UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

RICHARD MEDOFF, Individually and On Behalf Of All Others Similarly Situated, Plaintiff, vs. CVS CAREMARK CORPORATION, et al., Defendants.	)	No. 1:09-cv-00554-JNL-PAS <u>CLASS ACTION</u> MEMORANDUM OF LAW IN SUPPORT OF CO-LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Court-appointed lead plaintiffs, City of Brockton Retirement System, Plymouth County Retirement System, and Norfolk County Retirement System (together, "Co-Lead Plaintiffs"), by and through their undersigned counsel, respectfully submit this Memorandum of Law in Support of Co-Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation and hereby move the Court for a judgment finally approving the proposed settlement of this action ("Settlement") as memorialized in the previously-filed Stipulation of Settlement, dated as of August 24, 2015 (Dkt. No. 122) (the "Stipulation")[1], and an order approving the Plan of Allocation.

I. PRELIMINARY STATEMENT

Defendants CVS Caremark Corporation ("CVS Caremark"), Thomas M. Ryan, David B. Rickard, and Howard A. McLure (together, "Defendants") have agreed to pay $48 million in cash to resolve this Litigation. The terms of the Settlement are set forth in the Stipulation. *See* Dkt. No. 122. In the Court's Order Certifying a Class, Preliminarily Approving Settlement, and Providing for Notice ("Preliminary Approval Order"), the Court preliminarily approved the Settlement and directed that notice of the Settlement be provided to potential Class Members. As of November 25 2015, Defendants had deposited the $48 million Settlement Amount into an escrow account, and the amount has been invested in U.S. Agency or Treasury securities for the benefit of the Class. The Preliminary Approval Order directed that a Final Settlement Hearing be held on January 19, 2016, at 10:00 a.m., to determine the fairness, reasonableness, and adequacy of the Settlement and the Plan of Allocation, and to consider Lead Counsel's application for an award of attorneys' fees and expenses.

As set forth herein, and in the Joint Declaration of Robert M. Rothman and Jonathan Gardner in Support of: (1) Co-Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation; and (2) Lead Counsel's Application for an Award of Attorneys' Fees and Expenses, filed

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[1] All capitalized terms not otherwise defined in this Memorandum are defined in the Stipulation.

concurrently herewith (the "Joint Declaration" or "Joint Decl."), the $48 million cash Settlement Amount and the other terms of the Settlement are the product of six years of hard-fought litigation and was reached only after Lead Counsel had a firm understanding of the strengths and weaknesses of Co-Lead Plaintiffs' claims. At the time an agreement-in-principle to settle was reached, Lead Counsel had conducted an extensive investigation into Defendants' conduct, including speaking with over 100 former CVS Caremark employees, as well as current and former CVS Caremark clients impacted by the alleged conduct. Joint Decl., ¶22. The parties twice briefed Defendants' motion to dismiss and briefed the appeal of the Court's initial order thereon. Co-Lead Plaintiffs engaged in extensive formal discovery, including serving numerous discovery requests on Defendants, subpoenaing 60 non-party witnesses, reviewing and analyzing more than 1.3 million pages of documents, and taking or defending 15 depositions. The parties fully briefed Co-Lead Plaintiffs' motion for class certification. *See id.*, ¶¶59-61. Finally, the parties engaged in an extensive mediation with the Honorable Layn R. Phillips (Ret.), in which they exchanged detailed mediation statements and vigorously debated their respective views regarding the strengths and weaknesses of the case.

As a result of this and other litigation efforts, it is Lead Counsel's informed opinion that, in light of the significant risks and the delay, expense, and uncertainty of pursuing the Litigation through trial and any subsequent appeals, the Settlement is a certain and favorable result for the Class. The benefit that the Settlement will provide to the Class weighs strongly in favor of final approval when considered against the significant risks that the Class might recover less (or nothing) if the action were litigated through summary judgment, trial, and any additional appeals that would likely follow, a process that could last many years. While Co-Lead Plaintiffs believe they have meritorious responses to each of Defendants' arguments against liability and damages, the proposed Settlement, if approved, will enable the Class to recover without incurring the risks associated with

further litigation. Accordingly, Lead Counsel, who have extensive experience in prosecuting securities class actions, strongly believe that the proposed Settlement is fair, reasonable, adequate, and in the best interests of the Class, and deserves the final approval of this Court. *See* Joint Decl., ¶¶77-80.

Co-Lead Plaintiffs also move for final approval of the proposed Plan of Allocation of the Net Settlement Fund as fair and reasonable. The Plan of Allocation was developed in conjunction with Co-Lead Plaintiffs' damages expert and is designed to fairly and equitably distribute the net proceeds of the Settlement to Class Members, taking into account the losses suffered in transactions in CVS Caremark common stock which Co-Lead Plaintiffs and Lead Counsel believe are attributable to the conduct alleged in the Complaint. *See* Joint Decl., ¶¶106, 107, 110. Co-Lead Plaintiffs also seek final certification of the Class and appointment of Class Representatives and Class Counsel.

The reaction of the Class to date strongly supports the approval of both the Settlement and Plan of Allocation. Pursuant to the Court's Preliminary Approval Order, as of December 11, 2015, copies of the Notice of Proposed Settlement of Class Action ("Notice") and Proof of Claim and Release form ("Proof of Claim") (together, the "Notice Packet") have been mailed to more than 500,000 potential Class Members and nominees, and on December 4, 2015, the Summary Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire*. *See* Joint Decl., ¶74; Walter Decl., ¶¶2-11.[2] While the deadline for Class Members to object to the Settlement and Plan of Allocation has not yet passed, to date, only one objection to the Settlement has been received. For the reasons discussed in the Joint Declaration (Joint Decl., ¶111), it is without merit and should be rejected by this Court. Moreover, to date, no Class Members have submitted a request for exclusion. *See* Walter Decl., ¶15.

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[2] The "Walter Decl." is the Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice, submitted herewith.

For these reasons and the reasons set forth below, Co-Lead Plaintiffs respectfully submit that both the Settlement and Plan of Allocation are fair, reasonable, and adequate and should be approved.

II. PROCEDURAL AND FACTUAL BACKGROUND

The Court is respectfully referred to the accompanying Joint Declaration for a full discussion of the factual background and procedural history of the Litigation, the extensive litigation efforts of Lead Counsel, the mediation leading to this Settlement, and the reasons why the Settlement and Plan of Allocation are fair, reasonable, and adequate and should be granted.

III. ARGUMENT

A. The Proposed Settlement Warrants Final Approval

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). Courts "enjoy great discretion to 'balance [a settlement's] benefits and costs' and apply this general standard." *Voss*, 592 F.3d at 251.

Courts generally consider both "'the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial.'" *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005).[3] For courts in the First Circuit, the evaluation of the settlement "requires a wide-ranging review of the overall reasonableness of the settlement that relies on neither a fixed checklist of factors nor any specific litmus test." *In re Tyco Int'l Ltd.*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007); *see also New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 280 (D. Mass. 2009)

[3] Citations are omitted and emphasis is added throughout unless otherwise indicated.

("The First Circuit has not established a fixed test for evaluating the fairness of a settlement."). However, many courts in this Circuit have considered the following factors, initially set forth by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), in conducting their analysis:

> (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 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 attendants risks of litigation.

First Databank, 602 F. Supp. 2d at 280-81 (quoting *Grinnell*, 495 F.2d at 463); *Relafen*, 231 F.R.D. at 72 (same); *In re Lupron(R) Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93-94 (D. Mass. 2005) (same); *In re StockerYale, Inc. Sec. Litig.*, No. 1:05 cv 00177, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007) (same).

The determination of whether a settlement is fair, reasonable, and adequate is committed to the court's sound discretion. *See City P'ship*, 100 F.3d at 1043-44. In general, courts refrain from "prejudg[ing] the merits of the case" or "second-guess[ing] the settlement." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 211 (D. Me. 2003). Instead, the court's role is limited to "determin[ing] if the parties' conclusion is reasonable." *Id.* As one court noted:

> "Any settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial."

Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54, 68 (D. Mass. 1997).

In evaluating the Settlement, the Court must also consider the strong public policy favoring settlement, particularly in class actions. *See P.R. Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (noting the "'strong public policy in favor of settlements'"); *Tyco*, 535 F. Supp. 2d at

259 (noting that "public policy generally favors settlement – particularly in class actions as massive as the case at bar"); *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. Thus, the procedural and substantive fairness of a settlement should be examined 'in light of the "strong judicial policy in favor of settlement[]" of class action suits.'").

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

Where the parties have negotiated a settlement at arm's length and have conducted sufficient discovery, the court should presume that the settlement is reasonable. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009); *City P'ship*, 100 F.3d at 1043; *Relafen*, 231 F.R.D. at 71-72; *Lupron*, 228 F.R.D. at 93; *Gulbankian v. MV Mfrs., Inc.*, No. 10-10392-RWZ, 2014 WL 7384075, at *2 (D. Mass. Jan. 20, 2015) ("The Settlement Agreement is presumptively reasonable because it was the product of arms-length negotiations following extensive discovery."). Courts accord great weight to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.

A presumption of reasonableness is appropriate here. The Settlement was achieved after six years of vigorous litigation, including an appeal to the First Circuit, two rounds of briefing on Defendants' motion to dismiss, extensive factual discovery, consultation with experts, and after arm's-length settlement negotiations between experienced counsel. Although Lead Counsel and counsel for Defendants had broached the subject of settlement discussions on several occasions throughout the Litigation, serious settlement talks did not begin until August 24, 2015, after the parties had: (i) conducted a substantial amount of fact discovery; (ii) fully briefed class certification; and (iii) retained experts in the fields of economic analysis, pharmacy benefit management, and

health information technology and commenced preparation of expert reports. In connection with the August 2015 mediation, Lead Counsel and counsel for Defendants exchanged information regarding damages and liability, while litigation proceeded. By the time the agreement to settle was reached following mediation with the Honorable Layn R. Phillips (Ret.),[4] Lead Counsel had subpoenaed 60 non-party witnesses, reviewed and analyzed over 1.3 million pages of documents, and taken or defended 15 depositions and, thus, the case was at an advanced stage, and Lead Counsel were well informed about its strengths and weaknesses. Accordingly, the Settlement is procedurally fair and entitled to a presumption of reasonableness. *See Relafen*, 231 F.R.D. at 71-72; *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("[S]ettlement negotiations . . . conducted at arms' length over several months . . . support 'a strong initial presumption' of the Settlement's substantive fairness.").

The judgment of experienced and well-informed class counsel should be accorded significant weight by the Court. *See Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("[T]he trial court is entitled to rely upon the judgment of experienced counsel for the parties."); *Bussie*, 50 F. Supp. 2d at 77 ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that

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[4] Judge Phillips is recognized as one of the premier mediators in complex, multi-party, high-stakes litigation. *See In re Citigroup, Inc.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) (noting the procedural fairness of settlement mediated by Judge Phillips); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (describing Judge Phillips as "an experienced and well-regarded mediator of complex securities cases"); *see also In re Delphi Corp. Sec.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008) (speaking of Judge Phillips, "the Court and the parties have had the added benefit of the insight and considerable talents of a former federal judge who is one of the most prominent and highly skilled mediators of complex actions").

they believe the settlement provides to the Class relief that is fair, reasonable and adequate."). Lead Counsel have extensive experience in securities class action litigation and were well-informed about the facts of the case as a result of their investigation and extensive discovery at the time the Settlement was reached. They strongly believe that the Settlement is in the best interests of the Class in light of the significant risks of continued litigation.

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

Consideration of all the relevant *Grinnell* factors strongly supports approval of the Settlement as fair, reasonable and adequate.

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

The complexity of this case and the substantial expense and delay that would result if Co-Lead Plaintiffs sought to achieve a litigated verdict both weigh strongly in favor of approval of the Settlement. *See StockerYale*, 2007 WL 4589772, at *3 (noting that this factor "'captures the probable costs, in both time and money, of continued litigation'"); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *11 (E.D. La. Mar. 2, 2009) (explaining that, where continued litigation, including through discovery, class certification, trial and appeals, "would consume substantial judicial and attorney time and resources . . . avoiding such costs weighs in favor of settlement").

In the absence of the Settlement, continuing to litigate this action would have required substantial additional time and expense, without any guarantee of success. If the Court certified the Class, costly and protracted litigation would have ensued, including, but not limited to, expert designations, expert reports, and further fact discovery. The parties resolved this action prior to the filing of any summary judgment and *Daubert* motions, thereby avoiding further contentious motion practice, as well as a complex and costly trial, and any further appeals. At summary judgment, Co-

Lead Plaintiffs would have faced numerous, fact-intense hurdles, including Defendants' challenge to loss causation and damages – namely that the November 5, 2009 stock price decline was due to factors other than those at issue in this case, such as Defendants' revisions to prior earnings projections, which revisions were also announced on that day. In its Opinion and Order initially granting Defendants' motion to dismiss, the Court accepted Defendants' argument that the entire November 5, 2009 stock decline was due to non-actionable earnings projections. A jury could have done the same. Co-Lead Plaintiffs would also have faced Defendants' challenges to falsity (*i.e.*, whether Defendants' merger-related statements were false and misleading) and to scienter. There were significant factual hurdles proving that customers terminated or repriced their contracts because of problems caused by the merger and a failed integration. The Joint Declaration further details these and other factual and legal considerations highlighting the reasonableness of the Settlement here. *See* Joint Decl., ¶¶81-105.

Even if Co-Lead Plaintiffs' claims survived Defendants' expected motions for summary judgment, continued prosecution of the Litigation would be complex, expensive, and lengthy, with an outcome more favorable than the Settlement highly uncertain. Moreover, regardless of which side prevailed at trial, appeals likely would ensue. *See Relafen*, 231 F.R.D. at 72 ("[I]n light of the high stakes involved, 'an appeal is certain to follow regardless of the outcome at trial.'").

The present value of a certain recovery at this time, compared to the chance for a greater one down the road, supports approval of a settlement that eliminates the expense and delay of continued litigation, as well as the significant risk that the Class could receive no recovery. Any potential recovery by Class Members in the absence of a settlement would occur years in the future, substantially delaying any recovery for injured Class Members. By contrast, the Settlement offers the opportunity to provide definite compensation to the Class now. *See Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would

necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.”). Thus, the likely duration, complexity, and expense of further litigation supports a finding that the Settlement is fair and weighs in favor of final approval.

b. The Reaction of the Class to Date Supports Final Approval

The reaction of the Class to date also supports approval of the Settlement. The absence of meritorious objections or investors opting out of the Settlement provide evidence of Class Members' approval of the terms of the Settlement. *See RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587(PKL)(RLE), 2003 WL 21136726, at *1 (S.D.N.Y. May 15, 2003). "'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005).

Pursuant to the Preliminary Approval Order, and as stated in the Notice, Class Members were notified that they have until January 6, 2016 to request exclusion from the Class or to object to the Settlement. *See* Walter Decl., ¶15. In addition, a Summary Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire*. *Id.*, ¶11. As of December 15, 2015, only one objection to the Settlement has been received. Not one Class Member has filed a request to be excluded from the Class. The objection, filed on October 9, 2015, was sent to the Court and asked that it "reject any offer that doesn't recover at least 25% of the damage." Dkt. No. 123. As discussed in the Joint Declaration and Lead Counsel's response, dated October 20, 2015 (Dkt. No. 125), the objector misconstrued the recoverable damages in the Litigation by implicitly assuming that the entire decline in the price of CVS Caremark stock was caused by the alleged fraud.

As provided in the Preliminary Approval Order, following the close of the objection and opt-out period, Co-Lead Plaintiffs will file reply papers addressing all requests for exclusion and any other objections that may be received.

c. Co-Lead Plaintiffs Have Sufficient Information to Make Informed Decisions as to Settling This Case

The third *Grinnell* factor looks to the "stage of the proceedings and the amount of discovery completed," *Wal-Mart*, 396 F.3d at 117, and focuses on whether the plaintiffs "obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207(JGK), 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010).

Lead Counsel's extensive knowledge of the merits and potential weaknesses of the asserted claims is certainly adequate to support the Settlement in this case. By the time the parties agreed to settle this Litigation, Lead Counsel had, among other things:

- reviewed and analyzed CVS Caremark's Class Period and pre-Class Period public filings, annual reports, press releases, quarterly earnings call and investment conference transcripts, and other public statements;
- located and interviewed approximately 119 confidential witnesses, including former employees of CVS Caremark;
- researched, investigated, and drafted the initial complaint and the operative Complaint;
- researched and drafted the motion to appoint the Co-Lead Plaintiffs;
- fully briefed Defendants' motion to dismiss, including supplemental briefing;
- fully briefed Co-Lead Plaintiffs' First Circuit appeal;
- fully briefed Co-Lead Plaintiffs' motion for class certification;
- served discovery requests on Defendants, including:
  - seven Requests for Production seeking 83 categories of documents;
  - two sets of Interrogatories containing 22 separate Interrogatories; and
  - 22 Requests for Admission;
- frequently met and conferred with Defendants regarding the scope of production and on several occasions litigated discovery disputes to ensure comprehensive discovery;
- subpoenaed 60 non-party witnesses;

- reviewed and analyzed over 1.3 million pages of documents;
- conducted or defended 15 depositions of party and non-party witnesses;
- retained experts in the fields of economic analysis, pharmacy benefit management and healthcare information technology; and
- engaged in negotiations with the assistance of the Honorable Layn R. Phillips (Ret.), in which the parties exchanged mediation reports.

Thus, Lead Counsel are knowledgeable with respect to possible outcomes and risks in this matter and, thus, able to recommend the Settlement. *See, e.g.*, *StockerYale*, 2007 WL 4589772, at *3 (This factor supported settlement approval where "counsel had the benefit of information obtained through document discovery and its extensive own investigation."); *Bussie*, 50 F. Supp. 2d at 77 (The "parties' enormous discovery effort," which included review of three million pages of documents and 11 depositions, "enabled Lead Counsel to assess the merits of the Class's litigation position and . . . is probative of the Settlement's fairness."); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474 (D.P.R. 2011) (Even where formal discovery had not occurred, counsel's investigation and informal discovery provided "sufficient information to make a well informed decision.").

d. Co-Lead Plaintiffs Face Significant Risks in Establishing Liability and Damages

While Lead Counsel believe that the claims asserted against Defendants have merit, they recognize that there were very significant risks as to whether Co-Lead Plaintiffs would ultimately be able to establish liability and damages on their claims and obtain a recovery. Here, not surprisingly, Defendants vigorously contested both liability and damages.

In order to prove damages at trial, Co-Lead Plaintiffs bear the burden of establishing loss causation, *i.e.*, that CVS Caremark's statements caused the Class' alleged loss. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear the burden of proving "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover'") (quoting

15 U.S.C. §78u-4(b)(4))). Defendants vigorously argued throughout the Litigation that non-actionable "other factors" caused CVS Caremark's November 5, 2009 stock decline. During the earnings call held that same day, in addition to disclosing the service issues that Co-Lead Plaintiffs allege caused the Company to lose substantial business and revenue, Defendants also disclosed that the Company would not meet their prior earnings projections. Joint Decl., ¶86. Defendants claimed that these earnings revisions – which are not actionable as a matter of law – caused the November 5, 2009 stock decline, not Defendants' merger-related statements about "service issues." Notably, the Court accepted this argument when it granted Defendants' first motion to dismiss.

Rebutting Defendants' loss causation arguments required, and would continue to require, sophisticated and difficult disaggregation analyses by Co-Lead Plaintiffs' economics expert, as well as evidentiary support. Although the First Circuit held that the allegations were plausible for pleading purposes, the First Circuit expressly noted that "[i]f this case proceeds, it will be up to the Retirement Systems to prove how much of this drop resulted from revelations about CVS Caremark's integration, which are actionable, and how much resulted from disappointment in CVS Caremark's projected earnings, which is not actionable." *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 242 n.7 (1st Cir. 2013). While the Court denied Defendants' second motion to dismiss, in doing so it also warned, "[a]ccordingly, the defendants' motion to dismiss is denied, with further narrowing of the plaintiffs' claims to await a later stage of the litigation." *City of Brockton Ret. Sys. v. CVS Caremark Corp.*, No. 09-cv-554, 2013 WL 6841927, at *5 (D.R.I. Dec. 30, 2013).

Here, at a minimum, proof of loss causation and damages would ultimately have required expert testimony before a jury. While Co-Lead Plaintiffs would have presented a cogent and persuasive expert's view establishing loss causation and damages, Defendants also would have presented well-qualified experts to opine against a finding of loss causation with respect to the alleged price declines. There can be no certainty as to which expert's view would be credited by the

jury and who would prevail at trial in this "battle of the experts," and accordingly, this created a significant level of litigation risk. *See Tyco*, 535 F. Supp. 2d at 260-61 ("[E]ven if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400(CM)(PED), 2010 WL 4537550, at *18 (S.D.N.Y. Nov. 8, 2010) ("The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses.").

Further, Co-Lead Plaintiffs faced the risk of establishing that Defendants made false statements with scienter. According to opinions from this Court and the First Circuit, the only actionable statements pled in the Complaint were those relating to integration issues in connection with the Company's merger. Defendants, however, repeatedly claimed that no such integration issues caused the Company to lose business during the Class Period. With respect to scienter, Defendants argued that because there were no false statements, there could be no scienter. They also argued that certain Individual Defendants' stock sales could not support scienter. *See* Joint Decl., ¶¶92-101.

Even if Co-Lead Plaintiffs were successful in establishing material misrepresentations and scienter, there was a risk that the Court at summary judgment, or a jury at trial, would conclude that Co-Lead Plaintiffs had not established any damages. Indeed, Defendants advanced a compelling damages argument that might have persuaded a jury that the Class suffered ***no*** compensable damages. If Defendants succeeded in showing no actionable price impact at all on November 5, 2009, such that the price of CVS Caremark's common stock was not inflated by false information

related to the merger integration, Co-Lead Plaintiffs would have no cognizable damages at all – a fatal blow to this Litigation.

Finally, even if Co-Lead Plaintiffs obtained class certification, Defendants may have moved to decertify the Class before trial or on appeal at the conclusion of trial, as class certification may always be reviewed. A court may decertify a class at any time. Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *see also 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."); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 896 (7th Cir. 1981) ("[A] favorable class determination by the court is not cast in stone.").

When viewed in the context of these significant litigation risks and the uncertainties involved with any litigation, the Settlement represents a favorable and certain result. Accordingly, the significant risks discussed herein, and the factors the Court must consider, support approval of the Settlement. *See, e.g.*, *StockerYale*, 2007 WL 4589772, at *3 (This factor supported settlement where the defendants had defenses to liability and loss causation that "could result in no liability and zero recovery for the class."); *OCA*, 2009 WL 512081, at *13 (the substantial risks that plaintiffs faced in establishing loss causation and proving scienter favored approval of the settlement); *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *18 (N.D. Tex. Nov. 8, 2005) ("[P]laintiffs' uncertain prospects of success through continued litigation" – including challenges in proving that "the statements made by Defendants were false when made" and in establishing scienter – favored approval of the settlement.).

e. The Ability of Defendants to Withstand a Greater Judgment

While Defendants could have withstood a greater judgment than the Settlement represented here, "a defendant is 'not required to empty its coffers before a settlement can be found adequate.'"

In re Sturm, Ruger & Co., Inc. Sec. Litig., No. 3:09 cv 1293 (VLB), 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012). This factor, standing alone, is not sufficient to preclude a finding of substantive fairness where, as here, the other factors weigh heavily in favor of approving a settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001).

f. The Settlement Is Reasonable in Light of the Best Possible Recovery

The Court must consider the reasonableness of the Settlement Amount in light of the possible recovery in the Litigation and risks of the Litigation. The issue is not whether the Settlement represents the best possible recovery, but how the Settlement relates to the strengths and weaknesses of the case. Thus, the Court must "'consider and weigh the nature of the claim[s], the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.'" *Grinnell*, 495 F.2d at 462. 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.), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *accord Relafen*, 231 F.R.D. at 73 ("'A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes . . . .'"). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Relafen*, 231 F.R.D. at 73.

Here, the $48 million cash settlement is within the range of reasonableness under the circumstances so as to warrant final approval of the Settlement. Lead Counsel, with the benefit of the views of their damages expert, estimate that, after disaggregating confounding information, the maximum recoverable damages figure was in the range of $900 million, putting the Settlement recovery at approximately 5.33% of the best case recoverable damages in this Litigation. Joint Decl., ¶¶66-67. This analysis assumes, however, that 70% of the stock price drop on November 5, 2009 was attributable to the alleged fraud, *i.e.*, the integration and customer service issues relating to

the CVS Caremark merger rather than the poor earnings announcement also made that day. Defendants strongly contested, and would continue to marshal evidence to support their arguments at summary judgment and trial, that very little (and certainly significantly less than half), if any, of the stock price drop was attributable to the alleged fraud, rather than the disappointing earnings news.

Co-Lead Plaintiffs' recovery compares favorably with the range of other securities class action settlements. In nominal terms, the $48 million Settlement Amount compares favorably to other securities class action settlements. As reported by NERA Economic Consulting, the median settlement amount in securities cases in 2014 was $6.5 million. *See* Dr. Renzo Comolli & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review*, at 28 (NERA Jan. 20, 2015). Further, as a percentage of the best-case recoverable damages, the 5.33% recovery is well above the median percentage of 2.2% for cases with estimated damages between $500 and $999 million. *See* Laarni T. Bulan, Ellen M. Ryan, & Laura E. Simmons, *Securities Class Action Settlements 2014 Review and Analysis*, at 8-9 (Cornerstone Research 2014) (noting that in 2014, securities settlements overall and settlements with estimated damages between $500 and $999 million both returned a median of 2.2% of damages); *see also In re Merrill Lynch & Co. Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (court approved $40.3 million settlement representing approximately 6.25% of estimated damages and noted that this is at the "higher end of the range of reasonableness of recovery in class actions securities litigations").

Thus, the Settlement is reasonable in light of the best possible recovery – and represents a significant portion of the total damages, especially when compared to the overall range of securities class action settlements. Indeed, when weighed against the risks of continued litigation, including the risks that there would be no recovery at all, the proposed Settlement is a fair result. As discussed above, if a jury or the Court had credited even some of Defendants' arguments with respect to

liability or damages, the Class might have recovered nothing. In light of these risks, the Settlement provides a favorable result for the Class under the circumstances and should be approved by the Court.

Weighing each of these factors together, the proposed Settlement is a fair, reasonable, and adequate outcome for the Class. Lead Counsel weighed the strengths and weaknesses of the relevant claims, defenses and likelihood of recovery and, after extensive negotiations, reached an informed and satisfactory compromise. Under these circumstances, Co-Lead Plaintiffs respectfully submit that the Settlement should be finally approved.

B. The Court Should Finally Certify the Class

In presenting the proposed Settlement to the Court for preliminary approval, Co-Lead Plaintiffs requested that the Court preliminarily certify the Class so that notice of the proposed Settlement, the final approval hearing and the rights of Class Members to request exclusion, object or submit Proofs of Claim could be issued. In its Preliminary Approval Order, this Court certified the Class. Nothing has changed to alter the propriety of the Court's certification, and, for all the reasons stated in the Memorandum of Law in Support of Co-Lead Plaintiffs' Assented to Motion for Preliminary Approval of Settlement (Dkt. No. 121), incorporated herein by reference, Co-Lead Plaintiffs now request that the Court grant final certification of the Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and (b)(3), appoint Co-Lead Plaintiffs as Class Representatives, and appoint Lead Counsel as Class Counsel for the Class.

C. The Plan of Allocation Should Be Approved

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See Tyco*, 535 F. Supp. 2d at 262 ("Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate."); *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 109 (D. Mass. 2010) (same). A plan of allocation is fair and reasonable as long as it has a

"reasonable, rational basis." *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *10 (S.D.N.Y. May 9, 2014) ("A plan of allocation 'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'"), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012) (same).

A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable, but the plan "need not necessarily treat all class members equally." *Schwartz*, 2005 WL 3148350, at *23. A reasonable plan of allocation may consider "the strengths and weaknesses of the claims of the various types of class members." *In re Cabletron Sys. Sec. Litig.*, 239 F.R.D. 30, 35 (D.N.H. 2006); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 669 (E.D. Va. 2001) (approving plan that "sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims").

In addition, in determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See Advanced Battery Techs.*, 298 F.R.D. at 180 ("When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel."); *see also In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("'In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.'").

Here, the proposed Plan of Allocation, which was developed by Lead Counsel in consultation with Co-Lead Plaintiffs' damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Class Members who submit valid Proofs of Claim. Under the Plan of Allocation, a Class Member's claim will be calculated for each purchase or acquisition of CVS Caremark common stock during the Class Period that is listed in the Class Member's Proof of Claim and for which adequate documentation is provided. The calculation of claims is generally based on the difference between the amount of estimated alleged artificial inflation in CVS Caremark's

common stock price on the date the stock was purchased or acquired and the amount of estimated alleged artificial inflation in the price on the date of sale or the purchase price less the sales price, whichever is smaller. The Net Settlement Fund will be allocated among Authorized Claimants on a *pro rata* basis based on the relative size of their aggregate claims. *See* Joint Decl., ¶108.

Lead Counsel submit that the Plan of Allocation fairly and reasonably allocates the proceeds of the Net Settlement Fund among Class Members based on the losses they suffered on transactions in CVS Caremark common stock attributable to the conduct alleged. Moreover, the Plan of Allocation is set forth in the Notice, and to date no objections to the Plan of Allocation have been received from any Class Members. Accordingly, for all of the reasons set forth herein, the Plan of Allocation is fair and reasonable, and should be finally approved by the Court.

D. Notice to the Class Complied with Due Process

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). The purpose of the notice is to "afford members of the class due process which, in the context of the [R]ule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974)). A notice program must provide the "'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" *See Eisen*, 417 U.S. at 173 (citing Fed. R. Civ. P. 23(c)(2); emphasis omitted).

Both the substance of the Notice and the method of its dissemination to potential Class Members satisfied these standards. The Court-approved Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. §78u-4(a)(7), including: (i) an explanation of the nature of the Litigation and the claims asserted; (ii) the definition of the

Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and expenses that will be sought; (vii) a description of Class Members' right to opt-out of the Class or object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.

The Notice program was carried out by A.B. Data, a third-party claims administrator, under the supervision of Lead Counsel. *See* Walter Decl. In accordance with the Court's Preliminary Approval Order, as of December 11, 2015, the Claims Administrator distributed Notice Packets to over 500,000 potential Class Members and their nominees. *See id.*, ¶10. In addition, the Claims Administrator caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* on December 4, 2015. *See id.*, ¶11. Copies of the Notice Packet and Stipulation of Settlement were made available on the website maintained by the Claims Administrator. *See id.*, ¶14. In addition, the Claims Administrator maintains a toll-free automated telephone number to accommodate inquiries from potential Class Members – and responded to each message left and call received in a prompt manner. *See id.*, ¶12.

This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." *See, e.g.*, *Advanced Battery Techs.*, 298 F.R.D. at 182-83; *Schwartz*, 2005 WL 3148350, at *10-*11; *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *12-*13 (S.D.N.Y. 2009); *Cabletron*, 239 F.R.D. at 35-36.

IV. CONCLUSION

Based on the foregoing, Co-Lead Plaintiffs respectfully request that the Court enter an order and judgment: (i) granting final approval of the Settlement and Plan of Allocation; (ii) finding that

notice to the Class satisfied due process; (iii) finally certify the Class for settlement purposes, appoint the Co-Lead Plaintiffs as Class representatives and appoint Lead Counsel as Class Counsel; (iv) entering the proposed Order approving the Plan of Allocation in the form submitted; and (v) entering the proposed Final Judgment and Order of Dismissal with Prejudice of this Litigation in the form submitted.

DATED: December 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Barry J. Kusinitz, hereby certify that on December 15, 2015, I caused a true and correct copy of the attached:

MEMORANDUM OF LAW IN SUPPORT OF CO-LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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

/s/ Barry J. Kusinitz
BARRY J. KUSINITZ

Mailing Information for a Case 1:09-cv-00554-JNL-PAS Medoff v. CVS Caremark Corporation et al

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Manual Notice List

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- (No manual recipients)