UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EASTWOOD ENTERPRISES, LLC Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. TODD S. FARHA, PAUL L. BEHRENS, THADDEUS BEREDAY, and WELLCARE HEALTH PLANS, INC., Defendants.	Case No.: 8:07-cv-1940-VMC-EAJ

LEAD PLAINTIFFS' MOTION AND INCORPORATED MEMORANDUM OF LAW FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT, CERTIFICATION OF CLASS, AND APPROVAL OF PLAN OF ALLOCATION

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MOTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court-appointed Lead Plaintiffs, the New Mexico State Investment Council, the Public Employees Retirement Association of New Mexico, the Teachers' Retirement System of Louisiana, the Policemen's Annuity and Benefit Fund of Chicago and the Public School Teachers' Pension & Retirement Fund of Chicago (collectively, "Lead Plaintiffs"[1]), on behalf of themselves and the Class,[2] respectfully move the Court for: (i) an order which, among other things, approves the proposed Settlement with Defendant WellCare Health Plans Inc. ("WellCare" or the "Company") as fair, reasonable and adequate; grants final certification of the Class and dismisses the action with prejudice against WellCare and Todd S. Farha, Paul L. Behrens and Thaddeus Bereday (the "Individual Defendants," and, together with WellCare, "Defendants"); and (ii) an order approving the Plan of Allocation.

The instant Motion is supported by a Memorandum of Law and the Declaration of Steven Singer and Thomas A. Dubbs in Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl.") with annexed exhibits, submitted herewith.

Lead Counsel certify pursuant to Local Rule 3.01(g) that they have conferred with counsel for Defendant WellCare, which: (i) agrees that the proposed Settlement should be approved and the Class certified; and (ii) takes no position with respect to the Plan of Allocation.

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[1] All capitalized terms not otherwise defined herein have the same meanings as set forth in the Stipulation and Agreement of Settlement (the "Stipulation"), dated December 17, 2010, and filed with the Court on January 7, 2011 (ECF No. 265-1).

[2] In its Preliminary Approval Order, dated February 9, 2011, the Court certified for settlement purposes only a Class of all persons and entities who purchased or otherwise acquired WellCare common stock during the period between February 14, 2005, through 10:59 a.m. Eastern Standard Time on October 24, 2007, inclusive (the "Class Period"), and were damaged thereby, other than persons who are excluded from the Class by definition or who submit requests for exclusion that are accepted by the Court.

MEMORANDUM OF LAW

Lead Plaintiffs respectfully submit this Memorandum of Law in support of their motion for: (i) an order granting final approval to the Settlement as fair, reasonable and adequate and granting final certification of the proposed Class; and (ii) an order approving the Plan of Allocation, which was prepared in consultation with Lead Plaintiffs' economic damages expert to ensure a fair and reasonable distribution of the Net Settlement Fund.

I. PRELIMINARY STATEMENT

After three years of hard-fought litigation, Lead Plaintiffs have succeeded in obtaining an excellent recovery for the Class of at least $200 million, including: (i) $52.5 million in cash, plus interest as it accrues, which was deposited into an interest-bearing account on March 23, 2011; (ii) a $35 million promissory note due and payable in cash no later than July 31, 2011; and (iii) $112.5 million in freely tradable registration-exempt bonds with a maturity date of December 31, 2016, with a fixed coupon of 6% (the "WellCare Bonds").[3] This substantial recovery is the largest federal securities settlement in Florida history and the second largest securities settlement in the Eleventh Circuit. In consideration for these payments, the Settlement will result in the dismissal of the Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint," ECF No. 96) with prejudice, along with all Settled Claims against all Defendants and their related Released Parties.

The Settlement is the result of arm's-length negotiations by well-informed counsel and was achieved with the active assistance of the Honorable Layn R. Phillips (Ret.), a former

[3] Three potential events would also increase the amount of the Settlement, including: (i) if WellCare recovers any sums from the Individual Defendants or their estates based on claims that could have been asserted by WellCare prior to August 6, 2010, or for contribution arising under the Settlement, WellCare shall pay the Class 25% of those net proceeds; (ii) if WellCare receives any sums from the United States Government as a consequence of any recovery that the United States Government obtains from the Individual Defendants or their estates, WellCare shall pay the Class 25% of those net proceeds; and (iii) in the event that within 3 years WellCare experiences a change in control at a share price of $30.00 or its equivalent, WellCare shall pay the Class an additional $25 million in cash.

federal judge and experienced and highly-respected mediator. Lead Counsel have significant experience in securities and other complex class action litigation, and have negotiated numerous substantial class action settlements throughout the country. It is their informed opinion that the Settlement is an excellent result in light of the uncertainty and further substantial expense of pursuing this Action through trial and the appeals that may have followed. Indeed, given the particularly significant risks faced by Lead Plaintiffs in recovering from Defendants due to WellCare's constrained financial condition, this Settlement creatively addressed alternative means of resolving the Action and funding the Settlement through a combination of immediate cash, cash over time, and WellCare securities. It is respectfully submitted that the Settlement clearly satisfies the required standards being fair, reasonable and adequate, and is in the best interests of the Class.

II. OVERVIEW OF THE ACTION

Lead Plaintiffs are simultaneously submitting herewith the Joint Declaration. The Joint Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*, a detailed history of the Action through the submission of the Settlement to the Court; the nature of the claims asserted in the Action; the investigation undertaken; the negotiations leading to the Settlement; the value of the Settlement compared to the risks and uncertainties of continued litigation; and a description of the services provided by Lead Counsel.

The Settlement was reached at a point in which Lead Plaintiffs and Lead Counsel had a thorough understanding of the facts and challenges posed by the claims and defenses, and the factors that would impact a future recovery. Briefly, the proceedings to date have included:

- Extensive investigation and analysis of the claims at issue, including a review of all relevant public information such as WellCare's press releases, public statements, SEC filings, regulatory filings and reports, securities analysts' reports,

advisories and media reports about the Company. Lead Counsel also engaged in a significant amount of research of the applicable law with respect to the claims asserted in the Action. (Joint Decl. ¶¶7, 18.)

- The filing of the Complaint and contentious motion practice including successfully responding to motions to dismiss and the filing of a motion for class certification, including an expert report, which resulted in WellCare stipulating to class certification. (*Id*. ¶¶7, 18, 20-22, 31.)

- Locating and interviewing numerous former WellCare employees with knowledge of the relevant issues to the Action, which were instrumental in enabling Lead Plaintiffs to overcome Defendants' motion to dismiss. (*Id*. ¶7.)

- Extensive discovery including: serving document requests and interrogatories on Defendants; issuing twenty subpoenas to nonparties; reviewing and analyzing over four million documents and nearly three Terabytes of data obtained in response to these subpoenas and requests for documents; and taking six depositions of individuals in Massachusetts and Florida, including the former head of the Audit Committee of WellCare's Board of Directors, the former outside counsel to WellCare, and the Florida Agency for Health Care Administration officials responsible for overseeing the Company's Medicaid contract with the State of Florida. (*Id*. ¶¶7, 23-30.)

- Consulting with several experts including Hugh R. Lamle, an experienced financial consultant and President of M.D. Sass Investor Services, Inc., to assist Lead Plaintiffs in evaluating WellCare's financial condition and ability to satisfy a judgment and fund the Settlement, and John D. Finnerty, Ph.D., a well-recognized expert on market efficiency, loss causation and damages. (*Id*. ¶¶7, 34-36, 49-62.)

- Extended negotiations and three separate in-person mediation sessions before Judge Phillips. (*Id*. ¶¶7, 48-50.)

In light of the substantial result, the opportunity for an excellent recovery despite WellCare's financial condition, and the positive reaction by the Class to date, Lead Plaintiffs respectfully ask this Court to grant final approval of the Settlement, approve the Plan of Allocation and finally certify the proposed Class.

III. THE SETTLEMENT MERITS APPROVAL BY THE COURT

Public and judicial policy both strongly favor pretrial settlement of litigation; this policy is particularly compelling in class actions and other complex litigation. *See In re United States*

Oil & Gas Litig., 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits."); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) ("our judgment is informed by the strong judicial policy favoring settlement"); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)[4] ("Particularly in class action suits, there is an overriding public interest in favor of settlement."); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005) ("there exists 'an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex'"). Public policy recognizes that class actions alleging securities fraud are particularly well-suited for settlement. *See, e.g., Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) (due to "the notable unpredictability of result" and the length of such litigation, "securities fraud class actions readily lend themselves to settlement").

The criteria for granting final approval to a class action settlement, under Fed. R. Civ. P. 23(e), is that the settlement is "fair, adequate and reasonable [and] . . . not the product of collusion between the parties." *Bennett*, 737 F.2d at 986-87 (internal quotation marks and citation omitted); *accord Cotton*, 559 F.2d at 1330; *Knight v. Alabama*, 469 F. Supp. 2d 1016, 1031 (N.D. Ala. 2006), *aff'd sub nom*., *United States v. Alabama*, 271 Fed. Appx. 896 (11th Cir. 2008); *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005).

In *Bennett*, the Court of Appeals held that the following factors should be considered in evaluating a class action settlement:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

[4] Opinions of the Fifth Circuit issued prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

737 F.2d at 986; *see also In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1318 (11th Cir. 2009); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001).

Approval of a class action settlement, including application of the foregoing factors, "is committed to the sound discretion of the district court." *United States Oil*, 967 F.2d at 493; *accord In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 859 (11th Cir. 2009); *Bennett*, 737 F.2d at 986. Additionally, in evaluating a proposed settlement under these factors, the court "is entitled to rely on the judgment of experienced counsel for the parties." *Canupp v. Sheldon*, No. 2:04-cv-260, 2009 WL 4042928, at *5 (M.D. Fla. Nov. 23, 2009) (quoting *Cotton*, 559 F.2d at 1330). Indeed, in reviewing a class action settlement under Rule 23(e), "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330; *accord Strube*, 226 F.R.D. at 703.

A. The Settlement Satisfies the Threshold Consideration of Being the Product of Good Faith, Arm's-Length Negotiations

A threshold consideration is whether a proposed settlement is the product of fraud or collusion between the parties. "In determining whether there was fraud or collusion, the court examines whether the settlement was achieved in good faith through arm's-length negotiations, whether it was the product of collusion between the parties and/or their attorneys, and whether there was any evidence of unethical behavior or want of skill or lack of zeal on the part of class counsel." *Canupp*, 2009 WL 4042928, at *9 (citing *Bennett*, 737 F.2d at 987 n.9). Courts "presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered." William B. Rubenstein, Alba Conte and Herbert B. Newberg, 4 *Newberg on Class Actions* § 11:51 (4th ed. 2010).

Here, no claim of fraud or collusion in the negotiation of the Settlement could be credibly asserted. The record here demonstrates that the Settlement was the product of extensive, arm's-

length negotiations – including at least three separate in-person mediation sessions and numerous negotiations that took place over the course of more than one year. These mediations occurred before Judge Phillips, a retired federal judge and experienced mediator, and included the participation of Lead Plaintiffs, who attended the mediation sessions. During these mediations the parties discussed the merits of the litigation, including the evidence adduced, Defendants' defenses, and issues relating to damages. The parties also extensively discussed and analyzed WellCare's financial condition and ability to satisfy a judgment. Mr. Lamle, an experienced financial consultant, attended the mediation sessions as well and assisted in structuring the WellCare Bonds as part of the Settlement. (Joint Decl. ¶¶48-50.)

Even after the parties reached an agreement in principle as a result of the mediations, the parties continued to negotiate and prepare the comprehensive documentation necessitated by the settlement. The documentation process was particularly complex in this case due to the nature of the consideration – cash, Promissory Note, and WellCare Bonds. For example, the parties engaged in numerous complex discussions with the claims administrator, the escrow agents, and Mr. Lamle regarding potential issues that could arise related to the issuance and potential distribution of the WellCare Bonds. (Joint Decl. ¶50.)

The settlement negotiation process here demonstrates beyond question that there is no issue of collusion. *See Holman v. Student Loan Xpress, Inc.*, No. 8:08-cv-305-T-23MAP, 2009 WL 4015573, at *5 (M.D. Fla. Nov. 19, 2009) (finding "no apparent fraud or collusion" where a "settlement [was] the product of . . . arm's-length, '"protracted and contentious' negotiation with a mediator"); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (parties' use of an "experienced and well-respected mediator" supported the court's finding that the settlement

was fair and not the product of collusion); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (same).

B. Application of the *Bennett* Factors Supports Approval of the Settlement

1. The Significant Obstacles to Success at Trial Support Approval of the Settlement

The first *Bennett* factor is "the likelihood of success at trial," *Bennett*, 737 F.2d at 986. In assessing plaintiffs' likelihood of success at trial for purposes of reviewing a settlement, the court should not try the merits of the case but should only make a limited inquiry as to "whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of settlement." *Strube*, 226 F.R.D. at 697-98 (internal quotations and citations omitted); *see also Beavers v. Am. Cast Iron Pipe Co.*, 164 F. Supp. 2d 1290, 1298 (N.D. Ala. 2001); *Mashburn*, 684 F. Supp. at 670.

Although Lead Plaintiffs strongly believe that their claims against Defendants are meritorious, there were significant obstacles to success at trial in this Action. For example, Lead Plaintiffs faced a very real risk that: (i) they would be unable to establish the scienter of the Defendants, which is well-recognized as a difficult and uncertain element in any securities fraud case; (ii) Defendants would prevail in an argument that state and federal governmental entities were aware of many of WellCare's practices and therefore Defendants did not make material misrepresentations; (iii) even if Lead Plaintiffs prevailed on liability, Defendants would challenge loss causation and the calculation of damages; and (iv) even if Lead Plaintiffs succeeded at trial, they may have been unable to collect a judgment, or an amount close to the settlement amount.

Scienter. Lead Plaintiffs would have faced challenges by Defendants regarding Lead Plaintiffs' claim that Defendants had the requisite scienter. The difficulty of establishing scienter

is a substantial risk in any action under Section 10(b). Here, however, Lead Plaintiffs believed that they had strong evidence of scienter in light of their review and analysis of the evidence they adduced and the Deferred Prosecution Agreement ("DPA") that Wellcare entered into with the U.S. Attorney for the Middle District of Florida and the Florida Attorney General. Defendants, however, would likely have argued that the DPA would be held inadmissible at trial, and that the jury would not be able to consider this evidence at all. Furthermore, WellCare argued that any accounting errors were the product of innocent mistakes and not intentional fraud. For example, Defendants would have argued that the regulations they are accused of violating were unclear, and did not prohibit their conduct. Defendants would have also argued that the small size of the alleged accounting fraud buttressed their scienter arguments. Indeed, the Company's restatement amounted to only $46 million over three and a half years – or less than 1% of WellCare's revenue during the periods covered by the restatement. Accordingly, Defendants would have argued that, even if accounting errors were made, they were not material and were not made intentionally. (Joint Decl. ¶¶44-45.)

Material Misrepresentations. Defendants also would have argued that Lead Plaintiffs would be unable to establish that Defendants fraudulently misrepresented WellCare's compliance with government program requirements. Lead Plaintiffs expected Defendants to assert a defense that state and federal governmental entities were fully aware of WellCare's practices and did not question their practices at the time. Specifically, Defendants would likely have argued that Florida's Agency for Health Care Administration ("AHCA") was aware of and had approved the very transactions at issue in this case, namely, the payments that WellCare made to its wholly-owned subsidiary, Harmony Behavioral Health ("Harmony"). Defendants also would have argued that the language in AHCA's contracts was ambiguous and could be

construed to permit an HMO (such as WellCare) to validly record the entire payment to its subsidiary (such as Harmony) as medical expense, and that other HMOs in Florida engaged in the same practices. These complicated compliance issues would be heavily litigated were this Action to continue and the complex and changing nature of the reimbursement regulations further added to the risk that Lead Plaintiffs may not be able to establish liability. (Joint Decl. ¶45.)

Lead Plaintiffs' ability to construct a case would be further hampered by the fact that the case had been stayed (and could be stayed again) in connection with the criminal investigation and indictments. Indeed, given the stays of discovery ordered by the Court at the request of the U.S. Attorney during the pendency of the later part of its investigation, Lead Counsel believed that there was a material risk that the case would have been stayed through the conclusion of the criminal trials of Defendants Farha, Bereday and Behrens. There was thus a significant risk of further substantial delay and expense in pursuing the litigation. (Joint Decl. ¶46.)

Proof of Damages. Lead Plaintiffs faced risks not only in establishing the liability of Defendants, but also with respect to the calculation and proof of damages. The parties highly disputed the amount of potential damages in this Action. As in any securities class action, proof of damages would have been a disputed matter subject to conflicting expert testimony at trial and it was not possible to predict with any confidence precisely how a jury would resolve such a dispute. *See, e.g., Zuckerman v. Smart Choice Auto. Group, Inc.*, No. 6:99-CV-237-ORL28KRS, 2001 WL 686879, at *10 (M.D. Fla. May 3, 2001) ("The determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions."); *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) ("In the

'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury.").

Defendants would have likely argued that Lead Plaintiffs could not establish that the stock drop that occurred on October 24, 2007, was causally related to the fraud, and that therefore loss causation could not be established. Defendants would further contest the amount of damages, even were causation to be established. Defendants would likely argue that the recoverable damages should be limited only to those damages directly related to the relatively modest restatement demonstrating that the restated accounting errors never exceeded 1% of WellCare's revenue and were significantly less than the damages alleged by Lead Plaintiffs. These loss causation and damages issues would no doubt be vigorously contested were the litigation to continue, involve a battle of the experts presenting complicated issues, and potentially be decided by a jury, with the attendant risks of a lesser or no recovery.

Collectibility. Lead Plaintiffs also faced a significant risk that, were they to succeed at trial, WellCare would be unable to satisfy the judgment due to its extremely limited available cash. Lead Plaintiffs retained an experienced financial consultant, Hugh R. Lamle, President of M.D. Sass Investor Services, Inc., an investment management firm located in New York City, to assist Lead Plaintiffs in evaluating WellCare's financial condition. An analysis of the financial condition of the Company revealed that at the time the settlement was reached, WellCare had only approximately $150 million in unregulated (available) cash, most of which it needed to fund its business. Therefore even if Lead Plaintiffs succeeded at trial, they could ultimately recover an amount less than the settlement amount. (Joint Decl. ¶41.)

Lead Plaintiffs also faced risks in continuing the litigation because Defendants' available insurance was depleting, particularly in light of pending derivative actions and investigations by,

among others, the Federal Bureau of Investigation, the United States Department of Justice, the United States Department of Health and Human Services, the Securities and Exchange Commission, and the States of Florida and Connecticut. (Joint Decl. ¶41.)

It is due to WellCare's constrained financial condition that the proposed Settlement resolving the Action is structured as a combination of payments of immediate cash, cash over time and WellCare securities, so as to maximize the benefit to Class Members while recognizing the financial realities of the Company. (Joint Decl. ¶6.) In light of all these potential obstacles to recovery at trial, the certain recovery of at least $200 million represents an excellent result for the Class.

2. Considering the Range of Possible Recoveries, the Settlement Amount is Clearly Within the Range of Reasonableness

"The second and third factors in the Eleventh Circuit's *Bennett* analysis call for the Court to determine 'the possible range of recovery' and then ascertain where within that range 'fair, adequate, and reasonable settlements lie.'" *Garst v. Franklin Life Ins. Co.*, No. 97-C-0074-S, 1999 U.S. Dist. LEXIS 22666, at *64 (N.D. Ala. June 25, 1999) (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 541 (S.D. Fla. 1988) (same), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also Sunbeam*, 176 F. Supp. 2d at 1331 ("the second and third considerations of the *Bennett* test are easily combined").

In this Action, when compared to the range of possible recoveries at trial and the risks of continued litigation, the proposed Settlement is an outstanding recovery and clearly falls within the range of reasonableness. This substantial recovery of more than $200 million in cash and securities is the largest federal securities settlement in Florida history and the second largest securities settlement in the Eleventh Circuit. The Settlement would be an excellent recovery

under any circumstances, and particularly in a Section 10(b) case fraught with the risks enumerated above.

Indeed, the Settlement Amount is much greater than the amount sophisticated market participants estimated this lawsuit would settle for. In a May 20, 2009 report analyzing WellCare's financial status and potential liabilities, Goldman Sachs estimated that a shareholder class action against WellCare such as the present Action would likely settle for between $48 million and $120 million, but that based on their models, a settlement of $75 million was the most likely scenario. (*See* Goldman Sachs Global Investment Research Report, attached as Ex. C to Joint Decl., at 12).

Goldman Sachs examined three models in estimating these damages. In each of the models, Goldman Sachs considered a sample of 15 substantial settlements in securities litigations involving such well-known companies as Oxford Health Plans, HealthSouth and Nortel. The first model examined the median and average settlement as a percentage of damages, which resulted in a estimated settlement figure with WellCare of $100-$120 million. *Id*. The second model examined the median and average settlement as a percentage of market cap at the time of settlement and determined that the median and average settlement as a percentage of the issuer's market cap was 6.3% and 9.1%, respectively, which resulted in a estimated settlement figure with WellCare of $48-$70 million. *Id.* In contrast, the Settlement here consists of approximately **20% of WellCare's market cap** when the Settlement was announced, or approximately 3-4 times greater than historical norms cited by Goldman Sachs. The third model used a regression analysis, which resulted in a estimated settlement figure with WellCare of $70 million. *Id.* The Settlement Amount in this Action, totaling at least $200 million, is well beyond the estimated

recovery according to any of these metrics, and nearly **three times** the amount Goldman Sachs estimated as the most likely settlement figure. (Joint Decl. ¶42.)

In light of these facts, the recovery here of at least $200 million in cash and securities is well within the reasonable range of recovery and represents an outstanding result for the Class.

3. The Complexity, Expense and Likely Duration of Continued Litigation Support Approval of the Settlement

This Action has been challenging and complex, given the complicated facts and law at issue in the litigation. The Action involves not only the complex issues of law and fact associated with securities class actions generally, but the underlying allegations and defenses are intertwined with facts concerning the complicated state and federal compliance regulations of WellCare's Medicaid and Medicare medical services and prescription drug plans. The difficulties of litigating the Action have also been compounded by the parallel criminal investigations against the same Defendants. Unlike in many class actions in which Lead Counsel benefit from substantial assistance from the investigating government entities, here Lead Counsel received little support or benefit from the governmental investigations, and in fact have been impeded in their efforts by stays in the litigation granted because of federal criminal investigations (the Individual Defendants were not indicted until earlier this month, on March 2, 2011). Based on the volume of evidence adduced, the complexity of the issues involved and the tenacity of Defendants and their counsel, Lead Plaintiffs reasonably expected that continued litigation of the Action would involve an enormous amount of attorney time and additional work with multiple experts. (Joint Decl. ¶ 44.)

Lead Plaintiffs would need to complete fact and expert discovery; brief additional motions before the District Court, including the inevitable summary judgment motions and *Daubert* motions, and convince a jury that Defendants had perpetrated a fraud upon investors,

and that this conduct caused their losses. Trial would involve the significant challenge of proving the required elements of the Section 10(b) claims, including that the alleged misstatements were materially false and misleading, that Defendants acted with scienter, and that there was loss causation and resulting damages. These efforts would require additional large expenditures over an extended period, after which the Class might obtain a result far less beneficial than the one provided by the Settlement, especially in light of WellCare's precarious financial position and depleting resources. (Joint Decl. ¶41.) Moreover, even if successful at trial, which itself would have been long and expensive, Lead Plaintiffs would face the post-judgment appeals which were sure to follow and could have taken years to resolve.

In contrast to the substantial expense of litigating the case through trial and the extended duration that would result from the trial itself, post-trial motions, and appeals, the Settlement provides a certain payment of at least $200 million.

4. The Reaction of Class Members Supports Approval of the Settlement

The reaction of class members to a proposed settlement is a significant factor to be considered and the absence of substantial objections "is excellent evidence of the settlement's fairness and adequacy." *Ressler*, 822 F. Supp. at 1556; *see also Access Now, Inc. v. Claire's Stores, Inc.*, No. 00-14017-CIV, 2002 WL 1162422, at *7 (S.D. Fla. May 7, 2002) ("The fact that no objections have been filed strongly favors approval of the settlement."); *Garst*, 1999 U.S. Dist. LEXIS 22666, at *71-72 ("small amount of opposition strongly supports approving the Settlement").

Thus far, the reaction of the Class to the Settlement has been positive and supports approval of the proposed Settlement. The Court-approved Claims Administrator began mailing copies of the Notice of Pendency of Class Action and Proposed Settlement, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the

"Notice") to potential Class Members or their nominees on February 24, 2011. *See* Declaration of Jose C. Fraga Regarding (A) Mailing of the Notice and Proof of Claim; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion ("Fraga Decl."), attached to Joint Decl. as Ex. B at ¶¶2-6. To date, the Notice has been mailed to more than 90,000 potential members of the Class. *Id.* A Publication Notice was also published once in *Investor's Business Daily* and over *PR Newswire* on March 3, 2011, and the Notice and other related documents were published on the case-specific website and the websites of Lead Counsel. *Id*. ¶7.

The Notice informed Class Members of their right to exclude themselves from the Class and their right to object to any aspect of the Settlement, the Plan of Allocation and/or Lead Counsel's application for an award of attorneys' fees and expenses. *See* Ex. A to Fraga Decl. at ¶¶13-15, 18-19. As of the date of this Memorandum, no objection to the Settlement has been received.[5] (Joint Decl. ¶59.) The deadline for submitting objections to the Settlement is April 13, 2011. Should any objections be received, they will be addressed by Lead Plaintiffs in reply papers that will be filed on or before April 27, 2011.

5. The Settlement Was Reached After Substantial Discovery and Motion Practice and, thus, the Stage of the Proceedings Strongly Supports Approval of the Settlement

In assessing the stage of the proceedings at which a settlement is achieved, "the relevant inquiry is whether the parties have conducted sufficient discovery to assess the strengths and weaknesses of their claims and defenses." *Garst*, 1999 U.S. Dist. LEXIS 22666, at *69-70; *see Perez*, 501 F. Supp. 2d at 1383; *Behrens*, 118 F.R.D. at 544. Here, the Settlement was not reached until after three years of litigation and after Lead Plaintiffs filed a detailed consolidated complaint based on their comprehensive investigation; and the completion of extensive

[5] Additionally, while over 90,000 copies of the Notice have been mailed, to date no requests for "exclusion" have been received. As with objections, the deadline for requesting exclusion from the class is not until April 13, 2011.

discovery, including serving several document requests and interrogatories on Defendants, issuing twenty subpoenas to nonparties, reviewing over four million documents and nearly three Terabytes of data and taking six depositions of key WellCare employees and officials from the Florida Agency for Health Care Administration. (Joint Decl ¶¶7, 23-30.) The Action also involved briefing a contentious motion to dismiss, filing a motion for class certification and participating in numerous negotiations as well as three in-person mediations before an experienced mediator. (*Id*. at ¶¶7, 48-50.) After such efforts, there can be no question that the parties had sufficient information to assess the strengths and weaknesses of their claims and that each side "was well aware of the other side's position and the merits thereof." *Sunbeam*, 176 F. Supp. 2d at 1332. Accordingly, this factor strongly supports the fairness and reasonableness of the Settlement.

C. Application of the Issues Examined in *In re Winn-Dixie* Favor Approval of the Settlement

In *Winn-Dixie* this Court required counsel, in context of the settlement of an ERISA class action, to address additional criteria in deciding whether a class action settlement merits final approval; specifically, the Court cited six criteria from the Manual for Complex Litigation ("MCL"), Fourth, § 21.62 (2011). *See In re Winn-Dixie Stores, Inc. ERISA Litig.*, Nos. 3:04-cv-194-J-33MCR, 3:04-cv-308-J-33HTS, 3:04-cv-195-J-33JRK, 2008 WL 815724, at *6 (M.D. Fla. Mar. 20, 2008). These six MCL criteria also favor final approval of the Settlement here.

The first MCL criteria the Court examined in *In re Winn-Dixie* was whether the settlement amount was much less than the estimated damages incurred by members of the class as indicated by preliminary discovery or other objective measures, including settlement or verdicts in individual cases. Here, as discussed above, the parties highly disputed the amount of

potential damages in this Action. Moreover, as the Goldman Sachs report provides, the Settlement reflects a material percentage of the recoverable damages.

The remaining five MCL criteria analyzed by the Court in *In re Winn-Dixie* also favor approval of the Settlement. The Court considered whether defendants had an incentive to restrict payment of claims because defendants may reclaim residual funds. Here, Defendants have no such incentive because they are not entitled to any residual funds. Next, the Court examined whether any major claims or types of relief sought in the complaint had been omitted from the settlement. All of the major claims and types of relief requested in the Complaint in this Action are encompassed within the Settlement. The Court then addressed whether there were any claimants who were not members of the class, such as opt-outs or objectors, who were receiving better treatment than the class members. There are no such parties receiving better treatment than Class Members in this Settlement. The Court next examined whether attorneys' fees were so high in relation to the actual class recovery that the fees suggested a possibility of collusion. As discussed in the Joint Declaration and Lead Counsel's Motion and Incorporated Memorandum of Law for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, the request for 17% of the Settlement Fund in attorneys' fees is substantially below the range of fee awards approved by courts within the Eleventh Circuit, the majority of which fall between 20% to 30% of the fund. Therefore, the requested fees are not so high as to suggest any collusion. Finally, the Court considered whether a significant number of class members raised cogent objections to the settlement and whether there were objections that counsel had access to that were not before the Court. To date, there have been no written objections to this Settlement. Thus, the additional issues as set forth in the MCL examined by this Court in *Winn-Dixie* therefore also support final approval of the Settlement. (Joint Decl. ¶¶58, 69.)

D. The Recommendations of Experienced Counsel and Court-Appointed Institutional Lead Plaintiffs Heavily Favor Approval of the Settlement

In determining whether the proposed Settlement is fair, adequate and reasonable, the Court may rely on the judgment of counsel and, indeed, "should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330; *accord Perez*, 501 F. Supp. 2d at 1380; *Strube*, 226 F.R.D. at 703.

Lead Counsel, which are highly experienced in class action litigation of this type and are very well informed about the strengths and weaknesses of their case following nearly three years of litigation, strongly endorse the Settlement and believe that it represents an excellent recovery on behalf of the Class. (Joint Decl. ¶67.)

Moreover, Lead Plaintiffs, who are sophisticated institutional investors, closely supervised this litigation. They participated in settlement negotiations, including attending, in person, substantially all of the formal mediation sessions conducted with Defendants, and have strongly endorsed the Settlement as fair, reasonable and adequate to the Class. *See* Lead Plaintiffs' Declaration, attached to Joint Decl. as Ex. A. The endorsement of a settlement by a PSLRA lead plaintiff that has played an active role in the settlement process provides additional support for the fairness of the settlement. *See, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (participation of sophisticated institutional investor lead plaintiffs in the settlement process supported approval of the settlement).

IV. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE CLASS

In presenting the proposed Settlement to the Court for preliminary approval, 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, entered on

February 9, 2011, this Court preliminarily certified the Class.[6] Nothing has changed to alter the propriety of the Court's certification and, for all the reasons stated in the Lead Plaintiffs' Motion for Preliminary Approval of Settlement and Certification of Class for Settlement Purposes and Incorporated Memorandum of Law (ECF No. 264), incorporated herein by reference, 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 Lead Plaintiffs as Class Representatives and appoint Lead Counsel as Class Counsel for the Class.

V. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The standard for approval of a plan of allocation is the same as the standard for approving a settlement: whether it is "fair, adequate and reasonable and is not the product of collusion between the parties." *In re Chicken Antitrust Litig. Am. Poultry,* 669 F.2d 228, 238 (5th Cir. 1982) (citation omitted). Here, the Plan of Allocation, fully described in the Notice, should be approved as it provides a fair and equitable method of dividing the Net Settlement Fund among Class Members who submit timely and valid Proof of Claim forms ("Authorized Claimants"), consistent with governing law. (Joint Decl. ¶¶60-65.) Class Members were informed that they had an opportunity to object to the Plan of Allocation no later than April 13, 2011, and to date, no objections have been filed. (*Id*. ¶52.)

[6] The Class is comprised of all persons and entities who purchased or otherwise acquired WellCare common stock during the period between February 14, 2005, through 10:59 a.m. Eastern Standard Time on October 24, 2007, inclusive (the "Class Period"), and were damaged thereby. Excluded from the Class are (1) all persons or entities who purchased or otherwise acquired WellCare's common stock during the Class Period and sold or otherwise disposed of such WellCare common stock during the Class Period, to the extent of those shares; (2) Defendants Farha, Behrens and Bereday and members of their immediate families; (3) any entity in which Defendants WellCare, Farha, Behrens or Bereday had a controlling interest during the Class Period; (4) officers and directors of WellCare during the Class Period; and (5) the legal representatives, heirs, successors, or assigns of any of the excluded persons or entities who assert any interest in WellCare common stock through or on behalf of any of the excluded persons or entities. Also excluded from the Class are any persons or entities who exclude themselves by filing a request for exclusion in accordance with the requirements set forth in the Notice.

The objective of a plan of allocation is to provide an equitable basis upon which to distribute a settlement fund among eligible class members. Here, the Plan of Allocation was formulated with the assistance of, and approved by, Lead Plaintiffs' consulting damages expert, and was developed with a focus on providing a fair and reasonable allocation of the Net Settlement Fund based upon the information that was in the market at the time of a claimant's purchase and the strengths and weaknesses of the claims. This analysis included studying the market reaction to the public disclosure of the FBI raid and calculating the reasonable dollar amount of artificial inflation present in WellCare stock throughout the Class Period that was allegedly attributable to the wrongdoing. (Joint Decl. ¶62.)

As explained in the Notice, each Authorized Claimant is entitled to recover her Recognized Loss calculated in accordance with the Plan of Allocation. If the total Recognized Losses exceed the Net Settlement Fund, as is typical, Authorized Claimants will be entitled to receive a *pro rata* share of the Net Settlement Fund, *i.e*. the percentage of their Recognized Loss determined by the ratio of the total Recognized Losses of all Authorized Claimants to the value of the Net Settlement Fund. Calculation of the Recognized Loss will depend upon several factors, including when the shares were purchased during the Class Period, and whether they were retained or sold after the Class Period, and if so, when. (Joint Decl. ¶¶63, 65.)

Pursuant to the Stipulation and as explained in the Notice, in the Settlement, there are potentially two components of the Net Settlement Fund to be distributed to Authorized Claimants pursuant to each Authorized Claimant's Recognized Loss: (i) settlement cash; and (ii) the WellCare Bonds. If Lead Counsel sell the WellCare Bonds prior to distribution, all distributions of Settlement proceeds to Authorized Claimants will be in cash. If Lead Counsel do

not sell all of the WellCare Bonds prior to distribution, the WellCare Bonds will be distributed to Authorized Claimants as set forth in the Plan of Allocation. (Joint Decl. ¶64.)

Accordingly, Lead Plaintiffs and Lead Counsel submit that the Plan of Allocation is fair, adequate and reasonable and should be approved by the Court.

VI. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court: (i) approve the proposed Settlement as fair, reasonable and adequate and enter the proposed Judgment; (ii) grant final certification of the Class, and (iii) enter the proposed Order Approving the Plan of Allocation.

Dated: March 30, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2011, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will send an electronic notice to all counsel of record who are registered to receive electronic notices. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: NONE.

By: */s/ James W. Johnson*

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