2 (S.D.N.Y. Nov. 30, 1999) ("independent research discloses that recoveries in securities class actions tend to fall in the 7% to 15% range").

As noted above, the $10.9 million Settlement Amount also compares favorably with the Government's $15 million settlement with BioScrip.

Finally, as discussed above, if a jury or the Court had credited even some of Defendants' arguments with respect to liability, the Settlement Class might have recovered nothing. Given these risks, the Settlement is an extremely favorable outcome for the Class. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132, 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014) (approving $15 million settlement that represented "a recovery in the range of approximately 9.2% to 21% of estimated damages"), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *In re Giant*, 279 F.R.D. at 162 (finding that settlement representing recovery of approximately 16.5% of class's maximum provable damages "falls comfortably within the range of the reasonable"); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 2743675, at *12 (E.D.N.Y. Sept. 18,

[5] *See* Cornerstone Research, "Securities Class Action Settlements—2015 Review and Analysis," at 8 – 9 (Ex. 1).

2007) (approving $20 million settlement representing 10% of maximum damages); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (finding settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class action securities litigations").

In sum, the Settlement is fair, reasonable, and adequate under the *Grinnell* factors.

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

A plan for allocating settlement proceeds should be approved if it is fair and reasonable. *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." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-cv-8557, 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014); *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 Hi-Crush Partners*, 2014 WL 7323417, at *10; *IMAX*, 283 F.R.D. at 192. Plans of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). In determining whether a plan of allocation is fair and reasonable, courts give weight to the opinion of experienced counsel. *See Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051, 2014 WL 4401280, at *9 (S.D.N.Y. Sept. 4, 2014); *In re Giant Interactive Grp.,* 279 F.R.D. at 163 ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel").

The Plan of Allocation proposed by Lead Plaintiff is set forth in the Notice disseminated to the Settlement Class. *See* Notice, attached as Ex. A to Ex. 3 at ¶¶46–64. Lead Counsel developed

the Plan of Allocation in consultation with Lead Plaintiff's damages expert with the objective of equitably distributing the Net Settlement Fund to those Settlement Class Members who suffered economic losses as a result of the alleged securities law violations asserted in the Action. Lead Plaintiff's damages expert developed the Plan of Allocation based on an event study, which determined how much artificial inflation was in the price of BioScrip common stock on each day during the Settlement Class Period as a result of Defendants' alleged materially false and misleading statements and omissions, and how much the stock price declined as a result of the disclosures that corrected the alleged misstatements and omissions. In calculating this estimated alleged artificial inflation, the damages expert considered price changes in BioScrip common stock in reaction to the alleged corrective disclosures, adjusting for price changes attributable to market or industry forces, the evidence developed in support of Lead Plaintiff's allegations, and the strength of the claims, as advised by Lead Counsel. *See* Notice (Ex. A to Ex. 3) at ¶¶46-49.[6]

Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase of BioScrip common stock during the Settlement Class Period. *See* Notice (Ex. A to Ex. 3) at ¶50. In general, the Recognized Loss Amount will be the difference between the estimated artificial inflation on the purchase date and the estimated artificial inflation on the sale date, or the difference between the actual purchase price (or for shares purchased in the April 18, 2013 offering, the offering price) and the sales price, whichever is less. *Id*. ¶¶51–52. Accordingly, any shares purchased during the Settlement Class Period that were not held over a corrective disclosure will have no Recognized Loss Amount because the level of alleged artificial inflation is the same

[6] In accordance with the Court's prior rulings in the Action, under the Plan of Allocation shares purchased in the April 18, 2013 offering of BioScrip common stock have additional artificial inflation (over and above the inflation for other shares purchased during the Settlement Class Period) arising from alleged misrepresentations in the Offering Documents related to BioScrip's PBM business. *See* Notice (Ex. A to Ex. 3) at ¶49.

on the date of purchase and on the date of sale. *See id*. Under the Plan of Allocation, the sum of a Claimant's Recognized Loss Amounts will be the Claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. *See id*. ¶¶55–56.

Lead Counsel believes that the proposed 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, and their opinion is entitled to "considerable weight" by the Court in deciding whether to approve the plan. *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001) ("As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable weight."). To date, no objections to the Plan of Allocation have been received. *See* ¶83; *see also In re Nasdaq Mkt.-Makers Antitrust Litig*., No. 94 Civ. 3996, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) (holding that the "small number of objections to the Proposed Plan" was entitled to "substantial weight" in approving the plan). Finally, it is important to note that the Plan of Allocation is similar in structure to plans of allocation that have been used to apportion settlement proceeds in numerous other securities class actions. *See Veeco*, 2007 WL 4115809, at *14 ("Each valid claim will then be calculated so that each authorized claimant will receive, on a proportionate basis, the share of the net settlement fund that the claimant's recognized loss bears to the total recognized loss of all authorized claimants."); *Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.").

Thus, the proposed Plan of Allocation is fair and reasonable and should be approved.

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

Notice to the Settlement Class of the proposed Settlement satisfied 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." *Wal-Mart*, 396 F.3d at 114.

Both the Notice's substance and the method of its dissemination to potential Settlement Class Members satisfied these standards. The Notice contains the information required by Rule 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) a description of the basic terms of the Settlement, including the amount of the consideration and the releases to be given; (iv) 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 expenses that will be sought; (vii) a description of Settlement Class Members' right to request exclusion from 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. The Notice also provides recipients with information on how to submit a Claim Form in order to be potentially eligible to receive a distribution from the Net Settlement Fund.

As noted above, in accordance with the Preliminary Approval Order, as of May 5, 2016, A.B. Data has mailed 31,155 copies of the Notice Packet by first-class mail to potential Settlement Class Members and nominees. *See* Ex. 3, ¶8. A.B. Data also caused the Summary Notice to be published on March 24, 2016. *Id*. ¶9. A.B. Data also established a website dedicated to the Settlement, www.BioScripSecuritiesLitigation.com, to provide potential Settlement Class

Members with information about the Settlement and the applicable deadlines, as well as access to downloadable copies of the Notice (including the Plan of Allocation), Claim Form, Settlement Stipulation, Preliminary Approval Order, and Complaint. *Id.* ¶11. Copies of those documents were also made available on Lead Counsel's firm website. ¶74.

This combination of individual first-class mail to all members of the Settlement Class who could be identified with reasonable effort, supplemented by notice in a widely circulated publication, transmission over a newswire, and availability 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.

IV. FINAL CERTIFICATION OF THE SETTLEMENT CLASS

The Court's February 11, 2016 Preliminary Approval Order preliminarily certified the Settlement Class for Settlement purposes only under Rules 23(a) and (b)(3). (ECF No. 106). Nothing has changed to alter the propriety of class certification for Settlement purposes and, for all the reasons stated in Lead Plaintiff's Preliminary Approval Brief (ECF No. 102), and in the Court's Preliminary Approval Order, Lead Plaintiff respectfully requests that the Court grant final certification of the Settlement Class under Rules 23(a) and (b)(3).

CONCLUSION

Lead Plaintiff respectfully requests that the Court approve the proposed Settlement and Plan of Allocation and finally certify the Settlement Class for purposes of the Settlement.

Dated: May 9, 2016

Respectfully submitted,

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