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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN RE ALLERGAN, INC. PROXY VIOLATION DERIVATIVES LITIGATION	Case No. 2:17-cv-04776 DOC (KESx) The Hon. David O. Carter CLASS ACTION **PLAINTIFF TIMBER HILL LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: February 26, 2018 Time: 8:30 a.m. Place: Courtroom 9D

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I. INTRODUCTION

Class Counsel respectfully submits this Memorandum of Points and Authorities in Support of Plaintiff's Application for Preliminary Approval of Class Action Settlement and Approval of Form and Manner of Class Notice. After hard fought litigation, Timber Hill, LLC ("Timber Hill") and Defendants have reached a proposed settlement of this action, which is set forth in the parties' Stipulation and Agreement of Settlement (the "Stipulation"), dated January 26, 2018, which has been submitted to the Court for preliminary approval. The parties also seek approval of the form and manner of providing notice to the Class of the proposed Settlement and matters relating thereto.[1] The Settlement, if approved by the Court, will establish a cash settlement fund of $40 million for the benefit of the Class and will resolve all claims against Defendants in the *Timber Hill* action.

II. BACKGROUND OF THE SETTLEMENT

On June 28, 2017, a class action complaint, currently captioned *In re Allergan, Inc. Proxy Violation Derivatives Litigation* (the "Action"), was filed in this Court on behalf of all persons or entities that sold Allergan call options, purchased Allergan put options and/or sold Allergan equity forward contracts from February 25, 2014 through April 21, 2014, inclusive. Timber Hill alleged Defendants violated the federal securities laws through their illicit insider trading and front-running scheme that financially damaged Timber Hill and similarly situated investors by artificially deflating the value of the underlying security and the options and equity forwards traded by Timber Hill and Class Members.

Timber Hill's allegations are also the subject of another related action, *In re Allergan, Inc. Proxy Violation Securities Litigation*, Case No. 8:14-cv-2004-DOC (KESx) ("the Common Stock Class Action"), filed in this District on December 16, 2014. In that action, on March 15, 2017, the Court issued an order ("Class

[1] All capitalized terms used in this memorandum are as defined in the Stipulation.

Certification Order") certifying a class (the "Common Stock Class") consisting of: "All persons who sold Allergan common stock contemporaneously with purchases of Allergan common stock made or caused by Defendants during the period February 25, 2014 through April 21, 2014, inclusive and were damaged thereby." In certifying the Common Stock Class, the Court also denied Defendants' separate motion to dismiss for failure to join necessary parties under Federal Rule of Civil Procedure 19(a)(1)(B)(i). In so doing, the Court concluded that derivatives traders "can also be given notice the same time the Class members are given notice of this lawsuit meaning they will have notice and opportunity to intervene to bring their own claims before the case is resolved."

On April 28, 2017, the plaintiffs in the Common Stock Class Action filed a motion seeking approval of notice to the class of the pendency of the Common Stock Class Action. On June 5, 2017, the Court issued an Order denying the plaintiffs' motion for an order approving the class notice, recognizing that "[t]he derivatives traders' potential interests seem more analogous to those of dropped class members, who may have valid claims, but whose claims will not be pursued through this litigation." Case No. 8:14-02004-DOC-KESx, Dkt. 348 at 4. The Court further noted that "the derivatives traders may have a stronger interest than absent class members, as their hypothetical claims may be essentially precluded if Plaintiffs prevail here." *Id.* at 5. In this regard, the Court also held that if the plaintiffs "recover all of Defendants' gains or losses avoided that there will be nothing left for others to recover who were allegedly harmed by Defendants conduct." *Id.* On June 12, 2017, the plaintiffs in the Common Stock Class Action filed a motion seeking the Court's approval of a modified Notice and Summary Notice of Pendency of Class Action. Dkt. 359. On June 14, 2017, the Court issued an Order approving the plaintiffs' modified Notice and Summary Notice, finding that the notices "satisfactorily incorporate reference to the likelihood of a damages cap" pursuant to the Court's June 5, 2017 Order. Dkt. 363.

On July 31, 2017, Timber Hill filed a motion for relief from the PSLRA's discovery stay, Dkt. 41, which this Court granted on August 9, 2017, Dkt. 49. Class Counsel have had complete access to most of the discovery taken in the Common Stock Class Action, diligently reviewed that discovery in preparation for pretrial proceedings and trial, and have worked with experts to analyze plaintiff's claims. Seltzer and Entwistle Decl. ¶ 3.[2] Class Counsel also used predictive coding to conduct searches that were targeted by custodian, date range, and/or keyword. *Id.* ¶ 5. While Class Counsel did not manually review every document produced, we reviewed all of the relevant and material documents in each production in their entirety with computer assistance and incorporated the results into proof outlines, chronologies and hot document outlines. *Id.* Class Counsel also reviewed over 15,000 Timber Hill documents for relevance and privilege in anticipation of discovery requests, using broad parameters for relevance. *Id.* ¶ 6. Finally, Class Counsel worked with a team of experts from the Massachusetts Institute of Technology to assess damages on a class-wide basis. *Id.* ¶ 7.

On October 13, 2017, the Court appointed Susman Godfrey L.L.P. and Entwistle & Cappucci LLP as Interim Co-Lead Counsel. Dkt. 63. Subsequently, the Court ordered briefing in this case and the Common Stock Class Action regarding how damages should be allocated among classes in light of the damages cap of Section 20A. After submitting multiple briefs on this issue and participating in the hearing on the motion for allocation of damages, the parties resolved the case. On December 28, 2017, following multiple lengthy mediation sessions with Judge Phillips and Gregory Lindstrom, conducted in person and by telephone, Timber Hill and Defendants entered into a binding Memorandum of Understanding to settle the Action for $40 million in cash. Prior to agreeing to settle the Action,

[2] "Seltzer and Entwistle Decl." refers to the Joint Declaration of Marc Seltzer and Andrew Entwistle, filed concurrently herewith. Additionally, "Cirami Decl." and "Cappucci Decl." refer to the declarations of Stephen J. Cirami and Robert Cappucci, also filed concurrently herewith.

Timber Hill, through Class Counsel, conducted a thorough investigation of the claims, defenses, and underlying events and transactions that are the subject of the Action. This investigation and Class Counsel's efforts included, among other things: (i) review and analysis of the evidence and applicable law, including the review and analysis of hundreds of thousands of pages of documents produced by Defendants and third parties; (ii) consultation with multiple experts retained by Class Counsel; and (iii) engaging in motion practice.

Defendants have denied and continue to deny any wrongdoing or that they committed any act or omission giving rise to any liability or violation of the law. Defendants have denied and continue to deny each and every one of the claims alleged by Timber Hill in the Action, including all claims asserted in Timber Hill's complaint. Timber Hill and Class Counsel believe that the claims asserted in the Action have merit and that the evidence developed to date supports the claims asserted. However, Timber Hill and Class Counsel recognize and acknowledge the expense, uncertain outcome, and risk of any litigation, especially in complex actions such as this Action, as well as the difficulties and delays inherent in such litigation. Timber Hill and Class Counsel are also mindful of the inherent problems of proof and possible defenses to the claims alleged in the Action. Based on their evaluation, Timber Hill and Class Counsel believe that the Settlement set forth in this Stipulation confers substantial monetary and other benefits upon the Class and is in the best interest of Timber Hill and the Class.

III. DESCRIPTION OF THE PROPOSED SETTLEMENT

The Stipulation and the exhibits thereto provide all of the material details of the Settlement terms. Below is a summary of the salient provisions contained in those documents.

A. The Settlement Class.

The Settlement Class is comprised of all persons and entities who transacted in derivative securities that are price-interdependent with Allergan, Inc.'s publicly

traded common stock ("Allergan Derivatives") from February 25, 2014 through April 21, 2014, inclusive (the "Class Period"), excluding the Defendants, the officers and directors of Defendants during the Class Period; members of the immediate family of the individual Defendants and of the excluded officers and directors; any entity in which any Defendant, any excluded officer or director, or any member of their immediate family has or had a controlling interest; any affiliates, parents or subsidiaries of the Defendants; and the legal representatives, agents, affiliates, heirs, successors or assigns of any of the foregoing, in their capacities as such. Also excluded from the Class are Nomura Holdings, Inc., Nomura Securities International, Inc., Nomura International plc, and their affiliates, parents, subsidiaries and successors. Also excluded from the Class is any Person who would otherwise be a Class Member but who excludes himself, herself, or itself from the Class by submitting a valid and timely request for exclusion from the Class in accordance with the requirements set forth in the Notice.

B. The Settlement Benefits.

In full settlement of the claims asserted in the Action against the Defendants and in consideration of the releases specified in ¶¶ 3 and 4 of the Stipulation, Defendants are in the process of depositing $40,000,000 into the Escrow Account.

C. The Claims Process.

To qualify for a payment, a Class Member must timely and validly submit a completed Proof of Claim, which will be distributed as detailed in Section V.A. Any Class Member may also obtain a Proof of Claim on the Internet at the website maintained by the Claims Administrator. The Claims Administrator will establish a toll-free number that Class Members can use to ask questions about the Settlement.

D. Calculation and Payment.

The Net Settlement Fund will be distributed to the Authorized Claimants. An "Authorized Claimant" is a Class Member who submits a valid and timely Proof of Claim that is accepted for payment by the Court. Class Members who do

not timely submit valid Proofs of Claim will not share in the Settlement proceeds, but will otherwise be bound by the terms of the Settlement. The Notice advises Class Members that their claims will be calculated pursuant to Timber Hill's proposed Plan of Allocation if the Plan is approved by the Court. The Notice further advises Class Members that the Court may approve Timber Hill's proposed Plan of Allocation, or modify it without additional notice to the Class. Any order modifying the Plan of Allocation will be posted on the settlement website.

E. Release.

If the Settlement is approved by the Court and becomes effective in accordance with its terms, Timber Hill and each and every other Class Member, on behalf of themselves and each of their respective heirs, spouses, immediate family members, executors, trusts, trustees, representatives, administrators, predecessors, successors, and assigns, shall be deemed to have fully, finally, and forever waived, released, discharged, and dismissed each and every one of the Defendants' Released Parties from any and all claims, rights, demands, and causes of action of every nature and description, including both known claims and Unknown Claims (as defined in the Stipulation), whether arising under federal, state or common law, whether class or individual in nature, that Timber Hill or any other Class Member that arise out of or relate in any way to the institution, prosecution, or settlement of the claims in the Action against the Defendants. Plaintiffs' Released Claims also do not include any claims relating to the enforcement of the Settlement.

Defendants, likewise, on behalf of themselves and each of their respective heirs, executors, trustees, administrators, predecessors, successors, and assigns, shall be deemed to have fully, finally, and forever waived, released, discharged, and dismissed all claims, rights, demands, and causes of action of every nature and description, including both known claims and Unknown Claims (as defined in the Stipulation), whether arising under federal, state, common or foreign law, that Defendants could have asserted against any of the Plaintiffs' Released Parties that

arise out of or relate in any way to the institution, prosecution, or settlement of the claims in the Action against the Defendants. Defendants' Released Claims also do not include any claim relating to the enforcement of the Settlement.

F. Attorneys' Fees and Expenses.

Class Counsel will apply to the Court for an award from the Settlement Fund of attorneys' fees and payment of litigation costs and expenses incurred in prosecuting the Action, plus any earning on such amounts at the same rate and for the same periods as earned by the Settlement Fund ("Fee and Expense Application"). Class Counsel intend to apply for an attorneys' fee award equal to 25% of the Settlement Fund, plus costs and expenses incurred by them in connection with this litigation in an amount not to exceed $2 million.

IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL

A. Preliminary Approval Is Appropriate.

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims. There are three steps to be taken by the Court in considering approval of a tentative class-action settlement: (i) the Court must preliminary approve the proposed Settlement; (ii) members of the Class must be given notice of it; and (iii) a final hearing must be held, after which, the Court must decide whether the tentative settlement is fair, reasonable, and adequate. *See* Manual For Complex Litigation (Fourth) § 21.632, at 320-21 (4th ed. 2004) (the "Manual"). Approval of a proposed class-action settlement is a matter within the sound discretion of the district court. *See, e.g.*, *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Create-A-Card, Inc. v. Intuit, Inc.*, 2009 U.S. Dist. LEXIS 93989, at *7 (N.D. Cal. Sept. 22, 2009) (addressing final approval).

Preliminary approval does not require the Court to answer the ultimate question of whether a tentative settlement is fair, reasonable and adequate. That

decision is instead made only at the final-approval stage, after notice of the Settlement has been given to the Class Members and they have had an opportunity to voice their views. *See* 5 James Wm. Moore, Moore's Federal Practice § 23.83(1), at 23-336.2 to 23-339 (3d ed. 2002). Preliminary approval is merely the prerequisite to giving notice so that members of a class have "a full and fair opportunity to consider the proposed [settlement] and develop a response." *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).[3]

Unless the Court's initial examination "discloses[s] grounds to doubt its fairness or other obvious deficiencies," the Court should order that notice of a formal fairness hearing be given to settlement class members under Rule 23(e). *See Manual*, § 21.633 at 321-22.

1. The settlement class meets the standard for certification under Rule 23.

Because the value of the derivatives are all directly and economically related to the price of Allergan common stock, the derivatives class should be certified on the same grounds. Defendants do not oppose certification of a Settlement Class.

a. Numerosity Is Satisfied

Numerosity, the first prerequisite of class certification, requires that the class be "so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). In the Common Stock Class Action, the Court held that the numerosity requirement was satisfied on the grounds that defendants had conceded that the

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[3] Courts have consistently noted that the standard for preliminary approval is *less rigorous* than the analysis at final approval. Preliminary approval is appropriate as long as the tentative settlement "is neither illegal nor collusive and is within the range of possible judicial approval." William B. Rubenstein, Newberg On Class Actions § 13.15 (5th Ed. 2014) (quoting *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 1999 WL 1335318, at *5 (D.D.C. Nov. 23, 1999)). Courts employ a "threshold of plausibility" standard intended to identify conspicuous defects. *See, e.g.*, *Kakani v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 47515, at *16 (N.D. Cal. June 19, 2007); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 337- 38 (N.D. Ohio 2001).

proposed class would exceed one hundred members. *See* Case No. 8:14-cv-02004-DOC-KESx, Dkt. 318. Class Counsel is confident that the numerosity requirement is equally satisfied here because there are 11,433 trades during the class period for 129,651 option contracts. Seltzer and Entwistle Decl., ¶ 8.

b. Timber Hill Has Experienced The Same Injury As Other Class Members and is an Adequate Class Representative

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 984 (9th Cir. 2011) (quotation marks omitted). Here, the claims asserted by Timber Hill are typical, if not identical, to the potential claims of other class members. Timber Hill and each of the other class members: (i) traded in Allergan derivative securities during the Class Period contemporaneously with defendants' purchases; and (ii) were damaged thereby. *See Tanne v. Autobytel, Inc*., 226 F.R.D. 659, 667 (C.D. Cal. 2005) (finding typicality requirement met when the proposed lead plaintiff "submitted a sworn certification indicating that he [traded the company's] securities and suffered losses during the period."). Thus, Timber Hill's claims are typical of those of other derivatives class members. Timber Hill also satisfies the adequacy requirements of Fed. R. Civ. P. 23(a)4).[4]

Due process also requires that absent class members have an adequate representative. *See Hansberry v. Lee*, 311 U.S. 32, 43 (1940). An adequate

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[4] The arguments made in the Common Stock Class Action also do not apply to Timber Hill. In *Basile*, defendants argued that the class representatives were atypical because (1) the class representatives were "net gainers" who benefited from defendants' actions and had unique defenses available to them, and (2) Ohio STRS had "spoliated evidence." Not only were those arguments unpersuasive, they do not apply to Timber Hill as Timber Hill was not a "net gainer," *see* Dkt. 1, Exs. A-B, and there are no spoliation allegations against Timber Hill.

representative is one who will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A representative is adequate where: (1) there is no conflict of interest between the representative and its counsel and absent class members, and (2) the representative and its counsel will "pursue the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 120 (internal citations and quotations omitted). Under Fed. R. Civ. P. 23(a)(4), the representative parties must "fairly and adequately protect the interests of the class." As evidenced by Timber Hill's substantial losses resulting from its sales of Allergan call options and purchase of Allergan put options during the Class Period, its interests are clearly aligned with the interests of the members of the class it seeks to represent. There is also no evidence of any antagonism between Timber Hill's interests and those of the other members of the class. As detailed above, Timber Hill shares identical or substantially similar questions of law and fact with the other members of the proposed class and its claims are typical of the members of the class.

Timber Hill has also taken significant steps which demonstrate that it has protected the interests of the class. Among other things, Timber Hill has: (i) filed the only complaint on behalf of the derivatives class; (ii) met and conferred with counsel for defendants in the present case as well as counsel for the plaintiffs and defendants in the Common Stock Class Action; (iii) filed a status report with the Court; (iv) attended the July 25, 2017 hearing before the Court; (v) met with the Special Masters in this action and the Common Stock Class Action; (vi) negotiated a scheduling order; (vii) negotiated a protective order; (viii) moved for relief from the PSLRA discovery stay; (ix) further negotiated discovery-related issues with defendants separately, and in response to the Court's and Special Masters' directions; (x) completed substantial document discovery and review; (xi) prepared expert reports; (xii) prepared briefing on the motion regarding allocation of damages; (xiii) researched and drafted motion papers related to the calculation of the Section 20A damages cap; (xiv) extensively researched and prepared

preliminary briefing on the Section 20A damages cap and liability issues, including issues addressed by the Court's tentative ruling in the parties' summary judgment motions; (xv) developed witness files and related materials; (xvi) reviewed trial-related submissions in the Common Stock Class Action and developed parallel materials for use in the *Timber Hill* trial; (xvii) developed detailed and comprehensive proof outlines, chronologies and hot document files through review of the documents and testimony in the Common Stock Class Action (xiii) attended the hearing regarding the parties' settlement. Timber Hill also retained competent and experienced counsel to prosecute these claims and to investigate further the facts giving rise to this action. Class Counsel are highly qualified and experienced in the prosecution of class actions involving federal securities law claims, and conducted this complex litigation in a professional manner. Moreover, Timber Hill retained a team of experts from the Massachusetts Institute of Technology to advise and opine on damages, class certification, market efficiency, and trading, valuation and merger related issues. Thus, Timber Hill satisfies the adequacy requirements of Fed. R. Civ. P. 23.[5]

c. There are Common Issues that Warrant Certification of the Settlement Class.

There are a number of common issues that affect individual Class Members, including: (i) whether Defendants violated federal securities laws; (ii) whether

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[5] In the Common Stock Class Action, the defendants argued (1) class representatives were inadequate because the damages cap under Section 20A created a "zero-sum game in which Plaintiffs were incentivized to sell each other out in order to amass a larger portion of the damages for themselves;" (2) there was a conflict between late an dearly sellers of common stock because material nonpublic information changed throughout the class period; and (3) the "contemporaneous trading" standing rule created significant intra-class conflicts. While each of these arguments are equally applicable to this case, the Court disposed of all three of these arguments in evaluating the Common Stock Class Action and so they should not bar certification of the Settlement Class.

Pershing unlawfully purchased Allergan securities while in possession of material, nonpublic information relating to a tender offer; (iii) whether Valeant unlawfully communicated material, nonpublic information relating to a tender offer to Pershing; whether Defendants engaged in fraudulent, deceptive or manipulative practices in violation of Section 14(e) and Rule 14e-3 of the Exchange Act; and (iv) the extent of damages sustained by Class Members and the appropriate measure of damages. Just as in the *Basile* case, there is no question that there are multiple common questions of law and fact. Indeed, in *Basile* the presence of common questions was so apparent that Defendants did not dispute commonality (only arguing that the common questions did not predominate).

d. The Settlement Class Satisfies The Predominance and Superiority Requirements of Rule 23(b).

(1) Predominance

"Rule 23(b)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Rule 23(b) requires that courts "take a 'close look' at whether common questions predominate over individual ones." *Id*. The predominance inquiry "tests whether proposed class actions are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The same kinds of questions (including damages calculations) are at issue here as in the Common Stock Class Action, and the class satisfies the predominance inquiry for the same reasons. *See* Case No. 8:14-cv-02004-DOC-KESx, Dkt. 318 at 20-25.

(2) Superiority

The second prong of the analysis under Rule 23(b)(3) also requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). A class action is superior "[w]here classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino*, 97 F.3d at 1234. As in the Common Stock

Class Action, a class action is superior to litigating this case on an individual basis. *See* Case No. 8:14-cv-02004-DOC-KESx, Dkt. 318 at 25.

2. The proposed settlement is sufficiently fair, reasonable, and adequate for preliminary approval.

To determine whether a settlement is fair, adequate, and reasonable, "a district court must [ultimately] consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted).

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Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted).

B. The strength of plaintiff's case and the amount offered in settlement.

The proposed settlement provides substantial economic benefits and certainty of recovery to the derivatives class. Plaintiff's counsel were well informed about the merits of plaintiff's case before settlement negotiations began because plaintiff's counsel began preparing the case for trial from the time of their appointment as interim class counsel by the Court. Plaintiff's counsel's intense and

immediate immersion in the details of this litigation was undertaken in light of the very real possibility that this action might be consolidated for trial with the Common Stock Class Action, and the fact that the Court thereafter established an expedited pretrial and trial schedule in this case. Plaintiff's counsel also needed to be in a position to assess whether we should seek to intervene in order to participate in the summary judgment briefing in the *Basile* action. Plaintiff's counsel therefore quickly sought and obtained and reviewed a substantial portion of discovery produced and depositions taken in the Common Stock Class Action, with a particular focus on discovery central to the *Timber Hill* case.

While plaintiff's counsel believe strongly in the merits of the *Timber Hill* action, we recognize there are nevertheless significant risks of litigation based on the arguments raised by defendants and the damages cap calculation and allocation issues raised both by defendants and the Common Stock Class Action plaintiffs. Plaintiff's counsel carefully evaluated those risks and discussed them with Timber Hill, which was kept informed about the progress of the litigation and which had worked with us to provide voluminous documentary discovery and securities trading records to defendants. Given the inherent risks associated with any trial, let alone a complicated and vigorously contested case such as this, the settlement amount is believed to be fair and may well exceed the relief the derivatives class could receive as a result of a successful trial.

The settlement amount is fair when considered against the range of potential recoveries in this action. The method of calculating damages used in connection with determine the proposed Plan Of Allocation calculates potential class wide damages of $360 million. In evaluating the derivatives class' claims, plaintiff's counsel researched and considered two potential measures of recovery: out-of-pocket losses and disgorgement. Using the out-of-pocket measure of damages, plaintiff's experts from the Massachusetts Institute of Technology calculated a range of potential recovery of between $77 million and $611 million depending on

a number of variables, claims and defenses advanced by defendants including arguments that damages should be fixed when news entered the market and that losses should be netted against gains. The base computation was based on the plaintiff's experts' opinion as to the "but-for" price of Allergan's stock on February 24, 2014, assuming the common stock price had incorporated all relevant information about Valeant and Pershing's hostile takeover bid. The experts computed Black-Scholes-Merton European-style price values for the options traded by class members with various adjustments, including for dividends, and also evaluated the cost of covering call options issued by derivatives class members contemporaneously with defendants' trading in Allergan derivative securities. While plaintiff's counsel are confident in the reasonableness of their experts' damages calculations, those calculations assume that the jury would calculate damages at least through November 17, 2014, the date of the Actavis-Allergan merger announcement. But, of course, defendants vigorously contest the appropriate timeframe for the measurement of damages and the appropriate method of calculating the Section 20A damages cap. Defendants also raised a number of other causation-related challenges to the calculation of damages. In other words, plaintiff's damages claims were expected to be vigorously challenged by defendants.

Using the disgorgement theory of damages, plaintiff's counsel and their experts calculated the maximum potential recovery to total $3,367,949,239.19.[6] That number was calculated by subtracting the total price paid from the total sale price received, according to the Pollman formula. **Total Sale Price Received:** Sale Price Received for Derivatives ($6,396,391,612.74)[7] + Dividends Received on

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[6] The number is precise because of the data we were able to use in making that calculation is similarly precise.

[7] Defendants Pershing Square Capital Management, L.P., PS Management GP, LLC, PS Fund 1, LLC and William Ackman's Amended Responses to Plaintiff's

Derivative Transactions ($5,404,412.79)[8] + Interest on Derivative Transactions ($590,229,184.39)[9] = $6,992,025,209.92. **Total Price Paid:** Price Paid to Acquire Derivatives ($3,141,914,028.00)[10] + Price Paid to Exercise Derivatives ($482,161,942.73)[11] = $3,624,075,970.73. Thus, $3,367,949,239.19 ($6,992,025,209.92 - $3,624,075,970.73) is the total amount of profits earned by defendants on their illegal trading (an amount equal to the total Section 20A damages cap). This measure of damages was disputed by defendants because they contested both the availability of disgorgement as a remedy in a Section 20A case based on an underlying violation of Section 14(e) of the Securities Exchange Act of 1934 and the amount of their profits—which, as the Court is aware, defendants maintained was less than one billion dollars.

Additionally, plaintiff's theories of recovery do not take into account the means by which damages would be allocated among the classes. The Common Stock Class Action plaintiffs maintained that under their approach as to how damages should be allocated, the derivatives class' total damages would be equal to 6% of the total recovery for both classes. Dkt. 71 at 2.[12] Given the uncertainty regarding the allocation of damages and implementation of the damages cap, the

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Third Set of Interrogatories, dated December 16, 2016; ECF 74: Pershing Square's Answer and Affirmative Defenses

[8] The Center For Research In Security Prices, available at http://www.crsp.com/ ret'd Nov. 3, 2017

[9] http://people.stern.nyu.edu/adamodar/New_Home_Page/datafile/wacc.htm

[10] Pershing Defendants' Responses to Plaintiff's First Set of Interrogatories, dated December 16, 2016

[11] PERCAL0325041 (email).

[12] Defendants, for example, contend that the damages cap should be measured as of June 18, 2014 – effectively capping their Section 20A liability at one billion dollars or less. Dkt. 86 at 1. Defendants also argued the jury would have to determine whether PS Fund 1 traded on the basis of material, nonpublic information related to a tender offer that it obtained from Valeant, and if so, make factual findings to determine the date on which that material nonpublic information was publicly disseminated. *Id.* Such an approach, if adopted by the Court, could further substantially reduce the derivatives class' potential damages.

$40 million settlement is a favorable result for the derivative class.[13]

A settlement equal to far less than the possible maximum recovery amount may be fair and adequate in light of the uncertainties of litigation. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving a settlement that was assumed to be roughly one-sixth of the maximum potential recovery); *In re Celera Corporation Securities Litigation*, No. 5:10-cv-02604-EJD, 2015 WL 1482303, at *6 (N.D. Cal. Mar. 31, 2015) (approving a settlement with a class payment of approximately seventeen percent of the maximum potential recovery). *See also Rigo v. Kason Indus., Inc.*, No. 11–CV–64–MMA (DHB), 2013 WL 3761400, at *5 (S.D. Cal. July 16, 2013) ("[D]istrict courts have found that settlements for substantially less than the plaintiff's claimed damages were fair and reasonable, especially when taking into account the uncertainties involved with the litigation.").

C. The risk, expense, complexity, and likely duration of further litigation.

This factor also supports the strength of the settlement. In arriving at the settlement, plaintiff's counsel carefully considered the claims and defenses at issue, including the interrelationship between the Common Stock Class Action and this case and the potential application of collateral estoppel to our claims.

As described above, the availability of disgorgement as a remedy was anticipated to be hotly contested, both as to its availability in a Section 20A case, and how it should be measured and divided between the two cases. We also

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[13] Even putting aside the limitations on recoverable damages imposed by the Section 20A cap, the settlement far exceeds the median recovery as a percentage of estimated damages in similar cases. According to a recent study for securities class actions that settled with estimated damages of between $500 million and $1 billion, the median recovery was 1.8% for cases that settled between 2006-2015, and 1% for cases that settled in 2016. Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, Securities Class Action Settlements 2016 Review and Analysis at 8, Figure 7 (Cornerstone Research 2016).

anticipated the defendants would raise the related argument that any out-of-pocket losses would need to be netted against profits made in trades of Allergan common stock and derivative securities. Further, defendants advanced the argument that a lump sum damages award could not be made as a matter of law and that the recoverable damages could only be determined as a result of a claims administration process, during which the defendants could challenge the computation of damages and mount individualized defenses on a class member-by-class member basis. Dkt. 76 at 10. This process, were it to be followed, could dramatically reduce the total damages for the class as a whole and take years to complete. The settlement entirely eliminates the risk, uncertainty, expense and delay such a process would entail.

In assessing defendants' defenses on the merits, we worked extensively with our experts to analyze plaintiffs' class certification motion and evaluate potential damages scenarios, taking into account the parties' arguments about the applicability of the damages cap, the allocation of the damages within the cap, and how different recoveries in the two cases should be pro-rated between the classes. Further, on the merits, while the Court's tentative order on the motions for summary judgment would potentially have positively impacted the *Timber Hill* case, the Court made clear in the hearing on the motions for summary judgment a final ruling had not yet been made. Defendants also indicated an intent to seek interlocutory appeal of an unfavorable decision on their motions for summary judgment, which would have resulted in greater risk and uncertainty for the derivatives class. The proposed settlement guarantees substantial recovery for the derivatives class now while avoiding an uncertain trial and appellate process.

D. The risk of maintaining class action status throughout the trial.

Plaintiff has not yet obtained class certification and defendants have not been willing to stipulate to class certification. Although Plaintiff had not yet moved for class certification, Class Counsel carefully analyzed the submissions and decisions

in the Common Stock Class Action with our experts. We concluded that because the value of the derivatives are all directly and economically related to the price of Allergan common stock, the derivatives class should be certified on the same grounds. *See* Section IV.A.1. Defendants, however, made clear they intended to oppose class certification, including raising issues related to the typicality of Timber Hill's claims and the availability of class-wide proof of damages. Although Class Counsel believes that Timber Hill would be successful in certifying a class and maintaining class action status through the trial, there is a risk that defendants would successfully oppose class certification, and an ongoing risk that Timber Hill would need to defend class certification on appeal.

E. The extent of discovery completed and the stage of proceedings.

Class Counsel have had complete access to most of the discovery taken in the Common Stock Class Action, diligently reviewed that discovery in preparation for pretrial proceedings and trial, and have worked with experts to analyze plaintiff's claims. In addition to reviewing that discovery, Class Counsel reviewed all of the substantive filings in the Common Stock Class Action, which helped to inform our knowledge and opinions regarding the merits of the *Timber Hill* case. Additionally, plaintiff made several motions in this case and persuaded defendants to answer rather than move to dismiss, further advancing the case. Given the stage of these related proceedings, there can be no question that plaintiff's counsel had a clear view of the strengths and weaknesses of the derivatives class' claims and potential damages. Sufficient discovery has been conducted in this matter to allow plaintiff's counsel to adequately investigate the pertinent legal and factual issues and enable them to recommend the settlement.

F. The experience and views of counsel.

Class Counsel include attorneys who have many years of experience serving as counsel in numerous complex class actions, including litigating cases arising under the federal securities laws. Class Counsel also retained and were advised by

a team of leading experts all of whom are professors at Massachusetts Institute of Technology. Class Counsel fully endorse the settlement as fair, reasonable and adequate to the derivatives class.

G. The reaction of the class members to the proposed settlement.

Because derivatives class members have not yet received notice of the settlement this factor cannot yet be evaluated other than to observe that Timber Hill one of the largest market participants supports the settlement. No Class Member has raised any concern about the settlement following the broad reporting of news related to the settlement in the media.

H. The proposed settlement is the result of arm's-length negotiations undertaken in good faith by experienced counsel under the guidance of an experienced mediator.

In addition to the factors just discussed, the court must also be satisfied that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011) (holding that district court abused its discretion in approving settlement agreement). Factors considered here include: (1) Whether the settlement resulted from arm's-length negotiations between experienced, capable counsel, *see Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) ("While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the proposed settlement."); (2) The end result achieved, *see Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987) ("[r]ather than attempt to prescribe the modalities of negotiation, the district judge permissibly focused on the end result of the negotiation. . . . The proof of the pudding was indeed in the eating."); *see also, In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) (the most important concern for the court in reviewing a settlement of a class action is the strength of the plaintiff's case if it were fully litigated), *aff'd*, 818 F.2d 145 (2d Cir. 1987); and (3) Whether counsel are to receive a disproportionate distribution of

the settlement under a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds where fees not awarded revert to defendants rather than to the class. *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

The parties negotiated at arm's-length and in good faith under the supervision and with the assistance of the Hon. Layn R. Phillips, a well-respected former United States District Judge and highly experienced meditator, and his colleague Greg Lindstrom, both of whom are intimately familiar with both cases. The parties worked long and hard, often late into the night over the holidays to reach a resolution of this matter. The Court has Mr. Lindstrom's declaration in this matter and had an opportunity to meet and confer privately with Mr. Lindstrom during the January 16, 2018 hearing.

V. THE COURT SHOULD APPROVE THE NOTICE PLAN AND SCHEDULE A FAIRNESS HEARING

A. The Court Should Order Notice Be Provided to the Class.

Reasonable notice must be provided to the Class to allow class members an opportunity to object to the proposed Settlement. *See Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). Rule 23(e) requires notice of a proposed settlement "in such manner as the court directs." In a settlement of a class maintained under Rule 23(b)(3), class notice must meet the requirements of both the Federal Rules of Civil Procedure 23(c)(2) and 23(e). *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324-25 (E.D. Pa. 1993) (stating that requirements of Rule 23(c)(2) are stricter than requirements of Rule 23(e) and arguably stricter than the due process clause). Under Rule 23(c)(2), notice to the Class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997); *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56 (1st Cir. 2004), although actual notice is not required, *see Silber v.*

Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994).

The case law sets forth several elements of the "proper" content of notice. If these requirements are met, a notice satisfies Fed. R. Civ. P. 23(c)(2), Fed. R. Civ. P. 23(e) and due process, and binds all members of the Class. The notice should, among other things: (1) Describe the essential terms of the settlement; (2) Disclose any special benefits or incentives to the class plaintiff; (3) Provide information regarding attorneys' fees; (4) Indicate the time and place of the hearing to consider approval of the settlement, and the method for objection to or opting out of the settlement; (5) Explain the procedures for allocating and distributing settlement funds; and (6) Prominently display the address of class counsel and the procedure for making inquiries. *See* Manual, ¶ 21.312 (4th ed. 2004); *see also*, *e.g.*, *Air Lines Stewards & Stewardesses Ass'n Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 108 (7th Cir. 1972) (notice that provided summary of proceedings to date, notified of significance of judicial approval of settlement, and informed of opportunity to object at the hearing satisfied due process).

Timber Hill vetted several possible claims administrators, ultimately selecting Garden City Group, LLC ("GCG") to serve as the Claims Administrator in this case. Garden City Group is one of the premier class action settlement administration firms in the country and has years of experience in crafting notice plans. Cirami Decl. ¶¶ 2-3. Timber Hill believes that the proposed notice will fairly apprise Class Members of the Settlement and their options relating thereto, and therefore should be approved by the Court. Cappucci Decl. ¶ 8.

The proposed direct mail notice and publication notice, attached as Exhibits A and B to Exhibit 2 to the Stipulation, are clear, precise, informative, and meet the foregoing standards.[14] Dkts. 99-2, 99-3. The proposed notice program provides

[14] The notice is also written in plain English, is easy to read and includes other information such as the case caption; a description of the Class; a description of the claims; a description of the Settlement; the names of counsel for the Class; a

"the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See* Cirami Decl., ¶ 9. As reflected in the proposed notice plan detailed in the Stipulation, the notice plan will have two components: (i) direct notice, and (ii) publication notice in various venues, including *The Wall Street Journal*, and the settlement website. *See id.* ¶ 9. Notice via first class mail and publication are both avenues for notice that have been approved by various courts. *See, e.g.*, *White v. NFL*, 822 F. Supp. 1389, 1400 (D. Minn. 1993) (notice by mail to identified Class members and publication once in *USA Today* "clearly satisfy both Rule 23 and due process requirements"); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (approving as reasonable notice by third class mail to identified Class members and publication two times in the national edition of *USA Today*); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice by mail to identified Class members and publication in *USA Today*); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.").

Beginning not later than ten business days after the entry of the Preliminary Approval Order, GCG will begin mailing the Notice, substantially in the form attached as Exhibit A to Exhibit 2 to the Stipulation, by U.S. Mail, proper postage prepaid, to GCG's proprietary database with names and addresses of the largest and most common nominee holders, which consists of U.S. banks, brokerage firms, and

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statement of the attorneys' fees that will be sought by Class Counsel; the Fairness Hearing date; a description of Class members' opportunity to appear at the hearing; a statement of the procedures and deadlines for requesting exclusion and filing objections to the Settlement; and the manner in which to obtain further information. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 496 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998). *See also* § 21.312 (Rule 23(e) notice designed to be only a summary of the litigation and settlement to apprise Class members of the right and opportunity to inspect the settlement agreement).

nominees. Cirami Decl. ¶ 11. The notice program will include mailing claim packets to approximately 1,800 nominee addresses in GCG's nominee database. *Id.* ¶ 12. GCG will perform a personalized calling campaign to the largest nominees to answer potential questions and prompt them to respond to the notice. *Id.* ¶ 14.

GCG will supplement the direct notice by publishing the Summary Notice, attached as Exhibit B to Exhibit 2 to the Stipulation, in the *Wall Street Journal*. *Id.* ¶ 17. GCG will maintain a dedicated website, where the Notice, Proof of Claim, and the Stipulation will be posted, among other important information about the Settlement, including all relevant deadlines. *Id.* ¶ 18. GCG will also maintain a toll-free telephone hotline. *Id.* ¶ 20.

B. The Court Should Set Settlement Deadlines and Schedule a Fairness Hearing.

In connection with preliminary approval of the Settlement, the Court must set a final approval hearing date, dates for mailing the Notices, and deadlines for objecting to the Settlement and filing papers in support of the Settlement. Plaintiff proposes the following schedule, which the parties believe will provide ample time and opportunity for Class Members to decide whether to request exclusion or object. The proposed schedule set forth in the Notice assumes that the Court approves the Settlement on a preliminary basis no later than February 26, 2018, and that the Class Notice can be mailed by the date set forth below:

Date	**Event**
Ten (10) business days following the Court's entry of the Preliminary Approval Order	Date by which Claims Administrator shall cause the Notice and the Proof of Claim to be mailed.
Twenty (20) business days following the Court's entry of the Preliminary Approval Order	Date by which Class Counsel must submit Fee and Expense Application.
Thirty-one (31) business days following the Court's entry of the Preliminary Approval Order; thirty (30) calendar days after the	Date by which potential Class Members must submit a request to be excluded from the Class, or an objection to Class Counsel's Fee and Expense Application.

Date	Event
intended mailing of the Notice and Proof of Claim; and thirty-one (31) calendar days in advance of the Settlement Hearing	
Seven (7) calendar days prior to Settlement Hearing.	Date by which Class Counsel must submit Application for Final Approval of Settlement.
Seven (7) calendar days prior to Settlement Hearing.	Date by which reply papers in support of the Settlement, Plan of Allocation, and Class Counsel's application for an award of attorneys' fees, costs and expenses are to be filed with the Court.
Seven (7) calendar days prior to Settlement Hearing.	Date by which Class Counsel must file proof of mailing of the Notice and Proof of Claim.
April 30, 2018	Settlement Hearing

C. The Plan of Allocation Should Be Approved.

The Plan of Allocation, detailed in the Declaration of S.P. Kothari, filed concurrently herewith, is rational and ensures an equitable distribution of the Net Settlement Fund among Authorized Claimants based solely on their respective transactions. Plaintiff submits that the Plan of Allocation, which was fully disclosed in the Notice, is fair, reasonable, and adequate and should be approved.

VI. CONCLUSION

For all the above-stated reasons, Plaintiff respectfully requests that the Motion be granted and the Court enter an order: (i) granting preliminary approval of the Settlement; (ii) scheduling a final fairness hearing and establishing all related deadlines; (iii) directing that Notice be provided to the Class in accordance with the notice plan; and (iv) ordering a stay of all proceedings in this action until the Court renders a final decision regarding the approval of this Settlement.

Dated: January 29, 2018

Respectfully submitted,

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