UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PFIZER INC. SECURITIES LITIGATION	No. 04-cv-9866 (LTS)(HBP) ECF CASE

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

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Pursuant to Federal Rule of Civil Procedure 23(e), Court-appointed lead plaintiff Teachers' Retirement System of Louisiana ("Lead Plaintiff" or "TRSL") and additional Court-appointed class representatives Christine Fleckles, Julie Perusse and Alden Chace (collectively with Lead Plaintiff, "Plaintiffs" or "Class Representatives"), on behalf of themselves and the Court-certified Class, respectfully submit this memorandum in support of their motion for final approval of the proposed settlement ("Settlement") and for approval of the proposed plan for allocating the net settlement proceeds to the Class ("Plan of Allocation" or "Plan").[1]

PRELIMINARY STATEMENT

After nearly 12 years of hard-fought litigation, including complete fact and expert discovery, a motion to dismiss, a motion for class certification, a motion for judgment on the pleadings, multiple motions for summary judgment, fully-completed trial preparation, *Daubert* motions, a trip to the Court of Appeals to resurrect the case after the Court excluded Plaintiffs' loss causation and damages expert on the eve of trial, and further trial preparation after the Second Circuit vacated the Court's decision, the Class Representatives have agreed on a Settlement of all claims asserted in the Action against defendants Pfizer Inc. ("Pfizer"), Henry A. McKinnell, Karen L. Katen, Joseph M. Feczko, and Gail Cawkwell (collectively "Defendants"), in exchange for $486,000,000 in cash (the "Settlement Amount"). The Settlement represents a significant recovery for the Class − a result even more impressive in light of the fact that Plaintiffs were able to obtain the Settlement only after reviving their case on appeal. If

[1] All initial capitalized terms not defined herein have the meanings as defined in the Declaration of Charles T. Caliendo (the "Caliendo Decl."), submitted herewith, and the Stipulation and Agreement of Settlement (*see* ECF No. 700, Ex. 1) (the "Settlement Agreement"). The Caliendo Decl. is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted in the Action; the negotiations leading to the Settlement; and the value of the Settlement, as compared to the risks and uncertainties of continued litigation.

approved, this Settlement would represent one of the largest securities class action recoveries ever secured against a pharmaceutical company.

Lead Plaintiff, a sophisticated institutional investor of the type favored by Congress when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"), along with the three additional Court-appointed Class Representatives, have closely monitored and participated in all aspects of this long-running litigation, were aware of, participated in and approved the settlement negotiations, and have recommended that the Settlement be approved. Further, Lead Counsel, who has extensive experience in prosecuting securities class actions, strongly believes that the Settlement is in the best interests of the Class.

The Parties reached the Settlement while Defendants' petition for rehearing and rehearing *en banc* of the Second Circuit's reversal of this Action's dismissal was pending. As explained below, in addition to the possibility that the Second Circuit might grant the petition and uphold dismissal, there were many obstacles to Plaintiffs prevailing at trial on key elements of their claims, particularly scienter, materially false statements, loss causation and damages. In short, there were significant risks that Plaintiffs would recover nothing. Additionally, the many complex medical, scientific and statistical theories and facts at issue created risks of jury confusion. Seeking to avoid a lengthy and complicated trial (and the appeals that would likely follow), the Parties engaged in protracted settlement negotiations, including numerous mediation sessions, and ultimately agreed on the proposed Settlement only after the Second Circuit had issued its opinion reversing summary judgment.

In light of these circumstances and all of the considerations addressed herein and in the accompanying Caliendo Decl., the proposed Settlement is an excellent result for the Class. It is fair, reasonable and adequate and should, therefore, be approved. The proposed Plan of

Allocation also should be approved, as it has a reasonable and rational basis and fairly allocates the recovery among Class Members. Lastly, notice of the Settlement given to Class Members satisfied the requirements of Rule 23 and due process.

BACKGROUND

A. THE FACTUAL AND PROCEDURAL BACKGROUND

A detailed description of Plaintiffs' prosecution of this case (including discovery efforts, use of experts, dispositive motions and preparations for trial) is set forth in the accompanying Caliendo Decl., to which the Court respectfully is referred. The highlights are as follows.

This Action stems from the marketing of two of Pfizer's pain-relieving drugs − Celebrex and Bextra − by the so-called "Cox-2 Alliance" partnership between Pfizer and Pharmacia Corporation ("Pharmacia"). Plaintiffs alleged that Pfizer and certain of its officers and/or directors made material misstatements and omissions concerning, *inter alia*, the cardiovascular ("CV") safety of Celebrex and Bextra and the continuing ability of these two drugs to contribute to Pfizer's financial success. Specifically, Plaintiffs asserted that before and throughout the Class Period, Defendants repeatedly misrepresented that Celebrex and Bextra posed no increased CV risk compared to Pfizer's competitor's drugs. Plaintiffs further alleged that, as a result of these misrepresentations and omissions, the price of Pfizer common stock was artificially inflated during the Class Period and that, when the truth about the drugs' CV risks emerged, the price declined and Class Members suffered losses.

Beginning in December 2004, the first of a series of class action complaints was filed in this Court against Pfizer and certain of its officers and directors, asserting violations of the federal securities law in connection with Pfizer's statements regarding the CV risks of Celebrex and Bextra. ECF No. 1. By Opinion & Order dated October 21, 2005, the Court consolidated the related actions, appointed TRSL as Lead Plaintiff pursuant to the PSLRA and designated

Grant & Eisenhofer P.A. as Lead Counsel for the putative class. ECF No. 43.

On February 16, 2006, Lead Plaintiff and additional named plaintiff Christine Fleckles (among others) filed the Consolidated Class Action Complaint (the "Complaint"), asserting claims under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 promulgated thereunder, and Sections 20(a) and 20A of the Exchange Act against Pfizer and the Individual Defendants. ECF No. 51.[2] In May 2006, Defendants moved to dismiss the Complaint and discovery was automatically stayed. ECF Nos. 56-62. Thereafter, in June 2006, Plaintiffs moved to strike certain exhibits attached to and portions of the memoranda in support of Defendants' motion to dismiss. While these motions were pending, the Action was reassigned to the Honorable Laura Taylor Swain on February 22, 2008. ECF No. 81.

On July 1, 2008, the Court denied, in large part, Defendants' motion to dismiss, holding that Plaintiffs' allegations that Defendants misrepresented and concealed the CV risk associated with Celebrex and Bextra, and engaged in insider trading while in possession of such undisclosed information, sufficiently stated claims under Sections 10(b), 20(a) and 20A of the Exchange Act (the "July 1 Order"). ECF No. 90.[3] Defendants' motion for reconsideration was denied on September 4, 2008. ECF No. 98.

Defendants filed their answer and affirmative defenses to the Complaint in September 2008. ECF No. 102. In their answer, Defendants denied that any of them made material misstatements relating to Celebrex's or Bextra's CV safety or omitted material facts about that issue. They also denied that any of them acted recklessly or with intent to defraud Pfizer's

[2] "Individual Defendants" refers collectively to Henry A. McKinnell, John L. LaMattina, Karen L. Katen, Joseph M. Feczko and Gail Gawkwell. John L. LaMattina was dismissed with prejudice on May 13, 2014 and was no longer a defendant at the time of settlement.

[3] By the same Order, the Court dismissed Plaintiffs' claims for common law fraud, violations of state securities laws, and Section 18 of the Exchange Act.

shareholders, as is required to find a violation of the federal securities law provisions at issue. Defendants further denied that they caused Plaintiffs' economic losses.

At Defendants' request, before allowing Plaintiffs to engage in any merits discovery, the Court directed the Parties to conduct discovery solely to determine whether reliable scientific evidence existed to show that Celebrex or Bextra was associated with increased CV risk. To this end, Defendants produced millions of pages of documents previously produced in the action *In re Bextra & Celebrex Marketing Sales Practices and Prod. Liab. Litig.*, No. 05-cv-1699 (N.D. Cal.) and both sides exchanged multiple expert reports and conducted depositions related to their experts' qualifications under *Daubert*. In addition, both sides moved the Court to preclude the other side from offering the opinion testimony of the opposing side's experts. ECF Nos. 139-146. Following these submissions, in October 2009 the Court held a 5-day *Daubert* trial. On March 22, 2010, the Court found that the *Daubert* standard was satisfied with respect to all experts whose preclusion was sought, and denied both side's motions. ECF Nos. 191, 193.

Plaintiffs aggressively pursued merits discovery, serving multiple sets of document requests, reviewing millions of pages of documents in the more than 64 million page production database, and preparing for, taking or defending over 100 depositions.[4] On numerous occasions, disputes arose as to appropriate search terms, the breadth of discovery being sought, motions for protective orders, spoliation issues and other matters that were, to the extent that they could not be resolved by the Parties, briefed and argued before Judge Henry B. Pitman, the Chief Magistrate Judge for the Southern District of New York.

On March 16, 2011, Lead Plaintiff moved for class certification, which Defendants opposed in November 2011. ECF Nos. 234-238, 245-248, 303. Also in November 2011 – more

[4] These figures include discovery both prior to and after the *Daubert* hearing.

than five years after the Complaint was filed – Defendants again moved the Court for reconsideration of its July 1 Order. ECF No. 304. While the motion for reconsideration was pending, Lead Plaintiff, in January 2012, moved the Court for leave to amend the Complaint to conform the pleadings to the evidence.

On March 22, 2012, the Court denied Defendants' motion for reconsideration and granted Lead Plaintiff's motion to amend the Complaint. ECF Nos. 355-356. Thereafter, on March 27, 2012, Lead Plaintiff and additional named plaintiff Christine Fleckles (among others) filed the Amended Complaint. ECF No. 361. In May 2012, Defendants answered the Amended Complaint. ECF No. 369.

On March 29, 2012, the Court certified the Class, appointed Lead Plaintiff, Christine Fleckles, Julie Perusse and Alden Chace as Class Representatives and appointed Grant & Eisenhofer P.A. as Class Counsel. ECF No. 357. On April 6, 2012, the Court clarified its class certification order (with respect to certain individuals excluded from the Class). ECF No. 362.

Following the completion of fact discovery, Defendants moved for summary judgment in July 2012, asserting that (i) they made no material misstatements or omissions, (ii) the evidence did not show an intent to defraud, and (iii) Plaintiffs' alleged losses in Pfizer common stock were not caused by any fraud associated with Celebrex and Bextra. ECF Nos. 382-387.

Also in July 2012, in connection with its certification of the Class, the Court approved the form and manner of notifying the Class of the pendency of the Action as a class action and of the right of Class Members to request exclusion from the Class and the procedures for doing so. ECF No. 390. Beginning on July 26, 2012, Class Representatives caused the Notice of Pendency of Class Action (the "Class Notice") to be mailed to over 3.7 million potential members of the Class, and caused a summary of the Class Notice to be published in THE WALL STREET JOURNAL

and THE NEW YORK TIMES and transmitted over the PR Newswire on July 30, 2012. ECF No. 395. In October 2012, Class Representatives reported to the Court on the number of Class Members who opted out of the Class. ECF Nos. 412-414. Subsequently, a group of institutional investors who had validly opted out requested permission to rejoin the Class once the Second Circuit had issued its opinion in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), setting forth a bright line rule that the statute of repose is not tolled by the existence of a class action, thereby rendering any potential claims that these investors may have had untimely. Plaintiffs acquiesced to the former opt outs' requests, and the Court approved their reinstatement into the Class. ECF No. 513. A list of the persons who validly requested exclusion in connection with the Class Notice, and who did not opt back into the Class, is attached as Exhibit C to the Settlement Agreement. ECF No. 700-1 (Ex. C).

On March 28, 2013, the Court largely denied Defendants' motion for summary judgment. The Court found, *inter alia*, however, that (i) two of the seven "corrective disclosure" events which Plaintiffs had alleged were evidence of loss causation, were in fact not corrective of the alleged fraud, and (ii) certain statements made by Pfizer's co-promotion partner, Pharmacia, were not actionable under Section 10(b). ECF No. 455. In response to the Court's summary judgment opinion, Lead Plaintiff's loss causation and damages expert, Professor Daniel R. Fischel, submitted an updated report which removed the corrective disclosures eliminated by the Court from his analysis and adjusted his damage calculations. Professor Fischel did not adjust for the ruling regarding Pharmacia because it did not impact his analysis. An additional deposition of Professor Fischel was conducted with respect to his updated report.

Thereafter, in preparation for trial, the Parties made numerous pre-trial motions, including motions to narrow the issues to be tried and to exclude the testimony of various

witnesses. One such motion by Defendants was to exclude the testimony of Professor Fischel. ECF No. 521. In addition, in April 2014, certain of the Individual Defendants moved for judgment on the pleadings seeking dismissal of the Section 20A claim. ECF Nos. 650-651.[5]

By Order issued on May 21, 2014, the Court denied the remaining Individual Defendants' motions for judgment on the pleadings. ECF No. 659. Also in May 2014, the Court began ruling on the Parties' various motions *in limine*. On May 21, 2014, the Court granted Defendants' motion to exclude the testimony of Professor Fischel from the trial of this Action. ECF No. 660. Thereafter, Plaintiffs moved for leave to file an amended supplemental expert report. ECF Nos. 665-666, 668. In light of the Court's *Daubert* ruling as to Professor Fischel's testimony, Defendants filed a renewed motion for summary judgment. ECF Nos. 667, 669-670.

On July 8, 2014, the Court denied Plaintiffs leave to amend Professor Fischel's report and granted summary judgment to Defendants, on the basis that, without a damages expert, Plaintiffs would be unable to prove their claims at trial. ECF No. 679. On July 9, 2014, the Court entered judgment for Defendants and dismissed the Action. ECF No. 683.

In August 2014, Plaintiffs noticed their appeal with respect to, *inter alia*, the exclusion of Professor Fischel's testimony and the resulting dismissal of the case. ECF No. 688. Plaintiffs' appeal was fully briefed by the Parties and argued before the Second Circuit on May 26, 2015.

On April 12, 2016, the Second Circuit issued a decision vacating this Court's decision. ECF No. 694. On May 10, 2016, Defendants filed a petition for rehearing and rehearing *en banc* (the "Rehearing Petition") to the Second Circuit.

While the Rehearing Petition was pending, the Parties reached an agreement-in-principle

[5] On May 13, 2014, John LaMattina was dismissed with prejudice under FED. R. CIV. P. 41(a)(2) and 23(e) pursuant to a Court-approved stipulation of voluntary dismissal. ECF No. 657.

to resolve the Action on July 18, 2016, and thereafter, filed a joint motion for limited remand of the case, without prejudice pending approval of the proposed Settlement, and to hold the Rehearing Petition in abeyance. On July 27, 2016, the Second Circuit issued an order for a limited remand of the case to this Court for consideration of the proposed Settlement, holding the Rehearing Petition in abeyance pending final approval of the Settlement. ECF No. 697.

The Parties spent several more weeks negotiating the specific Settlement terms and, on August 26, 2016, entered into the Settlement Agreement and filed it with the Court. ECF Nos. 698-700. The Court preliminarily approved the Settlement on September 16, 2016. ECF No. 703.

B. THE HISTORY OF THE SETTLEMENT NEGOTIATIONS

The Parties engaged in settlement negotiations and mediation sessions at numerous times throughout the course of the litigation. In 2009, the Parties participated in a mediation conducted by Magistrate Judge Eaton, which was unsuccessful.

Thereafter, the Parties engaged in private mediation before David Brodsky, Esq. of Brodsky ADR. Prior to the initial mediation session in June 2012, the Parties provided to Mr. Brodsky and exchanged among themselves briefs discussing key factual and legal aspects of this Action, as well as substantial factual and expert support. After these materials were provided, Mr. Brodsky engaged in extensive pre-mediation discussions with each side concerning the strengths and weaknesses of their various positions. On June 19, 2012, the Parties participated in an all-day formal mediation session with Mr. Brodsky. In attendance at the June mediation session in addition to counsel were representatives from the Parties. No settlement was reached at these sessions. Thereafter, Mr. Brodsky met on multiple occasions with counsel for each side, and spoke to them frequently. As a result of these discussions, a second round of mediation

sessions was held on September 12 and 13, 2012, with each side making presentations on selected issues. Again, no settlement was reached.

Thereafter, the Parties prepared for trial until this Court's decisions in 2014 excluding the testimony of Plaintiffs' loss causation and damages expert and granting summary judgment in Defendants' favor. Following the Second Circuit's decision reversing the dismissal of the Action, counsel for the Parties reached a resolution and executed the Settlement Agreement in August 2016.

C. THE TERMS OF THE SETTLEMENT

The terms of the Settlement are set forth in the Settlement Agreement. Plaintiffs have agreed to release the claims asserted against Defendants in exchange for a cash settlement payment of $486 million for the benefit of the certified Class. The Class is defined in the Court's Opinion and Order filed March 29, 2012 as amended on April 6, 2012, as follows:

> [A]ll persons or entities who purchased and/or otherwise acquired common stock issued by Pfizer, Inc., between and including October 31, 2000 and October 19, 2005 (the "Class Period"), with the exception of: (a) any persons or entities who both purchased and sold all of their shares of Pfizer common stock between and including October 31, 2000 and October 6, 2004; (b) Pfizer and the Individual Defendants; (c) members of the immediate family of each of the Individual Defendants; (d) subsidiaries or affiliates of Pfizer or any of the Individual Defendants; (e) any person or entity who is, or was during the Class Period, a partner, officer, director, employee or controlling person of Pfizer or any of the Individual Defendants; (f) any entity in which any of the Individual Defendants has a controlling interest; (g) the legal representatives, heirs, successors or assigns of any of the excluded persons or entities; and (h) the insurance carriers or their affiliates who insure the Defendants (the "Main Class").[6]

[6] A subclass was also certified by the Court and consists of all members of the Main Class who purchased Pfizer common stock contemporaneously with the sale of Pfizer common stock by Individual Defendants Henry A. McKinnell, Karen L. Katen and John L. LaMattina on any of the following dates: October 26, 2000, November 6, 2000, October 19, 2001, October 23, 2001, October 29, 2001, February 21, 2002, February 25, 2002, February 27, 2003, November 18, 2003, , February 24, 2005, May 6, 2005, May 10, 2005 or August 16, 2005 (the "20A Subclass" and, together with the Main Class, the "Class").

D. THE PLAN OF ALLOCATION

The proposed Plan of Allocation, which is contained in the Notice that was mailed to Class Members and published on the Settlement website, calculates a Claimant's Recognized Claim based on the estimated artificial inflation in the prices paid for Pfizer common stock on each day during the Class Period, as determined by Professor Fischel, Plaintiffs' damages expert, and is similar in structure to numerous other such plans of allocation which have been approved and utilized in securities class action settlements. *See* Declaration of Michael Keable dated October 27, 2016 ("Second Keable Decl."), attached to the Caliendo Decl. as Ex. C, ¶¶6-9; *see also* ECF No. 702-2 and Declaration of Michael A. Keable dated September 13, 2016 ("First Keable Decl.") submitted in connection with Preliminary Approval of the Settlement, ECF No. 702-1, ¶¶1-2.

E. NOTICES OF THE SETTLEMENT TO THE CLASS

In its Preliminary Approval Order, the Court approved both the notice to be sent to Class Members and the publication notice, and these notices were timely disseminated and published in accordance with that Order. ECF No. 703; Affidavit of Angela Ferrante of Garden City Group LLC, attached to the Caliendo Decl. as Exhibit D.

ARGUMENT

I. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. PUBLIC POLICY FAVORS THE SETTLEMENT OF DISPUTES

"The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005);[7] *see In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("there is

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

an overriding public interest in settling and quieting litigation"). In particular, "federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004).

B. THERE IS A PRESUMPTION IN FAVOR OF THE FAIRNESS OF THE SETTLEMENT

A settlement "merits a presumption of fairness where it was the culmination of a complicated litigation over the course of several years between 'experienced, capable counsel after meaningful discovery.'" *Blessing v. Sirius XM Radio Inc.*, No. 09 CV 10035, 2011 WL 3739024, at *1 (S.D.N.Y. Aug. 24, 2011) (quoting *Wal-Mart*, 396 F.3d at 116); *see also In re Marsh & McLennan Cos. Inc. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *4 (S.D.N.Y. Dec. 23, 2009); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 1695, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

This presumption is applicable here. Plaintiffs and Defendants were each represented by counsel experienced in this type of complex litigation, who engaged in intensive, arm's-length negotiations to arrive at the Settlement. The Settlement was entered into after more than a decade of hard-fought litigation, including extensive motion practice, the production, review and/or analysis of tens of millions of pages of documents, participation in over 100 depositions, and consultation with a variety of experts in various disciplines which led to numerous expert reports and rebuttal reports, all of which enabled both sides to become well-informed about the strengths and weaknesses of the case. The Parties also benefitted from the assistance of an experienced mediator, David Brodsky, whose input further aided the Parties in reaching

informed decisions about their respective positions. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure").[8]

C. APPLICATION OF THE *GRINNELL* FACTORS SUPPORTS APPROVAL OF THE SETTLEMENT

The Court may approve a settlement of a class action only if it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). The factors courts in this Circuit consider when determining whether to finally approve a class action settlement are set forth in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974):

> (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.

"In finding that a settlement is fair, not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *Marsh & McLennan*, 2009 WL 5178546, at *4; *see Global Crossing*, 225 F.R.D. at 456 (same). Further, in deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611, 2007 WL

[8] In addition, the involvement and support of Lead Plaintiff – a sophisticated institutional investor, reinforces the presumption of fairness. "[U]nder the PSLRA, a settlement reached … under the supervision and with the endorsement of a sophisticated institutional investor … is 'entitled to an even greater presumption of reasonableness.'" *Veeco*, 2007 WL 4115809, at *5.

703926, at *2 (S.D.N.Y. Mar. 7, 2007); *see also In re Sony Corp. SXRD*, 448 Fed. App'x 85, 87 (2d Cir. 2011) ("when evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'").

The *Grinnell* factors favor approval of the Settlement, for the reasons discussed below.

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

Class actions "have a well-deserved reputation as being most complex." *Global Crossing*, 225 F.R.D. at 456; *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02 CV 3400, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) ("Securities class actions are generally complex and expensive to prosecute"). Due to this "notorious complexity," settlement is often appropriate in securities class actions because it "circumvents the difficulty and uncertainty inherent in long, costly trials." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006).

As set forth in the Caliendo Decl., and as the Court is aware, this case was unquestionably complex. Caliendo Decl. §VIII.A. Plaintiffs' claims involved highly complex issues of fact and law involving complicated statistical, scientific and legal issues requiring the use of many experts, making a trial both lengthy and expensive. For instance, there were at least twenty Celebrex, Bextra and/or parecoxib (the intravenous version of Bextra) clinical studies, epidemiological studies, pooled-analyses and meta-analyses that were central to Plaintiffs' task of showing increased CV risks for Celebrex and Bextra. Moreover, Plaintiffs would have had to explain to the jury, *inter alia*, the process by which the safety and efficacy of new drugs are tested, how to evaluate the statistical significance of adverse events, and the process by which the Food and Drug Administration ("FDA") passes on applications to market new drugs. *See*,

e,g., *In re Vicuron Pharm., Inc. Sec. Litig.*, 512 F. Supp. 2d 279, 285 (E.D. Pa. 2007) (approving settlement where "complicated medical facts" and "the technical nature of the subject matter would undoubtedly have reduced the case to a battle of experts").

In addition, the case involved difficult issues as to loss causation and damages, including questions as to the amount of inflation, if any, in the Pfizer stock price caused by Defendants' alleged misstatements and omissions. Indeed, prior to its reinstatement by the Second Circuit, the Action was dismissed in 2014 on complicated issues of loss causation and damages.

2. The Class Members' Reaction to the Settlement

The reaction of the Class to a proposed settlement is relevant to its adequacy. *See In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 134 (S.D.N.Y. 2008); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003). The deadline for objections is November 28, 2016. As of November 10, 2016, out of the millions of Notices mailed, there have been 10 objections submitted in connection with the Settlement. Caliendo Decl. § VI.[9]

3. The Stage of the Proceedings and the Amount of Discovery Completed

This factor is intended to assure the Court "that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them." *Klein ex rel. Ira v. PDG Remediation, Inc.*, No. 95 Civ. 4954, 1999 WL 38179, at *2-3 (S.D.N.Y. Jan. 28, 1999). The focus is "on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Advanced Battery Tech., Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014).

Here, the Parties clearly had "sufficient information to make an informed judgment on

[9] As provided in the Preliminary Approval Order, Lead Counsel will file reply papers on December 6, 2016 that will address all objections received. ECF 703, ¶ 15.

the reasonableness of the settlement proposal." *In re Excess Value Ins. Coverage Litig*, No. M21-84, 2004 WL 1724980, at *12 (S.D.N.Y. July 30, 2004). By the time the Settlement was reached after more than a decade of hard-fought litigation, the production, review and/or analysis of 65 million pages of documents had taken place, and over 100 depositions had occurred. In addition, the Parties had the benefit of this Court's decisions on the motion to dismiss, the motion for judgment on the pleadings, the motions for summary judgment, and the class certification motion, as well as the decision by the Court of Appeals with respect to the *Daubert* motion directed to Professor Fischel and related motion for summary judgment. Caliendo Decl. §§ II, VIII.C. Furthermore, Plaintiffs conducted a mock jury trial which provided valuable feedback on the strengths and weaknesses of their case. *Id.* § II.I.3.

In addition, the Parties participated in settlement discussions throughout the course of the litigation, including mediation sessions conducted by Mr. Brodsky, which helped illuminate the various strengths and weaknesses of each side's positions. *Id.* § III.

4. The Risks of Establishing Liability and Damages

Under *Grinnell*, in assessing the fairness, reasonableness, and adequacy of a settlement, a court should consider such factors as the "risks of establishing liability" and the "risks of establishing damages." 495 F.2d at 463.

The Amended Complaint alleges that Defendants made false and misleading statements concerning the CV risks of Celebrex and Bextra, which caused artificial inflation in the price of Pfizer stock. While Plaintiffs believe that their claims are valid and supported by the evidence, they also recognize that success proving liability, loss causation and damages is far from certain.

First, at the time the Settlement was reached, Defendants' Rehearing Petition in the Second Circuit was pending. Plaintiffs thus faced the possibility that rehearing would be granted, and that on rehearing the Court of Appeals would uphold this Court's decision

excluding Plaintiffs' loss causation and damages expert from testifying. In that event, Plaintiffs would have recovered nothing.

Assuming that the Second Circuit did not take such action, there were many other challenges to obtaining a successful outcome for the Class, including the risks that Plaintiffs would not be able to prove that: (i) Defendants made any materially false statements; (ii) Defendants made the challenged statements with the requisite *scienter*; and (iii) Defendants' false statements caused Plaintiffs' losses. *See* Caliendo Decl. § VIII.D. Additionally, because Celebrex is still being sold, the risk of jury confusion was high.

a. The Difficulty in Proving False Statements

Courts recognize that establishing liability in a securities case involves significant risks. *In re Flag Telecom Holdings*, 2010 WL 4537550, at *16-*17. As detailed in the Caliendo Decl., Defendants disputed that any of their statements concerning Celebrex and Bextra safety were false, and there was a substantial risk that the jury might agree with them. For example, Defendants consistently argued that the overwhelming amount of study data demonstrated that Celebrex and Bextra posed no material CV risk. Likewise, Defendants asserted that the FDA possessed all of the study data, approved both drugs for sale and would not have approved them if the study data evidenced CV risk. *See* Caliendo Decl. §§ I.C., VIII.D.

b. The Difficulty in Proving Scienter

Proving scienter is never an easy task. *See In re Bayer AG Sec. Litig.*, 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008); *Flag Telecom Holdings*, 2010 WL 4537550, at *16-*17; *Fishoff v. Coty Inc.*, No. 09 Civ. 628, 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011) ("[T]he element of *scienter* is often the most difficult and controversial aspect of a securities fraud claim"). The difficulties in proving scienter in this case are discussed in detail in the Caliendo Decl. As set forth therein, there was a significant risk that

they jury would decline to find that, if Defendants did make false or misleading statements, they did so with *scienter*. Caliendo Decl. § VIII.D.

c. The Difficulty in Proving Loss Causation and Damages

"[T]he legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages." *AOL Time Warner*, 2006 WL 903236, at *9. As discussed in the Caliendo Decl., Defendants disputed whether any of the alleged corrective disclosures corrected any alleged prior misstatements. For example, with respect to the disclosures as to increased CV risk in connection with APC clinical trial in late 2004, Defendants would have argued vigorously to the jury that those disclosures did not correct any alleged prior misstatements, because they were based on a new clinical trial that was not available when Defendants' earlier statements were made. While the Court declined to grant Defendants summary judgment with respect to this alleged corrective disclosure, it is uncertain what a jury would have done. Caliendo Decl. §§ I.C., VIII.E.

The foregoing demonstrates that there was significant risk that Defendants might prevail at trial either on liability or damages, or both. This factor supports approval of the Settlement.

5. The Ability of Defendants to Withstand a Greater Judgment

Defendant Pfizer likely would be able to withstand a greater judgment. However, that fact does not indicate any flaw in the Settlement, because "a defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008). As then-District Judge Lynch stated in *McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y. 2006), "the ability of defendants to pay more, on its own, does not render the settlement unfair, especially where the other *Grinnell* factors favor approval."

The possibility that Pfizer may have had the ability to pay more in settlement is

outweighed by the many other strong considerations favoring the Settlement, including the risks of establishing liability and damages and the reasonableness of the Settlement terms achieved in light of those risks.

6. The Range of Reasonableness of the Settlement Value in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The last two factors that courts consider are the range of reasonableness of the settlement amount in light of: (i) the best possible recovery and (ii) litigation risks. In analyzing these factors, the issue is not whether a settlement represents the "best possible recovery," but how it relates to the strengths and weaknesses of the case. *Grinnell*, 495 F.2d at 462 (a court should "consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable"). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Rather, "in any case there is a range of reasonableness with respect to a settlement" that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). As the Second Circuit stated in *Grinnell*, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." 495 F.2d at 455 n.2.

As set forth in the accompanying Second Keable Decl. at ¶8, if all liability issues were determined in Plaintiffs' favor, the maximum amount of damages that the Class might recover is estimated to be approximately $5.37 billion. Therefore, the Settlement represents a recovery of approximately 9% of damages − notably, at least nine times greater than similar securities class

action settlements where alleged losses are greater than $5 billion.[10] At trial, however, Defendants would be expected to argue that damages were truly zero, and, at a minimum, were far less than the $5.37 billion figure. Indeed, one single adverse factual determination by a jury could greatly reduce the Class's maximum recoverable damages. For example, if Defendants were successful in convincing a jury that the December 17, 2004 disclosure was not corrective, the Class's maximum recoverable damages would fall to only $28 million. Caliendo Decl. §§ I.C., VIII.E; Second Keable Decl. ¶10.

Accordingly, the Settlement now before the Court is truly exceptional and well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. Courts routinely approve settlements in complex class actions where the recovery is comparable to the percentage here, and far lower. *See, e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Jan. 31, 2007) (finding that a settlement representing approximately 6.25% of estimated damages was at the higher end of the range of reasonableness of recovery in class actions securities litigations); *Hicks v. Stanley*, No. 01 Civ. 10071, 2005 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (settlement representing 3.8% of plaintiffs' damage calculation was "within the range of reasonableness").

The benefits produced by the Settlement represent an excellent result for Class Members in light of the range of possible recoveries and the risks and expense of continued litigation.

[10] *See* Caliendo Decl. Ex. A (for years 2006-2015, one study showed median securities class action settlements as a percentage of estimated losses were only 0.8% to 1% for cases, like this one, with estimated losses of over $5 billion; another showed such settlements at 1%).

D. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

A plan of allocation must meet the same standards for approval to which the Settlements are subject — it must be fair, adequate and reasonable. *See Merrill Lynch Tyco*, 249 F.R.D. at 135; *EVCI Career Colleges Holding Corp. Secs. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). The purpose of a plan of allocation is to equitably distribute settlement proceeds to eligible class members. *See In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. 306, 316-17 (E.D.N.Y. 2006).

A plan of allocation is fair and reasonable as long as it has a "rational basis." *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See Hi-Crush Partners*, 2014 WL 7323417, at *10. Moreover, a plan of allocation need not be perfect, and can never be tailored to each class member with "mathematical precision." *PaineWebber,* 171 F.R.D. at 133 ("To determine precisely the distribution of the settlement fund among the myriad claimants in such a class would require counsel or the district court to weigh the strengths and weaknesses of the claims of each class member and would be an 'almost impossible task."); *accord Silverblatt v. Morgan Stanley,* 524 F. Supp. 2d 425, 430 (S.D.N.Y. 2007) ("Exactitude is not required in allocating consideration to the class, providing that the overall result is fair, reasonable and adequate"). Further, in assessing whether a proposed plan of allocation is fair and reasonable, courts have given great weight to the opinion of experienced counsel. *See Aramburu v. Healthcare Fin. Servs., Inc.*, No. 02 CV 6535, 2009 WL 1086938, at *5 (E.D.N.Y. Apr. 22, 2009) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel."). Courts have found that a

plan of allocation approved by experienced and competent counsel need only have a "reasonable, rational basis." *WorldCom,* 338 F. Supp. 2d at 344.

Developed by Plaintiffs' loss causation and damages expert and Plaintiffs' damages consultant in consultation with Lead Counsel and other Plaintiffs' Counsel and without consideration of the trading patterns of any of the Class Representatives or Lead Plaintiff, the proposed Plan of Allocation is eminently fair and reasonable. Under the Plan, and as more fully set forth in the First Keable Decl. and Second Keable Decl., a Claimant's Recognized Claim is calculated based on the estimated artificial inflation in the prices paid for Pfizer common stock on each day during the Class Period, as determined by Plaintiffs' damages expert. The estimated artificial inflation equals the excess amount that Class Members allegedly paid over fair market value for Pfizer common stock during the Class Period. The amount of artificial inflation for the Pfizer common stock each day of the Class Period is set forth in a chart included in the Notice.

In general, the Plan provides that Class Members whose claims are accepted for payment will receive a *pro rata* share of the Net Cash Settlement Amount based on the value of their Recognized Claim Amounts. For each purchase/acquisition of Pfizer stock during the Class Period, a Recognized Loss Amount is calculated based on a formula that considers the amount of artificial inflation on the date of purchase/acquisition and the amount of artificial inflation on the date of sale. Because any losses suffered on sales of Pfizer common stock before the first alleged corrective disclosure could not have been caused by the alleged wrongdoing, those losses are not compensated under the Plan. *See In re Omnivision Techs., Inc.,* 559 F. Supp. 2d 1036, 1043 (N.D. Cal 2008) (approving a plan of allocation that excluded recovery for shares not held through the purportedly corrective disclosure). Additionally, the Plan takes into account the Court's ruling on Defendants' first summary judgment motion in which the Court found that the

full extent of the truth was in the public domain as of the end of the day on December 19, 2004 and there was no loss-causing risk information disclosure after that time. As reflected in Professor Fischel's inflation table set forth in the Notice, as of the close of trading on December 16, 2004, all positive inflation had been fully removed from the stock price and, therefore, the Plan reflects that losses will not exist following that date.

The Plan does not include payments based on Pfizer shares acquired in exchange for Pharmacia shares in connection with the April 16, 2003 merger. Unlike cash or any other consideration used to acquire Pfizer stock, Plaintiffs' expert concluded that the exchanged Pharmacia shares were artificially inflated by at least as much as, if not more than, the acquired Pfizer shares because Pharmacia received more revenue from Celebrex and Bextra before the merger than Pfizer did. Second Keable Decl. ¶9. As a result, former Pharmacia shareholders who exchanged such shares did not suffer any harm from their acquisition of Pfizer stock.

Finally, it is important to note that the Plan is similar in structure to plans of allocation that have been used to apportion settlement proceeds in numerous other securities class actions. *See, e.g., In re Lucent Techs. Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004).[11]

Accordingly, the Plan of Allocation has a reasonable and rational basis and is fair and equitable to Class Members and should be approved.

II. NOTICE OF THE SETTLEMENT TO CLASS MEMBERS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Notice to the Class of the Settlement satisfied the requirements of Rule 23(c)(2)(B),

[11] *See also Veeco*, 2007 WL 4115809, at *14 ("Each valid claim will then be calculated so that each authorized claimant will receive, on a proportionate basis, the share of the net settlement fund that the claimant's recognized loss bears to the total recognized loss of all authorized claimants."); *Global Crossing*, 225 F.R.D. at 462 ("*Pro-rata* distribution of settlement funds based on investment loss is clearly a reasonable approach.").

which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974). Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114.

In its Preliminary Approval Order, the Court approved the form and content of the Notice and the proposed plan for providing notice to potential Class Members. ECF No. 703. The Notice includes all the information required by Rule 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (a) an explanation of the nature of the Action and the Class's claims; (b) the definition of the Class; (c) the amount of the Settlement; (d) the Plan of Allocation; (e) an explanation of the reasons why the Parties are proposing the Settlement; (f) a statement indicating the attorneys' fees and costs that will be sought; (g) a description of Class Members' right to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (h) notice of the binding effect of a judgment on Class Members. In addition, the Notice informed Class Members as to the date and place of the Final Approval Hearing.

As set forth in the Declaration of Angela Ferrante (attached to the Caliendo Decl. as Ex. D), within the time frame set by the Preliminary Approval Order, the Settlement Administrator mailed the Court-approved Notice to all persons and entities that were previously mailed copies of the Class Notice and any other potential Class Members who otherwise could be identified with reasonable effort. In addition, updated addresses were utilized where possible in connection with the mailing of notice packets. The Court-approved Publication Notice was published in THE NEW YORK TIMES, and THE WALL STREET JOURNAL, and transmitted over the PR Newswire

within the time frame set by the Preliminary Approval Order. In addition, the Notice, Publication Notice and Claim Form, along with other Settlement-related documents and information, were posted on the website established by the Settlement Administrator for the Settlement.

This combination of individual first-class mail to all members of the Class who could be identified with reasonable effort, supplemented by notice in widely-circulated publications, transmitted over a newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." FED. R. CIV. P. 23(c)(2)(B); *see, e.g., In re Advanced Battery Techs.*, 298 F.R.D. at 175; *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *12-*13.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement and the proposed Plan of Allocation as fair and reasonable.

Dated: November 11, 2016

Respectfully submitted,

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