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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IN RE AMGEN INC. SECURITIES LITIGATION

CASE NO. CV 07-2536 PSG (PLAx)

Honorable Philip S. Gutierrez

CLASS REPRESENTATIVE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Lead Plaintiff and Class Representative Connecticut Retirement Plans and Trust Funds ("Lead Plaintiff" or "Class Representative") respectfully submits this memorandum of points and authorities in support of its motion, pursuant to Fed. R. Civ. P. 23(e), for final approval of the proposed settlement of this securities fraud class action (the "Settlement") and the proposed plan of allocation for the proceeds of the Settlement ("Plan of Allocation").[1] The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement, dated as of July 20, 2016 (the "Stipulation"), which was previously filed with the Court and preliminarily approved on August 9, 2016. ECF No. 587.

I. PRELIMINARY STATEMENT

The Settlement provides for the payment of $95 million in cash by, or on behalf of, Defendants and, if approved by the Court, will resolve ***nine years*** of hard-fought litigation, in which the Parties reached an agreement in principle to settle just nine days before summary judgment motions were to be argued and 27 days before trial was scheduled to begin.

As discussed herein and in the Declaration of Christopher J. McDonald in Support of (I) Class Representative's Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses, dated September 20, 2016 ("McDonald Declaration" or "McDonald Decl."), the history of this hotly contested case is well-known to the Court, as are the unique strengths and challenges of the claims.[2] The claims asserted by Class Representative were

[1] All capitalized terms used herein are defined in the Stipulation and have the same meaning as set forth therein. ECF No. 581-3.

[2] The Court is respectfully referred to the accompanying McDonald Declaration, which is incorporated herein by reference, for a detailed history of the Action, the extensive efforts of Class Counsel, and the factors bearing on the reasonableness of the Settlement, Plan of Allocation of Settlement proceeds, and Class Counsel's request for an award of attorneys' fees and expenses. All exhibits referenced

(continued . . .)

carefully investigated and vigorously litigated. Defendants asserted strong defenses, adamantly denied liability, and were firm in their belief that Class Representative and the Class would not prevail.

The Settlement takes into account the specific risks and obstacles that Class Representative and the Class would face if litigation were to continue. Class Counsel is highly experienced in prosecuting securities class actions, and has concluded that the Settlement is an excellent recovery. This conclusion is based on, among other things, the substantial and certain recovery obtained when weighed against the significant risk, expense, and delay presented in continuing the Action through the completion of trial and inevitable post-trial motions and appeals; a complete analysis of the facts uncovered during expansive discovery; past experience in litigating complex actions similar to the present Action; and the serious disputes between the Parties concerning the merits and damages. McDonald Decl. ¶¶ 104-112, 141-145.

Accordingly, Class Representative respectfully requests that the Court: (i) finally approve the Settlement by entry of an order substantially in the form of the proposed Judgment and Order Approving Class Action Settlement (the "Judgment"), which was negotiated by the settling parties as Exhibit B to the Stipulation;[3] and (ii) approve the Plan of Allocation for distributing the Net Settlement Fund.

(. . . continued)

herein are annexed to the McDonald Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. _ - _." The first numerical reference refers to the designation of the entire exhibit attached to the McDonald Declaration and the second reference refers to the exhibit designation within the exhibit itself.

[3] Pursuant to Local Rule 5-4.4, the proposed Judgment is being filed herewith. However, because the October 4, 2016 deadline for exclusion requests and objections has not passed, a revised proposed Judgment may be re-submitted to the Court on or before October 18, 2016, together with Class Representative's reply papers, in order to reflect any objections and new timely and valid exclusion

(continued . . .)

II. BACKGROUND

A. History of the litigation.

A more detailed description of the litigation is reported in the McDonald Declaration; however for context, the following overview is being provided. On April 17, 2007, an initial securities class action complaint, captioned *Kairalla v. Amgen Inc.*, No. CV 07-2536 PSG, was filed in this Court on behalf of Amgen investors. ECF No. 1. Soon thereafter, several other individuals and entities filed complaints with similar allegations against Amgen. ECF No. 82 at 2. By Order entered July 31, 2007, the Court consolidated the cases, appointed Connecticut Retirement as the Lead Plaintiff, and approved Lead Plaintiff's selection of Labaton Sucharow LLP to serve as Lead Counsel. ECF No. 82 at 9.

On October 1, 2007, Lead Plaintiff filed the 74-page Consolidated Amended Class Action Complaint ("Complaint") that named a total of ten defendants: Amgen and nine individuals, including senior officers and members of Amgen's Board of Directors. ECF No. 109. The Complaint was based upon Class Counsel's extensive factual investigation (*see id*. at pages 1, 3, 18-26), concerning Amgen's erythropoiesis-stimulating agents (or "ESAs"), Aranesp and Epogen, with particular focus on Aranesp. ESAs were approved by the Food and Drug Administration ("FDA") for use in certain anemic patients, including cancer patients with chemotherapy-induced anemia ("CIA"), to build their hemoglobin and red blood cell levels and thereby avoid transfusions. McDonald Decl. ¶ 18.

The Complaint alleged that Defendants made a series of materially false and misleading statements and omissions concerning the safety, marketing, and market demand of its ESAs, which rendered Defendants' Class Period public

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requests. To date, there have been no objections and 20 new exclusion requests, some of which are invalid. *See* Ex. 3 ¶ 18-20.

statements and the Company's periodic reports filed with the SEC materially false and misleading in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 promulgated thereunder. Compl. ¶¶ 208-222. The Complaint further alleged that, as a result of Defendants' misrepresentations, the price of Amgen's securities was artificially inflated during the Class Period and a series of corrective disclosures removed the artificial inflation causing investor losses. *Id*. ¶ 202.

On November 8, 2007, Defendants filed a motion to dismiss the Consolidated Amended Class Action Complaint. ECF No. 116. On February 1, 2008, after full briefing and oral argument, the Court granted in part and denied in part Defendants' motion. ECF No. 137. The Court denied the motion as to Amgen and the Individual Defendants Kevin W. Sharer, George J. Morrow, Richard D. Nanula, and Roger M. Perlmutter. ECF No. 137. The Court granted the motion to dismiss as to other individuals. *Id*. Defendants filed their Answer to the Complaint on April 2, 2008. ECF No. 149.

On March 4, 2009, Lead Plaintiff moved to certify the class and to be appointed class representative. ECF Nos. 189-193. On April 29, 2009, Defendants challenged class certification on numerous grounds. ECF Nos. 198-206. On August 12, 2009, after full briefing and oral argument, the Court certified the Action for litigation purposes as a class action ("Class Certification Order"). ECF No. 246.

On August 28, 2009, Defendants sought permission to appeal the Class Certification Order to the United States Court of Appeals for the Ninth Circuit under Fed. R. Civ. P. 23(f). On December 11, 2009, the Court of Appeals granted Defendants' petition for permission to appeal this Court's Class Certification Order. ECF No. 261.

On December 30, 2009, Defendants sought a stay of further proceedings in this Court pending their Fed. R. Civ. P. 23(f) appeal, which this Court granted on February 2, 2010. ECF No. 297. On appeal, Defendants requested that the Ninth Circuit reverse the Class Certification Order on the ground that the District Court erred by omitting to consider materiality in finding whether questions or law or fact common to class members predominate over any questions affecting only individual members pursuant to Fed. R. Civ. P. 23(b)(3). On November 8, 2011, after full briefing and oral argument, the Ninth Circuit issued an Order affirming this Court's Class Certification Order. *Connecticut Retirement Plans and Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011) *aff'd*, 133 S. Ct. 1184 (2013).

On June 11, 2012, the United States Supreme Court granted Defendants' petition for writ of certiorari to resolve a conflict among the Courts of Appeals over whether, before certifying a class action under Section 10(b) and Rule 10b–5, district courts must require plaintiffs to prove, and must allow defendants to present evidence rebutting, the element of materiality. After extensive briefing and oral argument, the Supreme Court issued an Order on February 27, 2013 affirming the judgment of the Court of Appeals for the Ninth Circuit. *See Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,* 568 U.S. __, 133 S. Ct. 1184 (2013).

Following remand back to this Court, the Parties resumed discovery (discussed further below). On May 5, 2014, Class Representative filed an 89-page Corrected Second Amended Complaint (the "Amended Complaint"), which strengthened Class Representative's central allegations with additional evidence obtained in discovery as well as evidence arising from other developments including, in connection with Defendants' alleged off-label marketing of Aranesp, information concerning Amgen's December 18, 2012 plea of guilty to a criminal

information charging Amgen with misbranding in violation of the Food, Drug, and Cosmetic Act. ECF No. 425. The Amended Complaint also alleged several new misstatements based on additional Amgen clinical trials of Aranesp, known as Study 161 and Study 145.[4]

As with the October 2007 Consolidated Amended Complaint, the allegations in the 2014 Amended Complaint relate principally to misrepresentations and omissions in violation of federal securities law focused primarily on the safety of Aranesp, the marketing of Aranesp, and the commercial prospects of Aranesp.

The alleged material misstatements and omissions, as set forth in the Amended Complaint, were alleged to have caused Amgen's securities to trade at artificially inflated prices during the Class Period. Class Representative alleged that those who purchased Amgen securities at artificially inflated prices were damaged when the truth was disclosed on February 16, 2007 and May 10 and 11, 2007, and also when concealed risks materialized on March 9, 2007 and May 10 and 11, 2007, causing the price inflation to be removed, which negatively impacted the price of Amgen securities.

On May 13, 2014, Defendants filed a motion to dismiss the Amended Complaint, which Class Representative opposed. ECF No. 428, 436, and 444. By Order dated August 4, 2014, the Court denied Defendants' motion in large part. ECF No. 447.

On September 18, 2015, Class Representative filed a motion to approve the Notice and Summary Notice of Pendency of Class Action. ECF No. 504. On November 10, 2015, the Court approved the Notice of Pendency of Class Action

[4] Study 161 was an Amgen-sponsored clinical trial that tested Aranesp in patients with CIA suffering from lymphoproliferative malignancies. Study 145 was an Amgen-sponsored clinical trial that tested Aranesp in patients with CIA suffering from small cell lung cancer ("SCLC").

and the Summary Notice of Pendency of Class Action prepared by Class Counsel. ECF No. 506. Beginning with the initial mailing on December 3, 2015, the Notice of Pendency of Class Action was mailed to over 20,000 potential Class members. ECF No. 517, at ¶ 9. As set forth in the Declaration of Stephanie A. Thurin Re Notice of Pendency Dissemination and Publication, dated March 8, 2016, Epiq received 72 requests that were timely, contained all of the information required by the Court, and were valid. ECF No. 517-3.

The Parties have completed extensive class, fact, and expert discovery which included: (i) Defendants' production of more than 22 million pages of documents; (ii) production of documents by more than a dozen third parties; (iii) Class Representative serving or responding to more than 70 interrogatories, and serving more than 150 requests for admission; (iv) the Parties exchanging thirty-six expert reports directed at clinical trials, biostatistics, oncology, FDA rules and regulations, marketing, criminal plea agreements, loss causation, and damages; (v) the Parties participating in more than 50 depositions of fact and expert witnesses. McDonald Decl. ¶¶ 8, 73.

On March 24, 2016, the Defendants served Class Representative with two motions for partial summary judgment: a Motion for Partial Summary Judgment as to Falsity & Scienter and a Motion for Partial Summary Judgment as to Failure to Establish Loss Causation. ECF Nos. 520 and 521. In support, Defendants submitted briefs totaling 50 pages, Rule 56.1 statements totaling 107 pages, and a combined 167 exhibits. On April 25, 2016, Class Representative submitted its oppositions to the motions, including 50 pages of opposition briefing, 475 pages of Rule 56.1 statements, and a combined 356 exhibits. ECF Nos. 529-536.[5] On May 4, 2016, Defendants replied. ECF Nos. 537, 538.

[5] On April 27, 2016, Class Representative submitted a corrected Local Rule 56-2 Statement of Genuine Issues of Material Fact in Opposition to Defendants' *(continued . . .)*

In addition, the Parties exchanged deposition transcript designations, witness lists, and exhibit lists in preparation for trial. The Parties had each filed a memorandum of contentions of fact and law and numerous motions *in limine*. Class Representative also engaged in jury research, which provided extensive insight into the risks faced at trial. The Parties reached a settlement in principle on the eve of summary judgment argument and less than one month before the four-week trial was scheduled to begin.

B. Settlement negotiations.

On November 8, 2013, the Court appointed the first mediator in the case, the Honorable Vaughn R. Walker. ECF No. 368. In addition to the numerous informal conference calls that took place starting in late 2013, the Parties participated in two in-person mediated settlement discussions, one in December 2015 facilitated by Judge Walker and a second one on May 17, 2016 facilitated by the Honorable Dickran Tevrizian. McDonald Decl. ¶¶ 115-116. A settlement was not reached at either mediation; however, discussions continued and ultimately Judge Tevrizian made a "mediator's proposal" to the Parties recommending the $95 million Settlement Amount. *Id*. ¶ 118; *see also* Declaration of Dickran M. Tevrizian, Ex. 2. After the acceptance of the mediator's proposal to settle, Class Counsel and Defendants' Counsel, on behalf of their respective clients, entered into a binding term sheet dated June 22, 2016, just nine days before the partial summary judgment hearing and 27 days before the start of trial, setting forth, among other things, the agreement to settle and release all claims asserted against the Defendants in the Action. McDonald Decl. ¶ 10.

(. . . continued)
Motion for Partial Summary Judgment for Failure to Establish Loss Causation in order to fix certain typographical errors. ECF No. 535.

C. Preliminary approval and the notice program.

On August 9, 2016, this Court granted preliminary approval of the Settlement and approved the Settlement Notice, Proof of Claim, and Summary Settlement Notice for dissemination to the Class. ECF No. 587. A copy of the Preliminary Approval Order is attached as Ex. 15 to the McDonald Declaration. A copy of the Settlement Notice and Proof of Claim is attached as Ex. B to the Declaration of Stephanie A. Thurin Regarding Settlement Notice Dissemination and Publication, dated September 19, 2016 ("Mailing Declaration"), Ex. 3. On the same day, the Court also approved the appointment of the notice Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), as the Claims Administrator for the Settlement and set a hearing for October 25, 2016 (the "Settlement Hearing") to consider the fairness, reasonableness, and adequacy of the Settlement and the Plan of Allocation. ECF No. 587, Ex. 15.

In compliance with the Preliminary Approval Order and under the supervision of Class Counsel, Epiq mailed copies of the Settlement Notice and Proof of Claim ("Claim Packet") to those members of the Class who had been identified through reasonable effort. Ex. 3 ¶¶ 3-10. To date, Epiq has mailed 1,075,991 Claim Packets to potential Class members and brokers/nominees. *Id*. In addition, the Summary Settlement Notice was published in *The Wall Street Journal* and disseminated on *PR Newswire*. *Id*. ¶ 11. The Settlement Notice and Proof of Claim form were also posted on the websites of Class Counsel and Epiq for easy downloading by interested investors. *Id*. ¶ 17; McDonald Decl. ¶ 130.

The Settlement Notice describes, *inter alia*, the claims asserted in the Action, the contentions of the settling parties, the course of the litigation, the terms of the Settlement, the ceiling for the request for attorneys' fees and expenses, the Plan of Allocation, the right to object to the Settlement, the right to seek (again) to be excluded from the Class, and the right to opt-back into the

Class. *See generally* Ex. 3-B. The Settlement Notice also gave the deadlines for objecting or seeking exclusion from the Class and advised potential Class members of the scheduled Settlement Hearing before this Court. *Id*. at 2. The Settlement Notice specifically notified Class members that Class Counsel's request for attorneys' fees would not exceed 25% of the Settlement Fund (including accrued interest) and its request for payment of expenses would not exceed $7,500,000, plus interest at the same rate and for the same period as earned on the Settlement Fund. *Id*. at 3. The Settlement Notice further provided that such application for fees and expenses may also include a request for a separate award to Class Representative for reimbursement of its reasonable costs and expenses, including lost wages, directly relating to its representation of the Class in an amount not to exceed $150,000. *Id*. To date, there have been no objections and 20 new exclusion requests, some of which are invalid. *Id.* ¶¶ 18-20; McDonald Decl. ¶ 131.

III. ARGUMENT

A. The Settlement is eminently fair, adequate, and reasonable.

The Ninth Circuit has repeatedly asserted that there is a strong judicial policy in favor of settlement, particularly where complex class action litigation is concerned. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *see also In re Toys R Us-Delaware, Inc.*, 295 F.R.D. 438, 458–59 (C.D. Cal. 2014) ("[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is

especially true in complex class action litigation.").[6] Settlements of complex cases such as this one greatly contribute to the efficient utilization of scarce judicial resources and achieve the speedy resolution of claims. *See, e.g.*, *Garner v. State Farm Mut. Auto Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *10 (N.D. Cal. Apr. 22, 2010) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain and substantial recovery for the Plaintiff class.")

The standard for determining whether to grant final approval to a class action settlement is whether the proposed settlement is "fundamentally fair, adequate, and reasonable." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). The Ninth Circuit has provided the following framework for a court to determine whether a settlement is "fair, adequate, and reasonable" in a class action:

> Assessing a settlement proposal requires a district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining a class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; … and the reaction of the class members to the proposed settlement[7]. . . . In addition, the settlement may not be the product of collusion among the negotiating parties.

[6] Internal citations and quotations marks are omitted and all emphasis is added unless otherwise specified.

[7] The reaction of the Class will be discussed in Class Representative's October 18, 2016 reply papers, after the deadlines for objecting and seeking exclusion have passed.

Mego Fin., 213 F.3d at 458. Not all of these factors will apply to every class action settlement; under certain circumstances, as few as one factor alone may prove determinative in finding sufficient grounds for court approval. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

"[T]he settlement hearing is not meant to be conducted as a trial or rehearsal for trial on the merits." *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 445 (E.D. Cal. 2013). "It is neither for the court to reach any ultimate conclusions regarding the merits of the dispute, nor to second guess the settlement terms." *Evans v. Linden Research Inc.*, No. C-11-01078 DMR, 2014 WL 1724891, at *3 (N.D. Cal. Apr. 29, 2014). Significantly, a strong presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the litigation. *See, e.g.*, *Ramirez v. Ghilotti Bros. Inc.*, No. C 12-04590, 2014 WL 1607448, at *1 (N.D. Cal. Apr. 21, 2014) ("When class counsel is experienced and supports the settlement, and the agreement was reached after arm's length negotiations, courts should give a presumption of fairness to the settlement.").

As discussed below, the proposed Settlement readily meets these standards and merits final approval.

1. The strength of the claims and risks of continued litigation weigh in favor of approval.

To determine whether the proposed Settlement is fair, adequate, and reasonable, the Court must balance the continuing risks of litigation against the benefits afforded to the Class and the certainty of a substantial recovery. *Mego Fin.*, 213 F.3d at 458. Although Class Representative believes that the case it has developed to date against the Defendants is strong, that confidence must be tempered by the reality that the Settlement is extremely beneficial in providing a

significant guaranteed return, and that there were significant risks of less or no recovery, particularly in a case such as this. McDonald Decl. ¶¶ 146-148.[8]

In order to prove liability under the Exchange Act, a plaintiff must prove, *inter alia*, that: (i) defendants were responsible for materially false or misleading representations entering the market; (ii) defendants acted with scienter (i.e., that defendants made their misrepresentations knowingly or recklessly); (iii) that plaintiff's losses were caused by defendants' misrepresentations (i.e., "loss causation"); and (iv) that plaintiff and the class members suffered damages. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). In this case, proving each of these requirements posed significant risks.

First, Class Representative faced substantial risks in proving that Defendants' statements and omissions were false and misleading at the time that they were made or occurred. For example, with respect to the Amended Complaint's allegations concerning Study 145—the Aranesp study in patients with small cell lung cancer—Class Representative alleged, based on documents produced in discovery, that Defendants mischaracterized the results in that they misleadingly stated that Study 145 showed a "neutral impact of ESAs on survival" and that "ESAs have no appreciable effect on mortality in chemotherapy-induced anemia" notwithstanding that the unique biological nature of SCLC made it unlikely that the Study 145 results could be generalized to the broader population of cancer patients with CIA. The Court upheld these allegations at the Rule 12(b)(6) stage in part because "Defendant Perlmutter's statement is not so vague as to fail the falsity standard." ECF No. 447 at 25. There is no guarantee that a

[8] In the context of approving class action settlements, "[c]ourts experienced with securities fraud litigation 'routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear.'" *Redwen v. Sino Clean Energy, Inc.*, No. 11-CV-3936 PA (SSx), slip op. at 11 (C.D. Cal. July 9, 2013). Indeed here, the Court twice granted, in part, Defendants' motions to dismiss the complaints. ECF Nos. 137 and 447.

jury—which is not required to accept a plaintiff's version of the facts or draw all reasonable inferences in a plaintiff's favor—would find for Class Representative at trial, particularly given the fact that Defendants would provide the jury with a competing narrative supported by Amgen witnesses and hired experts to the effect that the statements in question were true or, at worst, honestly held opinions.

Second, Class Representative faced significant risks in proving that the alleged misstatements were made with scienter. McDonald Decl. ¶¶ 108-109. A defendant's state of mind in a securities case is often the most difficult element of proof and one which is rarely supported by direct evidence such as an admission. For example, the statistical analyses at the heart of Class Representative's claims concerning Study 161 were conducted by employees of Amgen who were several steps removed from the senior officers of the Company who spoke publicly about the Study's results in the Spring of 2004. The Court upheld these allegations in part because, based on the Amended Complaint's allegations, the Court found it likely that data concerning Study 161 "was at least mentioned, if not discussed" at a January 2004 meeting of Amgen's Development Review Board, as a result of which the Court found there to be a strong inference of scienter because the members of Amgen senior management who later spoke publicly about Study 161 were present at that meeting. ECF No. 447 at 16. Class Counsel may have had to rely in part on circumstantial evidence to show that Defendants were aware that Aranesp demonstrated an increased risk with no assurance that a jury would interpret the evidence the same way. McDonald Decl. ¶ 108. The significance of this risk is underscored because Study 161-related allegations impacted the entire Class Period and therefore have a larger potential impact on overall damages.

Class Representative also faced the risk that the Court would limit the extent to which the Criminal Information, plea transcript, hearing transcript, or plea agreement could be shared with a jury. Alternatively, to blunt the effects that

the guilty plea might otherwise have, Amgen retained as an expert an attorney who once served as the second-highest ranking official in the Department of Justice, former United States Deputy Attorney General Paul McNulty. Class Representative faced the risk that through the testimony of Mr. McNulty, Defendants could minimize the time frame covered by the guilty plea, the geographic area covered by the guilty plea, and/or the commercial scope of the guilty plea such that a jury would consider it less likely that senior Amgen personnel were aware of off-label marketing being performed. Were this evidence eliminated or neutralized, there was a risk that a jury would conclude that Defendants did not make these statements or omissions with the requisite scienter.

Third, with respect to loss causation, even a complete and total victory for Class Representative at trial would in all likelihood have led to years of post-trial appellate review. Class Representative's off-label marketing allegations survived Defendants' motion to dismiss in part because this Court credited Class Representative's "materialization of the risk" theory of loss causation. However, the Court further observed that "the Ninth Circuit has only addressed the materialization of the risk approach in the abstract." ECF No. 447 at 31. This legal uncertainty virtually guaranteed that a plaintiff's verdict would have been the subject of a lengthy, expensive appeal, with the possibility of a reversal and no recovery.

Moreover, given the Supreme Court's requirement that "a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss," *Dura Pharms.*, 544 U.S. at 346, Defendants would likely have continued to argue at trial that any alleged corrective or risk-related information was already publicly disclosed and reflected in Amgen's prices before the relevant price drop dates, and thus could not have caused the prices to fall significantly on those dates. McDonald Decl. ¶ 111. Indeed, with

respect to damages, Defendants' expert opined that there were no economic damages in this case, and that the Amgen price declines on February 16, March 9, May 10 and 11, 2007 could not reliably be attributed to the revelation of new information that Defendants previously misrepresented or failed to disclose, or to the materialization of any concealed risk. *Id*. ¶ 110. If these arguments had been credited, the Class could recover no damages even if the Class Representative proved that Defendants knowingly made the alleged misstatements or omissions.

Finally, these and other complex questions of falsity, scienter, and loss causation would have been factually intense and presented to the jury, in part, through the testimony of various competing scientific and damages expert witnesses at trial. In a "battle of experts," the outcome can in no way be guaranteed. *See, e.g. In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015); *In re Warner Commc'ns Sec. Litig*., 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 735 (2d Cir. 1986) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors…"). The outcome could well have depended on whose testifying expert the jury believed or even whether the jury was able to understand the economic theories used by the experts. *See, e.g.*, *Nguyen v. Radient Pharms. Corp.*, No. SACV 11-00406 DOC (MLGx), 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (approving settlement in securities case where "[p]roving and calculating damages required a complex analysis, requiring the jury to parse divergent positions of expert witnesses in a complex area of the law" and "[t]he outcome of that analysis is inherently difficult to predict and risky"). The Settlement eliminates the risk that the jury might award less than the amount of the Settlement or nothing at all to the Class.

2. The expense and duration of further litigation weigh in favor of approval.

The expense and likely duration of further litigation provides strong support for approving the Settlement. Continuing to defend against summary judgment and prepare for trial would have required significant time and resources. McDonald Decl. ¶ 104. A trial of a complex, fact-intensive case like this would have taken weeks, and the likely appeals of rulings on summary judgment and at trial would have added ***years*** to the litigation. Barring a settlement, there is no question that resolution of this case would take a considerable amount of court time and require additional expenses, with the possibility that the end result would be no better for the Class, and might even be worse. *See*, *e.g.*, *Larsen v. Trader Joe's Co.*, No. 11-cv-05188-WHO, 2014 WL 3404531, at *4 (N.D. Cal. July 11, 2014) ("[T]he high risk, expense, and complex nature of the case weigh in favor of approving the settlement."); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 640 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x. 716 (9th Cir. 2012) ("Considering these risks, expenses and delays, an immediate and certain recovery for class members … favors settlement of this action.").

3. The amount of the Settlement weighs in favor of approval.

In evaluating the fairness of a settlement, a fundamental question is the value of the settlement. In this regard, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Mego Fin.*, 213 F.3d at 459. Indeed, "[t]here is a range of reasonableness with respect to a settlement—a range which 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." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005).

Here, the proposed $95 million Settlement is an excellent result and well within the range of reasonableness. As an initial matter, the $95 million Settlement far exceeds both the average and median reported securities class action settlement amounts since the passage of the PSLRA in 1995, which have ranged from $13 million and $5.6 million in 1996 (adjusted for inflation), respectively, to $52 million and $7.3 million in 2015, respectively. *See* Svetlana Starykh and Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, NERA Economic Consulting at 26, 28 (Jan. 25, 2016) ("*NERA Recent Trends*"), Ex. 1; *see also* Laarni T. Bulan, Ellen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlement - 2015 Review and Analysis,* at 6 (Cornerstone Research 2016) (reporting that the average settlement amount in in securities cases 2015 was $37.9 million and the median settlement amount in 2015 was $6.1 million), Ex. 12. Based on Class Counsel's review of publicly available information concerning securities class action settlements, we also believe the Settlement is the second highest securities class action settlement in California over the past two years. McDonald Decl. ¶ 142.

Therefore, there can be little doubt that the Settlement is an excellent result and falls well within the range of reasonableness.

4. The extent of discovery completed and the stage of proceedings weigh in favor of approval.

With trial of the Action scheduled to begin on July 19, 2016, the Parties were immersed in trial preparations when the settlement term sheet was signed, signifying an agreement in principle. McDonald Decl. ¶ 10. Class Representative and Defendants had already exchanged their initial disclosures of trial exhibit lists, trial witness lists, and deposition designations. *Id*. In addition, Class Counsel obtained extensive discovery produced by Defendants and third parties, including over 22 million pages of documents. *Id*. ¶ 75. Here, the fact that all discovery had been completed and the Action was on the verge of trial assures that there has

been sufficient development of the facts to permit a reasonable judgment on the possible merits of the case. *See generally* McDonald Decl.

As a result of these efforts and at this stage of the proceedings, Class Representative, through its counsel, had a comprehensive understanding of the Action and sufficient information to make a well-informed decision regarding the fairness of the Settlement. *See Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-cv-09405-CAS-FFMx, 2014 WL 439006, at *4 (C.D. Cal. Jan. 30, 2014) (approving settlement where record established that "all counsel had ample information and opportunity to assess the strengths and weaknesses of their claims and defenses"); *Redwen v. Sino Clean Energy, Inc.*, No. 11-CV-3936 PA (SSx), slip op. at 11 (C.D. Cal. July 9, 2013) (settlement approved when, as here, "the parties have spent a significant amount of time considering the issues and facts in this case and are in a position to determine whether settlement is a viable alternative").

5. Experienced counsel concur that the Settlement is fair, adequate, and reasonable.

Experienced counsel, negotiating at arm's-length, has weighed the factors discussed above and endorses the Settlement. As courts within this district and the Ninth Circuit have noted, the views of the attorneys actively conducting the litigation and who are most closely acquainted with the facts of the underlying litigation are entitled to great weight. *See, e.g., Carter v. Anderson Merch., LP*, No. 08-0025, 2010 WL 1946784, at *8 (C.D. Cal. May 11, 2010) ("Counsel's opinion is accorded considerable weight."); *Riker v. Gibbons*, No. 08-00115, 2010 WL 4366012, at *4 (D. Nev. Oct. 28, 2010) ("The recommendation of experienced counsel in favor of settlement carries a great deal of weight in a court's determination of the reasonableness of a settlement."); *Nat'l Rural Telecomm. v. Direct TV, Inc.*, 221 F.R.D. 523 (C.D. Cal. 2004) ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.").

Throughout the settlement negotiations, Class Representative had the advice of Class Counsel, a firm with extensive experience in class action litigation. Labaton Sucharow LLP is among the nation's most experienced law firms in this area of practice and has served as lead or co-lead counsel on behalf of major institutional investors in numerous class actions since the enactment of the PSLRA, including *In re American Int'l Grp., Inc. Sec. Litig.*, No. 04-8141 (S.D.N.Y.) (representing the Ohio Public Employees Retirement System, State Teachers Retirement System of Ohio, and Ohio Police & Fire Pension Fund and reaching settlements of $1 billion); *In re Countrywide Fin. Corp. Sec. Litig.*, No. C 07-5295 (C.D. Cal.) (representing the State of New York and New York City Pension Funds and reaching settlements of more than $600 million); and *In re HealthSouth Corp. Sec. Litig.*, No. CV-03-1500 (N.D. Ala.) (representing New Mexico State Investment Council, the New Mexico Educational Retirement Board and the State of Michigan Retirement System and reaching settlements of more than $600 million). McDonald Decl. Ex. 5-C. In particular, Class Counsel has extensive experience litigating securities and antitrust actions against pharmaceutical companies. *See In re Schering-Plough Corp. / ENHANCE Sec. Litig.*, Civil Action No. 08-397 (D.N.J.) (representing Massachusetts Pension Reserves Investment Management Board and reaching a settlement of $473 million); *In re Bristol-Myers Squibb Sec. Litig.*, Civil Action No. 00-1990 (D.N.J.) (representing Longview Collective Investment Fund and reaching a settlement that included $185 million and significant corporate governance reforms); *In re TriCor Indirect Purchaser Antitrust Litig.*, Civ. No. 02-1512-SLR (D. Del.) (representing Vista Healthplan, Inc. and reaching a settlement of $65.7 million).

Based on its experience litigating securities-fraud class actions and its rigorous investigation and consultation with experts in this litigation, Class Counsel believes that the Settlement is a very favorable result that is in the best

interests of the Class. Accordingly, this factor strongly weighs in favor of the Settlement. *See, e.g.*, *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *5 (N.D. Cal. Sept. 26, 2013) ("Given the collective experience of the attorneys involved in this litigation, the Court credits counsels' view that the settlement is worthy of approval.").

6. The Settlement is not the product of collusion.

Another factor to be considered is whether there is any evidence that the settlement is the result of collusion. *Mego Fin.*, 213 F.3d at 458. The mediation process demonstrates that the Settlement is the result of hard-fought and arm's-length negotiations. The mediated discussions were facilitated by two experienced mediators who have considerable knowledge and expertise in the field of federal securities law. McDonald Decl. ¶¶ 115-116.[9] As courts in this district and within the Ninth Circuit have found, "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *see also Eisen*, 2014 WL 439006, at *5 ("[W]here the services of a private mediator are engaged, this fact tends to support a finding that the settlement valuation by the parties was not collusive.").

For all of the foregoing reasons, Class Representative respectfully urges the Court to grant final approval of the Settlement.

B. The Plan of Allocation is fair, adequate, and reasonable and should be approved by the Court.

Class Representative also requests that the Court approve the Plan of Allocation as "fair, reasonable, and adequate." *Officers for Justice*, 688 F.2d 615

[9] *See Noll v. eBay, Inc.*, 309 F.R.D. 593, 607–08 (N.D. Cal. 2015) (approving a settlement that was "the result of extensive arm's-length bargaining and was achieved only after extensive analysis, hard-fought litigation, and difficult negotiations—including two formal mediations before retired judges (Judge Tevrizian and Judge West of JAMS)").

at 625. A "plan of allocation of settlement proceeds in a class action … is governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate." *Omnivision Techs.*, 559 F. Supp. 2d at 1045; *see also In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 844, 847 (N.D. Cal. 2005). "Courts recognize that an allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Rieckborn v. Velti PLC*, No. 13-CV-03889, 2015 WL 468329, at *8 (N.D. Cal. Feb. 3, 2015); *see also In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005). Here, the Plan of Allocation was developed after careful consideration and analysis by Class Counsel and Class Representative's damages expert, and it reflects an assessment of the damages that could have been recovered under the theories asserted by Class Representative in this case. McDonald Decl. ¶¶ 120-121.

"A plan of allocation ... fairly treats class members by awarding a *pro rata* share to every Authorized Clamant, [even as it] sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *11; *see also Maine State Retirement System v. Countrywide Fin. Corp.*, No. 10-0302, 2013 WL 6577020, at *17 (C.D. Cal. Dec. 5, 2013). Under the proposed Plan of Allocation, the Claims Administrator will calculate each Authorized Claimant's claim based on the information supplied with each Class member's Proof of Claim: the dates of the purchases and sales of securities as compared to the alleged corrective disclosure dates. Each Class member's recovery will depend on their recognized losses, which will be calculated by the Claims Administrator for purposes of determining each claimant's *pro rata* participation in the Settlement Fund. *See Redwen*, No.

11-CV-3936 PA (SSx), slip op. at 11 (approving plan that provides "a reasonable basis for Class members to recover their pro rata damages based upon the dates of their purchase and sale transactions as compared with the disclosure dates identified in the complaint").

The Plan of Allocation reflects the allegations that the prices of Amgen securities were artificially inflated during the Class Period and that the inflation was removed in part on each of February 16, 2007, March 9, 2007, and May 10-11, 2007. McDonald Decl. ¶ 122. The formulation in the Plan of Allocation is consistent with the analysis of Class Representative's damages expert concerning the alleged corrective disclosure dates of February 16, 2007 (the publication by *The Cancer Letter* of news of the premature termination of the DAHANCA 10 study), March 9, 2007 (the FDA's imposition of a "Black Box" warning on ESA labeling), and May 10 and 11, 2007 (the day of and day after a meeting of the FDA's ODAC at which ODAC voted to recommend more clinical trials and stricter wording on ESA labels). *Id*. The Plan of Allocation provides for the *pro rata* distribution of the Net Settlement Fund to Class members, based on their individual recognized losses. McDonald Decl. ¶ 123, Ex. 3-B. After the claims administration process is completed, and claimants have been given an opportunity to address any deficiencies in their claims and challenge the rejection of invalid claims, Class Representative will file a motion with the Court asking for authorization to distribute settlement checks. Ultimately, any balance that remains in the Net Settlement Fund after distribution(s) to eligible claimants, which is not feasible or economical to reallocate, will be contributed to a non-sectarian, not-for-profit charitable organization(s) designated by Class Representative and approved by the Court. *See* Stipulation ¶ 25.

The Plan of Allocation was fully disclosed in the Settlement Notice that was mailed to 1,075,991 potential Class members and, as of the filing of this motion,

no Class members have filed an objection to it. *See Maine State Ret. Sys.*, 2013 WL 6577020, at *17 (approving a plan of allocation after noting there were only two objections to it). It is respectfully submitted that the proposed Plan of Allocation is fair, adequate, and reasonable and should be approved by the Court.

IV. CONCLUSION

Accordingly, for the reasons set forth above and in the McDonald Declaration, Class Representative respectfully requests that the Court: (i) grant final approval of the Settlement; and (ii) approve the proposed Plan of Allocation.

Dated: September 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 20, 2016.

By: */s/ Thomas A. Dubbs*
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