UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

KBC ASSET MANAGEMENT NV, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. AEGERION PHARMACEUTICALS, INC., et al., Defendants.	No. 1:14-cv-10105-MLW CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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SECONDARY AUTHORITY

Pursuant to Rules 23(b)(3) and 23(e) of the Federal Rules of Civil Procedure, KBC Asset Management NV, Sheet Metal Workers' National Pension Fund, and Chester County Employees' Retirement Fund (collectively, "Lead Plaintiffs" or "Plaintiffs")[1] respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement of the above-captioned class action (the "Litigation") and for approval of the proposed Plan of Allocation.[2]

I. PRELIMINARY STATEMENT

After three years of litigation, Plaintiffs propose for this Court's final approval: (1) a settlement and dismissal of this securities fraud action against Aegerion Pharmaceuticals, Inc. ("Aegerion" or the "Company"), Marc D. Beer, Craig Fraser, and Mark J. Fitzpatrick (collectively, "Defendants") in exchange for the payment of $22,250,000; and (2) a Plan of Allocation for the disbursement of the net settlement proceeds among Class Members. As set forth below and in detail in the accompanying Joint Declaration of Jack Reise and Gregg S. Levin in Support of: (A) Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation, and (B) Lead Counsel's Motion for Attorneys' Fees, Payment of Litigation Expenses, and Reimbursement of Lead Plaintiffs' Expenses (the "Joint Declaration"),[3] the Settlement represents a substantial recovery for the Class, particularly when balanced against the risks and obstacles of continued litigation. Significantly, the parties reached the Settlement only after extensive, arm's-length negotiations conducted by experienced counsel with the assistance of Judge Daniel Weinstein

[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation of Settlement dated January 17, 2017 ("Stipulation"). *See* ECF No. 136.

[2] Plaintiffs also seek final certification of the Class, the appointment of Plaintiffs as Class Representatives, and the appointment of Lead Counsel as Class Counsel.

[3] The Joint Declaration is an integral part of this submission and the Court is respectfully referred to it for, *inter alia*, a summary of the allegations and claims and a detailed description of the procedural history of the Litigation, the investigation conducted by Lead Counsel, the events that led to the Settlement, and the risks and uncertainties of continued litigation.

(Ret.) ("Judge Weinstein") and Jed D. Melnick, Esq. ("Mr. Melnick"), highly experienced and skilled mediators of complex actions.[4]

The Settling Parties aggressively and thoroughly litigated this Litigation. Plaintiffs' efforts, which are detailed in the Joint Declaration, include, *inter alia*: (i) a comprehensive factual investigation aided by private investigators and a Freedom of Information Act request; (ii) rigorous analysis of Aegerion's public filings and Defendants' public statements; (iii) review of news articles and analyst reports about the Company; (iv) interviews of numerous former Aegerion employees in connection with the drafting of three amended complaints; (v) review and analysis of Aegerion's settlement with the U.S. Securities and Exchange Commission ("SEC") and U.S. Department of Justice ("DOJ") related to the Company's sales activities and disclosures related to JUXTAPID (lomitapide) capsules ("JUXTAPID"); (vi) consultations with an expert on damages-related issues; and (vii) preparation of a detailed mediation statement. *See* Joint Decl., ¶¶6, 23, 40, 42. In view of the foregoing, Plaintiffs and their counsel had a comprehensive understanding of the strengths and weaknesses of the case and had sufficient information to make an informed decision regarding the fairness of the Settlement before entering into it and presenting it to the Court.

Lead Counsel are highly experienced in prosecuting securities class actions, and have concluded that the Settlement is an excellent result under the circumstances of the case. This conclusion is based on, among other things, the certain recovery obtained when weighed against the

[4] *See, e.g.*, *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) ("The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation supervised by Judge Weinstein."); *Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051(CM)(GWG), 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) ("Mr. Melnick's role in the settlement negotiations overcomes any hesitation this court might have about approving a settlement reached prior to any discovery. . . . The participation of this highly qualified mediator strongly supports a finding that negotiations were conducted at arm's length and without collusion.").

significant risk, expense, and delay presented in continuing the Litigation through motions to dismiss, class certification, the completion of fact and expert discovery, motion(s) for summary judgment, trial, and probable post-trial motions and appeal(s); an analysis of the facts adduced to date; past experience in litigating complex securities class actions; the serious disputes between the parties concerning the merits and damages; and collectability concerns. *Id.*, ¶¶62-65.

Accordingly, Lead Plaintiffs respectfully request that the Court finally certify the Class and approve the Settlement. In addition, the Plan of Allocation, which was developed with the assistance of Plaintiffs' consulting damages expert, is a fair and reasonable method for distributing the Net Settlement Fund to Class Members and also should be approved by the Court.

II. SUMMARY OF THE CLAIMS AT ISSUE IN THE ACTION

The Joint Declaration explains the full factual and procedural history of this Litigation. In short, this action arises out of allegations that the Defendants violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 promulgated thereunder, by, among other things, issuing false and misleading statements and/or failing to disclose that: (i) despite representing their compliance with the rules and regulations of the Food and Drug Administration ("FDA"), in order to achieve and maintain profitability, Defendants illegally marketed JUXTAPID beyond its FDA-approved label; (ii) the Company was experiencing a higher than expected drop-out rate of patients taking JUXTAPID; (iii) more patients than expected were not filling their JUXTAPID prescriptions; and (iv) issues existed relating to the performance of, or the potential market for, JUXTAPID, including, but not limited to, statements and omissions of information necessary for investors to understand that JUXTAPID was not performing and could not lawfully perform as well in the market as the Defendants' statements and omissions led the public to

believe. For context, Lead Plaintiffs further alleged that the drop-out rate and patient-elected non-starts were key metrics that Aegerion utilized to forecast its annual revenue guidance. *Id.*, ¶¶11-16.

On June 1, 2015, Lead Plaintiffs filed their Amended Class Action Complaint ("Amended Complaint"). On July 31, 2015, Defendants filed their Motion to Dismiss the Amended Complaint. On August 21, 2015, Lead Plaintiffs filed their Second Amended Class Action Complaint ("Second Amended Complaint"). Defendants, on September 4, 2015, moved to strike the Second Amended Complaint. Lead Plaintiffs filed their opposition to the Motion to Strike on September 18, 2015. *Id.*, ¶¶24-29.

Following oral argument on Defendants' Motion to Strike the Second Amended Complaint and Lead Plaintiffs' Motion for Leave to File the Second Amended Complaint, the Court entered an order requiring the parties to, among other things, confer and "report whether they have reached an agreement to permit or withdraw the lead plaintiffs' Second Amended Complaint." ECF No. 111. The parties thereafter conferred but were unable to reach an agreement, and informed the Court that Lead Plaintiffs would file an opposition to the Motion to Dismiss the Amended Complaint. Joint Decl., ¶32.

Following Aegerion's May 12, 2016 announcement that it had reached preliminary agreements in principle with the DOJ and the staff of the SEC regarding a settlement of the ongoing investigations by these agencies into the Company's sales activities and disclosures related to JUXTAPID, the parties conferred and reached an agreement for Lead Plaintiffs to file their Third Amended Class Action Complaint ("Third Amended Complaint"), which would extend the putative Class Period to April 30, 2013 through May 11, 2016, inclusive. Lead Plaintiffs filed the Third Amended Complaint on June 27, 2016. *Id.*, ¶¶33-36.

In an effort to conserve judicial and financial resources and attempt to settle the Litigation, the parties engaged the services of Judge Weinstein and Mr. Melnick, nationally recognized mediators. The parties prepared and exchanged detailed mediation statements and engaged in a full-day in-person mediation session on November 14, 2016. These efforts culminated with the parties agreeing on November 29, 2016, to settle the Litigation for $22,250,000, subject to the negotiation of the terms of a Stipulation of Settlement and approval by the Court. *Id*., ¶¶39-47. The Stipulation of Settlement was executed on January 17, 2017, and submitted to the Court that same day. *See* ECF No. 136. The Settlement received preliminary approval on May 19, 2017, and the Preliminary Approval Order was entered on June 29, 2017. *See* ECF No. 145 at 1 (citing ECF No. 141 at 21-22).

III. ARGUMENT

A. The Proposed Settlement Is Fair, Reasonable, and Adequate, and Should Be Approved

Federal Rule of Civil Procedure 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e); *see also Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). Courts "enjoy great discretion to 'balance [a settlement's] benefits and costs' and apply this general standard." *Voss*, 592 F.3d at 251 (alteration in original).[5]

In exercising its fiduciary duty to determine whether a settlement is fair, reasonable, and adequate, a court must first examine whether there was procedural fairness in the negotiation process leading to settlement. *See In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass 2005) ("Approval is to be given if a settlement is untainted by collusion."). Courts then consider

[5] Citations are omitted throughout unless otherwise indicated.

substantive fairness to determine whether the settlement's terms are fair, adequate, and reasonable by examining the litigation itself, its complexity and risks, and the possible recovery. *See, e.g., In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 71-72 (D. Mass. 2005).

The First Circuit has not yet established a fixed test for evaluating the fairness of a class settlement. Many courts in this Circuit, however, have looked to the factors set forth by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), to determine substantive fairness. *See, e.g.*, *Lupron*, 228 F.R.D. at 93 (noting *Grinnell* supplied the "most commonly referenced factors" and applying them); *Relafen*, 231 F.R.D. at 72 (listing *Grinnell* factors); *New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 280-81 (D. Mass. 2009) (same); *In re StockerYale, Inc. Sec. Litig.*, No. 1:05cv00177-SM, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007) (same). The *Grinnell* factors are:

> (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.

Grinnell, 495 F.2d at 463.

Ultimately, the determination of whether a settlement is fair, reasonable, and adequate is confided to the Court's sound discretion. *See City P'ship*, 100 F.3d at 1043-44. The Court should not "prejudge the merits of the case" or "second-guess the settlement." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 211 (D. Me. 2003). Rather, the Court's role is limited to "determin[ing] if the parties' conclusion is reasonable." *Id.*

In evaluating the Settlement, the Court also should consider the "'strong public policy in favor of settlements,'" particularly in class actions. *P.R. Dairy Farmers Ass'n v. Pagan*, 748 F.3d

13, 20 (1st Cir. 2014); *see also In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007) ("[P]ublic policy generally favors settlement—particularly in class actions.").

B. The Settlement Was Reached Following Extensive Arm's-Length Negotiations and Is Endorsed by Lead Plaintiffs and Lead Counsel

The Settlement was reached through arm's-length negotiations and after experienced counsel had thoroughly evaluated the merits of the claims, and is thus procedurally fair. The parties utilized the services of Judge Weinstein and Mr. Melnick, two well-respected and experienced mediators. Prior to the November 14, 2016 mediation, the parties drafted detailed position statements which were provided to the mediators and exchanged among the parties.

The parties' mediation statements detailed their respective positions, highlighted the factual and legal issues in dispute, and cited to supporting documents. Prior to the mediation, Defendants also made a presentation to the mediators and Lead Counsel regarding the Company's financial position and available insurance. *See* Joint Decl., ¶¶42-43. At the November 14, 2016 mediation, the parties' positions, including the strengths and weaknesses of their respective claims and defenses, as well as the Company's ability to fund any potential verdict in favor of the Class, were fully explored. *Id*., ¶44. Although no agreement to settle was reached at the mediation, the parties developed a better understanding of each other's position by the end of the session. Following further negotiations conducted under the auspices of the mediators, the parties ultimately reached an agreement-in-principle to resolve the Litigation. *Id*., ¶¶45-47.

Under these circumstances, it is clear that the Settlement was not the result of fraud, collusion, or abandonment of the interests of the Class, but rather was the result of extensive and informed arm's-length negotiations. *See, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] . . . mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Eisen v. Porsche Cars N. Am., Inc.*,

No. 2:11-cv-09405-CAS-FFMx, 2014 WL 439006, at *5 (C.D. Cal. Jan. 30, 2014) ("[W]here the services of a private mediator are engaged, this fact tends to support a finding that the settlement valuation by the parties was not collusive.").

Furthermore, courts accord great weight to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that they believe the settlement provides to the Class relief that is fair, reasonable and adequate."). Lead Counsel, who have extensive experience in securities class action litigation and were well-informed about the facts of the case as a result of their investigations prior to and while drafting three amended complaints, strongly believe that the $22.25 million Settlement is in the best interests of the Class in light of the significant risks of continued litigation. Because "'[t]here is no doubt that proposing counsel teams have extensive experience in the field,'" the Court should presume the Settlement to be reasonable. *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 108 (D. Mass. 2010) (alteration in original).

Furthermore, all three Lead Plaintiffs – sophisticated institutional investors that have supervised and monitored the work of Lead Counsel throughout the Litigation and were updated regarding the progress of settlement negotiations with Defendants – have endorsed the Settlement as providing an excellent result in light of the risks of continued litigation. *See* Declaration of Bart Elst ("KBC Decl."), ¶¶6, 11; Declaration of Lori Wood ("Sheet Metal Workers Decl."), ¶¶6, 11;

Declaration of Thomas L. Whiteman and Mark Rupsis ("Chester County Decl."), ¶¶6, 12, submitted herewith. That fact also weighs in favor of settlement approval. *See, e.g., City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) ("[T]he recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement.").

All of the foregoing considerations confirm the reasonableness of the Settlement and that the Settlement is entitled to a presumption of procedural fairness.

C. Consideration of All Relevant Factors Supports the Approval of the Settlement as Substantively Fair, Reasonable, and Adequate

The relevant *Grinnell* factors, discussed below, also weigh strongly in favor of final approval of the Settlement.

1. Litigation Through Trial Would Be Complex, Costly, and Long

The complexity of this case and the substantial expense and delay that would result if Lead Plaintiffs sought to achieve a litigated verdict weigh strongly in favor of approval of the Settlement. *See StockerYale*, 2007 WL 4589772, at *3 (noting factor "'captures the probable costs, in both time and money, of continued litigation'"); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *11 (E.D. La. Mar. 2, 2009) (noting continued litigation, including through discovery, class certification, trial and appeals, "would consume substantial judicial and attorney time and resources, and avoiding such costs weighs in favor of settlement"). By reaching a favorable settlement prior to resolution of a motion to dismiss, class certification, summary judgment, or trial, Plaintiffs avoid significant expense and delay and ensure a risk-free recovery for the Class. "Most class actions are inherently complex and settlement avoids the costs, delays and

multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000).

Here, Plaintiffs' claims raise numerous complex legal and factual issues concerning, *inter alia*, falsity, scienter, loss causation, and damages. *See, e.g.*, Joint Decl., ¶¶51-52, 55-61. It would be costly and time-consuming to pursue this Litigation all the way through to trial with no guarantee of success. Indeed, even if the Class had overcome Defendants' anticipated motion(s) to dismiss the Third Amended Complaint, an uncertain proposition at best, and ultimately recovered a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation and trial, the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery."). Furthermore, success at trial would not guarantee a recovery to the Class as there remained the risk that any verdict could be overturned on appeal. *See Relafen*, 231 F.R.D. at 72 ("[I]n light of the high stakes involved, 'an appeal is certain to follow regardless of the outcome at trial.'"). Thus, this factor weighs strongly in favor of approval of the Settlement.

2. The Reaction of the Class Supports Final Approval

"The 'favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval.'" *Hill v. State Street Corp.*, No. 09-12146-GAO, 2015 WL 127728, at *8 (D. Mass. Jan. 8, 2015). The reaction of the class factor "'attempts to gauge whether members of the class support the settlement.'" *StockerYale*, 2007 WL 4589772, at *3 (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 299 (3d Cir. 1998)). This factor can be analyzed "by comparing the number

of objectors and opt outs with the number of claimants"; reaction to a settlement is considered positive when the number of objectors is minimal compared to the number of claimants. *Lupron*, 228 F.R.D. at 96. As such, a small percentage of objections and opt-outs constitutes strong evidence that a settlement is fair and reasonable. *See Bussie*, 50 F. Supp. 2d at 77.

As of September 29, 2017, the Court-appointed Claims Administrator, Gilardi & Co. LLC ("Gilardi"), mailed a total of 58,465 copies of the Notice Package (consisting of the Notice and Proof of Claim and Release) to potential Class Members and their nominees. *See* accompanying Declaration of Carole K. Sylvester, ¶11 ("Mailing Decl."). Furthermore, a Summary Notice was published in *The Wall Street Journal* and transmitted over the *Business Wire* on July 25, 2017. *Id.*, ¶14. The Notice set out the essential terms of the Settlement and informed potential Class Members of their right to opt out of the Class or object to any aspect of the Settlement. *See* Joint Decl., ¶67.

While the deadline set by the Court for the Class Members to exclude themselves or object to the Settlement has not yet passed, as of October 2, 2017, Lead Plaintiffs have received no objections to and only one valid opt-out from the proposed Settlement. *See* Mailing Decl., ¶15. Thus, this factor clearly weighs in favor of settlement approval.[6]

D. Plaintiffs Had Sufficient Information to Resolve the Case Responsibly

Courts also examine "'the degree of case development that class counsel [had] accomplished prior to settlement.'" *StockerYale*, 2007 WL 4589772, at *3 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)) (alteration in original). Here, the parties reached a settlement early in the proceedings, a result consistent with the Federal Rules of Civil Procedure. *See In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005) (noting

[6] If any objections to the Settlement or additional requests for exclusion are received subsequent to the filing of this brief, Plaintiffs will respond in their reply papers, on November 16, 2017.

early resolution of litigation is consistent with Rule 1 of the Federal Rules of Civil Procedure, which states the Rules "'shall be construed and administered to ensure the ***just, speedy, and inexpensive determination*** of every action'") (emphasis in original).

Formal discovery is not required prior to settlement. *See Roberts v. TJX Cos., Inc.*, No. 13-cv-13142-ADB, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) (finding settlement to be fair and reasonable when "parties exchanged sufficient information over the course of the mediation process to ensure that both sides were making an informed decision regarding the adequacy of the settlement"); *Yedlowski v. Roka Bioscience, Inc.*, No. 14-CV-8020-FLW-TJB, 2016 WL 6661336, at *13 (D.N.J. Nov. 10, 2016) ("Courts in this Circuit frequently approve class action settlement[s] despite the absence of formal discovery."); *see also 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) ("[P]arties need not have even engaged in formal or extensive discovery."). Rather, the key question is "'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *In re Ocean Power Techs., Inc., Sec. Litig.*, No. 3:14-CV-3799, 2016 WL 6778218, at *17 (D.N.J. Nov. 15, 2016).

Here, despite the PSLRA-mandated formal discovery stay, Lead Counsel conducted a comprehensive independent investigation of the facts alleged. As set forth in the Joint Declaration, this investigation included, *inter alia*, reviewing and analyzing publicly available information concerning the Defendants, interviewing numerous potential witnesses with relevant knowledge of the Company's operations, and consulting with an expert about damages-related issues. *See* Joint Decl., ¶¶6-7, 23. In addition, information regarding the settlement between the Company on the one hand and the SEC and DOJ on the other, *id*., ¶33, confirmed certain facts revealed during Lead Counsel's investigation, ensuring that they had developed a comprehensive understanding of the key legal and factual issues in the Litigation. Thus, in agreeing to the Settlement, Plaintiffs and Lead

Counsel had "'a clear view of the strengths and weaknesses of their cases'" and of the range of possible outcomes at trial. *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004); *see also Ocean Power*, 2016 WL 6778218, at *17 (approving settlement and noting that, "[a]lthough there has been no formal discovery, Plaintiff's Counsel had ample information to evaluate the prospects for the Class and to assess the fairness of the Settlement"); *Rieckborn v. Velti PLC*, No. 13-cv-03889-WHO, 2015 WL 468329, at *6 (N.D. Cal. Feb. 3, 2015) ("Despite reaching settlement relatively early in the life span of this case, the Settling Parties have shown that their decision to settle was made on the basis of a thorough understanding of the relevant facts and law."). This factor weighs in favor of the Settlement.

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

While Lead Plaintiffs and Lead Counsel believe that they could have prevailed on their claims, they also recognize that there were considerable risks involved in pursuing the Litigation that could have led to a substantially smaller recovery or no recovery at all.[7]

Plaintiffs faced numerous hurdles to establishing liability. *See Hi-Crush*, 2014 WL 7323417, at *8 ("Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet."). More specifically, they faced substantial risks and uncertainties in proving, *inter alia*, that Defendants' alleged misstatements were materially false and misleading and that Defendants acted with scienter.[8] *See* Joint. Decl., ¶¶55-59. Against that backdrop, the Settlement represents a highly

[7] 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 (C.D. Cal. July 9, 2013) (quoting *Flag Telecom Holdings*, 2010 WL 4537550, at *17).

[8] *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS)(SMG), 2007 WL 2743675, at *11 (E.D.N.Y. Sept. 18, 2007) ("Establishing scienter is 'a difficult burden to meet.'").

favorable recovery for the Class. *See, e.g.*, *Gulbankian v. MW Mfrs., Inc.*, No. 10-10392-RWZ, 2014 WL 7384075, at *3 (D. Mass. Dec. 29, 2014) ("Settlement . . . avoids substantial risks and costs for both sides, giving a certain positive outcome in the face of a costly and uncertain one."); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class. In the circumstances of such as case as this, it may be preferable 'to take the bird in the hand instead of the prospective flock in the bush.'").

And, even if Plaintiffs successfully established liability, they also faced substantial risk in proving damages. In federal securities cases, the measure of damages remains a "'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and [a share]'s 'true value' absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004). "Undoubtedly, the Parties' competing expert testimony on damages would inevitably reduce the trial of these issues to a risky 'battle of the experts.'" *Aeropostale*, 2014 WL 1883494, at *9; *see also Tyco*, 535 F. Supp. 2d at 260-61 ("[E]ven if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages."). "The complex issues surrounding damages, therefore, support final approval of the Settlement." *Aeropostale*, 2014 WL 1883494, at *9.

F. The Risks of Maintaining the Class Action Through Trial Support Final Approval of the Settlement

This factor "'measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial'" because "'the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class action].'" *StockerYale*, 2007 WL 4589772, at *3 (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004)) (alteration in original). Absent the Settlement, and had Lead Plaintiffs defeated the likely

motion(s) to dismiss, there would have been a contested motion for class certification. Targeted class certification discovery would have been conducted and Defendants, without doubt, would have opposed the motion, requiring Lead Plaintiffs to retain experts to assist them in addressing Defendants' opposition. While Lead Counsel are confident that they would have presented a compelling motion for certification of a litigation class, the process would have added time and expense to the proceedings, and the outcome of such a contested motion was far from certain.

Moreover, Plaintiffs faced the risk that Defendants would have sought to decertify any class certified by the Court. *See, e.g.*, *Shepard v. Rhea*, No. 12-CV-7220 (RLE), 2014 WL 5801415, at *10 (S.D.N.Y. Nov. 7, 2014) ("The risk of obtaining class certification and maintaining it through trial is also present. Contested class certification motions would likely require extensive discovery and briefing. Defendants might challenge class certification by arguing that individualized questions preclude class certification. If the Court were to grant class certification, Defendants might seek to file an appeal . . . , the resolution of which would require an additional round of briefing. Plaintiffs' Settlement eliminates the risk, expense, and delay inherent in the litigation process."); *Roberts*, 2016 WL 8677312, at *7 ("The numerous opportunities for certification to fail could lead to delay and create substantial risk of Plaintiffs failing completely.").

G. The Ability of Defendants to Withstand a Greater Judgment Supports Approval of the Settlement

This factor considers "'whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement.'" *StockerYale*, 2007 WL 4589772, at *4 (quoting *Cendant*, 264 F.3d at 240) (alteration in original). Even so, "a defendant is 'not required to empty its coffers before a settlement can be found adequate.'" *In re Sturm, Ruger, & Co. Sec. Litig.*, No. 3:09cv1293 (VLB), 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012). Here, Lead Plaintiffs appropriately considered the fact that Aegerion's relatively limited financial resources and available

insurance would render collectability highly problematic. On November 29, 2016, Aegerion and QLT Inc. ("QLT") merged, with Aegerion becoming an indirect wholly owned subsidiary of QLT. In conjunction with the closing of the merger, QLT changed its name to Novelion Therapeutics Inc. ("Novelion"). Under the terms of the merger, however, Novelion is not responsible for any liability of Defendants to the Class. *See* Joint Decl., ¶64.

Additionally, at the time of entering into the Settlement, Aegerion's prospects for continuing as a going concern were questioned by its outsider auditor, EY (formerly Ernst & Young). *See* Aegerion Pharms., Inc., Quarterly Report (Form 10-Q), at 96 (Aug. 9, 2016) (noting EY's "substantial doubt" about Aegerion's ability to continue as a going concern in its report for year-end 2015). If Aegerion were to enter bankruptcy, the Class would likely receive no recovery. In this regard, from December 31, 2015 to June 30, 2016, Aegerion's available cash fell from $64 million to $46 million. *Id.* at 4. Aegerion's financial situation was such that it needed to arrange a $15 million "lifeline" loan with QLT. Absent such a loan, Aegerion stated that it "would need to raise capital or obtain alternative financing to . . . fund our operations," or it would be forced to "delay, reduce or cease operations." *Id.* at 109. Aegerion also projected that it would have a negative net income of $130 million in 2016 and a negative net income of $53 million in 2017. *See* QLT Inc., Registration Statement (Form S-4), at 80 (Aug. 8, 2016).

Further depleting the available resources available to the Class, Aegerion carries substantial debts and obligations, including $325 million in convertible notes that come due in 2019 and $40 million payable over five years to the DOJ and SEC as part of the resolution of certain investigations that had been conducted by those agencies. *See* Joint Decl., ¶63.

Finally, the insurance proceeds available to cover the claims in this Litigation are limited, further reducing the amount available to the Class. The longer the Litigation continued, the more the

available insurance proceeds would have been reduced, including the possibility that all available insurance policies would have been exhausted before any verdict or later settlement. *Id.*, ¶65. Accordingly, this factor weighs in favor of approving the Settlement.

H. The Remaining *Grinnell* Factors Also Support the Settlement

Courts also consider the range of reasonableness of a settlement in light of the best possible recovery and litigation risks. In this context, courts analyze "how the settlement relates to the strengths and weaknesses of the case." *Aeropostale*, 2014 WL 1883494, at *9. More specifically, a court "'consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.'" *Id*. (alterations in original). "Courts agree that the determination of a 'reasonable' settlement 'is not susceptible of a mathematical equation yielding a particularized sum.'" *Id.* "Instead, 'in any case there is a range of reasonableness with respect to a settlement.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

The proposed $22.25 million Settlement is well within the range of reasonableness and is an excellent result given the numerous and substantial risks the Class faced in the Litigation. Notably, the Settlement, in view of the risks and uncertainties discussed above, "is in line with the median ratio of settlement size to investor losses." *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 691 n.20 (D. Colo. 2014). According to a recent report published by Cornerstone Research, between 2006 and 2015 the median recovery in securities cases with estimated damages of between $500 million and $999 million was 1.8%.[9] Following an extensive analysis, Plaintiffs' retained consulting damages expert estimated maximum damages of approximately $844.6 million assuming Plaintiffs

[9] *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review and Analysis*, at 8 (Cornerstone Research 2017) ("Cornerstone Report") (attached as Ex. A to Joint Decl.).

prevailed on all of their claims for the entirety of the Class Period. *See* Joint Decl., ¶7. Measured against that yardstick, the Settlement, if approved, will compensate the Class for approximately 2.63% of its estimated damages – a substantial recovery in light of the procedural posture of the case, Defendants' countervailing legal arguments, and the aforementioned collectability issues. *See, e.g., Crocs*, 306 F.R.D. at 691 n.20 (approving settlement recovering "approximately 1.3% of the amount of damages that could be achieved"); *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 336 (D.N.J. 2002) (finding justifiable settlement that "represents less than two percent" of "maximum possible recovery," and noting "Settling Defendants appear to have significant defenses that increase the risks of litigation [and], as the risks of litigation increase, the range of reasonableness correspondingly decreases").

For the foregoing reasons, the Court should find that the Settlement is procedurally and substantively fair, reasonable and adequate, and enter Judgment approving the Settlement and dismissing the Litigation with prejudice.

IV. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

The Notice sets forth the Plan of Allocation detailing how the Net Settlement Fund is to be divided among eligible Class Members. "A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate." *Hill*, 2015 WL 127728, at *11 (citing *Tyco*, 535 F. Supp. 2d at 262). Moreover, "[a] plan of allocation is fair and reasonable as long as it has a 'reasonable, rational basis.'" *Id.* (quoting *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012)). When determining whether a plan of allocation is fair and reasonable, "courts give weight to the opinion of qualified counsel." *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014).

Here, Lead Counsel prepared the Plan of Allocation after careful consideration and with the assistance of a consulting damages expert. *See* Joint Decl., ¶¶38, 74. The Plan of Allocation was fully disclosed in the Notice that was mailed to potential Class Members and nominees, and, as of the filing of this motion, not a single Class Member has filed an objection to it. *Id*., ¶¶73-74. The Plan of Allocation ensures an equitable *pro rata* distribution of the Net Settlement Fund among Authorized Claimants based on their respective recognized losses. Plaintiffs and Lead Counsel submit that the Plan of Allocation is fair, reasonable, and adequate and should be approved. *See, e.g.*, *Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.").[10]

V. FINAL CERTIFICATION OF THE CLASS IS APPROPRIATE

In presenting their motion for preliminary approval, Plaintiffs requested that the Court preliminarily certify the Class for settlement purposes so that notice of the proposed Settlement, the final approval hearing and the rights of Class Members to request exclusion, object, or submit proofs of claim could be issued. In its Preliminary Approval Order, this Court preliminarily certified the Class. *See* ECF No. 145-1 at 1-2. Nothing has changed to alter the propriety of the Court's certification, and no potential Class Member has objected to class certification. Accordingly, and for all the reasons stated in support of Plaintiffs' Preliminary Approval Motion, *see* ECF No. 135 at 8-10, incorporated herein by reference, Plaintiffs now request that the Court: (i) finally certify the Class for purposes of carrying out the Settlement; (ii) appoint Plaintiffs as Class Representatives; and (iii) appoint Lead Counsel as Class Counsel.

[10] If any objections to the Plan of Allocation are received subsequent to the filing this brief, Plaintiffs will respond in their reply papers due November 16, 2017.

VI. CONCLUSION

The Settlement achieves substantial benefits for the Class, and is reasonable, fair, and adequate under any standard, but particularly when the risks, complexity, likely duration of further litigation, and collectability concerns are considered. Moreover, Plaintiffs fully support the Settlement. Judging by the lack of any objections to the Settlement, itself, and that only one exclusion request has been received to date, the reaction of the Class to the Settlement has been very positive. Accordingly, for the reasons set forth above, Plaintiffs respectfully request that the Court: (i) grant final approval of the Settlement; (ii) finally certify the Class; (iii) appoint Plaintiffs as Class Representatives and Lead Counsel as Class Counsel; and (iv) approve the Plan of Allocation as fair, reasonable, and adequate.

DATED: October 2, 2017

Respectfully submitted,

/s/ Gregg S. Levin

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically on this 2nd day of October, 2017, to the registered participants as listed on the Notice of Electronic Filing (NEF). At this time, I am not aware of any non-registered participants to whom paper copies must be sent.

/s/ *Gregg S. Levin*
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