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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

In re QUESTCOR PHARMACEUTICALS, INC. SECURITIES LITIGATION	No. 8:12-cv-01623-DMG(JPRx)
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

DATE: September 18, 2015
TIME: 10:00 a.m.
CTRM: The Honorable Dolly M. Gee

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I. PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("Rule 23(e)"), Lead Plaintiffs West Virginia Investment Management Board and Plumbers & Pipefitters National Pension Fund, and named plaintiff Steven Glucksberg (collectively, "Plaintiffs") submit this memorandum in support of their motion for final approval of the settlement of this securities class action (the "Litigation") and approval of the Plan of Allocation of settlement proceeds. The terms of the settlement are set forth in the Stipulation of Settlement dated April 8, 2015 ("Stipulation" or "Settlement"), which was previously submitted to the Court. Dkt. No. 234.[1] The Settlement provides for the payment of $38,000,000 in cash. The Settlement is the product of hard-fought litigation, extensive motion practice, the completion of fact discovery, and extensive arm's-length settlement negotiations between the parties, with the substantial assistance of the Honorable Layn R. Phillips (Ret.). The Settlement takes into account the specific risks and obstacles that Plaintiffs would have to overcome if litigation continued.

This case was carefully investigated and vigorously litigated. Defendants, who are represented by experienced and formidable securities litigators, have asserted strong defenses, adamantly denied liability, and were firm in asserting their belief that Plaintiffs could not prevail on the claims asserted. Plaintiffs and Lead Counsel clearly understood the strengths and weaknesses of Plaintiffs' claims as a result of their diligent and extensive efforts in prosecuting this Litigation over the course of nearly three years. Indeed, the Settlement was achieved only after Lead Counsel had, *inter alia*: (a) conducted an extensive factual investigation, including overseeing detailed investigative interviews of several former employees of Questcor Pharmaceuticals, Inc. ("Questcor" or the "Company"); (b) filed the Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("Consolidated Complaint");

[1] All capitalized terms not defined herein shall have the same meanings set forth in the Stipulation.

1 (c) opposed Defendants' comprehensive motions to dismiss, defeating them in part;
2 (d) prepared and filed a successful motion for class certification, including submitting
3 an expert report and engaging in discovery related to class certification; (e) conducted
4 extensive discovery, including the review and analysis of many of the over 1.6 million
5 pages of documents produced by Defendants and numerous third parties; (f) took or
6 defended the depositions of 32 fact witnesses; (g) responded to discovery propounded
7 by Defendants, including document requests, interrogatories and requests for
8 admission; (h) filed or defended complex discovery motions; (i) commenced expert
9 discovery involving experts in the areas of market efficiency, loss causation, damages,
10 the pharmaceutical industry, and Questcor's business practices; (j) assessed the risk
11 associated with summary judgment and trial; and (k) engaged in protracted settlement
12 negotiations, including mediation with Judge Phillips followed by months of post-
13 mediation settlement discussions with the substantial assistance of Judge Phillips.

14 During settlement negotiations, Lead Counsel made it clear that while it was
15 prepared to fairly assess the strengths and weaknesses of Plaintiffs' case, it would
16 continue to litigate (and in fact did) rather than settle for less than fair value. Indeed,
17 Plaintiffs and their counsel continued to litigate after the initial mediation on
18 September 8, 2014, while also continuing to engage in settlement negotiations with
19 Defendants. Ultimately, Judge Phillips made a mediator's proposal which both sides
20 separately accepted on March 5, 2015.

21 The Settlement takes into account the specific risks and obstacles that Plaintiffs
22 and the Class would face if litigation were to continue. If not for this Settlement, the
23 case would remain fiercely contested by the parties with the ultimate outcome
24 uncertain. Lead Counsel is highly experienced in prosecuting securities class actions,
25 and has concluded that the Settlement is an excellent recovery in the light of the risk,
26 delay, and expense of continued litigation. This conclusion is based on, among other
27 things, the substantial and certain recovery obtained when weighed against the
28 significant risk, expense, and delay presented in continuing the Litigation through the

completion of expert discovery, Defendants' anticipated motion(s) for summary judgment, trial, and probable post-trial motion(s) and appeal(s); analysis of the evidence adduced to date; past experience in litigating complex securities actions; and the serious disputes between the parties concerning the merits and damages.[2]

For all of the reasons discussed herein and in the Brown Declaration, it is respectively submitted that the Settlement is not only fair, reasonable, and adequate but is a highly favorable result for the Class and should be approved by the Court.[3] Likewise, the Plan of Allocation of settlement proceeds, which was developed with the assistance of Lead Counsel's damages expert, reflects an assessment of the damages that the Class may have recovered had liability been established at trial. As a result, the Plan of Allocation provides a fair and reasonable basis for allocating the Net Settlement Fund among Class Members, and therefore should be approved by the Court.

II. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the

[2] The Court is respectfully referred to the accompanying Declaration of Andrew J. Brown in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Brown Decl.") for a more detailed procedural and factual history of the Litigation, the efforts of counsel in obtaining this highly favorable result for the Class, and the factors bearing on the reasonableness of the Settlement, Plan of Allocation and counsel's request for an award of attorneys' fees and expenses.

[3] The Class consists of all Persons who, between April 4, 2011 and September 21, 2012, inclusive, purchased or otherwise acquired the common stock of Questcor, and were damaged thereby. Excluded from the Class are current and former defendants, members of the immediate family of any current or former defendants, directors, officers, subsidiaries and affiliates of Questcor, any person, firm, trust, corporation, officer, director or other individual or entity in which any current or former defendant has a controlling interest, and the legal representatives, affiliates, heirs, successors-in-interest or assigns of any such excluded party. Also excluded from the Class are those Persons who timely and validly request exclusion from the Class.

outcome, and the typical length of the litigation. It is beyond question that "there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). In deciding whether to approve the settlement of a shareholder class action under Rule 23(e), the court must find that the proposed settlement is "fair, adequate and reasonable."[4] The Ninth Circuit has set forth several factors that courts may consider in evaluating the fairness of a class action settlement:

> Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable. The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F.2d at 625;[5] *accord Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012); *Woo v. Home Loan Grp., L.P.*, No. 07-CV-202 H (POR), 2008 U.S. Dist. LEXIS 65144, at *8 (S.D. Cal. Aug. 25, 2008); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *In re Wash. Pub. Power Supply Sys.*

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[4] *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

[5] Citations and internal footnotes are omitted and emphasis is added unless otherwise noted.

Sec. Litig., 720 F. Supp. 1379, 1387 (D. Ariz. 1989), *aff'd sub nom.*, *Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992). "'The relative degree of importance to be attached to any particular factor will depend upon [and be dictated by] the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.'" *Woo*, 2008 U.S. Dist. LEXIS 65144, at *8 (quoting *Officers for Justice*, 688 F.2d at 625).

The district court must exercise "sound discretion" in approving a settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Torrisi*, 8 F.3d at 1375. However, in exercising this discretion, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit "has long deferred to the private consensual decision of the parties." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). The Ninth Circuit defines the limits of the inquiry to be made by the court in the following manner:

> Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Officers for Justice, 688 F.2d at 625 (emphasis in original).

In sum, the Court is now asked to ascertain whether the Settlement is within a range that responsible and experienced attorneys could accept, considering all relevant risk factors of litigation. This range 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. Therefore, courts have taken a liberal approach toward approving class action settlements, recognizing that the settlement process involves the exercise of judgment and that the concept of "reasonableness" can encompass a broad range of results. "'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). "As the Ninth Circuit has noted, 'Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.'" *In re Wells Fargo Loan Processor Overtime Pay Litig.*, No. C-07-1841 (EMC), 2011 U.S. Dist. LEXIS 84541, at *11 (N.D. Cal. Aug. 2, 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir. 1998)).

When examined under the applicable criteria, this Settlement is a highly favorable result for the Class. Lead Counsel believes that there are serious questions as to whether a more favorable monetary result could be attained after summary judgment, trial, and the inevitable post-trial motions and appeals. Brown Decl., ¶¶70-74. Here, it is the considered judgment of highly experienced counsel after extensive, hard-fought litigation and settlement negotiations that the Settlement is an excellent result for the Class. As discussed below, an analysis of the relevant factors further demonstrates that the Settlement merits this Court's final approval.

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III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Settlement Enjoys a Presumption of Reasonableness Because It Is the Product of Arm's-Length Negotiations

"A presumption of correctness is said to 'attach to a class settlement reached in arm's-length negotiations between experienced counsel after meaningful discovery.'" *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *32 (C.D. Cal. June 10, 2005); *see also Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 U.S. Dist. LEXIS 24300, at *16 (N.D. Cal. July 18, 1997) ("the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery [has] taken place create[s] a presumption that the agreement is fair"), *aff'd*, 151 F.3d 1234 (9th Cir. 1998). Further, the Ninth Circuit "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution" in approving a class action settlement. *Rodriguez*, 563 F.3d at 965.

The Settlement is entitled to this "presumption of correctness." It was reached only after extensive pre-trial proceedings, including the completion of fact discovery and the commencement of expert discovery. It is also the product of extensive arm's-length negotiations by experienced counsel on both sides, each with a well-developed understanding of the strengths and weaknesses of each party's respective claims and defenses. During the Litigation, the parties agreed to participate in mediation with Judge Phillips. Prior to the mediation, Plaintiffs and Defendants submitted detailed mediation statements which were provided to Judge Phillips and exchanged among the parties. On September 8, 2014, the parties participated in a full-day mediation session with Judge Phillips. While the parties negotiated in good faith, they were unable to reach a resolution at the September 8, 2014 mediation. As a result, the parties continued to vigorously litigate the case.

While litigation continued, the parties continued to engage in settlement negotiations with the substantial assistance of Judge Phillips, over the course of several months. Ultimately, Judge Phillips made a mediator's proposal to settle the

Litigation for $38,000,000. On March 5, 2015, the parties separately accepted Judge Phillips' proposal. During the course of the mediation and subsequent settlement negotiations, the parties extensively debated the merits of their respective claims and defenses. Lead Counsel zealously advanced Plaintiffs' positions and was fully prepared to continue to litigate (and did) rather than accept a settlement that was not in the best interest of the Class.

Plaintiffs' counsel have many years of experience in litigating securities class actions and have negotiated hundreds of securities class action settlements that courts throughout the country have approved. *See, e.g.*, accompanying Declaration of Andrew J. Brown Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Lead Counsel's Fee Decl."), Ex. G; www.rgrdlaw.com; the accompanying Declaration of Jerry E. Martin Filed on Behalf of Barrett Johnston Martin & Garrison, LLC in Support of Application for Award of Attorneys' Fees and Expenses ("Martin Decl."), Ex. E; www.barrettjohnston.com. Defendants are also represented by highly capable and experienced lawyers from Skadden, Arps, Slate, Meagher & Flom LLP and Latham & Watkins LLP who zealously represented their clients. The Settlement was reached after arm's-length negotiations by experienced counsel on both sides, each with a well-developed understanding of the strengths and weaknesses of each party's respective claims and defenses. These facts establish that the Settlement is the result of hard-fought arm's-length negotiations and "not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625. Thus, the Settlement enjoys a presumption that it is reasonable and should be approved.

B. The Settlement Appropriately Balances the Risks of Litigation and the Benefit to the Class of a Certain Recovery

In determining whether a settlement is fair, reasonable, and adequate, a court should balance against the continuing risks of litigation, the benefits afforded to

members of the class, and the immediacy and certainty of a substantial recovery. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (citing *Johansson-Dohrmann v. CBR Sys.*, No. 12-cv-1115-MMA (BGS), 2013 U.S. Dist. LEXIS 103863, at *11-*12 (S.D. Cal. July 24, 2013)). In other words,

> "[t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, 'It has been held proper to take the bird in hand instead of a prospective flock in the bush.'"

Nat'l Rural, 221 F.R.D. at 526. In the context of approving class action settlements, "[c]ourts experienced with securities fraud litigation, 'routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear.'" *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx), 2013 U.S. Dist. LEXIS 100275, at *19-*20 (C.D. Cal. July 9, 2013) (quoting *In re Flag Telecom Holdings*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *48 (S.D.N.Y. Nov. 8, 2010)).

As in every complex case of this kind, Plaintiffs faced formidable obstacles to recovery if the Litigation were to continue. The principal claims in this Litigation are based upon §10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder for securities fraud. While Lead Counsel believes it could prove the claims asserted, there is nevertheless a great deal of risk present as there is certainly no guarantee that it would prevail at trial and ultimately collect on a larger judgment after trial and subsequent appeals. Post-PSLRA rulings make it clear that the risk of no recovery has increased exponentially since the PSLRA was adopted in 1995.[6]

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[6] *See In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (acknowledging that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA"). The court in *Ikon* went on to indicate a number of additional factors that have made litigation of securities class actions more

1 Securities litigation generally involves complex issues of fact and law, and this
2 case is no exception. For example, to establish liability under §10(b), Plaintiffs bear
3 the burden of proving, *inter alia*, that Defendants participated in the public
4 dissemination of false or misleading information, that the information was material to
5 investors in determining whether to invest in Questcor stock, that the information
6 impacted the market price of the stock, caused damage to the Class, and that
7 Defendants acted with scienter. *DSAM Global Value Fund v. Altris Software, Inc.*,
8 288 F.3d 385, 388 (9th Cir. 2002). Further litigation to establish both liability and
9 damages poses a significant threat to any recovery for the Class.
10 While Lead Counsel believes that the Litigation has significant merit, it
11 recognizes that Plaintiffs faced numerous risks and uncertainties and was well aware
12 that many other similar actions have been prosecuted in the belief that they were
13 meritorious, only to lose on dispositive motions, at trial, or on appeal. The Settlement
14 recognizes the risks of complex litigation involving difficult legal and factual issues.
15 As discussed herein and in the Brown Declaration, the risks of continued litigation,
16 when weighed against the substantial and certain recovery for the Class, confirms the
17 reasonableness of the Settlement. The Settlement is unquestionably better than
18 another distinct possibility – little or no recovery for the Class.
19 Significantly, even if Plaintiffs were able to successfully prosecute this action
20 through trial, post-trial motions, and all appeals, there was no guarantee that a jury's
21 verdict would have been more than the Settlement Amount and it would have taken
22 years before all appeals were settled for the Class to receive any payment.
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26 difficult. "The Act imposes many new procedural hurdles, including restrictions on the types of plaintiffs who may serve as representatives and requiring increased court
27 intervention in the selection of lead counsel. It also substantially alters the legal standards applied to securities fraud claims in ways that generally benefit defendants
28 rather than plaintiffs." *Id*. at 194-95.

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1. Continued Litigation Poses Substantial Risks in Establishing Liability and Damages

Although Plaintiffs survived – in the main – Defendants' attacks on the pleadings, at summary judgment and trial they faced serious obstacles to recovery, both with respect to liability and damages. The claims asserted in the Litigation on behalf of the Class were based on §§10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated by the U.S. Securities and Exchange Commission ("SEC"). To prevail on their §10(b) claims, plaintiffs bear the burden of proving: (a) a misstatement or omission, (b) of material fact, (c) made with scienter, (d) on which plaintiffs relied, and (e) that caused loss. *McGonigle v. Combs*, 968 F.2d 810, 817 (9th Cir. 1992); *DSAM*, 288 F.3d at 388. Thus, Plaintiffs would have to prove that Defendants were responsible for material misstatements or omissions of fact, that Defendants acted with the requisite scienter, and that the Class suffered damages as a result of Defendants' conduct.

After the analysis of more than 1.6 million pages of documents, the taking or defending of 32 fact depositions, and consulting with experts, Plaintiffs and their counsel believe that they had developed sufficient evidence to succeed at summary judgment and at trial against Defendants. But, as detailed in the Brown Declaration, this Litigation involves substantial risks in proving both liability and damages. Indeed, Defendants' arguments in motions and settlement negotiations made it clear that the parties held in many cases polar opposite views of the factual and legal issues presented, many of which would have been the subject of expert testimony. Under these circumstances, there was certainly no guarantee that the jury would find in Plaintiffs' favor. Plaintiffs carefully considered these risks during the months of settlement negotiations with Defendants.

Even before settlement discussions commenced, it was very clear that Defendants did not agree that Plaintiffs would prevail on any of the claims asserted in the Litigation, particularly with respect to scienter, falsity and loss causation.

1 Defendants also vigorously challenged the amount of damages recoverable by the
2 Class. There is thus no question that Defendants would have raised every available
3 argument to avoid an adverse judgment had litigation continued. The defenses raised
4 by Defendants certainly had the possibility of success, making the ultimate outcome
5 difficult to predict.

6 The gravamen of Plaintiffs' Consolidated Complaint is that, in violation of
7 §§10(b), 20(a) and 20A of the Exchange Act and Rule 10b-5 promulgated thereunder
8 by the SEC, Defendants disseminated false and misleading statements to the investing
9 public about the effectiveness of Questcor's primary product, H.P. Acthar Gel
10 ("Acthar"), as a treatment for indications other than infantile spasms ("IS"), making it
11 impossible for shareholders to gain a meaningful or realistic understanding of the
12 drug's prospects and marketing success. Plaintiffs allege that the true facts, which
13 were known by Defendants but concealed from the investing public during the Class
14 Period, were as follows: (i) Questcor lacked clinical evidence to support the use of
15 Acthar for indications other than IS; (ii) Questcor had engaged in questionable tactics
16 to promote the sale and use of Acthar in the treatment of multiple sclerosis ("MS")
17 and nephrotic syndrome ("NS"); and (iii) Questcor lacked a reasonable basis to make
18 positive statements about the Company's prospects or its outlook, including
19 statements about the effectiveness of and potential market growth for Acthar.

20 Lead Counsel believes that based on the evidence adduced to date, Plaintiffs
21 had a strong theory of liability and would likely be able to prove that Defendants
22 knowingly made false and misleading statements concerning Questcor's prospects and
23 revenues and lacked a reasonable basis to make positive statements about the
24 effectiveness of Acthar in the treatment of MS and NS and thus the potential market
25 growth for Acthar. While Lead Counsel believes that the claims are strong and each
26 of the claims are supported by documentary evidence, getting past summary judgment
27 and establishing liability at trial is never guaranteed. Brown Decl., ¶¶70-74.
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1 Defendants have steadfastly denied liability and have asserted defenses from the
2 outset.
3 Although Plaintiffs survived – in the main – Defendants' attacks on the
4 pleadings, they still faced serious obstacles to recovery, both with respect to liability
5 and damages. *See In re Delphi Corp. Sec.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008)
6 (discussing "the risk that Defendants could prevail with respect to certain legal or
7 factual issues, which could result in the reduction or elimination of Plaintiffs'
8 potential recoveries"). One of the most difficult issues going forward is Plaintiffs'
9 ability to prove scienter, *i.e.*, that Defendants acted with knowledge of, or with
10 recklessness as to, the alleged falsity of their statements and omissions. A defendant's
11 state of mind in a securities case is often the most difficult element of proof and one
12 which is rarely supported by direct evidence such as an admission. *See In re Telik,*
13 *Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008); *Smith v. Dominion Bridge*
14 *Corp.*, No. 96-7580, 2007 U.S. Dist. LEXIS 26903, at *17 (E.D. Pa. Apr. 11, 2007)
15 ("Since stockholders normally have 'little more than circumstantial and accretive
16 evidence to establish the requisite scienter,' proving scienter is an 'uncertain and
17 difficult necessity for plaintiffs.'"). Thus, it was quite possible that Plaintiffs would
18 procure documentary and testimonial evidence from all Defendants and others with
19 knowledge about the relevant facts, yet not be able to adduce sufficient evidence to
20 satisfy their burden of proof on this issue at trial. If the jury sided with Defendants on
21 even one of their defenses, the Class could recover nothing.
22 Defendants have previously argued, and would likely argue again at summary
23 judgment and/or trial, that Plaintiffs are unable to demonstrate scienter because they
24 could not show Defendants knowingly or recklessly made any materially false or
25 misleading statements or omissions. Defendants took the position that the evidence
26 showed that their statements were truthful based on recent studies and the FDA's
27 conclusion that Acthar was effective in treating patients with MS and NS. Moreover,
28 Defendants would argue that their stock sales during the Class Period indicated that

1 they remained invested in the future growth of Questcor, thus, negating any inference
2 of scienter. As a result, Plaintiffs faced the risk of establishing liability where each
3 side can point to evidence that favors its position on an element that is readily
4 recognized to be difficult. Add to this specific risk, the following risks inherent in all
5 shareholder litigation and the benefit of the Settlement is readily apparent – (i) the
6 unpredictability of a lengthy and complex jury trial, (ii) the risk that witnesses could
7 be unavailable or jurors could react to the evidence in unforeseen ways, (iii) the risk
8 that a jury would find that some or all of the alleged misrepresentations were not
9 material, and (iv) the risk that the jury could find that Defendants believed in the
10 appropriateness of their actions at the time.

11 **2. The Risks of Proving Loss Causation and Damages**

12 Even if Plaintiffs were successful in establishing liability, they faced substantial
13 risk in proving loss causation and damages. There is no question that Defendants
14 would vigorously contest loss causation if litigation continued as they did in their
15 motions to dismiss and during settlement negotiations. Indeed, proving loss causation
16 is one of the major roadblocks that a plaintiff must overcome to successfully prosecute
17 a securities class action. Here, several months before the Settlement, the Ninth Circuit
18 issued an opinion holding that "any decline in a corporation's share price following
19 the announcement of an investigation can only be attributed to market speculation
20 about whether fraud has occurred. This type of speculation cannot form the basis of a
21 viable loss causation theory." *Loos v. Immersion Corp.*, 762 F.3d 880, 890 (9th Cir.
22 2014). This decision would have made Plaintiffs' burden of proving loss causation
23 and ultimately damages much more difficult, if not impossible based on Plaintiffs'
24 alleged corrective disclosure on September 24, 2012 whereby Questcor filed a Form
25 8-K with the SEC in which it admitted that the U.S. Government had initiated an
26 investigation into the Company's promotional practices. In response to this news,
27 Questcor's stock dropped $11.05 on September 24, 2012, a decline of 37%.
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The United States Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005), and subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than in the past. *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) ("Proving loss causation would be complex and difficult."). There are numerous examples that illustrate the difficulties in proving loss causation. The Eleventh Circuit in *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012), affirmed a lower court ruling that granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor. In *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), the court granted summary judgment in defendants' favor after years of litigation holding that shareholder plaintiffs failed to present sufficient evidence to establish loss causation under Rule 10b-5. While the Ninth Circuit reversed the decision, the court in *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHx-JAT, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 U.S. App. LEXIS 14478 (9th Cir. June 23, 2010), on a motion for judgment as a matter of law, overturned a jury verdict in favor of shareholders based on insufficient evidence presented at trial to establish loss causation.[7] Loss causation was certainly a significant risk Plaintiffs faced if litigation continued.

Establishing damages was also a significant risk. Of course, Defendants vigorously challenged the amount of damages recoverable by the Class. And in any securities case, the determination of damages is a complicated process involving conflicting expert testimony. Expert testimony would rest on many subjective

[7] *See also Phillips v. Scientific-Atlanta, Inc.*, 489 F. App'x. 339 (11th Cir. 2012) (upholding summary judgment in favor of defendants on loss causation grounds in a case litigated since 2001); *In re BankAtlantic Bancorp, Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011) (court granted defendants' judgment as a matter of law on the basis of loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd sub nom.*, *Hubbard*, 688 F.3d 713; *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (finding no loss causation and overturning $81 million jury verdict).

1 assumptions, any of which could be rejected by a jury as speculative or unreliable.
2 Both Plaintiffs and Defendants would engage highly qualified experts whose damages
3 assessments were sure to be at substantial odds and at trial, this crucial element
4 ultimately would be reduced to a "battle of experts." *Tyco*, 535 F. Supp. 2d at 260-
5 261 ("even if the jury agreed to impose liability, the trial would likely involve a
6 confusing 'battle of the experts' over damages").
7 A jury's reaction to such expert testimony is highly unpredictable, and Lead
8 Counsel recognized the possibility that a jury could be swayed by Defendants' experts
9 and find that there were no damages or only a fraction of the amount of damages
10 Plaintiffs contended. Thus, the amount of damages the Class would actually recover
11 at trial even if successful on liability issues was uncertain. *See, e.g.*, *In re Warner*
12 *Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving
13 settlement where "it is virtually impossible to predict with any certainty which
14 testimony would be credited, and ultimately, which damages would be found to have
15 been caused by actionable, rather than the myriad nonactionable factors such as
16 general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re Veeco*
17 *Instruments Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at
18 *30 (S.D.N.Y. Nov. 7, 2007) ("The jury's verdict with respect to damages would
19 depend on its reaction to the complex testimony of experts, a reaction which at best is
20 uncertain.").
21 Even if Plaintiffs prevailed and obtained a substantial judgment after trial, there
22 is little doubt that Defendants would have filed post-trial motions and/or appeals
23 which raised two significant risks for the Class. First, they would receive nothing
24 during the post-trial motions and appeals process which would have likely spanned
25 several years. Second, they could ultimately receive no recovery despite prevailing at
26 trial given that post-trial motions or appeals of any verdict carries the risk of reversal.
27 Finally, even with a judgment in hand, there is no guarantee that a significant
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1 judgment entered years down the road would be collectable. Therefore, the amount of
2 damages the Class would actually recover if successful at trial is uncertain.
3 After careful consideration of all of these factors, Lead Counsel believes that
4 the Settlement is an outstanding result and in the best interests of the Class. Although
5 Lead Counsel believes that the case is meritorious, its experience has taught it that
6 such risks can render the outcome of a trial extremely uncertain. *See In re Mfrs. Life*
7 *Ins. Co. Premium Litig.*, No. MDL 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D.
8 Cal. Dec. 21, 1998) ("even if it is assumed that a successful outcome for plaintiffs at
9 summary judgment or at trial would yield a greater recovery than the Settlement –
10 which is not at all apparent – there is easily enough uncertainty in the mix to support
11 settling the dispute rather than risking no recovery in future proceedings").
12
13 **3. Balancing the Certainty of an Immediate Recovery Against the Expense and Likely Duration of Trial Favors Settlement**
14 The immediacy and certainty of a recovery is a factor for the Court to balance
15 in determining whether this proposed Settlement is fair, adequate, and reasonable.
16 *E.g.*, *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Courts consistently have held
17 that "[t]he expense and possible duration of the litigation should be considered in
18 evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254,
19 267 (E.D.N.Y. 1984); *see also Officers for Justice*, 688 F.2d at 626.
20 Here, Lead Counsel obtained a substantial and certain recovery for the Class.
21 Absent this Settlement, the time and expense of continued litigation would have been
22 substantial, without the Class receiving the certain and substantial benefit of the
23 Settlement, thus creating the possibility that the Class would ultimately receive less or
24 no recovery at all. As noted above, Defendants have demonstrated a commitment to
25 defend this case through and beyond trial, if necessary, and are represented by well-
26 respected and highly capable counsel from two separate law firms. As the court noted
27 in *Ikon*, which is applicable here:
28

> In the absence of a settlement, this matter will likely extend for . . . years longer with significant financial expenditures by both defendants and plaintiffs. This is partly due to the inherently complicated nature of large class actions alleging securities fraud: there are literally thousands of shareholders, and any trial on these claims would rely heavily on the development of a paper trial [sic] through numerous public and private documents.

194 F.R.D. at 179.

While fact discovery was completed, expert discovery would still need to be completed. Moreover, after completion of expert discovery, Defendants' anticipated motion(s) for summary judgment would have to be briefed and argued, a pre-trial order would have to be prepared, proposed jury instructions would have to be submitted, and motions *in limine* would have to be filed and argued. Preparing the case for trial necessarily involves substantial time and expense. The trial itself would likely be long, expensive, and uncertain and no matter the outcome, appeals would be virtually assured, which would add considerably to the expense and duration of the action. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998) (settlement was favored where "the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court"). Finally, even if Plaintiffs obtained a substantial judgment after trial, there is little doubt that Defendants would have appealed. The appeals process would have likely spanned several years, during which the Class would have received no distribution on any damage award and would carry the risk of reversal.

There is no doubt that the Settlement will spare the litigants the significant delay, risk, and expense of continued litigation which would have caused Class Members who suffered economic losses between April 4, 2011 and September 21, 2012 to wait years longer for claims to be resolved. *See Reynolds v. Beneficial Nat'l*

Bank, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

As the Ninth Circuit has made clear, the very essence of a settlement agreement is compromise, "'a yielding of absolutes and an abandoning of highest hopes'":

> "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation."

Officers for Justice, 688 F.2d at 624; *Ellis*, 87 F.R.D. at 19 (as a *quid pro quo* for not having to undergo the uncertainties and expenses of litigation, the plaintiffs must be willing to moderate the measure of their demands).

C. The Parties Have Engaged in Sufficient Pretrial Discovery and Proceedings to Identify the Strengths and Weaknesses of Their Cases

The stage of the proceedings and the amount of discovery completed is another factor that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *Officers for Justice*, 688 F.2d at 625; *Mego*, 213 F.3d at 458 (9th Cir. 2000). That factor also favors the Settlement in this case.

Here, both the knowledge of Lead Counsel and the proceedings themselves have reached a stage where they were able to make a highly informed and intelligent evaluation of the Litigation and propriety of the Settlement. As discussed above and in the Brown Declaration, this Litigation has been hotly contested from its inception. During that time, the parties filed and opposed numerous motions, participated in extensive discovery, and engaged in arduous settlement negotiations. The extensive settlement negotiations included an all-day mediation session with Judge Phillips where the Plaintiffs' claims and Defendants' defenses were fully vetted. Prior to the mediation, Plaintiffs and Defendants submitted to Judge Phillips and exchanged among the parties detailed opening mediation statements, which further highlighted the factual and legal issues in dispute. There is no question that Plaintiffs and their

counsel were in an excellent position to evaluate the strengths and weaknesses of the claims asserted and defenses raised by Defendants, as well as the substantial risks of continued litigation and the propriety of settlement. Having sufficient information to properly evaluate the case, the Litigation was settled on terms highly favorable to the Class.

D. The Recommendations of Experienced Counsel Favor Approval of the Settlement

As the Ninth Circuit observed in *Rodriguez*, "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action. 563 F.3d at 965. Courts have recognized that "'[g]reat weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Nat'l Rural*, 221 F.R.D. at 528. Indeed, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007). Lead Counsel, who is actively involved and experienced in complex securities class action litigation, has weighed all of the relevant factors and has concluded that the Settlement is a highly favorable result that is in the best interest of the Class. Where, as here, the settlement is the product of serious, informed, and non-collusive negotiations, "'the trial judge . . . should be hesitant to substitute its own judgment for that of counsel.'" *Nat'l Rural*, 221 F.R.D. at 528.

Plaintiffs' counsel possess significant experience and expertise in securities and other complex class action litigation and have negotiated numerous other substantial class action settlements throughout the country. *See, e.g.*, www.rgrdlaw.com; Lead Counsel's Fee Decl., Ex. G; www.barrettjohnston.com; Martin Decl., Ex. E. Here, "[t]here is nothing to counter the presumption that Lead Counsel's recommendation is reasonable." *Omnivision*, 559 F. Supp. 2d at 1043.

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E. The Risks of Maintaining the Class Action Through Trial Support the Settlement

Plaintiffs' motion for class certification was granted after significant class certification discovery, including Plaintiffs' submission of an expert report. While the Court granted Plaintiffs' motion, there was no assurance of maintaining class status throughout the Litigation, as courts may exercise their discretion to decertify the class at any time. *See* Fed. R. Civ. P. 23(c).

F. Reaction of the Class Supports Approval of the Settlement

Pursuant to this Court's Order Preliminarily Approving Settlement and Providing for Notice (Dkt. No. 240) ("Preliminary Approval Order"), the Court-approved Notice of Proposed Settlement of Class Action ("Notice") was mailed to potential Class Members who could be identified with reasonable effort and a summary notice was published in *Investor's Business Daily* and transmitted over the *Business Wire*.[8] The Notice advised the Class of the terms of the Settlement and the Plan of Allocation, as well as the procedure and deadline for filing objections. As of August 6, 2015, more than 103,000 Notices had been mailed to potential Class Members and nominees. While the objection deadline, August 21, 2015, has not yet passed, not a single Class Member has filed an objection to the Settlement, the Plan of Allocation, or counsel's request for an award of attorneys' fees and expenses.

While not conclusive, "the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness." *Hanlon*, 150 F.3d at 1027. Of course, "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). "'A certain number of . . . objections are to be expected in a

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[8] *See* accompanying Declaration of Carole K. Sylvester Re (A) Mailing of the Notice of Proposed Settlement of Class Action 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, ¶¶3-10, 13.

1 class action.'" *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 533
2 (E.D. Ky. 2010), *aff'd sub nom.*, *Poplar Creek Dev. Co. v. Chesapeake Appalachia,*
3 *L.L.C.*, 636 F.3d 235 (6th Cir. 2011). Moreover, "a relatively small number of class
4 members who object is an indication of a settlement's fairness." 2 Herbert Newberg
5 & Alba Conte, *Newberg on Class Actions* §11.48 (3d ed. 1992); *see also In re Rite Aid*
6 *Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) ("such a low level of objection is a
7 'rare phenomenon'").[9]

8 Each of the above factors fully supports a finding that the Settlement is fair,
9 reasonable, and adequate, and therefore deserves this Court's final approval.

10 **IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE**

11 Lead Counsel also seeks approval of the Plan of Allocation of the settlement
12 proceeds. The Plan of Allocation was set forth in the Notice mailed to Class
13 Members. The Plan of Allocation provides an equitable basis to allocate the Net
14 Settlement Fund among all Class Members who submit an acceptable Proof of Claim
15 and Release. The Plan of Allocation was developed by Lead Counsel, with the
16 assistance of its damages expert, and reflects the theories of causation and damages it
17 would have presented at trial. Assessment of a plan of allocation in a class action
18 under Rule 23 is governed by the same standards of review applicable to the
19 settlement as a whole – the plan must be fair and reasonable. *See Ikon*, 194 F.R.D. at
20 184; *Class Plaintiffs*, 955 F.2d at 1284; *Atlas v. Accredited Home Lenders Holding*
21 *Co.*, No. 07-CV-00488-H (CAB), 2009 U.S. Dist. LEXIS 103035, at *13 (S.D. Cal.
22 Nov. 4, 2009). District courts enjoy "broad supervisory powers over the
23 administration of class-action settlements to allocate the proceeds among the claiming
24 class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978);
25 *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982).
26

27 [9] In accordance with the Court's Preliminary Approval Order, counsel for the
28 Plaintiffs will respond to any objections on or before September 11, 2015.

The objective of a plan of allocation is to provide an equitable basis upon which to distribute the settlement fund among eligible class members. An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992). Here, the Plan of Allocation was based on Plaintiffs' economic expert's analysis and reflects an assessment of the damages that Plaintiffs contend could have been recovered under the theories asserted in the case. The Plan of Allocation also takes into account the Ninth Circuit's decision in *Loos* whereby the Ninth Circuit held, "the announcement of an investigation without more is insufficient to establish loss causation." 762 F.3d 890. Lead Counsel believes that the Plan of Allocation will result in a fair and equitable distribution of the proceeds among Class Members who submit valid claims and, thus, it should be approved.

V. CONCLUSION

The Settlement is a highly favorable result, given the presence of skilled counsel for all parties, the extensive settlement negotiations, the considerable risk, expense, and delay if the Litigation were to continue, and the certain and immediate benefit of the Settlement to Members of the Class. In addition, the Plan of Allocation tracks the theory of damages asserted in the case and is necessarily fair, reasonable, and adequate.

Therefore, Plaintiffs respectfully request that this Court approve the settlement of this Litigation and the Plan of Allocation as fair, reasonable, and adequate.

DATED: August 7, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 7, 2015.

s/ Andrew J. Brown
ANDREW J. BROWN

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Mailing Information for a Case 8:12-cv-01623-DMG-JPR In re Questcor Securities Litigation

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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8:12-cv-01623-DMG-JPR In re Questcor Securities Litigation

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UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

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Case Name: In re Questcor Securities Litigation
Case Number: 8:12-cv-01623-DMG-JPR
Filer: Steven Glucksberg
Plumbers and Pipefitters National Pension Fund
West Virginia Investment Management Board
Document Number: 242

Docket Text:
MEMORANDUM in Support of NOTICE OF MOTION AND MOTION for Settlement Approval of Class Action and Plan of Allocation [241] filed by Consol Plaintiffs Steven Glucksberg, Plumbers and Pipefitters National Pension Fund, West Virginia Investment Management Board. (Brown, Andrew)

8:12-cv-01623-DMG-JPR Notice has been electronically mailed to:

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