IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-02546-RM-MEH
Consolidated with Civil Action Nos. 15-cv-02547-RM-MEH,
15-cv-02697-RM-MEH, and 16-cv-00459-RM-MEH

SONNY P. MEDINA, *et al.,*

Plaintiffs,

v.

CLOVIS ONCOLOGY, INC., *et al.,*

Defendants.

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff M.Arkin (1999) LTD and Arkin Communications LTD ("Lead Plaintiff" or the "Arkin Group"), on behalf of itself and the Settlement Class, respectfully submits this memorandum of law in support of its motion for final approval of the proposed settlement of this Action (the "Settlement"), and for approval of the proposed plan of allocation (the "Plan of Allocation").[1]

I. PRELIMINARY STATEMENT

Lead Plaintiff has agreed, subject to Court approval, to settle all claims in this Action in exchange for a $142 million payment consisting of $25 million in cash and shares of Clovis common stock valued pursuant to the terms of the Stipulation at $117 million. Lead Plaintiff respectfully submits that the proposed Settlement is an excellent result for the Settlement Class and easily satisfies the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure.

The proposed Settlement ranks as the second largest securities class action recovery ever obtained in Colorado and among the top four such recoveries in the Tenth Circuit. Moreover, as detailed in the accompanying Browne Declaration[2] and as set forth herein, the Settlement amount

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[1] Unless otherwise defined herein, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement, dated June 18, 2017 (Dkt. No. 156-1) (the "Stipulation") or in the Declaration of John C. Browne in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorney's Fees and Reimbursement of Litigation Expenses (the "Browne Declaration" or "Browne Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Browne Declaration and citations to "Ex." in this memorandum refer to exhibits to the Browne Declaration.

[2] The Browne Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action (¶¶21-99); the nature of the claims asserted (¶¶45-50); the negotiations leading to the Settlement (¶¶100-07); the risks and uncertainties of continued litigation (¶¶111-46); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶178-84).

far exceeds the typical securities class action settlement, and represents a very favorable recovery given the risks inherent in this litigation and Clovis' financial condition.

Lead Plaintiff and Lead Counsel have a well-developed understanding of the strengths and weaknesses of the Action. As detailed in the accompanying Browne Declaration, Lead Plaintiff and Lead Counsel have committed the resources necessary to obtain deep knowledge regarding the strengths and weaknesses of the Class' claims and Defendants' defenses. These efforts are detailed with particularity in the Browne Declaration, but include investigating claims and drafting a 152-page Consolidated Amended Complaint (¶¶11-15, 21-50), reviewing enormous amounts of scientific and regulatory literature, FDA guidelines and clinical drug trial protocols (¶¶31-36), successfully opposing Defendants' motions to dismiss, which consisted of more than 1,000 pages of briefing and exhibits (¶¶51-56, 61-64), obtaining and reviewing 350,000 pages of Clovis documents and an additional 40 gigabytes of clinical trial data (¶¶74-93); retaining multiple preeminent scientific, medical, and financial experts (¶¶38-40, 71-73), interviewing four senior Clovis executives (¶¶14, 94), engaging in a formal mediation with the well-respected mediator and former Federal District Judge Layn Phillips (¶¶100-07), investigating Clovis' ability to pay a judgment (¶¶122-27), and negotiating a favorable resolution to the litigation. ¶¶12-13, 101-7.

While Lead Plaintiff continues to believe that the claims asserted against Defendants are meritorious, it recognizes that the Action presented a number of substantial risks to establishing the liability of Defendants, including challenges in establishing that Defendants' statements were the result of fraud and not merely negligence, and faced complex issues of proof regarding interpretation of FDA guidelines and clinical trial results. *See* ¶¶111-46. In addition, given that Clovis is an early-stage biopharmaceutical company that has incurred significant net losses in

every quarter since its founding, there was a substantial risk that even if Lead Plaintiff were successful in establishing liability at trial (and after appeals from any verdict), Clovis would have been forced into bankruptcy rather than be able to pay a judgment. ¶¶122-27. Absent the Settlement, the Parties faced the prospect of protracted litigation through costly fact and expert discovery, additional contested motions, a trial, post-trial motion practice, and likely ensuing appeals. The Settlement avoids these risks while providing a substantial, certain, and immediate benefit to the Settlement Class in the form of a $142 million recovery.

At the July 26, 2017 hearing, the Court inquired about certain aspects of the proposed Stipulation of Settlement, including, among other things, the mechanism and means by which the Settlement Fund would be distributed to the Class. In paragraphs 147 to 167 of the Browne Declaration and in Section II of this Memorandum, Lead Plaintiff and Lead Counsel have attempted to address each of the matters raised by the Court at the July 26, 2017 hearing.

Moreover, Lead Plaintiff Arkin Holdings is an institutional investor of the type favored by Congress when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA") and has closely monitored and participated in this litigation from the outset. Lead Plaintiff played an instrumental role in settlement negotiations, closely evaluated the proposed settlement and recommends that it be approved. *See* Declaration of Moshe Arkin, attached to the Browne Decl. as Exhibit 2, at ¶¶2, 4-6. Further evidence of the fairness of the Settlement comes in the form of the accompanying declaration of the mediator, Judge Phillips, in which he states that "there were many complex issues that required significant thought and practical solutions," and concludes that "this Settlement represents a recovery and outcome that is reasonable and fair for the Settlement Class and all parties involved … I strongly support the approval of the settlement in all respects." Declaration of Layn R. Phillips, attached to the Browne Decl. as Exhibit 4 (Phillps

Decl.), at ¶¶16-18. In light of these considerations and for all the other reasons set forth in the Memorandum, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement warrants final approval by the Court.

In addition, Lead Plaintiff respectfully submits that the Plan of Allocation, which is set forth in the Notice disseminated to the Settlement Class, is a fair and reasonable method for allocating the Net Settlement Fund to eligible Class Members and also warrants the Court's approval.

II. TERMS OF THE SETTLEMENT AND RESPONSES TO MATTERS RAISED AT THE JULY 26, 2017 HEARING

The $142 million Settlement Amount consists of (i) a $25 million cash payment, which represents the entirety of Clovis' available director and officer insurance, and (ii) the issuance of shares of Clovis common stock valued at $117 million (the "Settlement Shares"). The Settlement Shares paid to the Settlement Class will be issued, pursuant to the exemption from registration provided by Section 3(a)(10) of the Securities Act of 1933, within five business days after the Court issues a final order approving the Settlement. *See* Stipulation ¶9.

As noted above, on July 26, 2017, the Court held a hearing where it raised certain matters for discussion. Lead Counsel has tried to address each of these matters.

(i) **The Stock Component of Plaintiffs' Counsel's Fee:** The Court asked whether Plaintiffs' Counsel could receive a fee comprised of stock in a company it was suing. *See* Tr. at 5:14-22. Lead Counsel respectfully submits that this is a well-recognized practice and has been expressly endorsed by multiple Courts. Indeed, it is considered the best practice in a case where the Settlement consideration partially consists of stock. *Montgomery v. Aetna Plywood, Inc., et al.,* 231 F.3d 399, 409 (7th Cir. 2000) ("Stock, like cash, is simply a form of compensation secured on the class' behalf. There is no reason it should be treated differently than cash. In fact,

treating it differently creates perverse incentives for attorneys by encouraging them to seek all cash recoveries even when a cash and stock recovery would be in their clients' best interest or would otherwise be more appropriate.")

Consistent with this principle, as set forth in Paragraphs 149 to 152 of the Browne Declaration, there have been multiple securities class action settlements in Colorado and around the nation in which some portion of the settlement fund was comprised of the settling corporate defendant's securities. In each of these cases, class counsel's fee was paid at least in part in the securities issued to the settlement class. For example, in *Rosenfeld v. Laser Tech. Inc., et al.,* No. 99-cv-266 (D. Colo. Oct. 19, 2000), Dkt. No. 87 (Ex. 8), the Court approved a settlement of $850,000 in cash and 475,000 shares of stock and awarded attorneys' fees of 30% of each. *See also Rasner v. Vari-L Co., Inc., et al.*, No. 00-cv-1181 (D. Colo. March 28, 2003), Dkt. No. 102 (docket indicates that court approved settlement of $644,000 in cash and 2 million shares of stock and awarding attorneys' fees of 25% of settlement fund not attributable to disgorgement) (Ex. 9); *Anderton v. ClearOne Commn'cs., Inc., et al.*, No. 2:03-CV-0062-PCG, slip op. at 2 (D. Utah March 16, 2004), Dkt. Nos. 79, 92 (approved settlement of $5 million in cash and 1.2 million shares of stock and awarding attorneys' fees of 19%) (Ex. 10). Similarly, in *In re Lumber Liquidators Holdings, Inc. Sec. Litig.*, No. 13-00157, slip op. at 2 (E.D. Va. Nov. 17, 2016), Dkt. No. 206 (Ex. 11), the court recently awarded "attorneys' fees in the amount of 23.75% of the Settlement Cash . . . and 23.75% of the Settlement Stock."[3]

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[3] *See also In re Ocean Power Techs. Inc. Sec. Litig.*, No. 14-03799, 2016 U.S. Dist. LEXIS 158222, at *93-94 (D.N.J. Nov. 15, 2016) (Lead Counsel "awarded $900,000 and 114,000 shares of OPT common stock"); *In re Heckmann Corp. Sec. Litig.*, No. 10-00378, slip op. at 2 (D. Del. June 26, 2014), Dkt. No. 308 (Ex. 12) (awarding "attorneys' fees in the amount of 33 1/3% of the Cash Settlement Amount (totaling $4,500,000) and 33 1/3% of the Settlement Shares (totaling 282,663 shares)"); *Crystal v. Medbox, Inc.*, No. 15-00426, slip op. at 33 (C.D. Cal. Nov.

(ii) **Potential Sale of the Settlement Shares:** The Court noted that the Stipulation of Settlement allowed Lead Counsel to liquidate any Settlement Shares awarded as attorney's fees without simultaneously selling the Settlement Shares issued for the benefit of the Class, raising a potential conflict of interest between the Class and Lead Counsel. ¶153. In order to address the Court's concerns, the Settling Parties have amended the Stipulation so that if Lead Counsel chooses to sell the Settlement Shares, it is now expressly required to liquidate ***all*** shares of Clovis common stock – both the Settlement Shares attributable to the Class and any attributable to Lead Counsel's Court-awarded attorneys' fees – together. *See* Amendment to Stipulation and Agreement of Settlement (Ex. 1 at ¶1). Once all of the Settlement Shares are liquidated, Lead Counsel may collect its share of any Court-awarded fees from the net cash proceeds received from the sale of the ***entire*** lot of shares, and the remaining balance of the cash proceeds will be deposited in the Escrow Account for distribution to the Class. *See* ¶¶155-56.

(iii) **Lead Counsel's Liability to the Class:** The Court questioned whether, and to what extent, Lead Counsel assumed liability to the Settlement Class in connection with the escrow and distribution of the Net Settlement Fund. ¶157. While Lead Counsel believes that the terms of the Stipulation of Settlement as drafted comport with its fiduciary duties to the Settlement Class and are commonplace in settlements such as this, it has amended the Stipulation so that it expressly states that Lead Counsel shall act as fiduciaries for the Settlement Class in

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14, 2016), Dkt. No. 114 (Ex. 13); ("the Court awards to Lead Counsel attorneys' fees in the amount of twenty-five per cent of the $1,850,000.00 cash portion of the Settlement Fund and twenty-five per cent of the shares of Medbox stock contributed by Defendants to the Settlement Fund."); *Adams v. Amplidyne, Inc.*, No. 99-4468 (MLC), 2001 U.S. Dist. LEXIS 14464, at *12 (D.N.J. Aug. 14, 2001) ("Plaintiffs' Counsel … awarded 33 % of the Cash Settlement Amount (including interest), and one-third of the Settlement Shares, as and for their attorneys' fees, which amounts the Court finds to be fair and reasonable"); *see* additional cases cited at Browne Decl. at ¶¶150-51.

connection with administration of the Settlement, notwithstanding any other provision of the agreement. *See* Amendment to Stipulation and Agreement of Settlement (Ex. 1 at ¶2); ¶¶157-58.

(iv) **Lead Plaintiff's "Designee":** The Court asked what or whom the phrase "Lead Plaintiff's designee" in the Stipulation of Settlement denotes. ¶159. This phrase refers to the securities brokerage firm that Lead Counsel will designate as the recipient of the Settlement Shares. Lead Counsel intends to liquidate all of the shares through its broker if market conditions are amenable to such a sale. *See* ¶¶159-60.

(v) **Transfer of Settlement Shares to Clovis' Transfer Agent:** The Court inquired why, in the unlikely event that the Settlement Shares cannot be liquidated, the Settlement Shares will be transferred to Clovis' transfer agent, who will be responsible for conducting the distribution of the shares to Authorized Claimants (rather than Lead Counsel or the Claims Administrator). ¶161. In order to distribute the Settlement Shares electronically, the Settlement Shares must be recorded through Clovis' transfer agent (Continental Stock Transfer & Trust Company), who will maintain the electronic record of the Authorized Claimants who will receive the stock component of the Settlement. This procedure will eliminate the time and expense to issue physical certificates for the Settlement Shares and avoid the burdens associated with undeliverable or lost settlement distributions. *See* ¶¶161-64.

(vi) **Release of Claims Against the Underwriter Defendants:** The Court asked whether the Settlement releases claims against the Underwriter Defendants. ¶165. The Settlement releases the Underwriter Defendants, who have indemnity agreements with Clovis in connection with their underwriting of the July 2015 Offering at issue in this case, without requiring any payment from the Underwriter Defendants. This release is consistent with common practice in such circumstances. *See id*.

(vii) **The Settlement's "Change-In-Control" Provision:** The Court asked about the "change-in-control" provision in the Stipulation of Settlement. ¶166. This provision specifies the nature of the consideration the Settlement Class will receive in lieu of Clovis common stock, in the event Clovis common stock is canceled as a result of a change-in-control transaction prior to the issuance of the Settlement Shares. Change-in-control transactions subsequent to the distribution of the Settlement Shares (or the proceeds of a sale of the Settlement Shares) do not create this problem because at the time of distribution, Clovis common stock will exist and can be sold or, if necessary, distributed to Authorized Claimants. *See* ¶¶166-67.

(viii) **St. Petersburg Employees' Retirement System's Role in the Litigation:** The Court inquired about the role City of St. Petersburg Employees' Retirement System ("St. Petersburg") played in the litigation. ¶168. Because Lead Plaintiff (the Arkin entities) did not purchase any shares directly in the July 2015 Offering, Lead Plaintiff and Lead Counsel added St. Petersburg – which purchased shares of Clovis stock in the July 2015 Offering directly from the offering's lead underwriter – to include a class member who had unquestioned standing to assert the claims under the Securities Act. This is a very common practice in securities class actions,[4] and it proved wise in this case as Defendants mounted several assaults on the standing

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[4] *See, e.g.*, *Fishbury, Ltd. v. Connetics Corp.,* 2006 WL 3711566, at *4 (S.D.N.Y. Dec. 14, 2006) ("If certain class claims cannot be advanced because of standing or class-certification issues, this deficiency can be corrected by the designation of other members of the purported class as named plaintiffs or class representatives," and collecting cases); *In re Global Crossing Sec. Litig.*, 313 F. Supp. 2d 189, 205 (S.D.N.Y. 2003) ("Lead Plaintiffs have a responsibility to identify and include named plaintiffs who have standing to represent the various potential subclasses who may be determined ... to have distinct interests or claims"); *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392, 422 (S.D.N.Y. 2003) ("In filing the Complaint, lead plaintiff fulfilled its obligation . . . to identify as named plaintiffs any additional class representatives that were necessary to assert the claims," and noting that it is "well established that named plaintiffs may jointly represent the class and it is their claims that determine whether there is standing to bring the claims alleged on behalf of the class"); *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117,

of plaintiffs to assert Securities Act claims, and the Court even partially granted the Underwriter Defendants' motion to dismiss on these grounds. *See* ¶¶168-70.

(ix) **Typographical Error in Paragraph 8(c) on Page 21 of the Stipulation of Settlement:** The Court noted a typographical error in paragraph 8(c) on page 21 of the Stipulation of Settlement. In order to fix this typo, the Settling Parties have amended the Stipulation so that the reference to "no later than twenty (120) days after the Valuation Date" is corrected to read "no later than One Hundred Twenty (120) days after the Valuation Date." *See* Amendment to Stipulation and Agreement of Settlement (Ex. 1 at ¶3); *see also* ¶171.

In short, Lead Plaintiff and Lead Counsel greatly appreciate the Court's foresight and consideration in holding the July 26, 2017 hearing and hope that – by working together with Defendants – they have resolved any concerns the Court may have had regarding the Settlement.

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standards

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23e(2). Courts in the Tenth Circuit recognize a policy favoring the settlement of litigation. *See Am. Home Assurance Co. v. Cessna Aircraft Co.*, 551 F.2d 804, 808 (10th Cir. 1977) ("[t]he inveterate policy of the law is to encourage, promote, and sustain the compromise and settlement of disputed claims.") (internal quotations omitted); *see also Big O Tires, Inc. v. Bigfoot 4x4, Inc.*, 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001) ("As a matter of public policy, the law favors and encourages settlements . . . . [and] [t]he settlement of actions should be fostered to avoid

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123 (S.D.N.Y. 2002) (noting that under the PSLRA, "plaintiffs are entitled to join new named plaintiffs" to perfect class standing).

protracted, wasteful and expensive litigation.") (citations omitted). The policy in support of settlement is particularly strong in complex class actions such as this one, "where substantial judicial resources can be conserved by avoiding formal litigation." *Tuten v. United Airlines, Inc.*, 41 F. Supp.3d 1003, 1007 (D. Colo. 2014) (internal quotations omitted); *see also Belote v. Rivet Software, Inc.*, No. 12-cv-02792-WYD-MJW, 2014 WL 3906205, at *3 (D. Colo. Aug. 11, 2014) ("settlements in class actions are favored.").

At final approval, the Court's inquiry focuses on four factors in determining whether the Settlement is fair, reasonable, and adequate. *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984); *see also Gottlieb v. Wiles,* 11 F.3d 1004, 1014 (10th Cir. 1993), *overruled in part on other grounds, Devlin v. Scardelletti*, 536 U.S. 1 (2002). These factors include: "(1) whether the proposed Settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable." *Jones*, 741 F.2d at 324; *see also Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002). As Lead Plaintiff demonstrates below, and as supported by the accompanying declarations submitted herewith, this Settlement more than satisfies each of these factors and should be finally approved.

B. The Proposed Settlement is Fair, Reasonable and Adequate and Should be Approved

1. The Settlement was Fairly and Honestly Negotiated

The Court must examine the fairness of the settlement negotiation process "in light of the experience of counsel, the vigor with which the case was prosecuted, and [any] coercion or collusion that may have marred the negotiations themselves." *McNeely v. Nat'l Mobile Health*

Care, LLC, No. CIV-07-933-M, 2008 WL 4816510, at *11 (W.D. Okla. Oct. 27, 2008). Furthermore, where a settlement results from arm's-length negotiations between experienced counsel, "the Court may presume the settlement to be fair, adequate and reasonable." *Lucas v. Kmart Corp.,* 234 F.R.D. 688, 693 (D. Colo. 2006) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir. 2005), *cert. denied*, *Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005)).

The record in this case clearly demonstrates that the Settlement was achieved in good faith through robust, arm's-length negotiations between the Settling Parties, with the guidance and input of experience and informed counsel, and conducted under the supervision of an independent and highly experienced mediator. The settlement negotiations included an intensive mediation process overseen by former U.S. District Court Judge Layn Phillips, which involved the parties' submission of two comprehensive sets of mediation statements to Judge Phillips, as well as an all-day, in-person formal mediation session. Although the parties did not resolve the litigation during the in-person mediation session, in the weeks following, the parties, through Judge Phillips and with his guidance, continued to discuss the possibility of a settlement of the Action, while continuing to aggressively litigate.

These discussions ultimately led to the Parties' arranging for Clovis' CEO, Defendant Mahaffy, to travel from Colorado to Israel to meet directly with Lead Plaintiff and Lead Counsel on May 23, 2017 to discuss the merits of the case. It was following this meeting, only after the parties exchanged extensive mediation materials and internal documents, participated in an all-day formal mediation session, and engaged in numerous rounds of vigorous negotiations, that the parties reached the proposed Settlement.

Judge Phillips gives an overview of the settlement negotiations and "attest[s] that the negotiations were extremely vigorous, completely at arm's-length, and fully conducted in good faith." Phillips Decl., ¶¶9-15, 16. He notes that "all counsel displayed the highest level of professionalism in carrying out their duties [and] the settlement is the direct result of all counsel's experience, reputation, and ability in these types of complex class actions." *Id.* at 18.[5]

The extensive and arm's-length nature of the parties' negotiations and the active involvement of an independent and experienced mediator such as Judge Phillips strongly supports the fairness of the proposed Settlement. *See In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 691 (D. Colo. 2014) (approving settlement where it was the result of arm's length negotiations and reached with the help of experienced mediators); *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 71039, at *16 (same); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that the involvement of a mediator in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure."); *IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *2 (D. Nev. Oct. 19, 2012) (noting settlement was fair when it "was reached following arm's length negotiations between experienced counsel that involved the assistance of an experienced and reputable private mediator, retired Judge Phillips"); *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 840-41 (E.D. Va. 2016) (settlement negotiations before Judge

[5] *See Colo. Cross-Disability Coalition v. Abercrombie & Fitch Co.*, No. 09-cv-02757-WYD-KMT, 2015 WL 5695890, at *3 (D. Colo. Sept. 29, 2015) (finding settlement negotiations to be fair, honest, and at arm's length where parties "'vigorously advocated their respective positions throughout the pendency of the case.'") (citing *Lucas*, 234 F.R.D. at 693 (quoting *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997))).

Phillips, acting as mediator and who "has extensive experience in mediating securities fraud settlement negotiations," demonstrated that the settlement was fair and reasonable).

Moreover, as noted above and detailed in the Browne Declaration (¶¶11-15, 21-99), before the Settlement was reached, Lead Plaintiff and Lead Counsel thoroughly understood, both factually and legally, the strengths and weaknesses of the claims asserted in the Action. Indeed, Lead Counsel and Lead Plaintiff devoted an enormous amount of time, resources and efforts to ensure that they fully understood the complex scientific, medical, and regulatory issues involved in this case. ¶¶21-50. Among many other things, Lead Plaintiff hired gold-plated scientific, medical and regulatory experts (¶¶71-73), reviewed an enormous number of Clovis internal documents (¶¶74-93), researched Clovis' ability to pay (¶¶122-27), and interviewed Clovis' senior management team (¶14) as part of its efforts to ensure the reasonableness of the Settlement. Thus, Lead Plaintiff and Lead Counsel were fully informed as to the strengths and weaknesses of the Class' claims in connection with reaching this Settlement.

2. There are Numerous Questions of Law and Fact, Placing the Ultimate Outcome of the Action in Doubt

The second factor considered by the Tenth Circuit in evaluating settlements is whether there were "serious questions of law and fact . . . [that] plac[ed] the ultimate outcome of the litigation in doubt." *Jones*, 741 F.2d at 324. In assessing the Settlement, the Court should balance the benefits of the substantial certain recovery for the Class against the risks of continued litigation. *See Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). Here, a balance of these factors strongly supports the Court's final approval of the Settlement.

This case involved numerous questions of law and fact and presented significant risks to Lead Plaintiff and the Class, who faced a very real possibility of obtaining no recovery at all. The particular risks of this litigation were heightened by the fact that Clovis is an early stage

biopharmaceutical company that has reported significant net losses in every quarter since its inception. Thus, even if Lead Plaintiff and the Class were ultimately successful on their claims at trial, there is the substantial risk that Clovis would be forced into bankruptcy rather than be able to pay a judgment. ¶¶122-27.

Throughout the litigation, the parties were deeply divided on several key fact issues central to the litigation, and there was no guarantee that Lead Plaintiff would prevail on any of these issues at either summary judgment or at trial. Defendants mounted strong defenses to contest their liability on falsity, materiality, and scienter grounds, and would have continued to do so if the case were to continue. For example, Defendants presented arguments that their public statements regarding the clinical trial standards governing Clovis' reporting obligations during the Class Period did not require confirmation of the "objective responses" the Company publicly reported. While the Court rejected Defendants' argument at the motion to dismiss stage, it noted that "the Clovis Defendants could present evidence at summary judgment indicating that their interpretation of RECIST was reasonable and that the FDA would accept their unconfirmed responses." ¶130.

Defendants also argued that they reasonably believed that the FDA would rely on unconfirmed responses in determining whether to approve, and how to label, rociletinib. Although Lead Plaintiff believes it has meritorious responses to this argument, it recognizes that this dispute involves complex issues of regulatory practice and procedure, that expert evidence supporting Lead Plaintiff's position is expensive, and that proof on these issues is by no means guaranteed. ¶131.

Likewise, the Court's Opinion and Order also stated that Defendants could prevail at summary judgment or at trial if clinical trial data showed that the "confirmed" objective response

rate Defendants failed to report to investors was no lower than the "unconfirmed" rate they publicly reported. ¶132. Defendants argued that, in fact, rociletinib's confirmed and unconfirmed rate never materially diverged until the very end of the Settlement Class Period. Again, while Lead Plaintiff believes it possesses meritorious responses to this argument, it recognizes that the Parties dispute even the definition of "confirmed response rate," that, again, Lead Plaintiff would be required to obtain evidence from numerous experts to meet its burden of proof, and that it was far from certain that a lay jury would appreciate and accept Lead Plaintiff's view of the complex medical and statistical facts at issue here. *Id*.

Even assuming that Lead Plaintiff overcame each of the above risks and successfully established Defendants' liability, they faced serious risks in proving damages and loss causation. For example, Defendants argued that the alleged corrective disclosures did not correct prior misstatements, but rather disclosed new facts about rociletinib, and it was these new facts – which made evident that the drug was less likely to obtain FDA approval – not the alleged misstatements, that caused the drops in Clovis' stock price. (Dkt. No. 105 at 55, n.214).

Moreover, to determine damages and loss causation, the Parties would have to rely on expert testimony. The experts would be subject to *Daubert* challenges. And, even if Lead Plaintiff's expert survived a Daubert motion, at trial, these critical elements of proof would likely be reduced to an inherently unpredictable and highly contentious "battle of the experts." *See, e.g.*, *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1242 (D.N.M. 2012) ("Damages in this case, as is common in securities class actions, would likely have been reduced to a 'battle of the experts,' and 'it is virtually impossible to predict with any certainty which testimony would be credited.'"). Lead Plaintiff and Lead Counsel recognize the real possibility

that a jury could be swayed by Defendants' experts, and find that there were no damages or only a fraction of the amount of damages Lead Plaintiff contended.

It was in the face of these significant risks (and a multitude of others) that Lead Plaintiff, working with Lead Counsel, achieved the $142 million recovery. Given these serious risks, the Settlement represents an excellent result and eliminates the risk that the Settlement Class could recover less or nothing at all from Defendants. Accordingly, this factor supports the Settlement's approval.

3. The Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief after Protracted and Expensive Litigation

Under the third factor for evaluating whether a settlement is fair, reasonable and adequate, the Court must consider "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation." *Jones*, 741 F.2d at 324; *see also Qwest*, 2006 U.S. Dist. LEXIS 71039, at *18-19 (approving securities class action settlement and noting that immediate recovery outweighed the possibility of future relief). This factor is to be weighed "not against the net worth of the defendant, but against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation." *Gottlieb*, 11 F.3d at 1015. It is the informed opinion of Lead Plaintiff and Lead Counsel that the benefits of settling this case now under the terms of the proposed Settlement far outweighs the risks of continued litigation.

In addition to the specific risks faced in this Action with respect to proving liability and damages (as discussed in detail above), Lead Plaintiff and Lead Counsel also considered the risks and costs involved in pursuing a securities class action through trial generally. In the absence of the Settlement, continued litigation of the Action would have included the completion of fact and expert discovery, an expected motion for summary judgment, and a trial that would

involve substantial expert and factual testimony with respect to liability and damages. Even if Lead Plaintiff succeeded at trial, it is virtually certain that Defendants would appeal, further delaying the receipt of any recovery by the Class. Thus, the risks and costs necessary to prosecute the claims through trial and appeals were extensive, and continued litigation of the Action would have required a significant expenditure of the Court's time and resources. *See Lane v. Page*, 862 F. Supp. 2d 1182 (D.N.M. 2012) ("Pursuing the litigation further would require significant judicial and party resources to complete motions for summary judgment, motions under *Daubert v. Merrell Dow Pharmaceuticals*, and motions in limine. Any of those decisions could then be appealed to the Tenth Circuit along with any jury verdict that might be returned.").

In contrast, the proposed Settlement provides an immediate and significant recovery of a $142 million payment for the benefit of the Settlement Class, without the risk, delay and expense of continued litigation. Indeed, the Settlement represents the second largest securities class action recovery ever obtained in Colorado and is among the four largest in Tenth Circuit history. ¶¶3-5. Furthermore, when viewed relative to other securities class action recoveries, the recovery obtained in this case is extremely noteworthy. For example, the median securities class action settlement in the Tenth Circuit between 2007 and 2016 was $8.4 million. Similarly, the median securities class action settlement nationwide between 1996 (the passage of the PSLRA) and 2015 was $8.3 million. Also, as noted in the Browne Declaration, the $142 million Settlement represents up to 37% of estimated Class-wide damages, while nationally the median securities class action settlement between 2007 and 2016 recovered 2.1% of estimated damages and settlements in the Tenth Circuit over the same time period recovered 1.6% of estimated damages. ¶¶112-14. Courts readily approve class settlements representing similar or lower

percentages of recoverable damages. *See, e.g.*, *Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1344-45 (S.D. Fla. 2011) (finding that settlement providing 9% of class' potential recovery was reasonable); *Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-cv-20880-UU, 2016 U.S. Dist. LEXIS 144133, at *9 (S.D. Fla. Oct. 17, 2016) (approving settlement representing 5.5% of the maximum damages and noting that the settlement is "an excellent recovery, returning more than triple the average settlement in cases of this size"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Feb. 1, 2007) ("The [$40.3 million] settlement . . . represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class action securities litigations."); *Hicks v. Morgan Stanley*, No. 01 Civ. 10071(RJH), 2005 U.S. Dist. LEXIS 24890, at *19 (S.D.N.Y. Oct. 24, 2005) (finding settlement representing 3.8% of plaintiffs' estimated damages to be within range of reasonableness); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (finding that settlements in the range of 3% to 7% of estimated losses in securities cases are common and reasonable).

In sum, Lead Plaintiff and Lead Counsel strongly believe that a recovery for the Class now – in particular one representing the second largest securities class action recovery in Colorado history – far outweighs the possibility of uncertain relief for Class Members from further protracted and expensive litigation. Thus, the third *Jones* factor strongly supports approval of the Settlement.

4. Lead Plaintiff and Lead Counsel Support Approval of the Settlement

In determining whether the proposed Settlement is fair, reasonable and adequate, the judgment of plaintiff's counsel is entitled to be given significant weight by the Court. *See Farley*

v. Family Dollar Stores, Inc., No. 12-cv-00325-RM-MJW, 2014 WL 5488897, at *3, (D. Colo. Oct. 30, 2014) ("'Counsels' judgment as to the fairness of the agreement is entitled to considerable weight.'") (citing *Lucas*, 234 F.R.D. at 695 (quoting *Marcus v. Kansas Dep't of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002))). In evaluating the Settlement's fairness, the Court "should not decide the merits of the lawsuit or substitute its own judgment for that of the parties." *Farley*, 2014 WL 5488897, at *2. Furthermore, where, as here, "a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable." *Marcus*, 209 F. Supp. 2d at 1182.

Lead Counsel, who is highly experienced in complex securities class-action litigation and is well-informed about the strengths and weakness of this case, endorse the Settlement and believe that it represents an excellent recovery for the Settlement Class. *See* ¶¶2-16. Moreover, Lead Plaintiff – a sophisticated investor with extensive knowledge of the complex subject matter of this case – actively participated in both the prosecution of the Action and the settlement negotiations. Lead Plaintiff's direct participation and approval of the Settlement is further evidence that the Settlement is fair, reasonable and adequate. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) ("[U]nder the PSLRA, a settlement reached . . . under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness . . . .'").

Finally, the positive reaction of the Class to the proposed Settlement further favors approval by the Court. As of September 20, 2017, more than 53,629 Notice Packets have been mailed to potential Class Members and nominees and the Summary Notice has been published in the national edition of the *Wall Street Journal* and transmitted electronically over the *PR*

Newswire. *See* Declaration of Stephanie A. Thurin, attached to the Browne Decl. as Ex. 5 ("Thurin Decl."), at ¶¶2-9. To date, no Settlement Class Member has objected to the Settlement.[6] ¶177.

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

The objective of a plan of allocation is to provide an equitable method for distributing a settlement fund among eligible class members. Like the standard governing approval of the settlement itself, a plan for allocating settlement proceeds warrants approval if the distribution of funds is "fair, reasonable and adequate." *Crocs,* 306 F.R.D. at 692. Where, as here, an allocation plan is endorsed by competent and experienced counsel, it "need only have a reasonable, rational basis." *Lucas*, 234 F.R.D. at 695. Additionally, in determining whether a plan of allocation is fair, courts give substantial weight to the opinions of experienced counsel. *See, e.g.*, *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000), *aff'd*, 246 F.3d 681 (10th Cir. 2001). As set forth below, the Plan of Allocation is fair and reasonable and should be approved.

Here, the proposed Plan of Allocation, which was developed by Lead Plaintiff in consultation with its damages expert, is a fair and reasonable method for allocating the Net Settlement Fund among eligible Class Members who submit valid Claim Forms ("Authorized Claimants") that are approved for payment by the Court. In developing the Plan of Allocation, Lead Plaintiff's damages expert calculated the estimated amount of artificial inflation in Clovis common stock and Clovis Call Options (and the estimated amount of artificial deflation in Clovis

[6] The deadline for Class Members to file objections to the Settlement is October 5, 2017. Lead Counsel will file reply papers on or before October 19, 2017, after the deadline for submitting objections has passed, which will address any objections.

Put Options) during the Class Period allegedly caused by Defendants' alleged false and misleading statements and material omissions. In calculating the estimated artificial inflation and deflation allegedly caused by Defendants' alleged misrepresentations and omissions, Lead Plaintiff's damages expert considered price changes in Clovis common stock and options in reaction to certain public announcements allegedly revealing the truth concerning Defendants' alleged misrepresentations and material omissions, adjusting for price changes that were attributable to market or industry forces and disclosures of information unrelated to the alleged fraud. *See* Notice ¶52.

Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of Clovis common stock and Clovis Call Option and each sale or writing of a Clovis Put Option during the Class Period (May 31, 2014 through April 7, 2016, inclusive) that is listed in the Claim Form and for which adequate documentation is provided by the claimant. *See id*. ¶55. In general, the Recognized Loss Amount calculated under the Plan of Allocation will be the difference between the estimated amounts of alleged artificial inflation (or deflation in the case of put options) on the date of purchase and on the date of sale, or the difference between the actual purchase/acquisition price and the sale price, whichever is less. *See id*. ¶54. Pursuant to the Plan of Allocation, the sum of a claimant's Recognized Loss Amounts is the Claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. *See id*. ¶¶74-75.

Lead Plaintiff and Lead Counsel believe that the Plan of Allocation has a reasonable and rational basis for equitably allocating the Net Settlement Fund among eligible Class Members. As noted above, more than 53,629 copies of the Notice, which describes the proposed Plan of

Allocation in detail and advises Class Members of their right to object to the Plan of Allocation, have been sent to potential Class Members and nominees. To date, no objection to the Plan of Allocation has been received. ¶184. Accordingly, the Plan of Allocation should be approved as fair, reasonable and adequate.

V. NOTICE TO THE SETTLEMENT CLASS SATISFIED RULE 23 AND DUE PROCESS

Notice to the Settlement Class of the proposed Settlement satisfied Rule 23's requirement of "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)'s requirement that notice of a settlement be "reasonable" – *i.e.*, it "'must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Tennille v. Western Union Co.*, 785 F.3d 422, 436 (10th Cir. 2015) (quoting *Eisen*, 417 U.S. at 174).

Here, both the Notice's substance and the method of its dissemination to potential Settlement Class Members easily satisfied these standards. The Court-approved Notice contains all the information required by Rule 23(c)(2)(B) and the PSLRA, 15 U.S.C. §78u-4(a)(7), including: (i) the nature of the Action and the claims asserted; (ii) the definition of the Settlement Class; (iii) the Settlement's basic terms, including the amount of the consideration and the releases to be given; (iv) the Plan of Allocation; (v) the reasons why the Settling Parties are proposing the Settlement; (vi) the maximum amount of attorneys' fees and expenses that will be sought; (vii) a description of the Class Members' right to request exclusion from the Settlement Class or to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members. The Notice

also provides information on how to submit a Claim Form in order to potentially receive a distribution from the Net Settlement Fund.

As noted above, in accordance with the Preliminary Approval Order (Dkt. No. 160), as of September 20, 2017, the Court-approved Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), has mailed more than 53,629 copies of the Notice Packet by first-class mail to potential Settlement Class Members and nominees. *See* Thurin Decl., Ex. 5, ¶8. In addition, on August 18, 2017, Epiq caused the Summary Notice to be published in the national edition of the *Wall Street Journal* and to be transmitted over the *PR Newswire*. *Id*. ¶9. Epiq also established a website dedicated to the Action, www.ClovisSecuritiesLitigation.com, to provide potential Settlement Class Members with information about the Settlement and the applicable deadlines, as well as access to downloadable copies of the Notice (including the Plan of Allocation), Claim Form, Stipulation of Settlement, Preliminary Approval Order, and Complaint. *Id*. ¶14.

This combination of individual notice by first-class mail to all members of the Settlement Class who could be identified with reasonable effort, supplemented by notice in a widely circulated publication, transmission over a newswire, and availability on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see e.g.*, *Crocs*, 306 F.R.D. at 693; *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 182-83 (S.D.N.Y. 2014).

VI. CONCLUSION

Based on the foregoing and the declarations submitted herewith, Lead Plaintiff submits that the Settlement and Plan of Allocation are fair, reasonable and adequate, and respectfully request that the Court grant final approval of the Settlement and the Plan of Allocation.

Dated: September 21, 2017

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CERTIFICATE OF SERVICE

I, Abraham Alexander, an attorney, hereby certify that on this 21st day of September, 2017, I caused a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION** to be filed with the Clerk of the Court using the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record.

I certify under perjury that the foregoing is true and correct.

/s/ Abe Alexander

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