UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PUBLIC PENSION FUND GROUP, et al.	:	No.: 4:08-CV-1859 (CEJ)
v.	:	
KV PHARMACEUTICAL COMPANY, et al.	:	

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

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Court-appointed Lead Plaintiffs, the Norfolk County Retirement System ("Norfolk County") and the State-Boston Retirement System ("State-Boston") (collectively, "Lead Plaintiffs"), on behalf of themselves and the proposed Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement of this class action, approval of the Plan of Allocation of the Net Settlement Fund, and final certification of the Class.[1]

PRELIMINARY STATEMENT

The Settlement achieved by Lead Plaintiffs – which provides for an immediate payment of $12,800,000 – is an excellent result for the Class and well above the median of reported securities settlements in 2013. It is the product of more than four years of hard-fought litigation by Lead Plaintiffs and Lead Counsel, which included, *inter alia*, preparing a thorough amended complaint, briefing Defendants' motions to dismiss, successfully appealing the dismissal of the Action to the Court of Appeals for the Eighth Circuit, and successfully lifting the bankruptcy stay as to the Individual Defendant, after being stayed for over five months by virtue of KV's bankruptcy filing. The Settlement is also the result of arm's-length negotiations that spanned the course of two years, conducted in part with the oversight of an experienced mediator, and

[1] Unless otherwise defined herein, all capitalized terms shall have the meanings set forth and defined in the Stipulation and Agreement of Settlement, dated as of December 20, 2013 (the "Stipulation"), attached as Exhibit 1 to the Declaration of Javier Bleichmar in Support of Lead Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses ("Bleichmar Decl." or "Bleichmar Declaration"), filed concurrently herewith. All exhibits referenced herein are attached to the Bleichmar 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 Bleichmar Declaration and the second reference refers to the exhibit designation within the exhibit itself.

The Bleichmar Declaration is an integral part of this submission and the Court is respectfully referred to the Bleichmar Declaration for a detailed description of, *inter alia*, the procedural history of the Action; a summary of the allegations and claims; the prosecutorial efforts; the events that led to the Settlement; the value of the Settlement as compared to the risks and uncertainties of continued litigation; and other matters.

included a formal mediation session.

While Lead Plaintiffs believe their claims are meritorious, the Class faced the genuine risk of a much smaller recovery, or no recovery at all, given KV's bankruptcy and reorganization (which eliminated the Company as an independent source of recovery) and wasting insurance policies. Additionally, Defendants had aggressively pursued numerous defenses at every stage of the Action. Lead Plaintiffs recognized that there would be substantial challenges in establishing liability and damages – including proving that Defendants made actionable material misstatements or omissions regarding compliance with regulatory requirements of the U.S. Food and Drug Administration (FDA) and Current Good Manufacturing Practices (cGMP).

Therefore, it is respectfully submitted that the Settlement is an excellent result for the Class, and should be approved as fair, reasonable, and adequate. Lead Plaintiffs also seek approval of the proposed Plan of Allocation, which was prepared by Lead Counsel in consultation with one of Lead Plaintiffs' consulting damages' expert, as fair and reasonable.

ARGUMENT

I. THE SETTLEMENT MERITS FINAL APPROVAL

A. The Standards for Evaluating Final Approval of a Class Action Settlement

A class action settlement requires Court approval, and a settlement should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999); *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988). In determining whether to approve a settlement, the district court acts as a fiduciary, serving as a guardian of the rights of absent class members. *See Wireless Tel.*, 396 F.3d at 932.

"A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." *Petrovic*, 200 F.3d at 1148. This policy is "particularly strong in the class action context." *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 2512750, at *7 (D. Minn. June 29, 2012).

In the Eighth Circuit, district courts are required to consider four factors in determining whether a class action settlement is fair, reasonable, and adequate: (i) the merits of the plaintiffs' case, weighed against the terms of the settlement; (ii) the defendants' financial condition; (iii) the complexity and expense of further litigation; and (iv) the amount of opposition to the settlement. *See Wireless Tel.*, 396 F.3d at 932; *Van Horn*, 840 F.2d at 607; *Grunin v. Int'l House of Pancakes*, 513 F.2d 114,124 (8th Cir. 1975). These four factors are not exclusive; courts may also consider factors such as the arm's-length nature of the settlement negotiations, the experience and opinion of counsel on both sides, and the use of an independent mediator. *See, e.g., DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995); *Buckley v. Engle*, No. 8:07CV254, 2011 WL 2161135, at *2 (D. Neb. June 2, 2011).

Finally, in considering whether a settlement should be approved, the Court does not need to resolve disputed issues and should not convert the approval hearing into a trial on the merits, as the purpose of a settlement is to avoid such a trial. *See, e.g., Wireless Tel.*, 396 F.3d at 932-33; *DeBoer*, 64 F.3d at 1178; *Charter Commc'ns, Inc. Sec. Litig.*, No. MDL 1506, 3:02-CV-1186 CAS, 2005 WL 4045741, at *5 (E.D. Mo. June 30, 2005). Here, the proposed Settlement easily satisfies the Eighth Circuit criteria for approval.

B. <u>The Settlement Is Excellent and Satisfies Eighth Circuit Standards</u>

1. <u>Merits of Plaintiffs' Case, Weighed Against Benefits of the Settlement</u>

"The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is 'the strength of the case for plaintiffs on the merits, balanced against the amount

offered in settlement.'" *Wireless*, 396 F.3d at 933. Under this factor, courts balance the continuing risks of litigation against the benefits afforded to members of the class and the immediacy and certainty of the recovery. *See In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1099 (D. Minn. 2009). In evaluating settlements of securities class actions, federal courts recognize that "[p]roof of both liability and damages in securities cases is complex and difficult and generally requires a significant amount of expert accounting or statistical evidence." *Desert Orchid Partners, L.L.C. v. Transaction Sys. Architects, Inc.*, No. 8:02CV553, 2007 WL 703515, at *2 (D. Neb. Mar. 2, 2007).

The $12.8 million Settlement provides a very substantial and immediate benefit to the Class. The Settlement is well above the $9.1 million median settlement amount of reported securities cases in 2013, and greater than the medians since the passage of the Private Securities Litigation Reform Act of 1995, which ranged from $3.7 million in 1996 to $9.1 million in 2013 (with a peak of $12.3 million in 2012). *See* Comolli and Starykh, "Recent Trends in Securities Class Action Litigation: 2013 Full Year Review" (NERA Jan. 21, 2014) (Ex. 14) at 28.

While Lead Plaintiffs and Lead Counsel believe that the claims asserted in the Action have merit, there were significant risks that the Class might not recover anything at all in light of KV's bankruptcy and reorganization, diminishing insurance, and lack of financial resources, which strongly weighed in favor of an immediate recovery for the Class from a settlement. Additionally, if the case were to continue to be litigated, the Class would still need to overcome numerous defenses in order to survive any dispositive summary judgment motions or recover at trial, including serious challenges in proving the falsity and materiality of the alleged misrepresentations and omissions; scienter; and loss causation. Bleichmar Decl. ¶¶ 38- 52; *see also Charter Commc'ns*, 2005 WL 4045741, at *7 (approving settlement and noting that "while

Lead Plaintiff remained confident of ultimately prevailing, there were clearly other hurdles to overcome").

(a) Risks related to Bankruptcy and Limited Financial Resources

As set forth in more detail in the Bleichmar Declaration (*see* ¶¶ 39-42), had the litigation continued there was a real risk that Lead Plaintiffs and the Class would have recovered less than the Settlement, or nothing at all, due to the Company's bankruptcy and reorganization, the limited and wasting insurance available, and the limited financial resources of the Individual Defendant. The Company's bankruptcy eliminated it as a source of recovery for the Class, given its financial state and the subordination of investors' claims below those of other creditors.[2] The Company had purchased, primarily for the benefit of its officers and directors, a total of $20 million in liability insurance that could be used to resolve various claims of investors; however, this insurance was also used to pay for attorneys' fees and costs arising out of the Action. By the time of renewed settlement discussions, there was slightly less than $16 million in insurance coverage still available and discovery had barely started. *Id*. ¶ 41. Had the parties not agreed to settle, they would have pursued merits and expert discovery and dispositive motions, which would have considerably increased defense costs. There was, therefore, a real threat that at the point of a judgment favorable to the Class, the Defendants would have no, or only limited, insurance funds to satisfy the judgment. Additionally, Lead Plaintiffs conducted a thorough asset search and review of the Individual Defendant's ability to pay and concluded that he did not appear to have sufficient personal resources to meaningfully contribute to a judgment or to

[2] Section 12.13 of the Sixth Amended Joint Chapter 11 Plan of Reorganization for K-V Discovery Solutions, Inc. and its Affiliated Debtors, which was confirmed by the bankruptcy court on August 29, 2013, was heavily negotiated and essentially permits, among other things, Lead Plaintiffs to pursue claims against the Defendants in the Action, obtain discovery, and enter into a settlement; however, any recovery on claims against KV is limited to available insurance. *See* Bleichmar Decl. ¶ 40, Ex. 4.

the Settlement. *Id.* ¶ 42.

(b) Risks Concerning Liability and Loss Causation

Lead Plaintiffs also faced challenges in establishing that Defendants' statements concerning the Company's compliance with regulatory requirements were materially false and misleading. For example, Defendants would likely present evidence at summary judgment or at trial of the "unimportance" of Forms 483 in general, that a Form 483 is an "inspectional observation" and does not represent a final FDA determination, and that the items highlighted in the Form 483s were minor deviations from cGMP that would not put the Company out of material compliance. Defendants would also highlight that after each and every Form 483 was received by the Company, the FDA notified KV that its inspection was "closed" and the Company would argue that inspections were only closed when a final decision was made not to take further administrative action. Therefore, Defendants would likely argue that KV's statements, that it was in material compliance with FDA regulations, were true and a factfinder could find that even known deviations may not constitute a lack of "material" compliance. Bleichmar Decl. ¶¶ 44-45. Accordingly, while Lead Plaintiffs believed that the alleged misstatements and omissions attributed to Defendants were false and misleading, there was a substantial risk to Lead Plaintiffs and the Class if the Court or a jury had agreed with any of Defendants' arguments.

Second, Lead Plaintiffs would also have the burden of establishing that Defendants acted with scienter. Establishing Defendants' knowledge of the falsity of their misstatements is often a significant obstacle in Section 10(b) cases, *see, e.g.*, *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004) (approving settlement where "Plaintiffs faced significant obstacles in establishing scienter"), and this case was no exception. Defendants would have likely presented evidence of the "marginal importance" of the Forms 483 "observations" and the fact that the

FDA did not escalate its enforcement for years, and would likely argue that this demonstrated that Defendants believed in the truth of their statements.

Additionally, although the FDA filed a Complaint for Permanent Injunction in March 2009 against Defendants, and others, that ended in a consent decree, Defendants would likely argue that the consent decree expressly stated that they did not admit or deny any allegations and therefore, the consent decree cannot serve as a basis to impute knowledge of the alleged fraud. Likewise, although Hermelin pled guilty to two counts of standing in the position of a responsible corporate officer under the applicable provisions of the Food, Drug, and Cosmetic Act in connection with the introduction of a misbranded drug, he would continue to vigorously distance this conduct from the alleged fraud in the Action. *See* Bleichmar Decl. ¶¶ 46-47. Defendants would also likely contend that Lead Plaintiffs could not prove that they had any motive to commit the alleged fraud. *See*, *e.g.*, *In re K-Tel Int'l Inc. Sec. Litig.*, 300 F.3d 881, 895 (8th Cir. 2002) ("general allegations of a desire to increase stock prices, increase officer compensation or maintain continued employment are too generalized and are insufficient…" to [establish] motive"); Bleichmar Decl. ¶ 47.

Third, Defendants also have argued throughout this Action that Lead Plaintiffs cannot establish loss causation. Defendants would continue to argue at summary judgment and trial that Lead Plaintiffs could not establish that the Class's losses were caused by the alleged fraud. Instead, Defendants would likely maintain that the stock price decreases stemmed from previously reported conditions or the economic losses that inevitably arise from product recalls and the suspension of production, as well as the economic downturn that devastated markets during the same time period.

In particular, Defendants would have argued (i) that the May 30, 2008 allegedly

corrective disclosure had nothing to do with FDA compliance but instead dealt only with earnings reports and previously reported issues and, therefore, any stock drop following this disclosure was not related to the alleged fraud; (ii) the November 13, 2008 allegedly corrective disclosure included confounding news relating to matters not alleged to be basis of the alleged fraud; and (iii) the December 23, 2008 and January 26, 2009 allegedly corrective disclosures regarding the suspension of manufacturing and shipment of products were not due to a revelation of prior fraud but due to the market's reaction to the Company's future business prospects and were therefore not "corrective." Bleichmar Decl. ¶¶ 48-50. While Lead Plaintiffs had responses to these arguments, there was a risk that either the Court or a jury might have found them persuasive. *See, e.g., Transaction Sys. Architects,* 2007 WL 703515, at *2 (risks of proving loss causation, among other risks, weighed in favor of approval of settlement); *Charter Commc'ns,* 2005 WL 4045741, at *7 (risks faced in proving loss causation supported approval); *IBP*, 328 F. Supp. 2d at 1064 (approving settlement where plaintiffs faced obstacles in proving the amount of stock price depreciation related to the fraud as distinguished from other factors).

Finally, proof of loss causation and damages would ultimately have required expert testimony before the jury. While Lead Plaintiffs would have been able to present cogent and persuasive expert testimony establishing loss causation and damages, Defendants' damages expert would have opined against a finding of loss causation. Because Lead Plaintiffs could not be certain which expert's view would be credited by the jury, this "battle of the experts" posed an additional litigation risk. *See Charter Commc'ns,* 2005 WL 4045741, at *7, *16 (establishing loss causation in a securities class action was "subject to a battle of experts").

Accordingly, on balance, considering all the circumstances and risks faced if Lead Plaintiffs continued the litigation through dispositive motions and trial, Lead Plaintiffs and Lead

Counsel concluded that the Settlement – which provides an immediate and certain payment of $12.8 million – was in the best interests of the Class.

2. Defendants' Financial Condition

There is no doubt that Defendants' financial condition weighs in favor of approval of the Settlement. *See, e.g., Charter Commc'ns*, 2005 WL 4045741, at *8 (approving settlement and noting that even if lead plaintiffs prevailed on their claims and overcame liability challenges, there were considerable risks regarding its ability to collect any sizeable judgment from defendant); *In re Northfield Labs, Inc. Sec. Litig.*, No. 06 C 1493, 2012 WL 2458445, at *3 (N.D. Ill. June 26, 2012) (granting final approval to settlement and noting that the "plaintiff class is unlikely ever to get more" where defendant was in bankruptcy and the settlement proceeds came from an insurance policy, which if the case continued, may reach its limit due to defense fees and costs); *In re OCA, Inc. Sec. and Deriv. Litig.*, No. 05-2165, 2009 WL 512081, at *15 (E.D. La. Mar. 2, 2009) (noting that bankruptcy and the fact that defendant's insurance policies were being depleted by litigation expenses and attorneys' fees, weighed in favor of approval of settlement).

Here, as set forth above in Section I.B.1.(a), in light of KV's bankruptcy, the dwindling insurance available to Defendants and Hermelin's limited financial resources, there was a very real possibility that Lead Plaintiffs –even if they succeeded –would have recovered less than the Settlement, or nothing at all, at the point of a judgment favorable to the Class, given that Defendants would have no, or only very limited, insurance funds to satisfy the judgment. Accordingly, for these reasons, Defendants' financial condition strongly weighs in favor of approval of the Settlement.

3. The Complexity and Expense of Further Litigation

"The possible length and complexity of further litigation is a relevant consideration to the

trial court in determining whether a class action settlement agreement should be affirmed." *Charter Commc'ns*, 2005 WL 4045741, at *8. Courts must weigh the immediate benefits of a settlement against the additional time and expense of achieving a litigated verdict. *See, e.g.*, *Wireless Tel.*, 396 F.3d at 933 ("barring settlement, this case would 'likely drag on for years, require the expenditure of millions of dollars, all while the class members would receive nothing'"). As set forth in *Charter Commc'ns*, 2005 WL 4045741, at *8:

> Continued litigation would likely take years, requiring the expenditure of millions of dollars. Moreover, the insurance policies, which are funding the cash portion of the Charter settlement, would have been significantly diminished by the defendants' attorneys fees. In fact, the first $25 million policy, and a portion of the second policy, was exhausted before the mediation began.

Here, Lead Counsel and Lead Plaintiffs have devoted substantial time and resources to examining the merits and value of the claims, and entered into the Settlement on a well-informed basis. As set forth in the Bleichmar Declaration, they engaged in extensive motion practice on Defendants' motions to dismiss, prevailed in appealing the Court's dismissal of the Action, engaged in motion practice relating to the bankruptcy case, and spent many hours in negotiations leading to the Settlement. However, discovery had just begun in the Action, and additional litigation would have consumed significant time and money over a period of years for merits and expert discovery (including numerous depositions), class certification, summary judgment proceedings, trial, and possible appeals. *See* Bleichmar Decl. ¶ 52. In contrast to complex, lengthy, expensive, and uncertain litigation, the Settlement provides an immediate, significant and certain recovery. Accordingly, this factor supports approval of the Settlement.

4. The Amount of Opposition to the Settlement

The reaction of the Class to the Settlement, to date, also strongly supports final approval. The lack of objections relative to the size of the Class is a "strong indicator" that the Class as a whole views the Settlement as fair, and weighs heavily in favor settlement." *In re Wireless Tel.*

Fed. Cost Recovery Fees Litig., No. MDL 1559, 2004 WL 3671053, at *13 (W.D. Mo. Apr. 20, 2004); *see also DeBoer*, 64 F.3d at 1178 ("The fact that only a handful of class members objected to the settlement similarly weighs in its favor"); *In re BankAm. Corp. Sec. Litig*, 210 F.R.D. 694, 702 (E.D. Mo. 2002) ("With respect to class members' opinions, the Court finds it significant that fewer than ten objections were filed[.]").

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, A.B. Data, Ltd. ("A.B. Data") has mailed 49,569 copies of the Notice and Proof of Claim form (collectively, "Notice Packet") to potential Class Members and nominees who may have purchased KV securities on their clients' behalf. *See* Declaration of Adam D. Walter on Behalf of A.B. Data Ltd. ("Mailing Decl.") (Ex. 5) ¶¶ 2-9. The Notice set forth the terms of the Settlement in detail and informed Class Members of their right to object to any aspect of the Settlement, the Plan of Allocation, or the request for attorneys' fees and expenses. *See* Ex. 5 - A at 7. The Notice also set forth that Class Members could seek exclusion from the Class, and the procedures for doing so. *Id*. at 6. While the deadline for Class Members to seek exclusion or object has not yet passed, to date, no objections or requests for exclusion have been received.[3]

5. Experience of Counsel and Counsel's Arm's-Length Negotiations Support Approval of the Settlement

The four factors enumerated by the Eighth Circuit are not an exclusive list of what may be considered in weighing the fairness, reasonableness, and adequacy of a proposed settlement. The experience and opinion of counsel should be considered, as well as whether a settlement resulted from arm's-length negotiations. *See, e.g.*, *DeBoer*, 64 F.3d at 1178; *Buckley*, 2011 WL 2161135, at *2. These additional factors also strongly support approval of the Settlement.

[3] The deadline for submitting objections and requesting exclusion from the Class is April 2, 2014. Lead Plaintiffs will file reply papers on April 16, 2014 addressing any timely objections or exclusion requests that may be received.

Courts give substantial weight to the judgment of the parties and counsel who have negotiated the settlement. *See Petrovic*, 200 F.3d at 1148-49 ("'[j]udges should not substitute their own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel'");[4] *DeBoer*, 64 F.3d at 1178 ("the views of counsel are to be accorded deference"); Indeed, courts have found that a presumption of fairness and reasonableness should attach when a settlement has been negotiated at arm's-length by experienced counsel. *See, e.g., Charter Commc'ns*, 2005 WL 4045741, at *5 ("there is a presumption of fairness when a settlement is negotiated at arm's length by well informed counsel").

Lead Counsel has extensive experience prosecuting complex securities class actions and is closely familiar with the facts of this case.[5] Lead Counsel believes that the Settlement is not only fair and adequate, but an excellent result for Lead Plaintiffs and the Class. *See generally* Bleichmar Decl. Additionally, the recommendation of Lead Plaintiffs, each of which is a sophisticated institutional investor, also supports the fairness of the Settlement. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor… is 'entitled to an even greater presumption of reasonableness'"). Here, Lead Plaintiffs took an active role in supervising this litigation, as

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[4] All internal citations are omitted from quotations unless otherwise noted.

[5] Labaton Sucharow is among the nation's preeminent law firms in this area of practice and has served as lead or co-lead counsel on behalf of major institutional investors in a number of high profile matters, for example: *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 more than $1 billion); *In re HealthSouth Corp. Sec. Litig.*, No. 03-1501 (N.D. Ala.) (representing the State of Michigan Retirement System, New Mexico State Investment Council, and the New Mexico Educational Retirement Board and securing settlements of more than $600 million); and *In re Countrywide Sec. Litig.*, No. 07-5295 (C.D. Cal.) (representing the New York State and New York City Pension Funds and reaching settlements of more than $600 million). *See* Ex. 7 - A.

envisioned by the PSLRA, and have each endorsed the Settlement as fair and reasonable. *See* Declaration of Daniel Greene of State-Boston, dated Feb. 25, 2014 (Ex. 2) ¶ 5 and Declaration of Joseph Connolly of Norfolk County, dated March 11, 2014 (Ex. 3) ¶ 5.

Approval of the Settlement is also strongly supported by a consideration of the negotiating process by which the Settlement was reached. Here, the Settlement is the product of arduous arm's-length negotiations between Lead Counsel and Defendants' counsel, which spanned the course of two years, were suspended at several junctures, and included an in-person formal mediation session. Bleichmar Decl. ¶¶ 34-37. The arm's-length nature of the negotiations provide strong support for approval of the Settlement. *See IBP*, 328 F. Supp. 2d at 1064 (approving a settlement that was "was vigorously negotiated at arms-length over several months with the assistance of a mediator").

In sum, all of the factors considered by courts in the Eighth Circuit support approval of the Settlement as fair, reasonable, and adequate.

II. THE PLAN OF ALLOCATION SHOULD BE APPROVED

Approval of a plan of allocation in a class action is governed by the same standard of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Charter Commc'ns*, 2005 WL 4045741, at *10. "There is no rule that a settlement benefit all class members equally." *Id.* A plan that allocates settlement funds to class members based on the extent of their injuries or the strength of their claims is fair and reasonable. *See id.* ("it is appropriate for interclass allocations to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of purchases and sales of the securities at issue"). The general rule is that a plan of allocation "'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'" *Id.*

Here, the Plan of Allocation, which was prepared by Lead Counsel with the assistance of

one of Lead Plaintiffs' consulting damages expert, Stanford Consulting Group, Inc. ("SCG")[6] provides for the distribution of the Settlement among Authorized Claimants on a *pro rata* basis based on "Recognized Loss" formulas that are tied to liability and damages. In developing the Plan of Allocation, Lead Plaintiffs' expert analyzed the movement of KV's securities and took into account the portion of the stock drops allegedly attributable to the challenged statements. In this respect, inflation tables were created for the four categories of KV publicly traded securities that traded during the Class Period and are eligible for a recovery from the Settlement: (1) KV's Class A common stock; (2) Class B common stock; (3) 7% Cumulative Convertible Preferred shares; (4) and Contingent Convertible Subordinated Notes due 2033. Bleichmar Decl. ¶¶ 60-62; Ex. 5 – A at 13-14.

The Plan of Allocation provides a formula for calculating a claimant's Recognized Loss for each acquisition or purchase of eligible KV securities during the Class Period. The Recognized Loss calculation will depend upon what securities were purchased, when the securities were purchased or sold, and whether they were held until the end of the Class Period. *Id*. ¶¶ 63-64; *see also Transaction Sys. Architects*, 2007 WL 703515, at *3 (approving a plan of allocation that "provides a pro rata distribution of the Net Settlement Fund among all class members based on the timing of their purchase and sale of shares, taking into account the relative amounts of allegedly artificial price inflation at various times during the class period").

The proposed Plan of Allocation tracks the theories of damages in the Action, is recommended by Lead Counsel, and, to date, no Class Members have objected to it.

[6] SCG provides research, analysis, and expert testimony in complex litigation and regulatory proceedings. Its consultants all hold doctoral or master degrees in finance, business, economic or operations research and provide analysis and expertise on issues including materiality, causation, and damages in many securities class action lawsuits nationwide. *See* Resume of Stanford Consulting, Ex. 6 submitted herewith.

Accordingly, for all of the reasons set forth herein and in the Bleichmar Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

III. NOTICE TO THE CLASS SATISFIED RULE 23 AND DUE PROCESS

The Court-approved Notice provided to the Class satisfied the requirements of Rule 23, which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with (the) proceedings." *Grunin*, 513 F.2d at 122. The Notice included all the information required by Rule 23 and the PSLRA, 15 U.S.C. § 78u-4(a)(7).

As noted above, since February 13, 2014, the Claims Administrator has mailed more than 49,000 copies of the Notice by first-class mail. *See* Mailing Decl. ¶¶ 5-9. In addition, Lead Plaintiffs caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* and copies of the Notice and Proof of Claim form were made available on a dedicated website maintained by the Claims Administrator. *Id.* ¶¶ 10-11. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by summary notice in an appropriate and widely-circulated newspaper, over *PR Newswire* and on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also Ray v. TierOne Corp.*, No. 8:10-cv-199, 2012 WL 2866577, at *5 (D. Neb. July 12, 2012) (approving notice plan that entailed mailed notice to class members who could be identified with reasonable effort and to brokerage firms and publication in *Investor's Business Daily* and over an electronic newswire).

IV. THE COURT SHOULD GRANT FINAL CLASS CERTIFICATION

The Court previously granted preliminary class certification for settlement purposes. *See* Preliminary Approval Order at ¶¶ 2-4; Preliminary Approval Brief, ECF No. 185 at 8-13. Because nothing has occurred since then to cast doubt on whether the applicable prerequisites of Rule 23 are met, the Court should finally certify the Class for settlement purposes and appoint Lead Counsel as Class Counsel.

V. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court grant final approval to the proposed Settlement, approve the Plan of Allocation of the Net Settlement Fund as fair and reasonable, and grant final class certification for settlement purposes. Proposed orders will be submitted with Lead Plaintiffs' reply papers, after the objection and exclusion deadlines have passed.

Dated: March 19, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the following was served electronically via the CM/ECF system on all counsel of record on this 19th day of March 2014.

Respectfully submitted,

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