UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE NEXCEN BRANDS, INC. SECURITIES LITIGATION This document relates to: all actions	Master File No. 1:08-cv-04906-AKH

MEMORANDUM OF LAW IN SUPPORT OF
LEAD PLAINTIFF'S MOTION FOR
(1) FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT,
(2) APPROVAL OF PROPOSED PLAN OF ALLOCATION, AND
(3) AN AWARD OF COUNSEL'S FEES AND REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

By the Stipulation and Agreement of Settlement dated May 2, 2011 (the "Stipulation"), Lead Plaintiff Vincent J. Granatelli, on behalf of himself and the Class,[1] agreed with Defendants to settle this class action, subject to the Court's approval. Lead Plaintiff respectfully submits this memorandum in support of his motion for: (i) final approval of the proposed Settlement with defendants NexCen Brands, Inc. ("NexCen" or the "Company"), Robert W. D'Loren, David B. Meister and David S. Oros (collectively, "Defendants"); (ii) approval of the proposed Plan of Allocation, and (iii) an award of attorneys' fees and reimbursement of expenses for Plaintiff's Counsel.[2] The discussion of the facts of the case, and terms and negotiations of the Settlement, are only summarized here, and Lead Plaintiff respectfully refers the Court to the accompanying Declaration of Lisa M. Mezzetti in Support of Lead Plaintiff's Motion for Final Approval of Proposed Class Action Settlement, Proposed Plan of Allocation and An Award of Attorneys' Fees and Expenses ("Mezzetti Decl.") for a more detailed discussion.[3]

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[1] "Class" and "Class Members" mean, for purposes of this Settlement, all persons who purchased or otherwise acquired any common stock of NexCen during the period from March 13, 2007 through May 18, 2008, and were damaged thereby. Excluded from the Class are (a) Defendants, and the members of their immediate families and Defendants' heirs, successors and assigns, any entity in which any Defendant has or had a controlling interest, and NexCen's predecessors; (b) present and former officers and/or directors of NexCen; (c) all shares of NexCen owned, legally or beneficially, or otherwise controlled by, Willow Creek (as defined in the Stipulation) and all such entities' general partners and managing members, and their successors, assigns, heirs, executors, administrators, trustees and any firm, trust, corporation, or entity in which any of them has a controlling interest; and (d) those persons who file valid and timely requests for exclusion.

All capitalized terms used in this memorandum, if not defined here, are defined in the Stipulation or its exhibits, previously filed at Dkt. No. 131.

[2] "Plaintiff's Counsel" is Cohen Milstein Sellers & Toll PLLC (which was appointed by the Court as Lead Counsel) and counsel working under their direction, The Rosen Law Firm, P.A.

[3] For efficiency and the convenience of the Court, Lead Plaintiff submits this one memorandum in support of all three matters on which he seeks the Court's approval; this allows for fewer pages, and much less repetition, than three separate briefs.

The Settlement requires the Defendants to cause payment of $4,000,000 in cash for the benefit of the Class – which amount has been paid – and for the balance of that amount, after payment of Court-approved fees and expenses, to be distributed to Class members who submit valid proofs of claim.

Although Lead Plaintiff believed that his claims were meritorious, there can be no question that Defendants could raise strong defenses to each of these claims. These defenses are in addition to the inherent risk, delay and uncertainty caused by continued litigation. In this case in particular, where Defendants' motions to dismiss had yet to be heard and resolved favorably to Lead Plaintiff, and where NexCen is in the process of dissolution, the benefits of the Settlement are manifest. Moreover, even if the Court issued a decision denying Defendants' motions to dismiss, Lead Plaintiff would be faced with substantial obstacles to proving damages, loss causation, falsity, omissions and scienter. These substantive obstacles, and the risks they posed, were unlikely to be resolved prior to trial and stand in contrast to the immediate and significant benefits provided by this Settlement.

The Settlement was negotiated by experienced counsel, with the oversight and participation of Lead Plaintiff, over a period of several months, including a meeting of all counsel and then a separate, formal mediation session with a retired federal district court judge. The negotiations involved competing presentations by opposing counsel on the merits of the case and the magnitude of damages. These negotiations ultimately concluded in agreement on the major terms of the Settlement. Subsequent negotiation of the details of the settlement papers, which were complicated by the status of the Company and certain procedural questions raised by the parties, took many more months, with several rounds of drafts, changes and efforts at resolution. There can be no fair question that the negotiations were conducted at arm's length.

They included the participation of Lead Plaintiff, a sophisticated businessman, and the Settlement meets with his approval. *See* Declaration of Vincent J. Granatelli ("Granatelli Decl."), ¶¶ 5-6, attached as Ex. 3 to the Mezzetti Decl.

Having achieved a significant cash benefit for the Class, Plaintiff's Counsel seeks an attorneys' fee award of 30% of the Settlement Amount. The requested attorneys' fee award represents a multiplier of 1.27 based on Plaintiff's Counsel's lodestar of $941,677 (for $2,011.49 hours of attorney, paralegal and other professionals' work).[4] Mezzetti Decl. ¶ 94. In light of the risks faced, the complexity of the case, the quality of legal work performed, the amount of time and effort expended by Plaintiff's Counsel, and the size of the fee in relation to the Settlement achieved, the fee request of 30% of the Settlement Amount is both fair and reasonable.

Plaintiff's Counsel also seeks reimbursement of their out-of-pocket litigation expenses incurred in connection with the prosecution of this action in the amount of $63,855.05. Mezzetti Decl. ¶ 105. These expenses were necessary for the successful prosecution and resolution of the claims against the Defendants.

Pursuant to the Court's Order Preliminarily Approving the Settlement and Providing for Notice to be sent to Class Members (Dkt. No. 133, July 5, 2011), approximately 8,200 notices and proofs of claim were mailed to potential Class Members; 1,936 packets were sent to their nominees, with the Court's order that it be forwarded to Class Members or their contact information be provided to the Administrator. Mezzetti Decl. ¶ 82 citing Mulholland Aff. ¶¶ 4, 8. In addition, as required, on August 11, 2011, the Summary Notice was published in the

[4] Cohen Milstein spent 1,325.50 hours litigating this action for a lodestar of $655,032.50. The Rosen Law Firm, working under the direction of Lead Counsel, spent 685.99 hours litigating this action for a lodestar of $286,644.50. Mezzetti Decl. ¶¶ 94-95.

Investor's Business Daily and the Press Release was issued on *Globe Newswire*.[5] *Id.* ¶ 7. Lead Plaintiff also established a settlement website, www.nexcensettlement.com, posting the documents relating to the Settlement, including the Court's July 5 Order, the Stipulation, Notice, Summary Notice, and Proof of Claim form; these documents were also posted at the administrator's website and the websites of the two law firms of Plaintiff's' Counsel. *Id.* Objections to, and requests to opt-out of, the Settlement are due by November 14, 2011; as of today, no objections to the Settlement or fee and expense request have been filed and no Class Member has elected to opt-out. *Id.*

The Settlement, the Plan of Allocation, and the fee petition should be approved.

II. BACKGROUND

A. Events Leading To The Filing of the Complaint

NexCen was a brand acquisition and management company with a focus on companies operating in the consumer-branded products and franchise industries, although it has since ceased all such business operations and is in the process of dissolving pursuant to a plan adopted by the Directors and approved by its shareholders. *See* http://www.nexcenbrands.com/.

The operative Consolidated Amended Class Action Complaint (the "Complaint") alleges that Defendants issued numerous materially false and misleading statements during the Class Period that caused NexCen's securities to trade at artificially-inflated prices. Specifically, the Complaint alleges Defendants incorrectly informed investors that NexCen planned to acquire three to five companies each year and had sufficient liquidity to complete those acquisitions

[5] A copy of the two Notices and the Press Release are attached as Exs. 1 and 2 to the Affidavit of Paul Mulholland, CPA, CVA Concerning Notice By Mailing and Publication and Other Issues of Class Action Administration, dated October 27, 2011 ("Mulholland Aff."). The Mulholland Aff. is attached as Ex. 1 to the Mezzetti Declaration.

while also sustaining existing operations. The Complaint alleges that the Company did not enjoy such liquidity, and further alleges that over the Class Period its substantial debt or credit facility did not provide enough cash for operations and such acquisitions.

The Complaint alleges that Defendants knew or recklessly disregarded the fact that the Company would never be able to accomplish its acquisition business plan under its current operations or credit facility, but they did not disclose this to the public. Instead, even after major, substantive amendments were made to the credit facility, NexCen suffered a severe cash shortfall.

On May 19, 2008, the Company disclosed that (1) the January 2008 amendment to its credit facility included an accelerated redemption feature, requiring a balloon payment that NexCen was unlikely to be able to pay; (2) the Company would soon face a cash shortage of $7 million to $10 million; (3) the public could no longer rely on the Company's reported 2007 financial results; and (4) there was "substantial doubt" about the Company's ability to continue as a going-concern. Indeed, this was correct: after substantial limitations on its business, on May 13, 2010, NexCen announced that it was selling its franchise businesses and management operations and then would be dissolving the Company.

B. The Litigation

On May 28, 2008, an initial complaint was filed alleging that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder (Dkt. No. 1).

On March 5, 2009, the Court appointed Mr. Granatelli as Lead Plaintiff and appointed Cohen Milstein as Lead Counsel (Dkt. No. 64). After some delay as a result of expected announcements by the Company, on August 24, 2009, Lead Plaintiff filed the Complaint. (Dkt. No. 76).

On October 8, 2009 Defendants filed four separate motions to dismiss the Complaint with supporting papers. (Dkt. Nos. 83-87, 89-95). On December 14, 2009, Lead Plaintiff filed his consolidated opposition to the Defendants' motions. (Dkt. Nos. 100-101). Defendants filed their replies in support of their motions on January 27, 2010. (Dkt. Nos. 104-108).

C. The Settlement Negotiations, Terms and Notice

After Defendants' motions to dismiss were fully briefed, but before the Court held a hearing, the parties engaged in settlement discussions that culminated in an in-person meeting in Manhattan on June 2, 2010. Mezzetti Decl. ¶ 39. Before and during that meeting, the parties exchanged information and detailed arguments on their respective positions. *Id.*

Thereafter, the parties and NexCen's Insurer engaged in an all-day mediation before retired U.S. District Court Judge Nicholas H. Politan in Manhattan on July 12, 2010. *Id.* ¶ 44. Before the session, they exchanged written mediation statements and many exhibits. *Id.* ¶¶ 42-43. During the session, presentations were made on the parties' respective positions and arguments on the motions, the allegations and other related issues. *Id.* ¶¶ 45-46. The mediation also included separate sessions for Defendants' Counsel and counsel for other plaintiffs in other litigations concerning the same matters. *Id.* ¶ 44. Throughout the negotiations, Lead Plaintiff took the position that certain entities -- known as the "Willow Creek" entities (as defined in the Stipulation), which had brought individual fraud claims against Defendants that were very similar to the fraud claims advanced by Lead Plaintiff on behalf of the Class -- could not participate in the class recovery if those entities recovered in their separate litigation. *Id.*; Declaration of Nicholas H. Politan ¶ 11, attached to the Mezzetti Declaration as Ex. 2.

Lead Counsel and Defendant's Counsel engaged in further discussions for five weeks, with the aid of Judge Politan (ret.), before the major terms of the Settlement could be reached. Mezzetti Decl. ¶ 47.

At all times, the negotiations were vigorous and at arm's-length. Indeed, as Judge Politan observed:

> The mediation consisted of, and the settlement was the product of, good faith, hard fought and protracted arm's-length negotiations on the part of all the parties, each of whom were well represented by highly-experienced counsel. . . . Counsel for each of the parties negotiated vigorously for their respective clients. Indeed, even at the end of the mediation, counsel for the Lead Plaintiff continued to press for a higher settlement amount, which was not available. I found that there were no conflicts of interests present that influenced counsel not to properly represent the respective parties who retained them.

Politan Decl. ¶¶ 14-15.

Before Lead Plaintiff finally agreed to the Settlement Amount of $4,000,000, Lead Plaintiff's Counsel engaged in confirmatory discovery of Defendants that included review of the documents that NexCen had produced to the SEC in connection with the SEC's inquiry of the Company. Mezzetti Decl. ¶ 51. Such discovery allowed Lead Plaintiff's Counsel to confirm that the Settlement was appropriate for the Class and should be consummated.

1. Cash Consideration and Release

The Settlement provides for a payment of $4,000,000 in cash to pay claims of investors who purchased NexCen stock from March 13, 2007 through May 18, 2008.

As was explained to the Class in the Court-approved Notice, the Settlement represents an average recovery of $0.2128 per share of NexCen stock for the estimated 18.8 million shares that Lead Plaintiff calculates were "damaged" and declined in value as a result of Defendants' alleged misconduct during the Class Period (and represents an average recovery of approximately $0.1452 per share of NexCen stock after deduction of attorneys' fees and expenses). The Settlement represents a material portion of all available insurance proceeds and Lead Plaintiff's costs in continuing to litigate the case would likely total a substantial portion of any collectable judgment, significantly reducing the amount that could be distributed to Class

Members. *See* Politan Decl. ¶ 13 ("If the settlement were not achieved, protracted litigation would have depleted all available insurance proceeds and jeopardized any substantial recovery for the Class. . . . it is likely all the insurance proceeds would have been depleted by the time this case was tried and all appeals resolved."). If the Settlement is finally approved by the Court, Lead Plaintiff and the Class will forever release their claims alleged against Defendants, and will receive a release of all potential claims of Defendants.

2. Notice to the Class

On or before August 4, 2011, pursuant to the preliminary approval Order, the Administrator mailed Notice of the Settlement to all known Class Members and the other parties and entities listed in the Mulholland Affidavit. Mulholland Aff. ¶ 4. The Notice set forth all the terms of the Settlement, the amount the Settlement would provide per damaged share, the reasons Lead Counsel recommends the Settlement, and the Plan of Allocation. It also noted that Plaintiff's Counsel would seek a fee award up to 30% of the Settlement Amount and an expense award not to exceed $70,000. Mulholland Aff., Exs. 2 and 4. The Notice also advised Class Members that any objections to the Settlement or this fee and expense request were due to be filed and served no later than November 14, 2011.

The Summary Notice was published in print in the *Investor's Business Daily* and the Press Release was issued on *Globe Newswire* on August 11, 2011. *Id.* ¶ 5. All of these documents and others relating to the Settlement were posted on the website created for this case, www.nexcensettlement.com, the Administrator's website, *id.* ¶ 4, and Plaintiff's Counsel's two websites. Mezzetti Decl. ¶ 7.

Since the mailing of over 8,200 copies of the Notice to potential Class Members and to brokerage entities who were to notify Class Members of the Settlement, no Class Member has objected to any aspect of the Settlement, the Plan of Allocation or the fee and expense request.

III. ARGUMENT

A. Given all the Facts and Law Applicable Here, The Court Should Grant Final Approval of Proposed Settlement

1. Certification of the Settlement Class Pursuant to Fed. R. Civ. P. 23 is Appropriate

To effectuate the proposed Settlement, Lead Plaintiff seeks final certification of a settlement class. Fed. R. Civ. P. 23(a) imposes four threshold requirements on a putative class action: numerosity, commonality, typicality, and adequacy of representation. In addition, Rule 23(b) requires that: (i) common questions must predominate over any questions affecting only individual members; and (ii) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.

a. Numerosity

Rule 23(a)(1) requires a class be so large that joinder of all members is "impracticable." Fed. R. Civ. P. 23(a)(1). Courts generally assume that the numerosity requirement is met in cases involving nationally traded securities. *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177(CM), at *12 (S.D.N.Y. July 27, 2007). Indeed, "numerosity is presumed at a level of 40 members." *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Novella v. Westchester Cnty.*, 443 F. Supp. 2d 540, 546 (S.D.N.Y. 2006) (finding a class of twenty-four individuals satisfied the numerosity requirement). In this case, although the exact size of the Class is not yet known, the Complaint alleges that there are hundreds if not thousands of members in the proposed Class, and that during the Class Period, the Company's stock was actively traded in an efficient market on the NASDAQ Global Market. In addition, 137 claim forms have been filed (the deadline for them is January 31, 2012). Mulholland Decl. ¶ 11. Thus, the numerosity requirement is met.

b. Commonality

The commonality element of Rule 23(a)(2) requires that "questions of law or fact [are] common to the class." *EVCI*, 2007 WL 2230177 at *13. In a securities class action, the commonality requirement "is applied permissively." *Id.* The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative: there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases. 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3.10 (4th ed. 2002).

Commonality is satisfied where, as here, there are common questions of law and fact on whether the Defendants violated the federal securities laws; whether one or more false statements of material fact were made; whether the statements were made with the requisite state of mind; whether the Class sustained damages; and what the proper measure of damages will be. *See, e.g., Teachers' Ret. Sys. of Louisiana v. ACLN Ltd.*, No. 01 Civ. 11814(LAP), 2004 WL 2997957, at *4 (S.D.N.Y. Dec. 27, 2004) (commonality met by allegation that class members have been injured by the same fraudulent scheme). Virtually identical common questions have been deemed sufficient in numerous securities law class actions. *See, e.g., In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 290-91 (2d Cir. 1992); *N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653, 2011 WL 3874821(PAC), at *8 (S.D.N.Y. Aug. 16, 2011); *In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 374-75 (S.D.N.Y. 2000).

c. Typicality

Rule 23(a)(3) requires that the representative's claim be typical of those of the members of the class. Rule 23(a)(3) is satisfied when the claims of the representative plaintiff "arise from the same course of conduct that gives rise to the claims of the other Class members." *In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 480 (S.D.N.Y. 2002) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126-27 (S.D.N.Y. 1997)). Here,

Lead Plaintiff's claims are undeniably typical of the claims of the Class Members because the claims arise out of the same uniform pattern of conduct alleged to be false and are based on the same legal and remedial theories. The Lead Plaintiff stands in the same position as all others who purchased NexCen common stock during the Class Period.

Further, "typical" does not mean identical. *EVCI*, 2007 WL 2230177 at *13. The heart of this requirement is that the representative party and each member of the Class have an interest in prevailing on similar legal claims. Assuming such an interest, particular factual differences, differences in the amount of damages claimed, or even the availability of certain defenses against a class representative may not render his or her claims atypical. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990); *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.*, No. 08 Civ. 10841, 2011 WL 3652477(JSD), at **7-10 (S.D.N.Y. Aug. 22, 2011).

d. Adequacy

Fed. R. Civ. P. 23(a)(4) requires that the representative plaintiff adequately protect the interests of the Class. This requirement has traditionally entailed a two-pronged inquiry: the moving party must show that the interests of the representative parties will not conflict with the interests of Class Members, and that class counsel is qualified, experienced and able to vigorously conduct the proposed litigation. *EVCI*, 2007 WL 2230177 at *13; *In re Ashanti Goldfields Sec. Litig.*, No. CV00-0717(DGT), 2004 WL 626810, at *14 (E.D.N.Y. Mar. 30, 2004). Pursuant to Fed. R. Civ. P. 23(g), adequacy of class counsel is now considered separately from the determination of the adequacy of the class representatives. Both prongs of the adequacy requirement are satisfied here.

As set forth above, Lead Plaintiff has been damaged in the same manner as other Class Members by Defendants' allegedly false and misleading statements during the Class Period. Lead Plaintiff is not subject to any unique defenses, and has vigorously prosecuted his claims in order to recover his own losses as well as the damages suffered by the Class. *See In re Chase Manhattan Corp. Sec. Litig.*, No. 90 Civ. 6092(LJF), 1992 WL 110743, at *2 (S.D.N.Y. May 13, 1992); *see also In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 73 (S.D.N.Y. 2009). Throughout this process, Lead Plaintiff has been involved in the litigation and has conferred with Plaintiff's Counsel concerning every stage of the action, including the Settlement. As Mr. Granatelli has confirmed:

> I have supervised Lead Counsel's work and have monitored and/or participated in all signification developments in this action, including the proposed settlement. I have been informed, involved, and active at every stage of the litigation, beginning with my decision to move for appointment as Lead Plaintiff, and including review of Lead Counsel's work on the amended complaint; reviewing a draft of the opposition to the Motions to Dismiss; reviewing and discussing the mediation statement drafted by Lead Counsel; conferring with counsel telephonically before and throughout the settlement/mediation processes, and approving the terms of the settlement. Lead Counsel sent me, and kept me informed on, several drafts of the settlement documents. . . .
>
> During the course of the action, I conferred with Lead Counsel on a regular basis regarding the action. They gave me periodic updates on the action. I also participated in telephone calls with Lead Counsel to discuss the allegations in the case and the arguments made in the Motion to Dismiss papers. I received from them, and reviewed, the significant pleadings prior to filing. In addition, Lead Counsel spoke to me before any settlement efforts were undertaken, kept me informed of their status, and spoke to me throughout the day of their meeting, and later phone exchanges, with Defense Counsel about possible settlement. When mediation was proposed, I spoke with Lead Counsel before they committed to it. During the mediation, they called me through the day to give me updates and to discuss the status. Then, they spoke with me as the negotiations continued in the following weeks, to tell me of their discussions with the Mediator. They received my approval of the settlement amount before they accepted the offer. As noted, I then received and reviewed several drafts of the settlement stipulation and its exhibits. While the papers were being negotiated, I met in person with Lead Counsel and we discussed them, and the process, among other things.

See Granatelli Decl. ¶¶ 4-5.

Moreover, the requirement of adequacy of representation is amply satisfied by Plaintiff's Counsel, who has extensive experience and expertise in securities class action litigation and are capable of "competently and vigorously prosecuting the litigation." *In re Auction Houses Antitrust Litig*., 193 F.R.D. 162, 165 (S.D.N.Y. 2000). This certainly is true of Plaintiff's Counsel, who have decades of experience in securities class action cases. *See* Mezzetti Decl. Exs. 4 and 5. Plaintiff's Counsel has, *inter alia*, conducted an extensive investigation of both public and non-public sources of information relating to the claims and the underlying events alleged in the Complaint; has researched the applicable law concerning the claims and the potential defenses against them and briefed all the issues raised in the four Motions to Dismiss; consulted accounting experts concerning the alleged GAAP violations of Defendants; consulted with a damages expert to analyze the Class' possible recovery; undertook the several phases of the extensive arm's-length negotiations with Defendants' Counsel in an effort to achieve this Settlement; engaged in confirmatory discovery; and drafted and negotiated the drafts of the Settlement papers. Mezzetti Decl. ¶ 96.

Thus, both prongs of the adequacy requirement are met.

e. <u>The Requirements of Rule 23(b) Also Are Satisfied</u>

In addition to satisfying Rule 23(a), a class action must satisfy the requirements of at least one of the subdivisions of Rule 23(b). In this case, the requirements of Rule 23(b)(3) are met. When "determining whether common questions of fact predominate [for purposes of Rule 23(b)(3)], a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class." *In re Indep. Energy*, 210 F.R.D. at 486. Further, "Rule 23(b)(3) does not require that all questions of law or fact be common; it only requires that the common questions predominate over individual questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981). It is well established that "predominance is a test readily met

in certain cases alleging . . . securities fraud." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)*; see also In re Livent Noteholders Sec. Litig.*, 210 F.R.D. 512, 517 (S.D.N.Y. 2002). Defendants' liability would have to be established or defeated on a class-wide basis, and, accordingly, class issues predominate over individual issues such as individual damage amounts. When considering whether a proposed class is superior for purposes of settlement, a court "need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

Accordingly, the proposed Class should be certified for settlement purposes**.** To Lead Counsel's knowledge, no other litigation has been brought elsewhere on behalf of the same class. In addition, because Class Members are dispersed throughout the country, it is desirable to concentrate the lawsuit in one forum as a class action, as opposed to having thousands of separate trials. In sum, the proposed Settlement Class here meets all of the requirements of Fed. R. Civ. P. 23 and should be finally certified for purposes of settlement. *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 132 (S.D.N.Y. 2008).

f. Lead Counsel Satisfies Rule 23(g) Standards

Rule 23(g) provides that class counsel "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g). Class counsel must be "qualified, experienced and generally able to conduct the litigation." *In re Drexel Burnham Lambert Group, Inc*., 960 F.2d at 291. As noted above, Plaintiff's Counsel is highly qualified in conducting complex litigation, with extensive and very successful experience in securities and other class actions, and has effectively prosecuted this case and negotiated the Settlement on behalf of the Class.

2. Final Approval of the Settlement Should be Granted Because the Proposed Settlement is Fair, Adequate and Reasonable Under the Second Circuit's *Grinnell* Factors

As a matter of public policy, courts strongly favor the settlement of lawsuits. *NYP Holdings, Inc. v. Newspaper and Mail Deliveries' Union of N.Y. and Vicinity*, 485 F. Supp. 2d 416, 419 (S.D.N.Y. 2007). This is particularly true in connection with complex class action litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). When evaluating a proposed settlement under Rule 23(e), a court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate, and was not the product of collusion. *Maywalt v. Parker & Parsley Petro. Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *Varljen v. H.J. Meyers & Co., Inc.*, No. 97 Civ. 6742(DLC), 2000 WL 1683656, at *3 (S.D.N.Y. Nov. 8, 2000); *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. at 132. A proposed class action settlement enjoys a presumption of fairness where, as here, it was the product of arm's-length negotiations conducted by capable counsel who are well-experienced in class action litigation arising under the federal securities laws. *See, e.g., EVCI*, 2007 WL 2230177, at *4; *Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Strougo*, 258 F. Supp. 2d at 257 (quoting *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993) (citation omitted)). The principal factors in evaluating the fairness of a proposed settlement in the Second Circuit are well-settled:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Wal-Mart, 396 F.3d at 117 (quoting *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974)). The determination of whether a settlement is appropriate is addressed to a court's sound discretion but, in weighing these factors, courts recognize that settlements usually involve a significant amount of give-and-take between the negotiating parties; therefore courts do not attempt to rewrite settlement agreements or try to resolve issues that are left undecided as a result of the parties' compromise. *See, e.g.*, *Strougo*, 258 F. Supp. 2d at 257 (quoting *In re Warner Commc'ns Sec. Litig*., 798 F.2d 35, 37 (2d Cir. 1986) ("It is not a district judge's job to dictate the terms of a class settlement.")). Lead Plaintiff submits that the proposed Settlement is fair, reasonable and adequate when measured under these criteria and should be approved by this Court.

a. Complexity, Expense and Likely Duration of the Litigation

Securities class action cases are particularly "difficult and notoriously uncertain" with respect to both liability and damages issues. *See In re Sumitomo Copper Litig.*, 189 F.R.D 274, 281 (S.D.N.Y. 1999); *see also In re WorldCom, Inc. Securities Litigation*, 388 F. Supp. 2d 319, 337 (S.D.N.Y 2005). While Lead Counsel believe the claims alleged in the Complaint are viable, uncertainty in litigation always remains.

The complexity of (and the complications that result from) Lead Plaintiff's claims weigh in favor of the Settlement. As further explained in the Mezzetti Declaration at ¶ 72, this action presents a mosaic of accounting fraud involving numerous accounting issues that would require in-depth analysis of various GAAP provisions, and would require testimony from accounting and potentially other experts.

This action also presents complicated questions concerning the materiality and falsity of NexCen's statements about its business plan (*e.g.* Complaint ¶ 62 "We remain focused on executing our business plan … acquiring … 3 to 5 companies a year") and whether such

statements are forward-looking statements accompanied by meaningful cautionary language. Resolution of these questions would require extensive analysis of the facts and circumstances known by NexCen's management at the time these statements were made. Such an analysis would have required extensive expert discovery on accounting and other issues and extensive discovery of fact witnesses from NexCen and its franchisees. *See* Mezzetti Decl. ¶¶ 63-66. Lead Plaintiff would also have to prove the Defendants' *scienter*, transaction causation, loss causation and damages, the proof of which always carries significant risks. Mezzetti Decl. ¶ 68.

In view of the procedural posture of this action, the costs and duration of the Motions to Dismiss, class certification, more fact and all of the expert discovery, additional motion practice, trial preparation, the trial itself, post-trial motions, and any appeals would vastly exceed the substantial attorney time and money already spent. Moreover, these procedures all would delay any payment to settlement Class members even if Lead Plaintiff prevailed at trial and then on appeal. *See In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 332-33 (E.D.N.Y. 2010); *Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggests that settlement is in the best interests of the Class."); *see also Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 213 (S.D.N.Y. 1992).

Further, the funds available from Defendants were limited -- NexCen is in the process of dissolution, 'and continued protracted litigation would have materially reduced the insurance proceeds available to compensate Class Members. Judge Politan (ret) confirmed this. Politan Decl. ¶ 13. In addition, the Individual Defendants showed that they could not make a substantial contribution to any verdict. Mezzetti Decl. ¶ 14.

b. Adequate Notice and Reaction of the Class

It has been repeatedly held that "one indication of the fairness of a settlement is the lack of or small number of objections." *Strougo*, 258 F. Supp. 2d at 258 (citing *Hammon v. Barry*, 752 F. Supp. 1087, 1093 (D.D.C. 1990)*; see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478-80 (S.D.N.Y. 1998) (approving settlement where "minuscule" percentage of the class objected); *Grinnell*, 495 F.2d at 462 (approving settlement where 20 objectors appeared from group of 14,156 claimants); *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922 (E.D. Mich. 2007) (approving settlement where 80 objectors appeared from a class of 11,000 people). Although the time for objecting to the terms of the Settlement has not yet expired, so far no Class Member has objected to any provision of the Settlement (Mulholland Aff. ¶ 10), which suggests that most Class Members believe that the Settlement should be approved. Indeed, thus far, 137 Class Members have noted that they wish to participate in the Settlement by filing their claim forms.

c. Stage of Proceedings and Discovery Completed

This Settlement was entered into after 2-1/4 years of litigation, during which Plaintiff's Counsel: (i) conducted an extensive factual investigation into the events and circumstances underlying the claims in the Complaint, including interviews of 14 confidential witnesses; (ii) obtained and reviewed NexCen's relevant regulatory filings, press releases and other news reports; (iii) thoroughly researched the law regarding the claims brought against the Defendants and the potential defenses thereto; (iv) retained a damages expert to perform a preliminary analysis of the amount of damages that could be recovered for the Class; (v) consulted with other experts; (vi) briefed oppositions to the four Motions to Dismiss and prepared for the hearing before the Court on them (which was ultimately adjourned to allow the settlement negotiations to continue); and (vii) researched the status of the Company and the effect of its dissolution on the

case and its resolution. *See* Mezzetti Decl. ¶¶ 8, 35. As a result, prior to entering into the Settlement, Lead Counsel had a comprehensive understanding of the strengths and weaknesses of Lead Plaintiff's case. *See Marisol A. v. Giuliani*, 185 F.R.D. 152, 163 (S.D.N.Y. 1999); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (settlement approved where the parties "have a clear view of the strengths and weaknesses of their cases."). Resolution at this stage of the case also maximizes the Class Members' recovery.

d. Risks of Establishing Liability and Damages

In assessing the Settlement, the Court should balance the immediacy and certainty of a recovery for the Class against the continuing risks of litigation. *See In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591-92 (S.D.N.Y. 1992); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. at 741; *see also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 139-40 (S.D.N.Y. 2010). Lead Plaintiff is confident in the sufficiency of his allegations and the merits and value of his claims. Nonetheless, Defendants' presentations to Lead Counsel and its own investigation indicate that Defendants have substantial defenses, particularly with regard to falsity, *scienter*, loss causation, and damages. Lead Plaintiff believes that any of these defenses could be a basis for the Court's dismissal of his claims, either on the Motions to Dismiss, on a motion for summary judgment, or at trial.

One of the main challenges Lead Plaintiff faced in the case was to establish the materiality and falsity of the Company's statements about its business plan of acquiring three to five companies a year, statements made prior to the amendment of credit facility on January 29, 2008. Defendants would argue that there was no liquidity problems at NexCen because from the start of the Class Period until the amendment of the credit facility, the Company's cash position increased throughout 2007 from $37.9 million in the first quarter to $53.3 million at year end,

along with over $39 million of available credit prior to amendment of the loan. They note that the amendment of the credit facility was made to complete the Company's largest acquisition to date, and not to meet expenses or sustain operations. *See In re Ultrafem, Inc. Sec. Litig.*, 91 F. Supp. 2d 678, 687, 700 (S.D.N.Y. 2000) (finding a statement that management believed it had adequate financial resources for 12 months for working capital purposes, not actionable where it was shown that company had adequate financial resources for the same period). Lead Plaintiff also faced the risk that these statements would be found to be immaterial puffery.

Additionally, even if Lead Plaintiff could adequately allege and later prove the materiality and falsity of the statements prior to the amendment of the credit facility, Lead Plaintiff faced the real risk of alleging and then proving loss causation for those statements. Defendants have contended that Lead Plaintiff is unable to prove the causal nexus between those alleged misstatements and the corrective disclosure in the case, the May 19, 2008 announcement, because the announcement only revealed the amendment of the credit facility, which caused NexCen's auditor to issue a going concern qualification. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) ("[A] plaintiff [must] prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss"). Here, the issue of whether the Class Period should extend back as far as alleged has a significant impact on damages. If the Class Period were substantially shortened, the amount of damages that the Class could reasonably have alleged would have been cut significantly, probably by as much as 50%.

Lead Plaintiff would also bear the burden of alleging and later proving *scienter* at trial, and thus proving knowing or reckless conduct. *ATSI Commc'ns, Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). It is a time-consuming and difficult task to plead and eventually prove *scienter*, since defendants rarely confess.

Judge Politan (ret) noted these risks (¶ 10):

> While both categories of misstatements would prove challenging to plead and eventually prove, both Lead Plaintiff and the Defendants correctly recognized the material risks involved in the first category of misstatements, relating to the Company's execution of its business plan. There was a question of whether these statements were forward-looking; whether they constituted immaterial puffery; and whether the statements were made with scienter. Scienter was of particular importance in discussions between the parties because there was no clear indication that Defendants knew or even could have known that the credit facility would be amended in January 2008, when they made their allegedly false statements in 2007. For similar reasons, loss causation as to these statements posed a material risk to Lead Plaintiff because the corrective disclosures concerned only the amendment of the credit facility.

In addition, the Company's Audit Committee hired a law firm to investigate the statements made and actions taken by management; although there was no written report, no action was taken in response, and the Company announced it found no intentional false action by management, which tends to support the conclusion that a jury could find for the Defendants if this case went to trial. *See* Mezzetti Decl. ¶ 39.

Lead Plaintiff also faced risks in establishing the amount of the Class' damages. Proof of damages in a securities fraud case is always difficult and invariably requires highly technical expert testimony. The experts retained by Lead Plaintiff and Defendants no doubt would have widely divergent views as to the range of recoverable damages at trial. Where it is impossible to predict which expert's testimony or methodology would be accepted by the jury, courts have recognized the need for compromise. *See generally In re American Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) (stating that "[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Lead Plaintiff would have fiercely contested each of Defendants' positions on the Motions to Dismiss, motions for summary judgment, at trial, and in possible appeals. Uncertainty about whether Defendants' arguments would prevail, however, would remain risks – indeed, we submit, significant risks – and these risks support the approval of the proposed all-cash Settlement.

e. Range of Reasonableness of the Settlement

Reality dictates that, in order to settle a case, some discount needs to be offered to the defendants or they would otherwise have no economic incentive to settle. In addition, in the context of a factually and legally complex securities class action lawsuit such as this, responsible class counsel cannot be certain that they will be able to obtain a judgment at or near the full amount of the class-wide damages. Thus, the possibility that a class "might have received more if the case had been fully litigated is no reason not to approve the settlement." *Strougo*, 258 F. Supp. 2d at 260 (quoting *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1206 (6th Cir. 1992) (citation omitted)).

"The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455 (footnote omitted); *accord In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006). "In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2; *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically recovered "between 5.5% and 6.2% of the class members' estimated losses"" (citation omitted)). Courts agree that the determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. *In re*

PaineWebber, 171 F.R.D. at 130; *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989).

In this case, Lead Counsel retained a damages expert (RSA Group, Inc.) who, based on work completed for purposes of the settlement discussions and mediation, concluded that under the Class' best case damages scenario (which assumes that Lead Plaintiff would be successful in opposing Defendants' arguments and prevail on *every* claim), the maximum recoverable damages in this case would be $36.7 million. Mezzetti Decl. ¶ 16. The expert reached this conclusion after conducting an event study analysis to determine whether the alleged false and misleading information and omissions affected 'NexCen's stock price and/or were material to investors. The Settlement Amount of $4,000,000 represents approximately 10.9% of the total recovery in the *best* possible outcome of this action.[6] The Defendants disputed this calculation and suggested that Lead Plaintiff and the Class suffered no damages attributable to their actions.

Given the numerous obstacles and risks to be overcome to achieve a recovery at trial in the case, a recovery of 10.9% of estimated damages is substantial. Further, it compares favorably to the "average 5.5%-6.2% of estimated losses recovered in securities fraud class [action] settlements since 1995" and falls well within the range of what constitutes a fair and adequate settlement. *In re Charter Commc'ns, Inc. Sec. Litig.*, Nos. MDL 1506, 4:02-cv-1186

[6] This percentage recovery somewhat understates the total percentage recovery by the Class because the 10.9% calculation does not take into account the fact that the Willow Creek entities will be excluded from the Class.' *See also* Politan Decl. ¶ 11 ("During the negotiations, counsel for Lead Plaintiff continuously took the position that the Willow Creek entities could not participate in the class settlement since they could (and did) receive a settlement from their private litigation and therefore stood in a different position from the rest of the proposed Class. The negotiation of the class action settlement was based on this position and the settlement agreements for both cases made this term clear.").

CAS, 2005 WL 4045741, at *6 (E.D. Mo. June 30, 2005) (citing *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001)).

The Settlement also compares favorably to analyses included in a December 2010 study by NERA (National Economic Research Associates, Inc.) and a 2009 study released by Cornerstone Research. The 2010 NERA study indicated that the median ratio of "settlements to investor losses" in 2010, 2009 and 2008, were, respectively, 2.4%, 2.5% and 2.7%. *See* Jordan Milev, *et. al., Trends 2010 Year-End Update*, at 25, Figure 23 (NERA Economic Consulting 2010), attached as Ex. 7 to the Mezzetti Decl. The 2009 Cornerstone Research report found that post-PSLRA securities class action settlements overall from 2002 through 2008 recovered a median of 2.9% of plaintiffs' estimated damages. *See* Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2009 Review and Analysis*, at 5 (Cornerstone Research 2010), attached as Ex. 8 to the Mezzetti Decl. All settlements during 2009 recovered 2.3% of damages. *Id.*

Thus, viewed as a percentage of the best possible recovery at trial, this Settlement provides the Class with a recovery significantly greater than the median settlements in such cases. Lead Plaintiff submits that a settlement of such magnitude is more than reasonable in light of the best possible recovery and the risks of litigation. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 242 & n.22 (3d Cir. 2001) (noting that approved settlement recoveries in securities class actions typically range from 1.6% to 14% of claimed damages); *see also In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 98 (D. Mass. 2005) ("[t]he evaluating court must . . . 'guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for

certainty and resolution." (alterations in original) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995)).

Moreover, the Settlement provides for payment to Class Members now and without delay, rather than some wholly-speculative payment of a hypothetically-larger amount years down the road. "[M]uch of the value of a settlement lies in the ability to make funds available promptly." *Aramburu v. Healthcare Fin. Servs., Inc.*, No. 02-CW-6536, 2009 WL 1086938(MDG), at *5 (E.D.N.Y. Apr. 22, 2009) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985)).[7]

Further, although additional litigation could theoretically result in a large trial award, such a process would have cost the Defendants millions of dollars worth of litigation expenses (they are represented by three large international law firms), depleting the available insurance. Such a result might have been a pyrrhic victory with no promise of recovering any personal assets of the Individual Defendants (and no opportunity to recover from the dissolved Company). No greater settlement amount was available in this negotiation (Politan Decl. ¶ 15; Mezzetti Decl. ¶ 48) and the possibility of greater recovery than provided by the Settlement is very uncertain at best. *See, e.g., In re American Bank Note*, 127 F. Supp. 2d at 427.

Given the obstacles and uncertainties attendant to this complex litigation, Lead Plaintiff submits that the Settlement is well within the range of reasonableness, and is unquestionably better than the possibility of no recovery at all.

[7] If the case proceeded to trial, both sides would have performed more extensive analyses and their trial experts could have reached different conclusions, either higher or lower, from the figures used in the settlement and mediation negotiations.

f. The Settlement Resulted From Arm's-Length Negotiations

The experience and reputation of the parties' counsel and the arm's-length nature of the negotiations is entitled to great weight. *See, e.g., Wal-Mart*, 396 F.3d at 116 (quoting *Manual for Complex Litigation, Third* § 30.42 (1995)) ("A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'"); *American Bank Note*, 127 F. Supp. 2d at 428 ("Courts have looked to ensure that the settlement resulted from arm's-length negotiations between counsel possessed of experience and ability necessary to effective representation of the class's interests" (quotations omitted)).

The record demonstrates the procedural fairness on which the Settlement is based. It is the result of lengthy negotiations between Plaintiff's Counsel and Defendants' Counsel. *E.g.*, Politan Decl. ¶ 14; Mezzetti Decl. ¶ 10. The attorneys on both sides are experienced and thoroughly familiar with the factual and legal issues, as evidenced by the procedural history of the case and the issues briefed before the Court. Two days of settlement discussions took place, including with Judge Politan (ret), followed by subsequent negotiations overseen by him. Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See Sumitomo*, 189 F.R.D. at 280 ("when settlement negotiations are conducted at arm's length, "'great weight"' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation") (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. at 125); *In re Salomon Inc. Sec. Litig.*, 91 Civ. 4442, 1994 U.S. Dist. LEXIS 8038, at *39 (S.D.N.Y. June 15, 1994) (judgment of experienced counsel "weighs in favor of the proposed settlement"); *Newberg on Class Actions* § 11.41.

Here, Judge Politan (ret) also recommends the Settlement for approval by the Court. Politan Decl. ¶ 16.

Thus, Lead Plaintiff and his Counsel urge final approval of the proposed Settlement based upon their experience, their knowledge of the strengths and weaknesses of the case, their analysis of what their investigation has uncovered to date, the likely recovery at trial and on appeal, and all the other factors considered in evaluating proposed class action settlements.

B. The Plan of Allocation of the Net Settlement Fund Is Fair, Reasonable, and Adequate and Should Be Approved

"Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate." *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 262 (D.N.H. 2007) (citing *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)). The standard for approval of a plan of allocation is not rigorous. "When formulated by competent and experienced class counsel," a plan of allocation "need have only a 'reasonable, rational basis."' *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (citation omitted). A reasonable plan of allocation may consider the relative strengths and values of different categories of claims and class members. *Id.*; *see also In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003) (asserting that courts "generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable").

The Net Settlement Fund will be distributed to Authorized Claimants – *i.e.*, members of the Class who submit timely and valid Proofs of Claim – in accordance with the Plan of Allocation set forth in the Notice. The Plan of Allocation treats all Class Members in a similar manner: everyone who submits a valid and timely claim, and who has not excluded himself, herself or itself from the Class, receives a *pro rata* share of the Net Settlement Fund in the proportion that the Class Member's recognized loss bears to the total of all recognized losses. The "Recognized Loss," as used in the Plan, is not market loss. Rather, it is a calculation used to

arrive at a weighted loss figure for the purpose of calculating an Authorized Claimant's *pro rata* participation in the Net Settlement Fund.

The Plan of Allocation, which was developed in consultation with Lead Plaintiff's damages consultant, reflects Lead Plaintiff's allegations that the price of NexCen's common stock was artificially inflated during the Class Period because of Defendants' materially false and misleading statements concerning the Company and its results, and that the truth regarding those facts leaked out to the market, correcting that artificial inflation.

Consistent with *Dura Pharm., Inc.*, Class Members who both purchased and sold shares prior to any corrective disclosure (so-called "in-and-out" traders) have no Recognized Loss under the Plan of Allocation. Other Class Members' damages are calculated based on when they purchased and their sales price or the PSLRA look-back value.

This Plan of Allocation is similar to the plans calculated and used in other securities law class actions, and is based on the facts of the case and the opinion of an expert. No Class Member, to date, has objected to it. Lead Plaintiff respectfully submits that it should be approved by the Court.

C. The Court Should Grant Plaintiff's Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses

Through their litigation efforts, Plaintiff's Counsel have obtained the benefit of $4,000,000 in cash for the Class. The Settlement Amount has been fully funded, has accrued interest since July, and represents the culmination of Lead Counsel's litigation efforts since this Court approved Mr. Granatelli's selection of Lead Counsel in March 2009.

As compensation for these successful efforts, Lead Plaintiff respectfully requests that the Court (1) award attorneys' fees to Plaintiff's' Counsel of $1,200,000, 30% of the Settlement Amount, and (2) order reimbursement of Plaintiff's' Counsel's litigation expenses out of the

Settlement Amount in the amount of $63,855.05. Lead Plaintiff also requests payment of the Claims Administrator's expenses in the amount of $ $33,977.02. Mulholland Decl. ¶ 12.

The requested award of attorneys' fees and expenses is reasonable and appropriate under all applicable standards and factors to be considered. Both the Lead Plaintiff and Judge Politan (ret) believe it is fair and reasonable. *See* Granatelli Decl. ¶ 7; Politan Decl. at ¶ 16. Lead Plaintiff and Plaintiff's' Counsel respectfully submit the petition should be granted.

1. The Requested Fee Is Fair Under the Percentage-of-Recovery Method and the Second Circuit's *Goldberger* Factors

The Supreme Court consistently has held that the percentage of recovery approach is a correct method for determining attorneys' fees in common fund cases. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585-86 (S.D.N.Y. 2008); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class"). District Courts in the Second Circuit also use the percentage of the recovery method in common fund cases. *See In re Arakis Energy Corp. Sec. Litig.*, No. 95 Civ. 3431 (ARR), 2001 WL 1590512 (E.D.N.Y. Oct. 31, 2001); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 Civ. 4318 HB, 2001 WL 709262, at *4 (S.D.N.Y. June 22, 2001) ("use [of] the percentage method is consistent with the trend in the Circuit.").

In *Goldberger*, the Second Circuit examined the history of the alternative methods for calculating attorneys' fees and expressly approved use of the percentage of recovery method in awarding fees from a common fund. 209 F.3d at 50. The trend within this Circuit and this District is to utilize the percentage of recovery approach when awarding attorneys' fees in common fund cases. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (stating that "the trend [is] in favor of the percentage-of-recovery approach ... within this district"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (citing

Goldberger, 209 F. 3d at 50, and noting "the trend within this Circuit is to use the percentage of recovery method to calculate fee awards to class counsel" in common fund cases); *In re Bayer AG Secs. Litig*., No. 03 Civ. 1546 (WHP), 2008 WL 5336691 (S.D.N.Y. Dec. 15, 2008).

In determining a reasonable fee under the percentage of recovery approach, courts look to the following factors: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *In re AOL Time Warner Inc. Sec. & "ERISA" Litig.*, MDL No. 1500 (SWK), 2006 U.S. Dist. LEXIS 78101, at *31 (S.D.N.Y. Sept. 28, 2006) (citing *Goldberger*, 209 F.3d at 50, quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989)). Each of these factors supports the fee request here.

a. Time and Labor Expended By Counsel

As set forth in the Mezzetti Declaration, Plaintiff's Counsel expended 2,011.49 hours for an aggregate lodestar of $941,677 in the litigation of this case. Mezzetti Decl.¶ 94, & Exs. 5 and 6. Plaintiff's Counsel, among other things: (i) conducted an extensive factual investigation into the events and circumstances underlying this action and drafted the Complaint; (ii) obtained and reviewed NexCen's relevant regulatory filings, press releases and other news reports; (iii) thoroughly researched the law regarding the claims brought against the Defendants and the potential defenses thereto; (iv) drafted the opposition to Defendants' four Motions to Dismiss; (v) consulted with their damages expert to analyze the amount of damages recoverable from the Defendants on behalf of the Class; (vi) consulted with accounting experts; (vii) engaged in the extensive settlement discussions, including the two days of meetings, and the discussions in the weeks before and after those meetings; (viii) prepared the mediation statement; (ix) negotiated and drafted several rounds of all the relevant settlement documents including the Stipulation,

Preliminary Approval Order and the notice documents; and (x) engaged in confirmatory discovery. *See* Mezzetti Decl. ¶ 96. Moreover, these reported hours and lodestar do not include the work to prepare this memorandum and the papers in support of the Motion for Final Approval of the Settlement (and, of course, it does not include any time expended on any fee or expense issue). Mezzetti Decl. ¶ 94. Plaintiff's Counsel will spend additional time preparing reply papers on any objections, preparing for and attending the Court's December 2 Hearing, and in supervising the Administrator's work on the claims processes and distribution of the Net Settlement Fund. Accordingly, the time and labor expended by Plaintiff's Counsel here amply supports the requested fee.

b. The Magnitude and Complexities of the Litigation

As discussed above and in the Mezzetti Declaration ¶ 72, all securities class actions are complex and detailed, and this action involves numerous complicated factual and legal issues.

c. The Risks of the Litigation

Although Lead Plaintiff believes that this action has significant merit, the risks of any litigation and the particular risks here (discussed above and in the Mezzetti Declaration), meant that the prospect of a favorable verdict was far from assured. As noted, Lead Plaintiff faced potential difficulty in proving liability, *scienter*, and damages. In particular, questions remain on Lead Plaintiff's ability to show fraud as to the Company's statements prior to the amendment of the credit facility in January 2008. Without the inclusion of those alleged misstatements, the scope of this case would have been vastly narrowed. Cases far less complex than this action have been lost on motion, at trial, or on appeal. As stated in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971):

> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

The Second Circuit explicitly recognizes that the attorneys' "risk of litigation" is an important factor to be considered in making an appropriate fee award. In *Grinnell*, the Second Circuit explained:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

Grinnell, 495 F.2d at 470-71 (quoting *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)). There are numerous cases where plaintiffs' counsel have spent thousands of hours and received no payment. Plaintiff's' Counsel took on this case despite those risks, and this should be calculated into the fee that is awarded to them.

d. <u>The Quality of Representation</u>

The result achieved and the quality of the services provided are also important factors to be considered in determining the amount of reasonable attorneys' fees under a percentage of the fee analysis. *See Goldberger*, at 209 F.3d at 50; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. at 748-49. Despite the significant risk of diminished or no recovery in this action, as a result of the high quality legal representation provided by Plaintiff's Counsel, a substantial cash settlement was secured for the Class and (as shown above) it compares favorably with the history of settlements of securities class actions.

The standing and prior experience of Plaintiff's Counsel is relevant in determining fair compensation. *See, e.g.*, *Grinnell*, 495 F.2d at 470; *Global Crossing*, 225 F.R.D. at 466; *Eltman v. Grandma Lee's Inc.*, No. 82 Civ. 1912, 1986 WL 53400, at *8(E.D.N.Y. May 28, 1986). The Mezzetti Declaration includes the firm resumes of Cohen Milstein and The Rosen Law Firm (attached to the Mezzetti Declaration as Ex. 4 and as an attachment to Ex. 5, respectively). As their firm resumes demonstrate, Plaintiff's Counsel are highly experienced in the specialized field of securities litigation, bringing decades of experience to the case and for the benefit of the Class. They utilized and relied on all of this experience in achieving this Settlement.

The quality and vigor of opposing counsel is also important in evaluating the services rendered by plaintiffs' counsel. *See, e.g., Warner Commc'ns*, 618 F. Supp. at 749. Here, the Defendants were represented by experienced and aggressive counsel. No issue was ignored, and no argument was left out of the Motions to Dismiss or the settlement discussions. The fact that Plaintiff's Counsel achieved this Settlement for the Class in the face of substantial legal opposition further evidences the quality of their work.

e. <u>The Requested Fee in Relation to the Settlement</u>

The fee request of 30% of the Settlement Amount, with a resulting multiplier of 1.27, is well within the percentage range that courts in this Circuit, and in this District Court, have awarded in similar securities class action settlements of this size. *See, e.g.*, *Fogarazzo v. Lehman Brothers*, No. 03 Civ. 5194, 2011 WL 671745, at *4 (S.D.N.Y. 2011) (awarding 33-1/3% of the $2,250,000 settlement fund); *In re Veeco Instruments, Inc. Secs. Litig.*, No. 05 Civ. 01695 (CM), 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007) (30% of $5.5 million); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 WL 31720381 (S.D.N.Y. Dec. 4, 2002) (awarding 33-1/3% of $2,795,000 settlement fund); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (one-third fee of $7.8 million is "well within the range accepted by courts in

this circuit"); *Berchin v. General Dynamics Corp.*, No. 93 Civ. 1325 (JSM), 1996 WL 465752 at *2 (S.D.N.Y. Aug. 14, 1996) (33% of first $3 million); *Del Global*, 186 F. Supp. 2d at 370 (awarding 33-1/3% of $11.5 million settlement fund); *Adair v. Bristol Tech. Sys., Inc.*, No. 97 Civ. 5874 RWS, 1999 WL 1037878, at *3 (S.D.N.Y. Nov. 16, 1999) (33%); *Klein ex rel. IRA v. PDG Remediation, Inc.*, No. 95 Civ. 4954 (DAB), 1999 WL 38179, at *3-4 (S.D.N.Y Jan. 28, 1999) (33%); *Cohen v. Apache Corp.*, No. 89 Civ. 0076 (PNL), 1993 WL 126560, at *1 (S.D.N.Y. Apr. 21, 1993) (awarding of one-third of $6,750,000 settlement fund); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (upheld fee award of 33.3% of $1.725 million settlement); *Davis v. J.P. Morgan Chase & Co.*, No. 01-CV-6492L, 2011 WL 4793835, at *9, 11 (W.D.N.Y. 2011) (awarding 33-1/3% of the settlement in FLSA litigation); *In re StockerYale, Inc. Secs. Litig.*, No. 05cv00177-SM, 2007 WL 4589772, at *6 (D.N.H. Dec. 18, 2007) (33% of $3.4 million settlement fund); *Smith v. Dominion Bridge Corp.*, No. 96-7580, 2007 WL 1101272, at *10 (E.D. Pa. Apr. 11, 2007) (33% of $750,000).

Thus, under the percentage of recovery approach, the fee Plaintiff's Counsel seeks is fair and reasonable in a litigation of this kind and consistent with the decisions of courts in this Circuit.

f. Public Policy Considerations

Private lawsuits serve to further the objective of the federal securities laws to protect investors and consumers against fraud and other deceptive practices. *See MetLife Demutualization*, 689 F. Supp. 2d at 363; *Eltman*, 1986 WL 53400, at *8. As a practical matter, those lawsuits can be maintained only if competent counsel can be obtained to prosecute them. *MetLife Demutualization*, 689 F. Supp. 2d at 363. Competent counsel can be obtained if courts award reasonable and adequate compensation for their services where successful results are achieved. "To make certain that the public is represented by talented and experienced trial

counsel; the remuneration should be both fair and rewarding." *Eltman*, 1986 WL 53400, at *8. Public policy thus supports the award of the attorneys' fees requested here.

For all of the reasons set forth above, including the result achieved for the Class, as well as the substantial efforts and considerable expenses undertaken on a contingent fee basis in a risky case, Lead Plaintiff and Plaintiff's Counsel respectfully request that the Court grant an attorneys' fee award of 30% of the Settlement Amount.

2. The Legal Standards Applicable to An Award of Attorneys' Fees

The Supreme Court has long recognized that where counsel's efforts have created a "common fund" for the benefit of a class, counsel should be compensated from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)*; see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885). Courts in this Circuit agree. *See, e.g., Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 84 (E.D.N.Y. 2002).

Awards of attorneys' fees from a common fund serve the dual purpose of encouraging representatives to seek redress for damages caused to an entire class of persons, as well as discouraging future misconduct of a similar nature. *Levinson v. About.Com Inc.*, No. 02 Civ. 2222 (DAB), 2010 WL 4159490, at *3 (S.D.N.Y. Oct. 7, 2010); *Dolgow v. Anderson*, 43 F.R.D. 472, 481-84 (E.D.N.Y. 1968). The Supreme Court has "long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (citing cases); *see also Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980) (holding class actions have important role of "vindicating the

rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost"); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)) (finding private actions "provide '"a most effective weapon in the enforcement'" of the federal securities laws and are '"a necessary supplement to [SEC] action'""").

Similarly, the Second Circuit has long held that a party that has secured a benefit on behalf of a class of individuals is entitled to recover its costs, including reasonable attorneys' fees, from the common fund created as a part of the settlement agreement. *See Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 86 (2d Cir. 2010); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999). This common fund doctrine is designed to prevent the unjust enrichment of class members who benefit from a lawsuit without paying for its costs. *See Boeing Co.*, 444 U.S. at 478:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole. . . . Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

3. Requested Fee is Reasonable Under the Lodestar "Cross-Check"

This Court may also consider whether the requested fee determined under the percentage approach is consistent with an award that would result under the lodestar/multiplier approach. *AOL Time Warner*, 2006 U.S. Dist. LEXIS 78101, at *40 (describing this second analysis as the "lodestar cross-check"); *Twinlab*, 187 F. Supp. 2d at 85.

The Second Circuit has encouraged the practice of performing this lodestar "cross-check" on the reasonableness of a percentage fee award. When doing so, however, the hours

documented "need not be exhaustively scrutinized." *Goldberger*, 209 F. 3d at 50. The lodestar/multiplier method involves calculating the product of the number of hours worked and counsel's respective hourly rates -- the "lodestar" -- and adjusting it for contingency, risk and other factors by applying a "multiplier" to the lodestar. *Grinnell*, 495 F.2d at 470-71.

As set forth in the Mezzetti Declaration, Plaintiff's Counsel expended 2,011.49 hours for lodestar of $941,677 in the litigation of this case. Mezzetti Decl. ¶ 94.[8] The lodestar multiplier -- the requested 30% fee divided by the lodestar – is 1.27. This multiplier is within the lower

[8] The Second Circuit has explained that the hourly rates to be applied in calculating the lodestar are "what a reasonable, paying client would be willing to pay." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany and Albany Cnty. Bd. of Elections*, 522 F.3d 182, 184 (2d Cir. 2008). Pursuant to the "forum rule," reasonable hourly rates are those normally charged for similar work by attorneys of comparable skill and experience in the District where the Court sits. *Id.* at 185; *see also Savoie*, 166 F.3d at 460; *Luciano v. Olsten Corp.*, 109 F.3d 111, 115-16 (2d Cir. 1997) (holding "[t]he lodestar figure should be 'in line with those [rates] 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (finding that an appropriate rate in performing lodestar analysis is "the rate 'normally charged for similar work by attorneys of like skill in the area,' taking into account factors such as the experience of the attorney performing the work and the type of work performed") (quoting *City of Detroit v. Grinnell Corp. of Am.*, 560 F.2d 1093, 1098 (2d Cir. 1977)). Further, the Supreme Court and Second Circuit have both approved the use of current rates in the lodestar calculation to "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *Union Carbide Corp*, 724 F. Supp. at 163 (quoting *In re Generics Corp. Sec. Litig.*, No. 75 Civ. 6295, 1980 U.S. Dist. LEXIS 15730, at *6 (S.D.N.Y. Dec. 4, 1980)); *Mo. v. Jenkins*, 491 U.S. 274, 284 (1989). The best indicators of the "market rate" for plaintiffs' securities class action counsel are the rates charged by New York and Washington, D.C. firms, including those that defend class actions on a regular basis. *See, e.g.*, *Blum*, 465 U.S. at 895; *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (asserting that "market standards should prevail"); *In re Cont'l Ill. Sec. Litig*., 962 F.2d 566, 568 (7th Cir. 1992) ("[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order.") (holding that district court committed legal error in placing "a ceiling of $175 on the hourly rates of all lawyers for the class, including lawyers whose regular billing rates were almost twice as high"); *Telik.*, 576 F. Supp. 2d at 589 (asserting the standard for proper hourly rate is the "rate charged in the community where the services were performed for the type of service performed by counsel"); *EVCI*, 2007 WL 2230177, at *17 n.6 (holding the market rate applied is the hourly rate in the community where counsel practices); *Strougo*, 258 F. Supp. 2d at 263 (holding the hourly rate applied is the rate that is normally charged in the community where counsel practices). The rates of counsel here are in-line with the general rates of firms practicing on both sides of the aisle in securities class action litigation.

range of lodestar multipliers approved by Courts in this Circuit and further demonstrates the reasonableness of the requested fee. *See Davis*, 2011 WL 4793835, at *11 (finding a lodestar multiplier of 5.3 reasonable); *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207, 2010 WL 3119374, at *6 (S.D.N.Y. 2010) (holding a lodestar multiplier of 2.05 reasonable); *In re Comverse Technology, Inc. Securities Litigation*, No. 06-CV-1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (finding a lodestar multiplier of 2.78 "well within the range awarded"); *Telik*, 576 F. Supp. 2d at 590 (holding that a lodestar multiplier of 1.6 to be low in contingent litigation where "lodestar multiples of over 4 are routinely awarded by courts"). As Judge McMahon noted, "[l]odestar multipliers of nearly 5 have been deemed 'common' by courts in this District." *EVCI*, 2007 WL 2230177, at *17, n.7 (citing cases); *see also In re AT&T Corp.*, 455 F.3d at 173 (reaffirming prior holding that 2.99 multiplier was reasonable in case that lasted "four months, 'discovery was virtually nonexistent'").

4. Plaintiff's Counsel's Request for Reimbursement of Litigation Expenses Also Is Appropriate and Should Be Granted

Plaintiff's Counsel further requests that the Court grant their request for reimbursement of $63,855.05 in litigation costs and expenses incurred by them in connection with the prosecution of this Action. *See* Mezzetti Decl. ¶ 105 & Exs. 5 and 6. So far no Class Member has objected to the request for reimbursement of expenses set forth in the Notice ("up to $70,000"). The expenses are detailed by category for each law firm in their respective declarations. *See* Mezzetti Decl., Exs. 5 and 6.

Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses. *See Telik*, 576 F. Supp. 2d at 587-88; *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993); *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987); *In re Merrill Lynch Tyco Research Sec. Litig.*,

249 F.R.D. at 143. Plaintiff's' Counsel further submits that these expenses, which include costs such as expert, investigator and consultant fees; mediation fees; electronic legal research; photocopying; postage; and transportation and other travel costs are the type for which "'"the paying, arms' length market'" reimburses attorneys and should therefore be reimbursed from the Settlement Amount. *See Global Crossing*, 225 F.R.D. at 468 (citation omitted).

IV. CONCLUSION

For all of the foregoing reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Settlement, the Plan of Allocation, and his motion for award of counsel fees and reimbursement of expenses.

Dated: November 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on November 1, 2011.

/s/ Catherine A. Torell