UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BING LI, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. AETERNA ZENTARIS INC., DAVID A. DODD, JUERGEN ENGEL, and PAUL BLAKE Defendants.	Case No. 3:14-cv-07081-PGS-TJB CLASS ACTION **MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION** Motion Day: February 16, 2021 Hon. Peter G. Sheridan

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Class Representatives Gregory Vizirgianakis, Phong Thomas Dinh, and Jamshid Khodavandi (collectively, "Lead Plaintiffs") respectfully submit this memorandum in support of their motion for: (i) final approval of the Settlement, as set forth in the Stipulation and Agreement of Settlement dated July 22, 2020 (ECF No. 169-1, the "Stipulation"), and preliminarily approved by the Court by order entered on September 29, 2020 (ECF No. 174, the "Preliminary Approval Order"); and (ii) approval of the proposed Plan of Allocation of the Net Settlement Fund.[1]

I. INTRODUCTION

After six years of hard-fought litigation, Lead Plaintiffs, through their counsel, obtained a $6,500,000 all cash, non-reversionary settlement for the benefit of the certified investor Class. As described below and in the Rosen Declaration, the Settlement is an excellent result for the Class, providing a significant and certain recovery in a case that presented numerous hurdles and risks. In fact, the Settlement represents 18% of the Class's maximum recoverable class-wide aggregate damages, which is an extremely favorable result when compared to the median recovery in securities class action settlements with similar aggregate damages. Moreover, the Settlement was reached only after extensive arm's-length negotiations conducted by experienced counsel with the assistance of two well-respected mediators, following two separate all-day mediations. The first mediation took place on August 25, 2017, and was overseen by Robert A.

[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Stipulation or the concurrently-filed Declaration of Laurence Rosen in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Rosen Declaration" or "Rosen Decl."). Unless otherwise noted, all citations herein to "¶__" and "Ex. __" refer, respectively, to paragraphs in, and exhibits to, the Rosen Declaration.

Meyer, Esq. of JAMS. The second mediation took place on March 4, 2020, and was overseen by the Honorable Daniel Weinstein (Ret.) of JAMS.

Lead Plaintiffs' and Lead Counsel's substantial efforts and well-developed understanding of the strengths and weaknesses of the Action also support final approval. Lead Plaintiffs' efforts, which are detailed in the Rosen Declaration, included, among other things: (i) a comprehensive investigation which included, *inter alia*, a review and analysis of Aeterna Zentaris, Inc.'s ("Aeterna" or the "Company") U.S. Securities and Exchange Commission ("SEC") filings, public reports and news articles concerning Aeterna, transcripts of Aeterna's investor calls, interviews with former employees and other potential witnesses with relevant information, and consultation with FDA, market efficiency, and loss causation and damages experts; (ii) drafting two amended complaints based on the investigation; (iii) successfully opposing Defendants' motion to dismiss and motion for reconsideration of the Court's order denying Defendants' motion to dismiss the SAC; (iv) fully briefing and obtaining class certification; (v) prevailing in the Third Circuit against Defendants' appeal of the order granting class certification; (vi) engaging in extensive discovery, including serving and responding to written discovery, reviewing and analyzing over 192,000 pages of documents produced by Defendants, taking or defending eighteen (18) fact and expert depositions (including three in Germany), and exchanging expert reports on price impact, liability, and damages; (vii) participating in two separate, full-day mediation sessions; (viii) engaging in negotiations regarding the terms of the proposed Settlement; and (ix) working with Lead Plaintiffs' damages expert to craft a plan of allocation that treats Lead Plaintiffs and other Class Members fairly. ¶¶5, 15-81, 103-105. In view of the foregoing, Lead Plaintiffs and their counsel had a comprehensive understanding of the strengths and weaknesses of the case and had sufficient

information to make an informed decision regarding the fairness of the Settlement before entering into it and presenting it to the Court.

Lead Plaintiffs and their counsel believe the Settlement is an excellent result for the Class. This belief is supported by, among other things, the certainty of a $6,500,000 recovery today versus the significant risk of a smaller or even no recovery following years of additional litigation; an analysis of the facts adduced to date; past experience in litigating complex securities class actions; the serious disputes between the Parties concerning the merits; and the favorable reaction of the Class. ¶¶4, 6, 82-94, 101, 119.

Lead Plaintiffs also move for approval of the Plan of Allocation of the Net Settlement Fund. The Plan of Allocation was developed in conjunction with Lead Plaintiffs' damages expert and is designed to fairly and equitably distribute the proceeds of the Net Settlement Fund to Class Members. ¶¶102-09. As such, Lead Plaintiffs respectfully submit that it too should be approved.

For these reasons, and those set forth below and in the Rosen Declaration, Lead Plaintiffs respectfully request that the Court grant final approval of the Settlement and Plan of Allocation.

II. STANDARDS GOVERNING APPROVAL OF CLASS ACTION SETTLEMENTS

Rule 23(e) requires court approval for any settlement of class action claims, and such approval should be granted "only after a hearing and only on finding that [a proposed settlement] is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Nat'l Football League Players Concussion Injury Litig.*, 2016 WL 1552205, at *16 (3d Cir. Apr. 18, 2016); *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at *9 (E.D. Pa. Jan. 25, 2016).[2]

[2] Unless otherwise noted, internal citations are omitted.

Rule 23(e)(2) instructs that the Court should determine whether the Settlement is "fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Factors (A) and (B) "identify matters . . . described as 'procedural' concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement," while factors (C) and (D) "focus on . . . a 'substantive' review of the terms of the proposed settlement" (*i.e.*, "[t]he relief that the settlement is expect to provide to class members"). Advisory Committee Notes to 2018 Amendments (324 F.R.D. 904, at 919).

These factors are not, however, exclusive. The four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id*. at 918; *see also Swinton v. SquareTrade, Inc.*, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019) ("The specific considerations in Rule 23(e)(2)(A)–(D) were part of the 2018 Amendments. However, they were not intended to displace the various factors that courts have developed in assessing the fairness of a settlement."). For this reason, the traditional factors that are utilized by courts in the Third

Circuit—known as the "*Girsh* factors"—to evaluate the propriety of a class action settlement (certain of which overlap with Rule 23(e)(2)) are still relevant:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) 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.

Singleton v. First Student Mgmt. LLC, 2014 WL 3865853, at *5 (D.N.J. Aug. 6, 2014) (*citing Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975)); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006) (same).

In sum, although the specific factors by which a settlement is evaluated may have changed in some respects, what has not changed is that "[t]he central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate." Advisory Committee Notes to 2018 Amendments (324 F.R.D. at 918).

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Settlement is Procedurally Fair

Rule 23(e)(2)(A), requiring adequate representation, and Rule 23(e)(2)(B), requiring arm's-length negotiations, "constitute the 'procedural' analysis" of the fairness inquiry. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D 11, 29 (E.D.N.Y. 2019). Each aspect of procedural fairness is satisfied here.

1. Lead Plaintiffs and Lead Counsel Adequately Represented the Class

Adequacy of representation is measured by two standards. First, the representatives must not have interests that are antagonistic to the interest of other members of the class. *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 641

(D.N.J. 2004). Second, class counsel must be qualified, experienced and able to conduct the litigation. *Id*. Both requirements are satisfied here.

First, Lead Plaintiffs' claims are typical of, and coextensive with those of the Class. Lead Plaintiffs, like all Class Members, purchased Aeterna common stock at artificially inflated prices during the Class Period as a result of the alleged materially false and misleading statements, and were allegedly damaged thereby. *See In re Schering-Plough Corp*., No. 8-397 (DMC)(JAD), 2012 U.S. Dist. LEXIS 138078, at *21 (D.N.J. Sept. 25, 2012) ("Further, when Lead Plaintiffs have a strong interest in establishing liability under federal securities law, and seek similar damages for similar injuries, the adequacy requirement can be met."); *see also Du on behalf of Enteromedics, Inc. v. Blackford*, 2018 WL 4691046, at *5 (D. Del. Sept. 28, 2018) (finding adequacy where "[p]laintiff's interests are coextensive with, and not antagonistic to, the interests of the class since they all raise the same claims and seek the same relief"). As such, Lead Plaintiffs' interest in obtaining the largest possible recovery in this Action is aligned with the other Class Members' interests. *See In re Polaroid ERISA Litig*., 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest"). Lead Plaintiffs also demonstrated their commitment to the litigation by vigorously pursuing their shared claims against Defendants, communicating regularly with Lead Counsel, producing documents and responding to written discovery, preparing and sitting for their depositions,[3] preparing for, and participating in, multiple in-person mediation sessions, including Lead Plaintiff Khodavandi attending the all-day mediation session held on August 25, 2017, and participating in settlement discussions with Lead Counsel. *Id.*

[3] Mr. Vizirgianakis traveled from South Africa to New York for his deposition (Ex. 5, ¶ 7), and Messrs. Khodavandi and Dinh both travelled from California to New York to be deposed. Ex. 3, ¶ 7; Ex. 4, ¶ 7.

Second, as the Court recognized when appointing Plaintiffs' Counsel to serve as counsel for the Class, "[a]ll three firms have extensive experience in securities litigation and have demonstrated competency in litigating the present matter." *See Bing Li v. Aeterna Zentaris, Inc.*, 324 F.R.D. 331, 346 (D.N.J. 2018).[4] Consequently, this factor supports final approval of the Settlement.

2. The Settlement was Reached After Substantial Litigation and Arm's-Length Negotiations Between Experienced Counsel Conducted Under the Auspices of a Well-Respected Mediator

Rule 23(e)(2)(B) evaluates whether the proposed settlement "was negotiated at arm's-length." This "procedural" fairness determination also encompasses the third *Grish* factor, which assesses the "degree of case development that Class Counsel have accomplished prior to Settlement" to "determine whether counsel had an adequate appreciation of the merits of the case before negotiating" the settlement. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 321 (3d Cir. 2011); *see also In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010). Approval of a settlement is warranted "[w]here a court can conclude that the parties had 'sufficient information to make an informed decision about settlement[.]'" 4 NEWBERG ON CLASS ACTIONS § 13.50; *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (The relevant inquiry "is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement.").

Courts have recognized that the participation of an experienced, respected mediator weighs in favor of a proposed settlement's procedural fairness. *See Alves v. Main*, 2012 WL

[4] *See also* Ex. 6-C (The Rosen Law Firm, P.A. firm resume); Ex. 7-C (Glancy Prongay & Murray LLP firm resume); and ECF No. 104-7 (Carella, Byrne, Cecchi, Olstein, Brody & Agnello firm resume).

6043272, at *22 (D.N.J. Dec. 4, 2012) ("[t]he participation of an independent mediator in settlement negotiations 'virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.'"); *Bodnar v. Bank of America, N.A.*, 2016 WL 4582084, at *2-3 (E.D. Penn. Aug. 4, 2016) (finding a settlement fair where the "Settlement Agreement was negotiated at arm's length").

As discussed above, the Settlement was negotiated by counsel with extensive experience in securities litigation, who were well versed in the strengths and weaknesses of the case. ¶¶5, 15-81 (detailing the investigation and work performed by Lead Counsel). And, the mediation process—which included two separate mediation sessions and ultimately resulted in a mediator's recommendation that the Parties accepted—was led by Hon. Weinstein (Ret.), a highly respected mediator. ¶¶5, 67-70. Courts have repeatedly and favorably cited Judge Weinstein's participation in granting final approval of securities class action settlements, and his participation in the instant Settlement underscores that it is the product of non-collusive, arm's-length negotiations. *See W. Palm Beach Police Pension Fund v. DFC Glob. Corp.*, 2017 WL 4167440, at *3 (E.D. Pa. Sept. 20, 2017) (finding the use of mediator Judge Weinstein strong evidence of arm's-length negotiations).[5]

[5] *See also City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014), *aff'd sub nom.*, *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) ("[t]his initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations and, ultimately, with the assistance of Judge Daniel Weinstein, one of the nation's premier mediators in complex, multi-party, high stakes litigation"); *In re Wachovia Equity Sec. Litig.*, 2012 WL 2774969, at *3 (S.D.N.Y. June 12, 2012) (finding procedural fairness and noting the involvement of mediator Judge Weinstein).

B. The Settlement is Substantively Fair: the Relief Provided for the Class is Adequate Taking into Account the Costs, Risks, and Delay of Litigation

Rule 23(e)(2)(C) instructs the Court to consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" along with other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). Rule 23(e)(2)(C)(i) essentially incorporates six of the traditional *Girsh* factors: the complexity, expense, and likely duration of the litigation (first factor); the risks of establishing liability and damages (fourth and fifth factors); the risks of maintaining class action status through the trial (sixth factor); and the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation (eighth and ninth factors). *Singleton*, 2014 WL 3865853 at *5. As discussed below, each of these factors supports approval of the Settlement.

1. The Complexity, Expense, and Likely Duration of the Litigation

In assessing whether the proposed Settlement is fair, reasonable, and adequate, the Court "must also 'survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement.'" *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 439 (3d Cir. 2016), as amended (May 2, 2016) (quoting *In re Prudential Ins. Co. Am. Sales Practices Litig.*, 962 F.Supp. 450 (D.N.J. 1997), *aff'd*, 148 F.3d 283, 319 (3d Cir. 1998)).

Courts routinely recognize that "[s]ecurities fraud class actions are notably complex, lengthy, and expensive cases to litigate[.]" *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013).[6] This Action is no exception. Putting aside the significant risks of

[6] *See also DFC Glob. Corp.*, 2017 WL 4167440, at *4 (commenting that "[s]ecurities litigation is notoriously complicated and it is certainly not conducted on the cheap"); *P. Van Hove BVBA v. Universal Travel Grp., Inc.*, 2017 WL 2734714, at *7 (D.N.J. June 26, 2017) (observing that "[f]ederal securities class actions by definition involve complicated issues of fact and law.") (quotation omitted).

proving liability and establishing damages (*see* Sec. III.B.2, *infra*), Lead Plaintiffs' best-case damages of scenario of $35.9 million constitutes a non-trivial portion of Aeterna's total market capitalization. This lack of a "deep pocket" means any recovery would likely be funded by the Company's officers' and directors' insurance. These funds, which have already been partially used for defense costs in this six-year ligation, would be further and rapidly depleted if litigation were to continue.

Additionally, were the litigation to continue, a potential recovery—if any—"would occur years from now, substantially delaying payment . . . to the [] Class." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *8 (S.D.N.Y. Mar. 24, 2014). In contrast, the Settlement provides immediate and substantial compensation to the Class without exposing the Class to the risk, expense, and delay of continued litigation. *See Par Pharm.*, 2013 WL 3930091, at *4 ("Given the procedural and substantive complexities inherent in securities fraud class actions, and the time and expense necessarily involved in fully adjudicating this matter, the Court finds that this factor weighs decidedly in favor of approving the Settlement.").

2. Risks to Proving Liability and Damages

When deciding whether to approve a proposed class action settlement, the fourth and fifth *Girsh* factors—the risks of establishing liability and damages—are "commonly analyzed together" and "survey the possible risks of litigation by balancing the likelihood of success . . . against the immediate benefits offered by settlement." *Alves*, 2012 WL 6043272, at *19; *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995) (noting the "potential rewards (or downside)" of continued litigation).

While Lead Counsel believes that Lead Plaintiffs' claims are meritorious, they also recognize that they face substantial obstacles to proving liability and damages. When compared to the certainty of the significant benefit conferred by the Settlement, these risks militate against

further litigation, and support a determination that the Settlement is fair, reasonable and adequate.

Liability: Lead Plaintiffs faced considerable hurdles to establishing liability. While Lead Plaintiffs believed they would be able to prove falsity and scienter, they recognize "[t]he difficulty of establishing liability is a common risk of securities litigation." *In re AOL*, 2006 WL 903236, at *11.

Here, Defendants maintained throughout the Action that Lead Plaintiffs could not prove any of their statements were materially false or misleading. Defendants argued, and would have continued to argue, that the SPA was ambiguous and it was reasonable for Aeterna to interpret the SPA as requiring inclusion only of patients who were correctly identified as cases. ¶85. Additionally, Defendants argued that prior to Aeterna's submission of the NDA for AEZS-130, the FDA never explicitly disagreed with Aeterna's proposal to base the primary efficacy analyses on only true cases, and although the FDA ultimately had a difference of opinion with Aeterna, that did not render Aeterna's opinion about the efficacy of AEZS-130 false or unreasonable at the time the challenged statements were made. *Id.*

Additionally, Defendants would have argued that Lead Plaintiffs could not establish scienter as to the sole remaining Individual Defendant in the case, which was required because the Third Circuit has not yet recognized the doctrine of "corporate scienter." ¶86. Defendants would have argued that the sole Individual Defendant, who was based in Germany, was sufficiently removed from the day-to-day aspects of AEZS-130 Phase 3 trial such that he relied on Aeterna's personnel in the U.S. to report findings, and those U.S. personnel—as well as third party consultants and medical advisers—reported positive results to him. *Id.*

While Lead Plaintiffs were confident that they would be successful in demonstrating falsity and scienter, there is always a risk that the Court or a jury may have accepted Defendants' arguments.

Loss Causation and Damages: Lead Plaintiffs also would have faced considerable challenges in establishing loss causation and damages. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear the burden of ***proving*** "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover'"). While Lead Plaintiffs would have argued that the declines in Aeterna's stock price were attributable to the correction of the alleged misstatements that occurred on November 6, 2014, Defendants would have asserted that, according to the FDA's Complete Response Letter, the FDA denied approval of AEZS-130 for three separate and independent reasons, only one of which related to AEZS-130 missing the primary efficacy objective based on the MITT population results. ¶88. Disentangling the market's reaction to various pieces of news is a "complicated concept, both factually and legally." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

In complex securities cases, it is axiomatic that the Parties would rely on expert testimony to assist the jury in determining damages. Indeed, proving damages in securities fraud trials "is always difficult and invariably requires expert testimony which may, or may not, be accepted by a jury." *In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 WL 22244676, at *3 (S.D.N.Y. Sep. 29, 2003); *see also In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *4 (D.N.J. Nov. 28, 2007) ("there would likely be a battle of experts at trial and there would be no guarantee whom the jury would believe.").

Moreover, Defendants identified two factors that could significantly limit damages. First, Defendants argued that Lead Plaintiffs' damages model failed to account for the fact that stock drop following the FDA's denial of AEZS-130 was the result of a materialization of a known risk (*i.e.*, that approval of AEZS-130 might not be granted), and that any damages would thus need to be limited to the inflation in the stock price that reflected the increase in the risk of denial due to the alleged fraud as opposed to the generally known risk that the drug might not be approved. ¶89. In other words, Defendants argued that Lead Plaintiffs' damages model failed to take into account that the market did not believe that there was a 100% chance of approval prior to the fraud, and the market did not believe that there was 0% chance of approval had Aeterna disclosed the truth, because there was still a possibility that the FDA might approve AEZS-130 despite the failure of the MITT efficacy analyses. *Id.* Second, Defendants argued that Lead Plaintiffs' damages model did not adjust the "inflation ribbon" to reflect changes in the perceived value of AEZS-130 at different times during the Class Period. *Id.* Had Lead Plaintiffs' expert accounted for varying levels of inflation based on the differences in information in the market during the Class Period, Defendants argued, damages would have been reduced significantly. *Id.*

If a jury were to accept Defendants' arguments, damages in this case could be greatly reduced, or even eliminated. *In re Marsh & McLennan Cos., Sec. Litig.*, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) ("[i]f there is anything in the world that is uncertain when a case like [a securities class action] is taken to trial, it is what the jury will come up with as a number for damages."). As a result, "the risks faced by the securities plaintiffs in establishing damages are substantial, and this factor favors approving the settlement." *Global Crossing*, 225 F.R.D. at 459.

3. Risks of Maintaining Class Certification

The sixth *Girsh* factor "evaluates the risks of maintaining the class throughout the trial." *F.C.V. Inc. v. Sterling Nat'l Bank*, 2006 WL 1319822, at *6 (D.N.J. May 12, 2006). The Court certified the Class on February 28, 2018. ECF No. 144. Even though the Third Circuit affirmed the Court's certification of the Class, Rule 23 provides that a class certification order may be altered or amended any time before a decision on the merits. Thus, while certification-related risks were not dire, a risk remained that the Class definition could be modified, or the Class decertified. Fed. R. Civ. P. 23(c)(1)(C); *Annunziato v. Collecto, Inc.*, 293 F.R.D. 329, 340 (E.D.N.Y. 2013) ("[U]nder rule 23, district courts have the power to amend class definitions or decertify classes as necessary. . . .").

C. The Settlement Amount is Within the Range of Reasonableness in Light of the Best Possible Recovery and Attendant Risks of Litigation

"The final two factors set forth in *Girsh* are typically considered in tandem, and 'ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial.'" *Par Pharm.*, 2013 WL 3930091, at *7. In conducting this evaluation, the Court should keep in mind "that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *In re Johnson & Johnson Deriv. Litig.*, 900 F. Supp. 2d 467, 484-85 (D.N.J. 2012). "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." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 105 (D.N.J. 2012). "Rather, the percentage recovery must represent a material percentage recovery to [the] plaintiff in light of all the risks considered under *Girsh*." *In re AT&T*, 455 F.3d at 170.

In light of the substantial risks detailed above, the proposed Settlement, which provides a substantial and certain recovery of $6.5 million for the benefit of the Class, is an excellent result. Indeed, Lead Plaintiffs' damages expert estimates that if Lead Plaintiffs had fully prevailed at both summary judgment and after a jury trial, and if the Court and jury accepted Lead Plaintiffs' damages theory, including proof of loss causation—*i.e.*, Lead Plaintiffs' ***best-case scenario***—the total ***maximum*** damages would be approximately $35.9 million. Thus, the $6.5 million Settlement Amount represents approximately 18% of the total ***maximum*** damages ***potentially*** available in this Action. ¶93.

This was, however, Lead Plaintiffs' best-case scenario. Defendants raised a number of credible arguments concerning loss causation and damages that—if accepted—would have substantially reduced recoverable damages. For example, Defendants contested Lead Plaintiffs' damages model and proffered an expert who intended to testify that actual damages were, at most, approximately $17.95 million, which equates to a recovery of 36.2%. ¶90. A recovery within the range of 18-36.2% is well above the average recovery in similar situations. *See* Ex. 1 (Laarni T. Bulan and Laura E. Simmons, Cornerstone Research, "Securities Class Action Settlements: 2019 Review and Analysis" (Mar. 2020), at p. 6, Fig. 5) (reporting median percentage of 2019 recoveries of 9.2% and 12.8% in cases alleging between $25-75 million and less than $25 million in damages, respectively, and 4.8% overall for all securities class actions); *Par Pharm.*, 2013 WL 3930091, at *2 (approving $8.1 million settlement, which amounted to approximately 7% of class-wide damages). In light of these risks, there can be no doubt that the Settlement Amount is well within the range of reasonableness, weighing in favor of final approval.

D. The Class's Reaction to the Settlement Supports Final Approval

The second *Girsh* factor—the reaction of the Class—overlaps with Rules 23(e)(4), on the opportunity for exclusion, and 23(e)(5), on the opportunity to object. As required by Rule 23(e)(4) & (5), the Settlement affords Class Members the opportunity to request exclusion from, or object to, the Settlement. Ex. 2 ("Evans Decl.") ¶¶12-13. The Class's reaction to the Settlement—as exhibited by the fact that there have been no requests for exclusion or objections—demonstrates strong support for the Settlement. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement[.]")

Here, in accordance with the Court's Preliminary Approval Order, the Claims Administrator, Strategic Claims Services ("SCS"), mailed 21,497 copies of the Notice and Claim Form (together, the "Notice Packet") to potential Class Members and nominees as of January 11, 2020, and caused the Summary Notice to be published in the national edition of *Investor's Business Daily* and transmitted over the *PR Newswire* on November 9, 2020. Evans Decl. ¶¶7, 9. SCS also established a case-specific website dedicated to this Settlement, www.AeternaSecuritiesLitigation.com, to provide potential Class Members with information concerning the Settlement and access downloadable copies of the Notice Packet, as well as copies of the Stipulation and Preliminary Approval Order. *Id.* at ¶11. To date, there have been no requests for exclusion received by SCS, and no objections have been filed on this Court's docket. *Id.* at ¶12; Rosen Decl. at ¶101.

As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers in support of the Settlement on February 9, 2021, after the deadline for requesting exclusion and

objecting has passed. Lead Plaintiffs' reply papers will address any requests for exclusion and objections received and/or filed.

E. Defendants' Ability to Withstand a Greater Judgment

Aeterna's ability, or potential lack thereof, to withstand a greater judgement (*Girsh* factor seven) supports final approval of the proposed Settlement. Aeterna only has one FDA-approved product. Based on currently available annual statements filed with the SEC, Aeterna, since 2016, has operated at a loss in every year but one. Aeterna's directors' and officers' insurance policies are paying for the defense of this lawsuit and, after six years of hard-fought litigation, the insurance is rapidly wasting. Further litigation would continue to drain the available insurance. ¶91.

F. The Remaining Rule 23(e) Factors Support Final Approval

1. The Proposed Method of Distribution to the Class Is Effective (Rule 23(e)(2)(C)(ii))

The Settlement proceeds will be allocated to Class Members who submit a valid Claim Form in accordance with the Plan of Allocation. *See* Sec. IV, *infra*. SCS will review and process all Claim Forms received, provide claimants with an opportunity to cure any deficiency in their claim or request review of the denial of their claim, and ultimately mail a check to, or wire, Authorized Claimants their *pro rata* share of the Net Settlement Fund as calculated under the Plan of Allocation following Court approval. This type of claims processing and method for distributing settlement proceeds is standard in securities class actions and is effective. Moreover, the Settlement is not "claims-made"—none of the Settlement will revert to Aeterna.[7]

[7] *See* Stipulation at ¶12.

2. The Proposed Award of Attorneys' Fees Is Fair and Reasonable (Rule 23(e)(2)(C)(iii))

The relief provided for the Class is also adequate when the terms of the proposed award of attorneys' fees are taken into account. As discussed in detail in the accompanying Fee and Expense Memorandum, the proposed attorneys' fees of 33⅓%, to be paid upon approval by the Court, are reasonable in light of the substantial work and efforts of Plaintiffs' Counsel, their significant investment of resources in the case, their skillful prosecution of the Action for the benefit of the Class, the risks that they faced in the litigation, and the overall benefit of the Settlement achieved. Most importantly, with respect to the Court's consideration of the Settlement's fairness, the approval of attorneys' fees is entirely separate from approval of the Settlement; neither Lead Plaintiffs nor Lead Counsel may terminate the Settlement based on the ultimate award of attorneys' fees or expenses.

3. Identification of Agreements in Connection with the Settlement (Rule 23(e)(2)(C)(iv) and Rule 23(e)(3))

The Parties entered into a confidential agreement establishing conditions under which Defendants may terminate the Settlement if a certain threshold of Class Members submit valid and timely requests for exclusion. This type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the Settlement. *See Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-cv-1152, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018) (approving settlement with similar confidential agreement).

4. The Settlement Treats Class Members Equitably Relative to Each Other (Rule 23(e)(2)(D))

Rule 23(e)(2)(D) requires that the Court assess whether "the proposal treats class members equitably relative to each other." The Settlement does that. All Authorized Claimants will receive their *pro rata* share of the Net Settlement Fund based on the amount of their

Recognized Loss calculated under the Plan of Allocation. Ex. 2 (Notice at ¶¶56-77); *see also* Sec. IV, *infra* (regarding Plan of Allocation).

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

Approval of a "plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Par Pharm.*, 2013 WL 3930091, at *3; *see also In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *2 (D.N.J. May 31, 2012) (same); *Walsh v. Great Atlantic & Pacific Tea Co. Inc.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The Court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund"). To meet this standard, a plan of allocation recommended by experienced and competent class counsel "need only have a reasonable and rational basis." *Par Pharm.*, 2013 WL 3930091, at *8; *see In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). Further, "a plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable." *In re Lucent*, 307 F. Supp. 2d at 649.

Here, the proposed Plan of Allocation, which was developed by Lead Plaintiffs' damages experts in consultation with Lead Counsel, is set forth in the Notice, and provides a fair and reasonable method to allocate the Net Settlement Fund among Class Members who submit valid Claim Forms. Ex. 2 (Notice at ¶¶56-77). The proposed Plan of Allocation reflects an assessment of the damages that Lead Plaintiffs contend could have been recovered under the theories of liability asserted in the Action. ¶103. More specifically, the Plan of Allocation reflects, and is based on, Lead Plaintiffs' allegation that the price of Aeterna common stock was artificially inflated during the period from August 30, 2011, through and including November 6,

2014, as a result of Defendants' alleged materially false and misleading statements. ¶105. The Plan of Allocation is based on the premise that the decrease in the price of Aeterna common stock that followed the alleged corrective disclosure on November 6, 2014 may be used to measure the alleged artificial inflation in the price of Aeterna common stock prior to the disclosure. ¶106; Ex. 2 (Notice at ¶¶56-77). The same methodology would have been proffered by Lead Plaintiffs at summary judgment and trial had the Action not settled.

An individual Claimant's recovery under the Plan of Allocation will depend on a number of factors, including how many shares of Aeterna common stock the Claimant purchased, acquired, or sold during the Class Period, when that Claimant bought, acquired, or sold the shares, and the number of valid claims filed by other Claimants. ¶106. If a Claimant has an overall market gain with respect to his, her, or its overall transactions in Aeterna common stock during the Class Period, or if the Claimant purchased shares during the Class Period, but did not hold any of those shares through the alleged corrective disclosure, the Claimant's recovery under the Plan of Allocation will be zero, as any loss suffered would not have been caused by the revelation of the alleged fraud. *Id.*

Lead Plaintiffs and Lead Counsel believe that the proposed Plan of Allocation will result in a fair and equitable distribution of the Net Settlement Fund among Class Members similar to the result if Lead Plaintiffs prevailed at trial. ¶108; *see also City of Omaha Police & Fire Ret. Sys. v. LHC Group*, 2015 WL 965693, at *15 (W.D. La. 2015) (approving plan of allocation where: "[u]nder the Plan, each Class Member will receive his or her pro rata share of the funds based on the calculation of recognized losses."). To date, no objections to the Plan of Allocation have been filed on this Court's docket or received by Lead Counsel. ¶109. For these reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Plan of Allocation.

V. THE NOTICE PROGRAM SATISFIES RULE 23 AND DUE PROCESS

The Notice provided to Settlement Class Members satisfied the requirements of both Fed. R. Civ. P. 23(c)(2) and 23(e). Rule 23(e) requires that notice of the proposed settlement be given "in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(B) further requires certified classes to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In securities class actions, the notice must contain the information outlined in Rule 23(c)(2)(B) and the PSLRA. *See* 15 U.S.C. § 78u–4(a)(7).

Here, both the substance of the Notice and the method of its dissemination to potential members of the Class satisfy these standards. As noted above, in accordance with the Court's Preliminary Approval Order, SCS began disseminating copies of the Notice Packet to potential Class Members and nominees on October 28, 2020. *See* Evans Decl. ¶4. As of January 11, 2020, SCS disseminated 21,497 Notice Packets to potential Class Members and nominees. *See id*. ¶7. In addition, SCS caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* on November 9, 2020. *See id.* ¶9. SCS also established a toll-free helpline and a case-specific website dedicated to this Settlement, www.AeternaSecuritiesLitigation.com, to provide potential Class Members with information concerning the Settlement and access to copies of the Notice and Claim Form, as well as the Stipulation and Preliminary Approval Order. *Id.* ¶¶10-11.

This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmission over a newswire, and publication on an internet website, was "the best notice . . . practicable under the circumstances." *See* Fed. R. Civ. P. 23(c)(2)(B). Courts in this Circuit

routinely find that comparable notice programs meet the requirements of due process, the PSLRA, and Rule 23. *See e.g., In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *10 (D.N.J. Nov. 15, 2016) (finding comparable notice in securities class action satisfied requirements of Rule 23, PSLRA, and due process); *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000) (finding comparable notice in securities class action settlement satisfied Rule 23 and due process); *In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, 2008 WL 4974782, at *10 (E.D. Pa. Nov. 21, 2008) (same).

In sum, the Notice complied with the Court's Preliminary Approval Order, as well as the requirements of Fed. R. Civ. P. 23, the PSLRA, and due process.

VI. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court grant final approval of the class action Settlement and approve the proposed Plan of Allocation.

Dated: January 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2021 a true and correct copy of the foregoing document was served by CM/ECF to the parties registered to the Court's CM/ECF system.

/s/ Laurence M. Rosen
Laurence M. Rosen