UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re INTERCEPT PHARMACEUTICALS, INC. SECURITIES LITIGATION	Civil Action No. 1:14-cv-01123-NRB
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARD TO PLAINTIFFS PURSUANT TO 15 U.S.C. §78u-4(a)(4)

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Plaintiffs George Burton and Scot H. Atwood (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for approval of: (i) the $55,000,000 all-cash Settlement; (ii) the proposed Plan of Allocation; (iii) Lead Counsel's application for an award of attorneys' fees and expenses; and (iv) Plaintiffs' application for an award for time incurred in prosecuting the Litigation (pursuant to 15 U.S.C. §78u-4(a)(4)).[1]

I. Introduction

As of May 31, 2016, Intercept Pharmaceuticals, Inc. ("Intercept" or the "Company") paid a total of $55,000,000 in cash into an interest-bearing escrow account maintained on behalf of the Class in accordance with the terms of the Stipulation. This Settlement is an excellent recovery, representing approximately 35% of the total estimated damages and far exceeding the median recovery over the past 20 years in similar cases of only 2.6% of the estimated damages. *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* at 33, Figure 29 (NERA Jan. 25, 2016) ("NERA 2015 Full-Year Review"), attached as Exhibit A to the accompanying Declaration of Tor Gronborg in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and for an Award of Attorneys' Fees and Expenses and Award to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) ("Gronborg Decl."). The Settlement recovered $27.5 million for each day of the Class Period, and is, Lead Counsel believes, the largest per-day recovery in the history of securities litigation. The estimated average distribution per share, even assuming that 100% of the eligible shares of Intercept common stock participates in the Settlement, is approximately $48.27 per share before the deduction of any Court-approved fees and expenses.

[1] Unless otherwise noted, all capitalized terms used herein are defined in the May 2, 2016 Stipulation of Settlement ("Stipulation" or "Settlement"). Dkt. No. 113.

This Settlement was achieved after over two years of hard fought litigation, including the filing of multiple discovery-related motions, critical depositions, and after class certification had been fully briefed and argued. It was achieved only after extensive negotiations over a two-day period overseen by John Van Winkle, a nationally-recognized mediator of complex cases and class actions. Based on thorough discovery which had nearly been completed, Plaintiffs and their counsel knew the case very well, including its strengths and weaknesses. Defendants contested every key element of the asserted claims and would have presented significant risks of failure at summary judgment, trial, or on appeal. These risks, as well as the associated delays, when measured against the certainty and immediacy of the $55,000,000 Settlement, justify this Court's approval of the Settlement.

Plaintiffs also request that the Court approve the proposed Plan of Allocation, which was set forth in the Notice sent to Class Members. The Plan of Allocation governs how claims will be calculated and ultimately how the settlement proceeds will be equitably distributed among Authorized Claimants. It was prepared in consultation with Plaintiffs' damages expert, Dr. Steven P. Feinstein, as well as the Claims Administrator, Gilardi & Co. LLC, and is premised on the out-of-pocket measure of damages, *i.e.*, the difference between what Class Members paid for their Intercept shares during the Class Period and what they would have paid had the alleged misstatements not been made (and the omitted information disclosed). The Plan of Allocation calculates Class Member claims as they would have been calculated had Plaintiffs prevailed at trial. It is fair, reasonable, and adequate and should be approved.

Lead Counsel also respectfully applies for an award of attorneys' fees in the amount of 28.63% of the Settlement Amount and litigation expenses of $421,898.62, plus interest on both

amounts. Lead Counsel's fee request, approved by Plaintiffs,[2] is within the range of percentages awarded in class actions in this District, and across the country, even when the results obtained in those other cases pale in comparison to the result achieved here. The cumulative fees and expenses, at 29.4%, was calculated to be and is fully consistent with the average (median) fees and expenses awarded in cases settling between $25 million and $100 million. *See* NERA 2015 Full-Year Review, at 36, Figure 32. It is also reasonable in light of Lead Counsel's hard work, demonstrated efficiency, the risks in bringing and prosecuting this complex action on a contingency basis on behalf of the Class for over two years, and, most importantly, the result achieved.

Finally, plaintiffs Burton and Atwood apply for an award of $5,275 and $7,401.25, respectively, pursuant to 15 U.S.C. §78u-4(a)(4), for their time incurred in prosecuting this Litigation.[3]

II. Procedural and Factual Background

The Court is respectfully referred to the Gronborg Declaration for a full discussion of the factual background and procedural history of the Litigation, the extensive litigation efforts of Lead Counsel, a discussion of the negotiations leading to this Settlement, the reasons why the Settlement and the Plan of Allocation are fair and reasonable and should be approved, and why Lead Counsel's application for an award of attorneys' fees and expenses and Plaintiffs' application for an award for their time incurred should be approved.

III. The Notice of Proposed Settlement Satisfies Rule 23 and Due Process Requirements and Is Reasonable

Rule 23(c)(2) requires the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle*

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[2] *See* Declaration of George Burton ("Burton Decl."), ¶4; Declaration of Scot H. Atwood ("Atwood Decl."), ¶4, submitted herewith.

[3] Burton Decl., ¶5; Atwood Decl., ¶5.

& Jacquelin, 417 U.S. 156, 173-75 (1974) (class notice is designed to fulfill due process requirements). The standard for measuring the adequacy of a class action settlement notice is reasonableness. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Id.*[4] "Notice is 'adequate if it may be understood by the average class member.'" *Id.*

Here, in accordance with the Court's Preliminary Approval Order, starting on June 7, 2016, the Claims Administrator caused the Notice of Pendency of Class Action and Proposed Settlement (the "Notice") and Proof of Claim and Release form (the "Proof of Claim"), as approved by the Court, to be mailed by First-Class Mail to potential Class Members and nominees. *See* accompanying Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Sylvester Decl."), ¶¶4-10. As of July 26, 2016, the Notice had been mailed to over 21,300 potential Class Members and nominees. *Id.*, ¶11. The Notice contains a thorough description of the claims asserted, the Settlement, the Plan of Allocation, and Class Members' rights to participate in and object to the Settlement, or to exclude themselves from the Class and the attorneys' fees and expenses that Lead Counsel intends to request. Sylvester Decl., Ex. A. On June 20, 2016, the approved Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*. Sylvester Decl., ¶14 and Ex. D thereto. Information regarding the Settlement, including downloadable copies of the Notice and Proof of Claim, was also

[4] Citations are omitted throughout, unless otherwise indicated.

posted on a website devoted solely to the administration of the Settlement (www.interceptsecuritieslitigation.com). Sylvester Decl., ¶13.[5]

The notice program, which combined an individual, mailed Notice and Proof of Claim to all potential Class Members who could be identified with reasonable effort, as well as to custodian holders, and a Summary Notice published in one of the pre-eminent national business publications and over the internet, contained all of the information required by §21D(a)(7) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and is adequate to meet the due process and Rule 23(c)(2) and (e) requirements for providing notice to the Class.

IV. The Proposed Settlement Is Fair, Reasonable, and Adequate

A. Settlements Are Generally Favored and Encouraged

The court may approve a "class action settlement if it is 'fair, adequate, and reasonable, and not a product of collusion.'" *Wal-Mart*, 396 F.3d at 116. The evaluation of a proposed settlement requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Id.* While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a general policy favoring settlement exists, especially with respect to class actions. *Id.* (noting "'strong judicial policy in favor of settlements, particularly in the class action context'").

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

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[5] The settlement documents were also posted on Lead Counsel's website (www.rgrdlaw.com/cases-intercept-pharmaceuticals-settlement.html).

B. The Settlement Is Presumptively Fair

A "'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart*, 396 F.3d at 116. In addition, great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 315 (E.D.N.Y. 2006). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

This initial presumption of fairness and adequacy applies in this case because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations over two days with the assistance of a nationally-recognized mediator of complex cases and class actions, John Van Winkle. Gronborg Decl., ¶¶92-93. In addition, Lead Counsel was fully informed of the merits and weaknesses of the case at the time the Settlement was reached. Lead Counsel had nearly completed discovery, including extensive written discovery of Defendants, serving Freedom of Information Act ("FOIA") requests on the National Institutes of Health ("NIH") and the Securities and Exchange Commission ("SEC"), subpoenaing 46 third parties, reviewing and analyzing in excess of 1.5 million pages of documents, taking fact and expert depositions, retaining and consulting with three experts and consultants, and briefing multiple discovery-related motions. *See* Gronborg Decl., ¶¶38-78. Thus, this Settlement is entitled to the presumption of procedural fairness under Second Circuit law.

C. The Settlement Meets the Second Circuit Requirements for Approval

There are nine factors the Second Circuit has identified to determine whether to approve a proposed settlement of a class action:

(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. Although all nine factors need not be satisfied, in fact, as demonstrated below and in the Gronborg Declaration, the Settlement meets each of the relevant criteria set forth above. As such, the Settlement warrants this Court's final approval.

1. The Complexity, Expense, and Duration of the Litigation Justifies the Settlement

Courts have long recognized that the expense and possible or actual duration of the litigation should be considered in evaluating the reasonableness of a settlement. *See, e.g.*, *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). Securities class actions are notoriously complex, difficult to prosecute, and expensive. More importantly, there is no guarantee that the outcome will favor class members. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (holding that securities class action litigation is "'notably difficult and notoriously uncertain'"); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) (noting that continued litigation in a securities case would be complex, lengthy, and expensive, with no guarantee of recovery by the class members). This case was complex, expensive, had already been litigated for two years, and, if Plaintiffs prevailed on summary judgment and at trial, was likely to go on for many years.

There can be no question that this was a complex case. Initially, Lead Counsel engaged in an extensive investigation, including serving a FOIA request on the NIH. After filing the operative complaint, the parties briefed Defendants' motion to dismiss that raised a host of complicated legal issues. Gronborg Decl., ¶¶24-27. In addition, the parties exchanged written discovery and Plaintiffs subpoenaed 46 third parties and served a FOIA request on the SEC. The negotiations for the deposition of the National Institute of Diabetes and Digestive and Kidney Diseases ("NIDDK") representative, Dr. Averell Sherker, alone, took more than five months and involved conferences with attorneys at the NIH and Department of Justice. Further, the parties engaged in numerous and lengthy meet and confers regarding Defendants' search for, and production of, electronically stored information ("ESI"), among other issues, and were forced to approach this Court with respect to several discovery disputes. Plaintiffs filed four motions to compel, and Defendants filed a motion for a protective order. *Id.*, ¶¶50-56. The parties also fully briefed and argued Plaintiffs' motion for class certification. That motion was still pending *sub judice* when the Settlement was reached. More importantly, the case arose out of a complex set of facts, rules, and regulations. At trial, Plaintiffs would have needed to explain to the jurors, among other things, issues concerning clinical drug trials generally and specifically the FLINT trial involving the drug obeticholic acid ("OCA"), Intercept's lead product candidate, as a treatment for nonalcoholic steato-hepatitis ("NASH"). Other issues at trial would have included the materiality of Defendants' omissions, Defendants' state of mind (scienter), and loss causation and damages, including the possible disaggregation of company-specific non-fraud related information.

Similarly, there is no question that this case was expensive to litigate and would have resulted in the expenditure of an even higher amount of money, time, and judicial resources had it not settled. Plaintiffs' counsel had already invested $5,784,386.00 in attorney and paraprofessional

time and $421,898.62 in in-house charges and expenses at the time the Settlement was reached. Plaintiffs would have spent significantly more on expert testimony, consultants, and other items prior to and at trial. Assuming Plaintiffs won at trial, the Class would have incurred additional millions in fees and expenses for what would have been a hotly-contested claims process, including post-trial disputes over the reliance of absent Class Members. Defendants would have incurred similar charges. Moreover, one of the critical benefits of the Settlement is that the Court's time is no longer impacted by the case. In all likelihood, this case would have taken at least seven days to try. Thereafter, there would have been extensive post-trial motions. Assuming Plaintiffs won, the Court would have had to oversee the claims process, including any objections that Defendants had to particular claims. Finally, after all of those resources had been committed by this Court, Defendants would have undoubtedly appealed any adverse judgment. And, at that point, the Second Circuit's resources and time would have been impacted by the proceedings on appeal.

The $55,000,000 Settlement at this juncture results in an immediate and substantial recovery for the Class, without the considerable risk, expense, and delay of a trial, contested claims process, and subsequent appeal. Therefore, Plaintiffs submit that this factor weighs heavily in favor of approval of the proposed Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the Class to the Settlement is a significant factor in assessing its fairness and adequacy, and "'the absence of objectants may itself be taken as evidencing the fairness of a settlement.'" *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *see also Luxottica Grp.*, 233 F.R.D. at 311-12. The Notice, describing the nature of the Litigation and the terms of the Settlement, was distributed to over 21,300 potential Class Members and nominees. Sylvester Decl., ¶11. As of the date this motion was filed, no objections to

the Settlement have been received and no investors have opted out of the Class. However, the Court-ordered deadline set for objections or to opt out is August 11, 2016. Accordingly, if Lead Counsel receives any objections, they will be addressed in Plaintiffs' reply brief scheduled to be filed on September 1, 2016.

3. The Stage of the Proceedings and Discovery Completed

"There is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. . . . At minimum, the court must possess sufficient information to raise its decision above mere conjecture." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §11.45, at 127, 128 (4th ed. 2002). Courts have approved settlements reached even before the parties engage in formal discovery. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("[f]ormal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims"). In stark contrast, in this case nearly all discovery was completed when the parties agreed to the Settlement.

Counsel for the parties had the ability to reliably assess the value of this case. This case settled after over two years of intense litigation. At the time the Settlement was reached, Lead Counsel had: (i) obtained key evidence through requests made to the NIH and SEC pursuant to FOIA requests; (ii) conducted a detailed investigation, including the review and analysis of (a) Intercept's public SEC filings, (b) transcripts of analyst conference calls, (c) Intercept's press releases, (d) analysts' reports, (e) independent media reports regarding Intercept and the NIDDK, (f) publicly-available information concerning OCA and the FLINT trial, (g) economic analyses of Intercept's stock price movement, pricing, and volume data, and (h) consultation with

pharmaceutical and medical experts; (iii) successfully opposed Defendants' motion to dismiss; (iv) fully briefed and argued class certification; (v) conducted extensive discovery, including the review and analysis of over 1.5 million pages of documents produced by Defendants and third parties; (vi) took the depositions of 10 fact and expert witnesses and prepared to take a number of other depositions; (vii) responded to multiple written discovery requests propounded by Defendants; and (viii) filed four motions to compel and opposed Defendants' motion for a protective order. Gronborg Decl., §II.

Thus, this Litigation had advanced to a stage where the parties certainly "'have a clear view of the strengths and weaknesses of their cases.'" *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 In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 161 (S.D.N.Y. 2011) (this factor supported settlement where the action had proceeded through substantial document production, five depositions, "a round of mediation submissions and sessions, and expert consultations on damages and causation," and, thus, "the parties were able to make an intelligent appraisal of the value of the case"). Therefore, the Court should find that this factor further supports approval of the Settlement.

4. The Risks of Establishing Liability

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *8 (S.D.N.Y. Nov. 7, 2007). While Plaintiffs believe they would have prevailed at trial, they recognize that ultimate success is not assured, and further believe that this substantial Settlement, when viewed in light of the risks of proving liability, is fair, adequate, and reasonable. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (when evaluating

securities class action settlements, courts have long recognized such litigation to be "'notably difficult and notoriously uncertain'") (quoting *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973)); *IMAX*, 283 F.R.D. at 189 (noting securities class actions are "'notably difficult and notoriously uncertain'" to litigate).

Despite the strengths of Plaintiffs' case, they faced numerous hurdles to establishing liability. This Litigation involved claims for relief under the federal securities laws and, to prevail, Plaintiffs had to demonstrate: (1) a material misrepresentation (or omission); (2) scienter, *i.e.*, a wrongful state of mind; (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

Defendants maintained throughout the Litigation that the evidence would demonstrate that they did not make any misleading statements or omissions of material facts and that they did not act with the requisite state of mind. For instance, while Plaintiffs alleged that Defendants misrepresented the halting of the treatment phase of the FLINT trial, Defendants argued that they accurately disclosed all material information about OCA and the FLINT trial. Gronborg Decl., ¶83. In fact, Defendants argued that their statements had been approved by the NIDDK and were otherwise in line with the NIDDK's official position. *Id.* In addition, they asserted a "truth-on-the-market" defense – that prior to and throughout the Class Period investors were aware that OCA caused lipid abnormalities like those observed in the FLINT trial based on the results of a prior clinical trial. *Id.* For the same reasons, Defendants argued that Plaintiffs could not establish scienter. *Id.*, ¶84. Defendants were also prepared to argue at trial that there was insufficient evidence of motive since there was no insider trading or other financial gain by them during the Class Period. *Id.*, ¶85.

Even if these defenses were overcome, Plaintiffs would have to prevail on the element of loss causation, *i.e.*, that Defendants' alleged fraud caused Plaintiffs and the Class to suffer economic loss. *Dura Pharm.*, 544 U.S. at 338 (a "private plaintiff who claims securities fraud must prove that the defendant's fraud caused an economic loss").

The issue of loss causation would have been hotly contested at summary judgment and trial. Defendants no doubt would have taken the position, supported by expert testimony, that none of the drops in Intercept's stock price could be attributed to OCA's association with lipid abnormalities and therefore Class Members had suffered no legally cognizable damages. Defendants would have contended that non-fraud related information disclosed after the close of trading on January 10, 2014 and later in May 2014 actually caused the share price to decline. While Plaintiffs would have disputed these contentions, there was a substantial risk of recovering limited or no damages if the jury agreed with Defendants' loss causation arguments.

By the time the parties agreed on the proposed Settlement, Lead Counsel had come to the conclusion that certain of the defenses described above might resonate with jurors, and would render the inherently difficult burden of proving the elements of Plaintiffs' claims as to all of the Defendants even more difficult. While Plaintiffs remained confident in their ability to ultimately prove their claims and to counter any asserted affirmative defenses, the risk of losing at summary judgment, trial or on appeal, when weighed against the immediate and substantial benefits of a $55,000,000 settlement, certainly supports a finding that the Settlement is in the best interest of the Class.

5. The Risks of Establishing Damages

Plaintiffs also faced substantial risk in proving damages. *See In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 WL 7323417, at *9 (S.D.N.Y. Dec. 19, 2014) (discussing

difficulty of proving damages in securities cases and consequent "very real risk of no recovery"). In order to prevail on their §10(b) claims, Plaintiffs would be required to prove that the Defendants' misleading statements and omissions inflated the price of Intercept stock, and would also be required to prove the amount of the artificial inflation. Lead Counsel, with the assistance of its economics and damages expert, calculated the artificial inflation in the market price of Intercept stock, that, in its opinion, was attributable to the alleged wrongdoing. This figure assumes that every element of the Class' damages theory is accepted by a jury as being correct and recoverable. As such, its viability as a calculation for damages could be affected at trial by Defendants' rebuttals and defenses to Plaintiffs' damage calculations and expert testimony.

The proof of damages is a complex matter that would require the presentation of expert testimony. At trial, Defendants would have challenged Plaintiffs' expert's methodology for calculating damages (the same methodology Defendants challenged at class certification). Accordingly, Plaintiffs would have faced a "battle of the experts" – a battle in which no party is ever assured to prevail. While Lead Counsel believes that its expert was convincing and that it would have prevailed on this issue, there is no question that the trial with respect to damages would have been a dogfight.

In short, it is possible that, in the unavoidable "battle of the experts," a jury might disagree with Plaintiffs' expert, or find Defendants' expert more persuasive.[6] The jury could have awarded no damages or far less in damages than Plaintiffs were seeking at trial or recovered in the Settlement. The risk of proving damages also weighs in favor of the Settlement.

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[6] *See, e.g.*, *PaineWebber*, 171 F.R.D. at 129 (noting unpredictability of outcome of battle of damage experts); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions."), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

6. The Risks of Maintaining the Class Action Through Trial

Plaintiffs believe that the Court would have certified this case as a class action and that it would have been tried as such. Nevertheless, certification was not guaranteed and, even if certified, courts may exercise their discretion to re-evaluate the appropriateness of class certification at any time. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."). To the extent that there was any uncertainty regarding this issue, the Settlement eliminates it.

7. The Ability of the Defendants to Withstand a Greater Judgment

The ability of a defendant to pay a judgment greater than the amount offered in a settlement can be relevant to whether a settlement is fair. *Grinnell*, 495 F.2d at 463. The fact, however, that a defendant is able to pay more than it offers in settlement, does not, standing alone, indicate that the settlement is unreasonable or inadequate. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) ("[T]he fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008) ("a defendant is not required to 'empty its coffers' before a settlement can be found adequate").

There is significant doubt as to whether Intercept has sufficient resources to pay a sum larger than the Settlement Amount. The Company is funding approximately $45,000,000 of the Settlement. Intercept is a development stage pharmaceutical company which generates no revenue. Indeed, at the time of the Settlement, the Company was in the process of reducing personnel to save money. Further, even if Intercept could have paid more, as a practical matter the prospects of recovering a marginally greater sum at trial were offset by the spectre of inevitable post-trial motions

and appeals Defendants would undoubtedly pursue. Additionally, the Settlement eliminates any risk of non-collection. In fact, as of May 31, 2016, the Settlement Amount has been segregated and earning interest for the Class.

8. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The last two factors are satisfied here. The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130; *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) ("[I]n any case there is a range of reasonableness with respect to a settlement."); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993) (The determination of a reasonable settlement "is not susceptible of a mathematical equation yielding a particularized sum," but turns on whether the settlement falls within "'a range of reasonableness.'") (citing *Newman*, 464 F.2d at 693). In addition, in considering the reasonableness of the Settlement, the Court should consider that the Settlement provides for payment to the Class now, rather than a speculative payment many years down the road. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *13 (S.D.N.Y. Apr. 6, 2006) (where settlement fund is in escrow and earning interest for the class, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery").

The Settlement Amount represents a recovery of approximately 35% of the total estimated damages. By comparison, over the past 20 years the median settlement recovered only 2.6% of the estimated damages. NERA 2015 Full-Year Review, at 33, Figure 29. In fact, Lead Counsel believes

that the $27.5 million recovery for each day in the Class Period is the largest per-class-day recovery in the history of securities class action litigation. Gronborg Decl., ¶98. By any metric, this is a very good result for the Class.

Moreover, the Settlement eliminates the numerous risks involved in litigation – especially litigation that involves the complex issues inherent in securities class actions. In light of the complex legal and factual issues typically present in securities class actions, the unpredictable outcome of a lengthy and complex trial, and the appellate process that would most likely follow, the fairness of this substantial settlement is readily apparent.

In sum, the *Grinnell* factors, individually and collectively, weigh strongly in favor of the Settlement being approved.

V. The Plan of Allocation Is Fair and Reasonable and Should Be Approved

If the Court approves the proposed Settlement, upon completion of the claims administration process, the Net Settlement Fund will be distributed to Authorized Claimants according to the Plan of Allocation set forth in the Notice. "[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133; *Luxottica Grp.*, 233 F.R.D. at 316-17. As with the Settlement, the opinion of experienced and informed counsel carries considerable weight. *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001). An allocation formula need only have a reasonable basis, particularly if recommended by experienced class counsel. *Id.* at 429-30. District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978).

Here, the Plan of Allocation was formulated by Lead Counsel, Plaintiffs' economics and damages expert, Dr. Feinstein, and the Claims Administrator, and calculates individual Class Member's claims as they would have been calculated if Plaintiffs prevailed at trial. The plan is based on the out-of-pocket measure of damages and is designed to measure the difference in what Class Members paid for their Intercept shares during the Class Period and what they would have paid had the allegedly omitted information regarding OCA and the FLINT trial been disclosed or alleged misstatements not been made. Gronborg Decl., ¶100. Under the Plan of Allocation, each Authorized Claimant will receive a *pro rata* share of the Net Settlement Fund, with that share to be determined by the ratio that the Authorized Claimant's allowed claim bears to the total allowed claims of all Authorized Claimants. Notice, §XII.

Accordingly, the Plan of Allocation is fair, reasonable, and adequate to the Class as a whole. The Plan of Allocation should be approved by the Court.

VI. Award of Attorneys' Fees

A. Lead Counsel Is Entitled to an Award of Attorneys' Fees from the Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons,"[7] and therefore to discourage future alleged misconduct of a similar nature. Indeed, the Supreme Court has emphasized that private

[7] *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); *accord In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007).

securities actions, such as this one, are "an essential supplement to criminal prosecutions and civil enforcement actions"[8] brought by the SEC. Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

B. The Court Should Award a Reasonable Percentage of the Common Fund

Most courts find that the percentage-of-the-fund method, under which counsel is awarded a percentage of the fund that they created, is the preferred means to determine a fee because it "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart*, 396 F.3d at 122; *see also Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 24 (2d Cir. 2013) ("[A]s the district court recognized, the prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class."). The percentage approach also recognizes that the quality of counsel's services is measured best by the results achieved and is most consistent with the system typically used in the marketplace to compensate attorneys in non-class contingency cases.[9]

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[8] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (Private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'") (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

[9] *See, e.g.*, *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011) (the "advantages of the percentage method . . . are that it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made, and that it is consistent with the system typically used by individual clients to compensate their attorneys").

The Supreme Court has indicated that attorneys' fees in common-fund cases generally should be based on a percentage of the fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class").

The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50 (holding that either the percentage-of-the-fund method or lodestar method may be used to determine appropriate attorneys' fees); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"). The Second Circuit also has acknowledged that the "trend in this Circuit is toward the percentage method." *Wal-Mart*, 396 F.3d at 122; *accord Davis*, 827 F. Supp. 2d at 183-85; *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG) (RER), 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010). All federal Courts of Appeal to consider the matter have approved of the percentage method, with two circuits ***requiring*** its use in common-fund cases.[10]

The PSLRA also supports use of the percentage-of-the-fund method, as it provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a ***reasonable percentage*** of the amount" recovered for the class. 15 U.S.C. §78u-4(a)(6)

[10] *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012); *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). The Eleventh and District of Columbia Circuits have required the use of the percentage method in common fund cases. *See Camden*, 946 F.2d at 774; *Swedish Hosp.*, 1 F.3d at 1271.

(emphasis added). Several courts have concluded that Congress, in using this language, expressed a preference for the percentage method when determining attorneys' fees in securities class actions. *See, e.g.*, *Telik*, 576 F. Supp. 2d at 586; *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002).

C. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 33% of the recovery. *See Blum*, 465 U.S. at 904 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

The requested 28.63% fee and total award of 29.4%, including expenses, is well within the range of percentage fees awarded within the Second Circuit in other comparable securities and antitrust cases. *See, e.g.*, *Landmen Partners, Inc. v. Blackstone Grp., L.P.*, No. 08-cv-03601-HB-FM, slip op. at 5 (S.D.N.Y. Dec. 18, 2013) (awarding 33.33% of $85 million settlement fund); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33-1/3% of $586 million settlement fund); *In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (NRB), 2005 U.S. Dist. LEXIS 45798, at *12-*13 (S.D.N.Y. June 14, 2005) (awarding 28% of $120 million settlement fund); *In re Oxford Health Plans, Inc. Sec. Litig.*, MDL No. 1222 (CLB), 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement fund); *In re Buspirone Antitrust Litig.*, MDL No. 1413 (JGK), 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 17, 2003) (awarding 33-1/3% of $220 million settlement fund); *Kurzweil v. Philip*

Morris Cos., Inc., No. 94 Civ. 2373 (MBM), 1999 WL 1076105, at *1 (S.D.N.Y. Nov. 30, 1999) (awarding 30% of $123.8 million settlement fund).

A review of fee awards in other securities cases and other complex class actions from other jurisdictions further confirms the reasonableness of the requested award. *See, e.g.*, *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2001 WL 34312839, at *9-*10 (D.D.C. July 16, 2001) (awarding 33.7% of $365 million settlement fund); *see also, e.g.*, *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *5, *19 (E.D. Pa. June 2, 2004) (awarding 30% of $202.5 million settlement fund); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 130-35 (D.N.J. 2002) (awarding 28% of $194 million settlement fund).

Indeed, the proposed award was selected, and approved by Plaintiffs, precisely because it reflected the average (median) fees and expenses awarded in cases settling between $25 million and $100 million according to the most recent NERA study. NERA 2015 Full-Year Review, at 36, Figure 32.

D. A Review of the *Goldberger* Factors Confirms that the Requested 28.63% Fee Is Fair and Reasonable

The Second Circuit has repeatedly held that the appropriate criteria to consider when reviewing a request for attorneys' fees in a common-fund case include the "*Goldberger*" factors:

> "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . .; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Goldberger, 209 F.3d at 50.

Consideration of these factors demonstrates that the fee requested by Lead Counsel is reasonable.

1. The Time and Labor Expended by Plaintiffs' Counsel Support the Requested Fee

In the over two years since this action was filed, Lead Counsel dedicated an enormous amount of time and money to successfully litigate this case. Lead Counsel's efforts included the extensive and thorough investigation necessary to prepare the initial class action complaint and the Consolidated Complaint. Gronborg Decl., ¶21. Lead Counsel's investigation also included a FOIA request of the NIH, in February 2014, which produced key documents reflecting communications between Defendants and the NIDDK concerning the FLINT trial. *Id.*, ¶22. Lead Counsel also opposed Defendants' motion to dismiss, which required extensive briefing and argument. *Id.*, ¶25.

Lead Counsel further devoted considerable resources to developing a compelling evidentiary record to prove Plaintiffs' claims and to support class certification. This included serving Defendants with comprehensive discovery requests, including document requests, interrogatories, and requests for admission. *Id.*, ¶¶40, 47-48. Lead Counsel also subpoenaed 46 third parties, including securities analysts, the U.S. Food and Drug Administration, NIDDK, the publisher of the *New England Journal of Medicine*, another pharmaceutical company rumored to have considered buying Intercept, and Intercept's public relations consultants, among many others. *Id.*, ¶59. In addition, in order to obtain key documents over Defendants' and third parties' many objections, Lead Counsel met and conferred on many occasions with counsel for Defendants and various third parties. Of particular importance, Lead Counsel spent a considerable amount of time seeking and obtaining Defendants' ESI which proved to be an invaluable source of critical evidence. *Id.*, ¶¶42-46. In addition, Lead Counsel was forced to file four discovery-related motions against Defendants concerning, for example, documents pertaining to (i) Intercept's expected OCA revenue, (ii) insider trading, (iii) Intercept's hiring of Bank of America analyst Rachel McMinn, and (iv) meetings between Intercept and NIDDK. *Id.*, ¶¶50-55. Plaintiffs also challenged the redaction or withholding

of certain purportedly privileged documents and opposed Defendants' motion for a protective order to preclude the production of documents by Intercept's public relations firm. *Id.*, ¶¶53-56.

Lead Counsel's discovery efforts resulted in the production of a substantial number of relevant documents and testimony. In total, Lead Counsel obtained over 1.5 million pages of documents through discovery. *Id.*, ¶61. Lead Counsel carefully reviewed and analyzed these documents for use in depositions, at class certification, summary judgment, and at trial. Lead Counsel utilized its sophisticated e-discovery system for identifying and tracking the documents most likely to be used in depositions and at trial; identifying relevant witnesses for deposition and additional discovery requests and identifying responsive documents that had not yet been produced. *Id.*, ¶62. Attorneys and staff reviewed and analyzed the documents, including through the utilization of search terms, date filters, custodian fields, and predictive coding. This effort was massive and ongoing throughout the Litigation, and it was extremely effective as Lead Counsel identified the key documents in the case. Lead Counsel used these documents to depose four current and former Intercept employees, five third-party fact witnesses, and Defendants' market efficiency expert. *Id.*, ¶64. Lead Counsel also prepared to take several additional fact depositions, including the depositions of defendants Drs. Pruzanski and Shapiro, that were scheduled but were ultimately cancelled once the parties reached a settlement.

In addition, on July 15, 2015, Plaintiffs moved for class certification. *Id.*, ¶29. In support, Plaintiffs submitted extensive briefing, deposition testimony, documentary evidence, and the expert declaration of Dr. Steven P. Feinstein. Dr. Feinstein concluded that Intercept common stock traded in an efficient market during the Class Period (*id.*, ¶30), thus supporting the presumption of reliance and hence, predominance. The Settlement was reached only after the completion of briefing and oral argument on Plaintiffs' class certification motion.

In sum, Lead Counsel devoted an enormous amount of time and resources to prosecuting this Litigation. As set forth in their respective declarations, submitted herewith, Plaintiffs' counsel expended 11,106.20 hours prosecuting this Litigation. *See* Declaration of Tor Gronborg Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), Ex. A; Declaration of Frank J. Johnson of Johnson and Weaver, LLP in Support of Plaintiffs' Unopposed Motion for an Award of Attorneys' Fees and Reimbursement of Expenses ("Johnson and Weaver Decl."), Ex. A; Declaration of Leigh Handelman Smollar Filed on Behalf of Pomerantz LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Pomerantz Decl."), Ex. A. The significant amount of time and effort devoted to this case by Plaintiffs' counsel confirms that the fee requested here is reasonable.

2. The Magnitude and Complexity of the Litigation Support the Requested Fee

As mentioned above, courts have long recognized that securities class actions are """notably difficult and notoriously uncertain.""" *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)). This Litigation was no exception. It raised many novel and complex issues with respect to both discovery and the merits, including, for example, the discoverability of certain ESI, obtaining *de bene esse* deposition testimony from the NIH pursuant to Dep't of Health and Human Servs., 52 Fed. Regs. 37146 (Oct. 5, 1987) (to be codified at 45 C.F.R. pt. 2), the specialized areas of clinical drug trials, Intercept's OCA drug and the NIDDK, as well as issues of market efficiency.

In addition, Defendants raised compelling arguments in connection with the elements of falsity, scienter, loss causation, and damages. Defendants consistently argued that their statements were accurate and truthful and that even if false, they were too vague or inconsequential to be

disclosed and not made with the requisite scienter. Gronborg Decl., ¶¶84-85. With respect to loss causation and cognizable damages, at summary judgment and trial Defendants would have challenged the impact their statements and omissions had on Intercept's common stock price. These and other issues required substantial efforts by Lead Counsel, often through analysis of the factual record and consultation with experts.

Accordingly, the magnitude and complexity of this Litigation support the conclusion that the requested fee is fair and reasonable.

3. The Risks of the Litigation Support the Requested Fee

The risk undertaken in the litigation is often considered the most important *Goldberger* factor. *Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at *5; *Telik*, 576 F. Supp. 2d at 592. The Second Circuit has recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award:

> "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended."

Grinnell, 495 F.2d at 470. When considering the reasonableness of attorneys' fees in a contingency action, the Court should consider the risks of the litigation at the time the suit was brought. *See Goldberger*, 209 F.3d at 55; *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 276 (E.D.N.Y. 2009) (the court should consider "'the contingent nature of the expected compensation'" and the "'risk of non-payment viewed as of the time of the filing of the suit'").

Lead Counsel undertook this case on a wholly contingent basis, knowing that the Litigation could last for years and would require them to devote substantial attorney time and significant expenses with no guarantee of compensation. Gronborg Decl., ¶13. Although the case was brought to a successful conclusion, this was far from guaranteed at the outset – or indeed, through much of

the Litigation. "There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise." *Veeco*, 2007 WL 4115808, at *6. Lead Counsel's assumption of this contingency-fee risk strongly supports the reasonableness of the requested fee. *See Flag Telecom*, 2010 WL 4537550, at *27 ("the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

And, this case presented substantial risks and uncertainties from the outset, which made it far from certain that any recovery, let alone a substantial recovery of $55,000,000 in cash, would ultimately be obtained for the Class. Representative of the fact that this case was seen as difficult is the fact that no firms, other than Plaintiffs' counsel, filed a complaint alleging fraud against any of the Defendants and only one other firm moved to be appointed as lead counsel, and that firm dropped out before briefing was even completed. In the end, Lead Counsel was the only firm to move to lead this case, as other firms in the securities litigation field deemed the case too risky or too small to pursue.

As discussed in the Gronborg Declaration (¶¶79-91) and above (at 11-14), there were substantial risks here with respect to the ability to prove at trial that Defendants had made material misstatements or omissions with scienter which caused Plaintiffs' losses. Indeed, Plaintiffs had the burden of proving that Defendants made false and misleading statements about Intercept's OCA drug and the FLINT trial, in particular the disclosure of the NIDDK's finding of OCA's efficacy while failing to disclose the finding of significant lipid abnormalities in patients on OCA compared to those on placebo. Defendants argued, among other things, that their statements regarding the

halting of the treatment phase of the FLINT trial had been approved by the NIDDK and were otherwise in line with the NIDDK's official position. Gronborg Decl., ¶83. Defendants also asserted a "truth-on-the-market" defense, arguing that the market was aware that OCA caused lipid abnormalities like those observed in the FLINT trial. *Id.* As a result, Defendants contended that the challenged statements were simply not actionable. Plaintiffs faced the risk that the jury would side with Defendants on these issues.

Establishing scienter is always challenging, but here it was particularly so. Defendants argued that scienter was lacking because they reasonably believed the lipid finding did not need to be disclosed, in particular because such information was too vague or inconsequential to be disclosed. *Id.*, ¶84. Defendants further argued that there was no insider trading or other financial incentive to support motive, and they believed the Order denying their motion to dismiss supported their position. *Id.*, ¶¶24-28, 85.

Lead Counsel firmly believes that Plaintiffs' claims were meritorious. However, Defendants were represented by highly capable attorneys and the risk of a defense verdict was significant. Lead Counsel's willingness to assume that risk with a significant commitment of time and money demonstrates that this *Goldberger* factor weighs heavily in favor of the requested fee.

4. The Quality of Representation Supports the Requested Fee

The quality of the representation is another important factor that supports the reasonableness of the requested fee. The quality of the representation here is best evidenced by the quality of the result achieved. *See Goldberger*, 209 F.3d at 55. As a result of its skill and substantial experience in the specialized field of shareholder securities litigation (*see* Lead Counsel's firm resume, attached to the Robbins Geller Decl. as Ex. G) and its substantial discovery efforts (*see* Gronborg Decl., ¶¶38-78), Lead Counsel developed a strong factual record over the course of over two years of litigation.

That record was critical to briefing and arguing in favor of class certification and negotiating the Settlement. The quality of Lead Counsel's efforts in the Litigation to date, its ability to marshal the necessary resources, and its commitment to the Litigation, enabled Lead Counsel to recover the $55,000,000 for Intercept investors, a recovery of approximately 35% of the estimated classwide damages. Given that the median recovery in securities class actions over the past 20 years was only 2.6% of estimated damages, the recovery here is quite significant.[11] That the recovery of $55,000,000 was for a Class Period lasting only two days makes this Settlement nearly unprecedented.

Finally, courts repeatedly recognize that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of counsel's performance. *See, e.g.*, *Marsh*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."). Here, Defendants are represented by Wilmer Cutler Pickering Hale and Dorr LLP, a highly respected law firm, and the individual attorneys representing Defendants brought to bear both substantial experience in securities litigation and tenacity in representing their clients. Notwithstanding this formidable opposition, Lead Counsel's ability to present a strong case and to demonstrate its willingness to continue to vigorously prosecute the Litigation enabled Lead Counsel to achieve a very favorable Settlement for the benefit of the Class.

5. Second Circuit Precedent Supports the 28.63% Fee as a Reasonable Percentage of the Total Recovery

Courts have interpreted the next factor – the requested fee in relation to the settlement – as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. Further, "[w]hen determining whether a fee request is reasonable in relation to a

[11] NERA 2015 Full-Year Review, at 33, Figure 29.

settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3. As discussed above, the requested fee and 29.4% fee and expense award is well within the range of percentage fees that courts in the Second Circuit and around the country have awarded in comparable complex cases. *Supra* at 21-22. Accordingly, the fee requested is reasonable in relation to the size of the Settlement.

6. Public Policy Considerations Further Support the Requested Fee

Public policy strongly favors rewarding firms for bringing successful securities actions like this one. *See Flag Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Hicks*, 2005 WL 2757792, at *9 ("'To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.'"). Accordingly, public policy favors granting the fee and expense application here.

7. Plaintiffs' Approval and the Class' Reaction Support the Requested Fee

Lead plaintiff George Burton and original plaintiff Scot H. Atwood were actively involved in the prosecution and settlement of this Litigation and have considered and approved the requested fee and the 29.4% fee and expense award. *See* Burton Decl., ¶¶2-4; Atwood, ¶¶2-4.

The reaction of the Class also supports the requested fee. As of July 26, 2016, the Claims Administrator has sent the Notice to over 21,300 potential Class Members and their nominees (Sylvester Decl., ¶11), informing them that, among other things, Plaintiffs' counsel intended to apply

to the Court for an award of attorneys' fees in an amount not to exceed 28.8% of the Settlement Amount. Sylvester Decl., Ex. A at 2 (Part IV). While the time to object to the fee-and-expense application does not expire until August 11, 2016, to date, not a single objection has been received. Should any objections be received, Lead Counsel will address them in its reply papers.

E. A Lodestar Cross-Check Strongly Confirms the Reasonableness of the Fee Request

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, the Second Circuit permits district courts to "cross-check" the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50. In cases like this, fees representing multiples of the lodestar are regularly awarded to reflect the contingency-fee risk and other relevant factors. *See, e.g.*, *Flag Telecom*, 2010 WL 4537550, at *26 ("'Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.'"); *Comverse*, 2010 WL 2653354, at *5 ("Where . . . counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar.").

Accordingly, in complex contingent litigation, lodestar multipliers between 2 and 5 are commonly awarded. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Davis*, 827 F. Supp. 2d at 185 (awarding fee representing a multiplier of 5.3, which was "not atypical" in similar cases); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011) (awarding fee representing a multiplier of 4.7); *Comverse*, 2010 WL 2653354, at *5 (awarding fee representing a 2.78 multiplier); *Telik*, 576 F. Supp. 2d at 590 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court."); *In re Bisys Sec. Litig.*, No. 04-3840, 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding 30% fee representing a 2.99 multiplier and finding that the multiplier "falls well within

the parameters set in this district and elsewhere"); *AremisSoft*, 210 F.R.D. at 135 (a 4.3 multiplier was appropriate in light of the contingency risk and the quality of the result achieved); *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

Here, if the Court decides to consider it, a lodestar cross-check would fully support the requested percentage fee. In this entirely contingent action that was litigated for over two years and where the recovery is approximately 35% of the estimated classwide damages, Plaintiffs' counsel collectively devoted 11,106.20 hours of attorney and professional support time in the prosecution of the Litigation. Plaintiffs' counsel's total lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is $5,784,386.00.[12] The requested fee of 28.63% of the Settlement Amount represents a multiplier of 2.72 on Plaintiffs' counsel's lodestar. Thus, the 28.63% fee requested results in a multiplier that is well within the range awarded in cases of this type.

VII. Plaintiffs' Counsel's Expenses Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained

Lead Counsel's application includes a request for charges and expenses that were reasonably incurred in furtherance of the claims on behalf of the Class. Plaintiffs' counsel's expenses and certain in-house charges are properly recovered by counsel. *See, e.g.*, *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "'for reasonable out-of-pocket expenses incurred and

[12] *See* Robbins Geller Decl., Ex. A; Johnson and Weaver Decl., Ex. A; Pomerantz Decl., Ex. A, filed herewith. Both the Supreme Court and courts in this Circuit have long approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment that is inherent in class actions, inflationary losses, and the loss of access to legal and monetary capital that could otherwise have been employed had class counsel been paid on a current basis during the pendency of the litigation. *See In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989); *Veeco*, 2007 WL 4115808, at *9; *Jenkins*, 491 U.S. at 284.

customarily charged to their clients, as long as they were "incidental and necessary to the representation""); *Flag Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class.").

As set forth in detail in Plaintiffs' counsel's fee and expense declarations, Lead Counsel requests $421,898.62 in expenses for prosecuting this Litigation for the benefit of the Class.[13] The expenses are the type that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses and other charges include consultant and expert fees, document-management/litigation support (*i.e.*, managing a database of more than 1.5 million pages of documents), online factual and legal research, mediation costs, and travel expenses, among other litigation expenses.

The Notice informed Class Members that Plaintiffs' counsel would apply for expenses in an amount not to exceed $450,000 to be paid from the Settlement Fund. Sylvester Decl., Ex. A at 2 (Part IV). The expenses actually requested, $421,898.62, are well below that amount. To date, no one has objected to Lead Counsel's request for expenses.

VIII. Plaintiffs Burton and Atwood Should Be Awarded Their Reasonable Time Under 15 U.S.C. §78u-4(a)(4)

Lead Counsel also seeks approval for an award of $5,275 and $7,401.25 to compensate Plaintiffs George Burton and Scot H. Atwood, respectively, for the time they spent directly relating to their representation of the Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4). Numerous courts have approved such awards under the PSLRA to compensate class representatives for the time

[13] *See* Robbins Geller Decl., Ex. B; Johnson and Weaver Decl., Ex. B; Pomerantz Decl., Ex. B, filed herewith.

and effort they spent on behalf of the class. *See Veeco*, 2007 WL 4115808, at *12 (award to Steelworkers based on "over eighty hours valued at a total of $15,964.20"); *see also Hicks*, 2005 WL 2757792, at *10 ("Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.").

As set forth in the Burton and Atwood Declarations (filed herewith), Plaintiffs Burton and Atwood took an active role in the prosecution of the Litigation, including communicating with Plaintiffs' counsel regarding issues and developments in the Litigation, reviewing certain documents filed in the case, including the operative complaint, and consulting with Plaintiffs' counsel concerning the litigation and settlement strategy. Burton Decl., ¶¶2-3; Atwood Decl., ¶¶2-3. Pursuant to the PSLRA, Plaintiffs Burton and Atwood request $5,275 and $7,401.25, respectively, based on the value of their hours expended participating in and managing this Litigation on behalf of the Class. Burton Decl., ¶5 (52.75 hours); Atwood Decl., ¶5 (47.75 hours). These are precisely the types of activities that courts have found to support awards to class representatives. *See, e.g.*, *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04 Civ. 8141 (DAB), 2010 WL 5060697, at *3 (S.D.N.Y. Dec. 2, 2010) (granting PSLRA award of $30,000 to institutional lead plaintiffs "to compensate them for the time and effort they devoted on behalf of a class"); *Flag Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to lead plaintiff for time spent on the litigation).

The Notice informed potential Class Members that such expenses would be sought. Sylvester Decl., Ex. A at 2 (Part IV). The modest requests by Plaintiffs are supported by their declarations, including a description of the hours dedicated to the Litigation. Plaintiffs' requests are reasonable and fully justified under the PSLRA and should be granted.

IX. Conclusion

For the foregoing reasons, Plaintiffs and their counsel respectfully request that the Court approve the Settlement and the Plan of Allocation as fair, reasonable and adequate, approve Lead Counsel's request for an award of attorneys' fees and expenses, and approve the award of $5,275 and $7,401.25 sought by Plaintiffs Burton and Atwood, respectively, as allowed by the PSLRA.

DATED: July 27, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tor Gronborg, hereby certify that on July 27, 2016, I caused a true and correct copy of the attached:

> Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and for an Award of Attorneys' Fees and Expenses and Award to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4)

to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filings to all counsel registered to receive such notice.

s/ Tor Gronborg
TOR GRONBORG