UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re OSG SECURITIES LITIGATION	Civil Action No. 1:12-cv-07948-SAS
This Document Relates To: ALL ACTIONS.	CLASS ACTION LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENTS AND PLAN OF ALLOCATION

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SECONDARY AUTHORITY

I. PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs Stichting Pensioenfonds DSM Nederland, Indiana Treasurer of State, and Lloyd Crawford (collectively, "Lead Plaintiffs" or "Plaintiffs"), on behalf of themselves and the Class, respectfully submit this memorandum of law in support of their motion for final approval of the three settlements reached in the above-captioned consolidated securities class action (the "Action") and approval of both the Plan of Allocation of the Settlement Amount and the Plan of Allocation of the Bankruptcy Court Settlement proceeds. The terms of the settlements are set forth in the Stipulation of Settlement with the Individual Defendants, the Stipulation of Settlement with PricewaterhouseCoopers LLP, and the Stipulation of Settlement with the Underwriter Defendants ("Stipulations" or "Settlements"), which were previously filed with the Court. Dkt. Nos. 232-234.[1] The Settlements – which provide for the payment of $16.25 million in cash (the "Settlement Amount")[2] for the benefit of the Class in exchange for the dismissal of all claims brought in the Action against the Defendants – bring the total amount recovered for Class Members to a minimum of $31.676 million.[3] This recovery is the product of Lead Plaintiffs' vigorous efforts in prosecuting the Action, followed by arm's-length settlement negotiations among experienced and knowledgeable counsel, including a formal

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulations and the Declaration of David A. Rosenfeld in Support of Lead Plaintiffs' Motion for Final Approval of Settlements and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and Reimbursement of Lead Plaintiffs' Expenses ("Rosenfeld Decl."), submitted herewith.

[2] The Individual Defendants have paid $10.5 million, the Underwriter Defendants have paid $4 million, and PwC has paid $1.75 million to resolve the Action.

[3] In addition to the $16.25 million Settlement Amount, Lead Counsel obtained at least $15.426 million in settlement of the Class' claim against OSG in the Bankruptcy Court. Rosenfeld Decl., ¶2 n.4. The Bankruptcy Court approved that settlement in July 2014, and Lead Counsel intend to distribute that amount to Class Members along with the amount obtained in the Settlements before the Court for approval.

mediation session (as well as numerous telephonic sessions) conducted by a nationally-recognized, neutral mediator.

The Settlements represent an outstanding result for the Class in light of the risks Lead Plaintiffs faced, and would have faced, had the litigation continued, including: (1) the risk that the Defendants would prevail on their motions for summary judgment at the conclusion of discovery;[4] (2) the possibility that the Class would not be certified; and (3) the possibility that protracted and contested litigation, including trial and likely appeals, could ultimately lead to no recovery, or a far smaller recovery, against the Defendants.

Further confirming the fairness of the Settlements is the fact that, to date, members of the Class have reacted positively to the Settlements. Pursuant to the Orders preliminarily approving the Settlements ("Notice Orders") (Dkt. Nos. 235-237), copies of the Notice were sent to over 65,900 potential Class Members and nominees beginning on September 2, 2015, and a Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on September 8, 2015.[5] *See* Sylvester Decl., ¶¶4-11, 14. To date, there have been no objections to any aspect of the Settlements and two requests for exclusion from the Class have been received. *Id.*, ¶15.

Finally, Lead Counsel, who have substantial experience prosecuting securities class actions, have concluded that the Settlements are fair, reasonable, and adequate and in the best interest of the

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[4] On May 29, 2015, the Court granted defendant Ernst & Young, LLP's motion for summary judgment. Dkt. Nos. 223, 224. Lead Plaintiffs appealed that decision, and on September 2, 2015, Lead Plaintiffs and Ernst & Young, LLP filed a stipulation withdrawing Lead Plaintiffs' appeal pursuant to Fed. R. App. P. 42. Dkt. No. 240.

[5] *See* Declaration of Carole K. Sylvester Regarding: (A) Mailing of the Notice of Pendency and Proposed Partial Settlements of Class Action, Motion for Attorneys' Fees and Settlement Fairness Hearing and the Proof of Claim and Release Form, (B) Publication of the Summary Notice, (C) Internet Posting, and (D) Requests for Exclusion Received to Date ("Sylvester Decl."), submitted herewith on behalf of the Court-appointed Claims Administrator for the Settlements, Gilardi & Co. LLC ("Gilardi").

Class. Accordingly, Lead Plaintiffs respectfully request that the Court grant final approval of the Settlements, and approve the Plan of Allocation as fair and reasonable.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Plaintiffs respectfully refer the Court to the accompanying Rosenfeld Declaration for a detailed discussion of the factual background and procedural history of the Action, the efforts undertaken by Plaintiffs and their counsel during the course of the Action, the risks of continued litigation, and a discussion of the negotiations leading to the Settlements.

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Law Favors and Encourages Settlements

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014); *see also In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class 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 Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) ("the courts have long recognized that [complex class action] litigation 'is notably difficult and notoriously uncertain,' . . . and that compromise is particularly appropriate") (citation omitted). Therefore, when exercising discretion to approve a settlement, courts are "mindful of the 'strong judicial policy in favor of settlements.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)).

"Due to the presumption in favor of settlement, '[a]bsent fraud or collusion, courts should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'"

Advanced Battery, 298 F.R.D. at 174 (citing *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007)). Thus, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

B. The Settlements Must Be Procedurally and Substantively Fair, Adequate, and Reasonable

Courts may approve a settlement that is binding on the class if it determines that the settlement is "'fair, adequate, and reasonable, and not a product of collusion.'" *Wal-Mart*, 396 F.3d at 116 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)). This evaluation requires courts to consider both "the terms of the settlement and the negotiation process leading up to it." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008); *Wal-Mart*, 396 F.3d at 116.

With respect to the negotiation process, a class action settlement enjoys a "presumption of fairness" where it is the product of arm's-length negotiations between experienced and capable counsel. *See City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *3 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *see also In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012); *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *1 (S.D.N.Y. Dec. 28, 2011). With respect to the substantive terms of a settlement, courts in the Second Circuit consider the following factors (known as the "*Grinnell* factors") when determining whether to approve 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.

Wal-Mart, 396 F.3d at 117 (quoting *Grinnell*, 495 F.2d at 463).

In finding that a settlement is substantively fair, reasonable, and adequate, not every factor needs to be satisfied, but "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)). As such, the court should assess the settlement as presented, without modifying its terms, and without substituting its '"business judgment for that of counsel, absent evidence of fraud or overreaching.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (quoting *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 838 F. Supp. 729, 737 (S.D.N.Y. 1993)).

Plaintiffs respectfully submit that the proposed Settlements are fair, reasonable, and adequate when measured under the relevant criteria and the circumstances of this Action.

IV. THE PROPOSED SETTLEMENTS ARE PROCEDURALLY AND SUBSTANTIVELY FAIR, ADEQUATE, AND REASONABLE

A. The Settlements Are Entitled to a Strong Presumption of Fairness

As previously noted, a strong presumption of fairness attaches to a class action settlement reached through arm's-length negotiations among able and experienced counsel. *See Wal-Mart*, 396 F.3d at 116; *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Here, the presumption of fairness and adequacy is appropriate because the Settlements were reached by experienced, fully-informed counsel after arm's-length negotiations, without collusion, and following a full-day mediation session before a nationally-recognized mediator. *See Global*

Crossing, 225 F.R.D. at 461; *see also* Rosenfeld Decl., ¶82. Indeed, the participation of the Honorable Layn R. Phillips (Ret.), a former federal district judge and a highly-qualified mediator, strongly supports a finding that negotiations were conducted at arm's length and without collusion. *See In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 26635, at *7 (N.D. Cal. Mar. 3, 2015) (finding Judge Phillips to be "an experienced mediator"); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (approving settlement where parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *Int'l Bhd. of Elec. Workers Local 697 v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, at *2 (settlement was fair where it "was reached following arm's length negotiations between experienced counsel that involved the assistance of an experienced and reputable private mediator, retired Judge Phillips").

The negotiation process that Judge Phillips oversaw also supports the presumption of fairness. In that regard, the process included the preparation and exchange of detailed mediation statements, and candid and frank discussions about the strengths and weaknesses of the case. Rosenfeld Decl., ¶82. Thus, Lead Counsel were fully informed of the strengths and weaknesses of the case by the time the Settlements were reached. *See id.*, ¶¶83-95; *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) (""'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation'") (citation omitted).

These and other considerations discussed in the Rosenfeld Declaration, therefore, confirm the reasonableness of the Settlements. Thus, the Settlements should be entitled to the presumption of procedural fairness under Second Circuit law.

B. The Settlements Satisfy the *Grinnell* Factors

1. Continued Litigation Would Be Complex, Expensive, and Protracted

Without the Settlements, the anticipated complexity, cost, and duration of the Action would be considerable. *See Advanced Battery*, 298 F.R.D. at 175 ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"); *see also In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS), 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Not only does this Action involve many complex legal issues relating to the federal securities laws, it also involves the expense and complexities associated with litigating against the Individual Defendants, PwC, and the Underwriter Defendants, the accounting and disclosure rules applicable to Section 956 of Subpart F of the Internal Revenue Code, an esoteric tax provision which is subject to varying interpretations, and the accumulated earnings from OSG's foreign shipping income. Rosenfeld Decl., ¶¶87-88. Accordingly, if the litigation were to proceed, the parties would be required to complete expensive and time consuming document and deposition discovery. At the time the Settlements were reached, Lead Counsel had received and reviewed over two million pages of documents from Defendants and third parties, including bankrupt OSG, had retained a number of experts and taken and defended several depositions, and were conducting class certification discovery.

Had the Settlements not been reached, Lead Plaintiffs would be required to complete document and deposition discovery, retain additional experts, prepare expert reports, and take expert depositions and discovery. Motions for class certification and summary judgment, as well as motions *in limine* also would have to be briefed by the parties. All of the foregoing would add years of additional delay before Class Members could enjoy the benefit of a verdict, if any, obtained by

Lead Plaintiffs. *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008).

Even if the Class could recover a larger judgment after a trial, the additional delay posed by the trial itself, as well as post-trial motions, and the appellate process could deny the Class any recovery for years, further reducing any such recovery's value. *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 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.").

Finally, continued litigation necessarily would impact the amount of insurance available for funding a settlement or a judgment after trial. Indeed, if the litigation were to continue, the defense costs incurred by the Individual Defendants in order to litigate this case up to and through a trial and the inevitable appeals process would have substantially depleted and could have exhausted the insurance available to fund a settlement or verdict achieved at trial. Rosenfeld Decl., ¶15.

The Settlements avoid these risks. Instead of the lengthy, costly, and uncertain course of further litigation, the Settlements provide for an immediate cash recovery for the Class. As a result, the Settlements outweigh the risks associated with lengthy and costly continued litigation.

2. The Lack of Objections to Date Supports Final Approval of the Settlements

The reaction of the Class to the Settlements "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007) (citation omitted); *see also In re Flag Telecom Holdings*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010). In fact, the "'"absence of objections may itself be taken as evidencing the fairness of

a settlement.'"'" *City of Providence*, 2014 WL 1883494, at *5 (citing *PaineWebber*, 171 F.R.D. at 126).

To date, the reaction of the Class is unanimously positive and supports approval of the Settlements. *Sadia*, 2011 WL 6825235, at *1. Pursuant to the Notice Orders, copies of the Notice were mailed to 65,967 potential Class Members and nominees; and a Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on September 8, 2015. Sylvester Decl., ¶¶11, 14. Class Members have until November 10, 2015 to object to the Settlements or request exclusion from the Class. While that date has not yet passed, to date, there have been no objections to the Settlements and only two requests for exclusion have been received. *Id.*, ¶15. Lead Plaintiffs will file papers, if necessary, on or before November 24, 2015, to address any objections and further requests for exclusion that may be received following this submission.

3. Lead Plaintiffs Have Sufficient Information to Make Informed Decisions as to the Settlements

In considering the third *Grinnell* 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.'" *Bear Stearns*, 909 F. Supp. 2d at 267 (quoting *IMAX*, 283 F.R.D. at 190). "To satisfy this factor, parties need not have even engaged in formal or extensive discovery." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 WL 7323417, at *7 (S.D.N.Y. Dec. 19, 2014) (noting that discovery cannot commence in cases brought under the PSLRA until the motion to dismiss is denied); *Maley*, 186 F. Supp. 2d at 363; *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) ("[T]he Court need not find that the parties have engaged in extensive discovery. Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently

make . . . an appraisal' of the Settlement.") (quoting *Plummer v. Chem. Bank*, 668 F.2d 654, 660 (2d Cir. 1982)), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001); *see also Global Crossing*, 225 F.R.D. at 458 ("[T]he question is whether the parties had adequate information about their claims.").

In this case, there is no question that Lead Plaintiffs had sufficient information to make an informed decision on the propriety of the Settlements. As detailed in the Rosenfeld Declaration, Lead Plaintiffs and their counsel were able to negotiate settlements for the Class after conducting an extensive factual investigation and analysis relating to the events and transactions alleged in the TAC, and undertook substantial litigation efforts over the last three years. This included, *inter alia*: (1) reviewing and analyzing OSG's filings with the U.S. Securities and Exchange Commission ("SEC"), as well as securities analysts' reports and other news articles concerning OSG and its operations; (2) researching Section 956 of Subpart F of the Internal Revenue Code; (3) interviewing former employees of OSG; (4) drafting three amended complaints; (5) opposing Defendants' four motions to dismiss; (6) serving discovery on Defendants and third parties; (7) serving initial disclosures; (8) participating in a Rule 26(f) conference with Defendants; (9) working with forensic and tax accountants to review the more than two million pages of discovery produced by Defendants and third parties; (10) negotiating with Defendants and third parties concerning the production of documents and other discovery; (11) pursuing the Class' claim in the Bankruptcy Court, including receiving documents from OSG and obtaining a settlement worth more than $15.4 million; (12) responding to Defendants' discovery requests; (13) conducting or defending ten depositions; (14) preparing a comprehensive mediation statement and reply to Defendants' mediation statements; (15) participating in an in-person mediation with Defendants overseen by Judge Phillips, with numerous

follow-up sessions; and (16) researching the applicable law with respect to Lead Plaintiffs' claims and Defendants' potential defenses. *See generally* Rosenfeld Decl.

As noted above, Lead Counsel prepared a detailed mediation statement that was provided to Defendants' counsel prior to the November 20, 2014 mediation session, and also held discussions with Defendants' counsel during the mediation where Defendants' counsel not only pressed the arguments raised in their motions to dismiss but also identified arguments Defendants likely would make if the case were to progress. *Id.*, ¶82. Thus, Lead Counsel had a clear picture of the strengths and weaknesses of this case and of the legal and factual defenses that Defendants would likely raise had the litigation continued.

Accordingly, Plaintiffs and their counsel "have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial." *City of Providence*, 2014 WL 1883494, at *7 (citing *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004)).

4. Establishing Liability and Damages Involves Significant Risks

In assessing the Settlements, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *Veeco*, 2007 WL 4115809, at *8; *Austrian & German Bank*, 80 F. Supp. 2d at 177. However, the Court need not "'decide the merits of the case or resolve unsettled legal questions'" (*Cinelli v. MCS Claim Servs.*, 236 F.R.D. 118, 121 (E.D.N.Y. 2006) (citation omitted)), or "foresee with absolute certainty the outcome of the case." *Austrian & German Bank*, 80 F. Supp. 2d at 177. Rather, the Court need only weigh the risks of litigation against the certainty of recovery

offered by the Settlements. *See Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 337 (S.D.N.Y. 2005).

The risks presented by securities litigation generally weigh in favor of final settlement approval. Courts in this district """have long recognized that [securities] litigation is notably difficult and notoriously uncertain."""" *Flag Telecom*, 2010 WL 4537550, at *15 (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)); *see also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation.").

While Lead Counsel believe, based on their investigation and the discovery obtained to date, that the claims asserted against Defendants have merit, they also recognize that Lead Plaintiffs would (and did) face hurdles and uncertainties in prosecuting the Action and recovering a judgment from the Defendants. Rosenfeld Decl., ¶¶84-95. As the Court has observed, Section 956 "is notoriously esoteric, even among tax lawyers." *See* Dkt. No. 188 at 8. Defendants have argued that Plaintiffs could not prove the falsity of Defendants' statements or that Defendants acted knowingly and/or recklessly and/or negligently with respect to the applicability of Section 956. *Id.*; Rosenfeld Decl., ¶¶87-88. Courts have often recognized the difficulty and substantial risk of pleading and proving scienter. *See In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 426 (S.D.N.Y. 2001); *Slomovics v. All for a Dollar*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995). Moreover, it is not certain that Plaintiffs could prove that the Registration Statement for the Senior Notes or Defendants' statements during the Class Period that OSG's financial statements were GAAP-compliant were materially false or misleading.[6]

[6] The Underwriter Defendants, PwC and OSG's Outside Directors had due diligence defenses available to them under the Securities Act claims that they would be expected to press, putting a recovery against them at risk. PwC's audit opinion might also have been found to be an inactionable

Therefore, as detailed in the Rosenfeld Declaration, while Plaintiffs believe that they could have satisfied their burden of establishing falsity, materiality, and scienter, they recognize that overcoming these obstacles was not a foregone conclusion.

Additionally, Lead Plaintiffs also would have faced challenges with respect to loss causation and the calculation of damages. *See AOL Time Warner*, 2006 WL 903236, at *9 (noting that "the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages"). The parties had significant disagreement over, *inter alia*: (i) whether partial disclosures not identified in the TAC constituted loss-causing events; (ii) whether Plaintiffs could recover damages under a materialization-of-the-risk theory of loss causation; and (iii) whether confounding events would reduce recoverable damages. Rosenfeld Decl., ¶89. While Plaintiffs would have been able to present a cogent and persuasive expert's view establishing loss causation and damages, Defendants also would have been able to produce well-qualified experts who would opine against a finding of loss causation for the price declines, giving rise to the risk of a "battle of the experts." *See Am. Bank Note*, 127 F. Supp. 2d at 427 ("'In [a] "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.'") (citation omitted). Plaintiffs could not be certain which expert's view would prevail at trial. *See, e.g.*, *Flag Telecom*, 2010 WL 4537550, at *18; *see also Sadia*, 2011 WL 6825235,at *2 ("Damages must be proved by expert testimony, which a jury may choose to reject."). Accordingly, courts have recognized that when parties will likely rely on significant expert testimony and analysis,

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opinion based on the Supreme Court's recent decision in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, ___ U.S. ___, 135 S. Ct. 1318 (2015).

settlement is favored. *See Park v. Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008).

Even if Plaintiffs successfully established loss causation, there would be no guarantee that a jury would have agreed with Plaintiffs' expert's calculation of damages. Defendants would likely contend that a portion of the October 22, 2012 stock price decline resulted from non-fraud-related events. Rosenfeld Decl., ¶97. "Calculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." *Global Crossing*, 225 F.R.D. at 459 (citations omitted). As with loss causation, Plaintiffs could not be certain which expert's view would prevail at trial. Moreover, Defendants would likely argue that Senior Notes purchasers would have been made whole had they held onto them through March 20, 2013. Rosenfeld Decl., ¶¶93, 97, 99.

5. Maintaining Class Action Status Through Trial Presents a Substantial Risk

While Lead Counsel believe that Plaintiffs would prevail on their motion for class certification, for the Class Period alleged in the TAC, the Settlements avoid any uncertainty with respect to whether a class may be maintained and whether the proposed Class Period was appropriate. Even if the Class were certified, Defendants may have moved to decertify the Class or to shorten the Class Period before trial or on appeal, as class certification may be reviewed at any stage of the litigation. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."); Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time). The presence of this risk and the uncertainty surrounding it, therefore, weighs in favor of final approval of the Settlements.

6. Defendants' Ability to Withstand a Greater Judgment

Courts generally do not find the ability of a defendant to withstand a greater judgment to be a barrier to settlement when the other factors favor the settlement. "[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *PaineWebber*, 171 F.R.D. at 129; *see also IMAX*, 283 F.R.D. at 191 ("'[A] defendant is not required to "empty its coffers" before a settlement can be found adequate.'") (citations omitted). Nevertheless, the potential sources of recovery from the Individual Defendants (the directors and officers insurance policy) was decreasing through the course of the litigation. Had insurance been completely depleted, the Class might be left with no recovery from these defendants, even if it prevailed at trial.

7. The Settlements Amounts Are Reasonable in View of the Best Possible Recovery and the Risks of Litigation

The adequacy of the amount offered in settlement 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." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *see also Wal-Mart*, 396 F.3d at 119. A court need only determine whether the settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted). The "range of reasonableness" has been described by the Second Circuit as a range that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, the $16.25 million Settlements (plus the $15 million-plus obtained in the Bankruptcy Court Settlement) is a substantial result for the Class, especially in light of the stage of litigation, the risks associated with continued litigation of this complex securities class action, and the total amount

of damages. Plaintiffs estimated that a maximum of $41 million in §10(b) damages and $24 million in §11 damages could be recovered by the Class for the decline following the October 22, 2012 announcement that ended the Class Period.[7] Rosenfeld Decl., ¶97. *See In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approving settlement amounting to 5.2% of damages for common stock holders); *see also Union Carbide*, 718 F. Supp. at 1103 ("The Court of Appeals has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought. . . . The essence of settlement is compromise."); *Global Crossing*, 225 F.R.D. at 461 ("'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'") (quoting *Grinnell*, 495 F.2d at 455).

Here, however, the Settlements far exceed the median recovery of 2.7% and 2.2% of damages in all sample securities class action lawsuits during 2005-2013 and 2014, respectively. Additionally, the Settlements compare favorably with the median recovery of 5% and 3% of damages in securities class actions with losses between $50 and $124 million, during 2005-2013 and 2014, respectively. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2014 Review and Analysis*, at 9 (Figure 8) (Cornerstone Research 2015).

Moreover, the Settlements offer the opportunity to provide immediate relief to the Class, rather than a speculative payment years down the road. *AOL Time Warner*, 2006 WL 903236, at *13 (where the settlement fund is in escrow and earning interest for the class, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"). In light of the

[7] Including the portion of the Bankruptcy Court Settlement being allocated to Plaintiffs' §11 claims, Plaintiffs have recovered $20.9 million of the $24 million in maximum estimated damages for that claim, an outstanding result by any measure.

complex legal and factual issues present here, the fairness of the Settlements is apparent. *See, e.g.*, *Maley*, 186 F. Supp. 2d at 366-67.

Accordingly, Plaintiffs respectfully submit that the immediate cash benefit is well "within the range of reasonableness" in light of the best possible recovery and all the risks of litigation.

V. THE PLAN OF ALLOCATION OF THE NET SETTLEMENT FUND IS FAIR AND ADEQUATE

The standard for approval of the Plan of Allocation (the "Plan") is the same as the standard for approving the Settlements as a whole. Specifically, "'it must be fair and adequate.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (quoting *Maley*, 186 F. Supp. 2d at 367). "'As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003) (citation omitted), *aff'd sub nom. Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005). "'When formulated by competent and experienced class counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'" *Advanced Battery*, 298 F.R.D. at 180 (quoting *Global Crossing*, 225 F.R.D. at 462; *Am. Bank Note*, 127 F. Supp. 2d at 429-30).

The Plan, which is set forth in the Notice, was prepared by Lead Counsel's damages expert to create a fair method to divide the Net Settlement Fund for distribution. *See* Rosenfeld Decl., ¶¶101-105. The Plan attempted to eliminate the effects of market forces unrelated to the alleged misrepresentations and omissions, as well as to simplify claims administration with attendant reduced cost to the Class. The Net Settlement Fund will be distributed to Authorized Claimants, *i.e.*, members of the Class who submit timely and valid Proof of Claim forms that are approved for payment from the Net Settlement Fund pursuant to the Plan. The Plan treats all Class Members in a similar manner: everyone who submits a valid and timely Proof of Claim form, and does not exclude himself, herself,

or itself from the Class, will receive a *pro rata* share of the Net Settlement Fund in the proportion that the Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants so long as such Authorized Claimant's payment amount is $10.00 or more.

Indeed, it is appropriate for distributions to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of the purchases of the securities at issue. *See In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001). Otherwise, certain Class Members may receive an inequitable windfall, to the detriment of others. *PaineWebber*, 171 F.R.D. at 133.

Lead Counsel believe that the Plan is fair and reasonable and respectfully submit that it should be approved by the Court. Notably, there have been no objections to the Plan to date, which also supports the Court's approval. *Veeco*, 2007 WL 4115809, at *7; *Maley*, 186 F. Supp. 2d at 367.[8]

VI. NOTICE TO THE CLASS SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Rule 23 of the Federal Rules of Civil Procedure requires that notice of a settlement be "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); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Additionally, notice of a settlement must be directed to class members in a "reasonable manner." Fed. R. Civ. P. 23(e)(1). Notice of a settlement satisfies Rule 23(e) and due process where it fairly apprises "'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 (citations omitted); *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26-27

[8] The Bankruptcy Court Settlement proceeds will be distributed to Authorized Claimants in accordance with the Plan. Rosenfeld Decl., ¶106.

(2d Cir. 2014). "Notice need not be perfect" or received by every class member, but instead be reasonable under the circumstances. *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008). Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *Id.* (citing *Wal-Mart*, 396 F.3d at 114).

The Notice and the method utilized to disseminate the Notice to potential Class Members satisfies these standards. The Court-approved Notice and Proof of Claim form (the "Notice Packet") amply apprise Class Members of, *inter alia*: (1) the pendency of the Action; (2) the nature of the Action and the Class' claims; (3) the essential terms of the Settlements; (4) the proposed Plan; (5) Class Members' rights to request exclusion from the Class or object to the Settlements, the Plan, or the requested attorneys' fees or expenses; (6) the binding effect of a judgment on Class Members; and (7) information regarding Lead Counsel's motion for an award of attorneys' fees and expenses. *See* Sylvester Decl., Ex. A. The Notice also provides specific information regarding the date, time, and place of the Settlement Hearing, and sets forth the procedures and deadlines for: (1) submitting a Proof of Claim; (2) requesting exclusion from the Class; and (3) objecting to any aspect of the Settlements, including the proposed Plan and the request for attorneys' fees and expenses.

The Notice also contains the information required by the PSLRA (15 U.S.C. §77z-1(a)(7); 15 U.S.C. §78u-4(a)(7)), including: (1) a statement of the amount to be distributed, determined in the aggregate and on an average per share basis; (2) a statement of the potential outcome of the case (*i.e.*, whether there was agreement or disagreement on the amount of damages); (3) a statement indicating the attorneys' fees and costs sought; (4) identification and contact information of counsel; and (5) a brief statement explaining the reasons why the parties are proposing the Settlements. *See*

Sylvester Decl., Ex. A; *see also In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 184 (S.D.N.Y. 2003).

In accordance with the Notice Orders, Gilardi commenced the mailing of the Notice Packet by First-Class Mail to potential Class Members, brokers, and nominees on September 2, 2015. Sylvester Decl., ¶¶4-7. As of October 29, 2015, over 65,900 copies of the Notice Packet have been mailed. *Id.*, ¶11. Gilardi also published the Summary Notice in *Investor's Business Daily* and transmitted it over *PR Newswire* on September 8, 2015. *Id.*, ¶14. Additionally, Gilardi posted the Notice Packet, as well as other important documents, on the website maintained for the Settlements. *Id.*, ¶13.[9]

This combination of individual First-Class Mail to all Class Members who could be identified with reasonable effort, supplemented by mailed notice to brokers and nominees and publication of the Summary Notice in a relevant, widely-circulated publication and internet newswire, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). This method of providing notice has been repeatedly approved for use in securities class actions and other comparable class actions. *See, e.g.*, *Sadia*, 2011 WL 6825235, at *1; *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *7-*9 (E.D. La. Mar. 2, 2009) (mailing, internet publication, and newspaper publication satisfied due process notice requirements).

VII. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23

Certification of a class for settlement purposes is recognized as "the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *IMAX*, 283 F.R.D. at 186 (citation and internal quotation marks omitted). The Court has already

[9] The Notice and Summary Notice reference the Internet website for the Settlements. *See* Sylvester Decl., Exs. A and D.

preliminarily certified the Class for settlement purposes. Notice Orders, ¶¶3-4. Dkt. Nos. 235-237. Nothing has changed to alter the propriety of the Court's certification. For the reasons stated in Lead Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement at 15-21 (Dkt. No. 231) (incorporated by reference herein), the Class satisfies all the elements of Rules 23(a) and (b)(3).

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter the proposed final Judgments approving the Settlements, approving the notice program, and certifying the Class for settlement purposes. Plaintiffs also request that the Court enter an order approving the Plan, which will also govern distribution of the settlement proceeds obtained in the Bankruptcy Court Settlement.

DATED: November 3, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2015, I caused the foregoing Lead Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Settlements and Plan of Allocation to be served electronically on all ECF participants.

s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART