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18
19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA

21 In re GILEAD SCIENCES SECURITIES)
LITIGATION)

Master File No. C-03-4999-SI

) CLASS ACTION

22 _____)
23 This Document Relates To:)

NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
24 ALL ACTIONS.)
25 SETTLEMENT AND PLAN OF
ALLOCATION OF SETTLEMENT
PROCEEDS AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
26 THEREOF

27 DATE: November 5, 2010
TIME: 10:30 a.m.
28 CTRM: The Honorable Susan Illston

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§240.10b-511

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that, pursuant to the Order Preliminarily Approving Settlement
3 and Providing for Notice dated July 7, 2010 (Dkt. No. 271), a “Fairness Hearing” will be held on
4 November 5, 2010, at 10:30 a.m., or as soon thereafter as counsel may be heard, at the United States
5 Courthouse, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Susan
6 Illston, United States District Judge. Plaintiffs Trent St. Clare and Terry Johnson (collectively,
7 “Lead Plaintiffs”) will move at the Fairness Hearing for a judgment finally approving the Settlement
8 of this Action and dismissing it with prejudice. This motion is based on the attached Memorandum
9 of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement and
10 Plan of Allocation of Settlement Proceeds, the Joint Declaration of David J. George and Lori G.
11 Feldman in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation
12 of Settlement Proceeds; and an Award of Attorneys’ Fees and Expenses (“Joint Declaration”), the
13 Stipulation of Settlement dated as of June 28, 2010 (the “Stipulation”) (Dkt. No. 267)¹, all other
14 pleadings and matters of record, and such additional evidence or argument as may be presented
15 before or at the hearing.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. PRELIMINARY STATEMENT**

18 Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs submit this
19 memorandum in support of their motion for final approval of the Settlement of this Action for
20 \$8,250,000 (plus accrued interest) in cash, and for approval of the Plan of Allocation of the
21 Settlement proceeds. The Settlement was reached after more than six years of hard-fought and
22 extensive litigation, including five rounds of motion to dismiss briefing, an appeal to the United
23 States Court of Appeals for the Ninth Circuit (“Ninth Circuit”), and arm’s-length settlement
24 negotiations with the substantial assistance of the Honorable Layn R. Phillips (Ret.), a highly-
25 respected mediator with extensive experience in the mediation of complex civil actions.

26 _____
27 ¹ Unless otherwise defined herein, capitalized terms shall have the same meanings as set forth
28 in the Stipulation which was previously filed with the Court.

1 Plaintiffs' Co-Lead Counsel submit, as discussed herein and in the accompanying Joint
2 Declaration, that the Settlement is a highly favorable result, as demonstrated by a balancing of
3 factors. These factors include the strengths and weaknesses of the case, the risk, expense,
4 complexity, and the likely duration of the case, the recommendation of experienced counsel after
5 extensive litigation and arm's-length settlement negotiations, and reaction of the Class Members to
6 the Settlement.

7 Lead Plaintiffs allege that Defendants violated the federal securities laws by making
8 misrepresentations and omissions concerning Gilead Sciences, Inc.'s ("Gilead") marketing and sale
9 of Viread, a flagship product, that created the impression that demand for Viread was strong (when
10 prescription volume was actually overwhelmingly driven by off-label marketing) which was material
11 to Gilead's financial success. This alleged off-label marketing caused Gilead Publicly Traded
12 Securities to be overvalued and artificially inflated, so that when the off-label marketing was
13 revealed, physicians stopped prescribing Viread. This caused wholesalers to draw down their Viread
14 inventory, and ultimately, when these facts became available to the investing public, the truth
15 regarding Gilead's financials and future business prospects caused the value of Gilead's stock to
16 plummet.

17 Defendants vigorously opposed the Action from the outset, filing three motions to dismiss
18 before the District Court dismissed the case with prejudice. Undaunted, Plaintiffs' Co-Lead Counsel
19 successfully appealed the dismissal to the Ninth Circuit, which reversed the District Court's
20 decision, finding that Lead Plaintiffs sufficiently alleged both loss causation and economic loss.
21 Defendants continued to aggressively defend the Action, unsuccessfully seeking certiorari and filing
22 two more motions to dismiss before this Court upheld Lead Plaintiffs' Fifth Amended Complaint.

23 As evidenced by their extensive efforts to date, Plaintiffs' Co-Lead Counsel believe this
24 Action has significant merit and that they would likely prevail on the issues presented. However,
25 they are also aware that Lead Plaintiffs faced significant risks in obtaining a favorable outcome if
26 litigation continued. For example, Defendants would continue to argue that Lead Plaintiffs could not
27 prove loss causation because, among other things, the temporal gap between the time the FDA
28 Warning Letter was revealed and the subsequent decline in Gilead's stock value. Similarly,

1 Defendants would argue that Lead Plaintiffs could not prove that physicians stopped prescribing
2 Viread due to the FDA Warning Letter. Although the Ninth Circuit reversed the District Court's
3 holding that Lead Plaintiffs failed to adequately plead loss causation, Lead Plaintiffs' ability to prove
4 the essential element of loss causation on summary judgment or at trial was uncertain. Moreover,
5 Lead Plaintiffs were faced with the formidable task of proving falsity and materiality on summary
6 judgment or at trial because Defendants took the position that Gilead's sales of Viread were both
7 legal and ethical and that off-label marketing, if any, did not result in material sales of Viread during
8 the Class Period.

9 In addition, as a result of the significant time between the events of interest and any
10 deposition or trial, the ability, as well as willingness, of many witnesses to testify competently about
11 those events could have been impaired and many of the documents Lead Plaintiffs would seek could
12 have been lost or otherwise unavailable for production. These issues would affect Lead Plaintiffs'
13 ability to successfully prosecute their case. The Settlement eliminates these and many other risks of
14 continued litigation. Here, Defendants have demonstrated a commitment to defend this case through
15 and beyond trial, if necessary, and are represented by well-respected and highly capable counsel
16 from Cooley LLP. If not for this Settlement, the case would have continued to be fiercely contested
17 by the parties with the ultimate outcome uncertain.

18 At the time of settlement, Plaintiffs' Co-Lead Counsel were able to fully assess the strengths
19 and weaknesses of Lead Plaintiffs' claims as a result of more than six years of investigation and
20 litigation. In addition to preparing five fact-intensive complaints, briefing five rounds of motions to
21 dismiss and an appeal to the Ninth Circuit, Plaintiffs' Co-Lead Counsel: (i) thoroughly reviewed and
22 analyzed publicly available information regarding Gilead; (ii) thoroughly investigated, with the
23 assistance of in-house and outside private investigators, the facts underlying the allegations in the
24 complaints; (iii) thoroughly reviewed and analyzed documents from various sources, which required
25 understanding the many highly technical and scientific issues in the Action; (iv) thoroughly
26 researched the law pertinent to the claims and defenses asserted; (v) consulted with medical experts
27 regarding the pharmaceutical marketing and FDA rules, regulations, and procedure; (vi) analyzed the
28 damages in the Action and consulted with economic experts regarding the calculation of damages,

1 loss causation, materiality, and movements in the price of Gilead stock; and (vii) prepared for and
2 attended mediation with Judge Phillips.

3 Plaintiffs' Co-Lead Counsel, who are well-respected and highly experienced in prosecuting
4 securities fraud class actions, have concluded that the Settlement is a very good result under the
5 circumstances, and is in the best interest of the Class. This conclusion is based on all the
6 circumstances present here, including the substantial risks, expense, and uncertainties in continuing
7 the Action through summary judgment, trial, and probable appeal, the relative strengths and
8 weaknesses of the claims and defenses asserted, a complete analysis of the evidence obtained and the
9 legal and factual issues presented, past experience in litigating complex actions similar to the present
10 action, and the serious disputes between the parties concerning the merits and damages.

11 While the deadline for filing objections has not yet passed, members of the Class appear to
12 agree with Plaintiffs' Co-Lead Counsel's conclusion. Pursuant to an Order of the Court dated July 7,
13 2010, over 74,000 copies of the Settlement Notice and Proof of Claim were sent to potential Class
14 Members.² In addition, a Summary Notice was published in *Investor's Business Daily*. The
15 Settlement Notice, Summary Notice, and Proof of Claim were also placed on the Claims
16 Administrator's website, on or before July 23, 2010. La Count Aff., ¶¶13-15. The Settlement
17 Notice informed potential Class Members of the terms of the Settlement, their right to object or opt-
18 out of the Settlement, the Plan of Allocation of Settlement proceeds, and counsel's request for an
19 award of attorneys' fees and expenses. Although the deadline for objecting is September 30, 2010,
20 to date not a single Class Member has objected to any aspect of the Settlement, Plan of Allocation,
21 or Plaintiffs' Co-Lead Counsel's request for an award of attorneys' fees and expenses.

22 For all of the reasons discussed herein and in the Joint Declaration, it is respectfully
23 submitted that the Settlement should be finally approved by the Court. Moreover, the Plan of
24 Allocation was developed with Lead Plaintiffs' materiality and damages experts and tracks the
25

26 ² See paragraphs 5 through 10 to the Affidavit of Michelle M. La Count of A.B. Data Ltd.
27 Regarding Mailing of Settlement Notice and Proof of Claim Forms and Publication of Summary
28 Notice ("La Count Aff."), submitted herewith.

1 theory of damages asserted and provides a fair and reasonable basis for allocating the net settlement
2 proceeds among Class Members, and therefore should be approved.

3 **II. THE STANDARDS GOVERNING JUDICIAL APPROVAL OF CLASS**
4 **ACTION SETTLEMENTS**

5 It is well-established in the Ninth Circuit that “voluntary conciliation and settlement are the
6 preferred means of dispute resolution.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615,
7 625 (9th Cir. 1982); *see also In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2007)
8 (“[T]he court must also be mindful of the Ninth Circuit’s policy favoring settlement, particularly in
9 class action law suits.”). Class action suits readily lend themselves to compromise because of the
10 difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. It is
11 beyond question that “there is an overriding public interest in settling and quieting litigation,” and
12 this is “particularly true in class action suits.” *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950
13 (9th Cir. 1976); *see also Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443
14 (9th Cir. 1989).³ In deciding whether to approve a proposed settlement of a stockholders’ class
15 action under Federal Rule of Civil Procedure 23(e), the court must first find that the proposed
16 settlement is “fair, adequate, and reasonable.”⁴ The Ninth Circuit has provided factors which may
17 be considered in evaluating the fairness of a class action settlement:

18 Although Rule 23(e) is silent respecting the standard by which a proposed settlement
19 is to be evaluated, the universally applied standard is whether the settlement is
20 fundamentally fair, adequate and reasonable. The district court’s ultimate
21 determination will necessarily involve a balancing of several factors which may
22 include, among others, some or all of the following: the strength of plaintiffs’ case;
23 the risk, expense, complexity, and likely duration of further litigation; the risk of
24 maintaining class action status throughout the trial; the amount offered in settlement;
25 the extent of discovery completed, and the stage of the proceedings; the experience
26 and views of counsel; the presence of a governmental participant; and the reaction of
27 the class members to the proposed settlement.

28
3 The law consistently favors the compromise of disputed class action claims. *See Williams v.*
4 *First Nat’l Bank*, 216 U.S. 582, 595 (1910); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.
5 1995); *Churchill Vill. L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004); *MWS Wire Indus., Inc. v.*
6 *Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986).

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4 *Pac. Enters.*, 47 F.3d at 377; *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday*
Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977). All citations are omitted and emphasis added
throughout unless otherwise indicated.

1 *Officers for Justice*, 688 F.2d at 625. *Accord* *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375
2 (9th Cir. 1993); *Woo v. Home Loan Group, L.P.*, No. 07-CV-202 H (POR), 2008 WL 3925854, at *3
3 (S.D. Cal. Aug. 25, 2008); *Church v. Consol. Freightways, Inc.*, No. C-90-2290-DLJ, 1993 U.S.
4 Dist. LEXIS 6439 (N.D. Cal. May 3, 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F.
5 Supp. 1379 (D. Ariz. 1989) (“*WPPSS*”), *aff’d sub nom. Class Plaintiffs v. Seattle*, 955 F.2d 1268
6 (9th Cir. 1992). “The relative degree of importance to be attached to any particular factor will
7 depend upon . . . the nature of the claim(s) advanced, the type(s) of relief sought, and the unique
8 facts and circumstances presented by each individual case.” *Woo*, 2008 WL 3925854, at *3
9 (quoting *Officers for Justice*, 688 F.2d at 625).

10 The district court must exercise “sound discretion” in approving a settlement. *Ellis v. Naval*
11 *Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff’d*, 661 F.2d 939 (9th Cir. 1981); *Torrissi*,
12 8 F.3d at 1375. In exercising its discretion,

13 the court’s intrusion upon what is otherwise a private consensual agreement
14 negotiated between the parties to a lawsuit must be limited to the extent necessary to
15 reach a reasoned judgment that the agreement is not the product of fraud or
overreaching by, or collusion between, the negotiating parties, and that the
settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

16 *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit defines the limits of the inquiry to be made
17 by the court in the following manner:

18 [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for
19 trial on the merits. Neither the trial court nor this court is to reach any ultimate
20 conclusions on the contested issues of fact and law which underlie the merits of the
21 dispute, for it is the very uncertainty of outcome in litigation and avoidance of
wasteful and expensive litigation that induce consensual settlements. The proposed
settlement is not to be judged against a hypothetical or speculative measure of what
might have been achieved by the negotiators.

22 *Id.* (emphasis in original).

23 Moreover, where, as here, a proposed class settlement has been reached after arm’s-length
24 negotiation conducted by capable counsel, it is presumptively fair. *See Lundell v. Dell, Inc.*, No.
25 CIVA C05-3970 JWRS, 2006 WL 3507938, at *3 (N.D. Cal. Dec. 5, 2006) (approving class action
26 settlement that was “the result of intensive, arms’-length negotiations between experienced attorneys
27 familiar with the legal and factual issues of this case”); *In re Indep. Energy Holdings PLC*, No. 00
28 Civ. 6689(SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) (“the fact that the Settlement

1 was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator
2 experienced in complex litigation, is further proof that it is fair and reasonable”).

3 **III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND**
4 **ADEQUATE**

5 **A. The Strength of Lead Plaintiffs' Case When Balanced Against the**
6 **Risk, Expense, Complexity, and Likely Duration of Further Litigation**
7 **Supports Approval of the Settlement**

8 In determining whether the proposed Settlement is fair, reasonable, and adequate, the Court
9 should balance against the continuing risks of litigation, the benefits afforded to the Class and the
10 immediacy and certainty of a substantial recovery. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir.
11 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979); *In re Warner Commc'ns*
12 *Sec. Litig.*, 618 F. Supp. 735, 741 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). In other
13 words,

14 “[t]he Court shall consider the vagaries of litigation and compare the significance of
15 immediate recovery by way of the compromise to the mere possibility of relief in the
16 future, after protracted and expensive litigation. In this respect, ‘It has been held
17 proper to take the bird in hand instead of a prospective flock in the bush.’”

18 *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

19 In the context of approving class action settlements, courts attempting to balance these
20 factors have recognized “that stockholder litigation is notably difficult and notoriously uncertain.”
21 *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973); *see also Republic Nat'l Life Ins. Co. v.*
22 *Beasley*, 73 F.R.D. 658, 667 (S.D.N.Y. 1977). This is even more so today in this post-PSLRA
23 environment amid defendants' constant attempts to push the envelope and contours of the PSLRA.
24 *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (“securities actions have
25 become more difficult from a plaintiff's perspective in the wake of the PSLRA”). As one court
26 noted: “An unfortunate byproduct of the PSLRA is that potentially meritorious suits will be short-
27 circuited by the heightened pleading standard.” *Bryant v. Avado Brands, Inc.*, 100 F. Supp. 2d 1368,
28 1377 (M.D. Ga. 2000), *rev'd on other grounds and remanded sub nom. Bryant v. Dupree*, 252 F.3d
1161 (11th Cir. 2001).

1 While Plaintiffs' Co-Lead Counsel believe that the litigation has significant merit, they
2 recognize that Lead Plaintiffs faced numerous risks and uncertainties and were well aware that many
3 other similar actions have been prosecuted in the belief that they were meritorious, only to lose on
4 dispositive motions, at trial, or on appeal. The Settlement recognizes the risks of complex litigation
5 involving difficult legal and factual issues. As discussed herein and in the Joint Declaration, the
6 risks of continued litigation when weighed against the substantial and certain recovery for the Class
7 confirms the reasonableness of the Settlement. The Settlement is unquestionably better than another
8 distinct possibility – no or little recovery for the Class.

9 **1. The Risks of Proving Falsity and Materiality**

10 Lead Plaintiffs' case centered on allegations that Defendants engaged in an illegal, off-label
11 marketing scheme, with respect to Viread, and intentionally made material misstatements and
12 omissions with regard to Viread sales, which caused the artificial inflation of Gilead stock during the
13 Class Period, in violation of the federal securities laws. The alleged misrepresentations and
14 omissions concerning the marketing and sales of Viread created the impression that demand for
15 Viread was strong, when prescription volume was actually driven by improper off-label marketing.
16 Lead Plaintiffs also allege that 75%-95% of all Viread sales during the Class Period resulted from
17 improper off-label marketing. This was material to Gilead's financial success, as Viread sales
18 comprised approximately 65% of Gilead's total revenues during the Class Period. This alleged off-
19 label marketing of Viread caused Gilead securities to be overvalued and artificially inflated, so that
20 when the off-label marketing was revealed, physicians stopped prescribing Viread, which caused
21 wholesalers to draw down their Viread inventory, and ultimately, when these facts became available
22 to the investing public, the truth regarding Gilead's financials and future business prospects caused
23 the value of Gilead's stock to plummet.

24 Lead Plaintiffs believe that based on the evidence adduced to date, including interviews with
25 former Gilead employees and customers, they had a good case as to liability and would be able to
26 prove that Defendants failed to disclose that they were engaged in illegal off-label marketing of
27 Viread, and that the misstatements and omissions made by Defendants during the Class Period
28

1 regarding Viread sales were material and caused the price of Gilead securities to be artificially
2 inflated.

3 While Lead Plaintiffs believe that their claims are strong, getting past summary judgment and
4 establishing liability at trial would by no means be guaranteed. Defendants have adamantly denied
5 any liability and have asserted from the outset of the Action that they possess absolute defenses to
6 Lead Plaintiffs' claims. As evidenced by Defendants' numerous motions to dismiss, falsity and
7 materiality were aggressively contested issues in this Action, which may have proved difficult to
8 establish. Defendants took the position that Gilead's sales of Viread were both legal and ethical and
9 that off-label marketing, if any, did not result in material sales of Viread during the Class Period.
10 Proving the falsity and materiality of any of Defendants' actionable Class Period statements would
11 have been a significant hurdle on a motion for summary judgment and at trial.

12 Although Lead Plaintiffs believe that they would present sufficient evidence to support their
13 claims, Lead Plaintiffs were aware that Defendants would present counter-evidence and other
14 substantial obstacles to obtaining a judgment in their favor at trial. Moreover, there was no certainty
15 that discovery would tend to support or disprove Lead Plaintiffs' allegations. In order to prove their
16 case, Lead Plaintiffs would have to rely on significant testimony from former Gilead employees and
17 customers, many of whom would be testifying about matters that occurred more than seven years
18 ago. As a result of the significant time between the events of interest and any deposition or trial, the
19 ability, as well as willingness, of many witnesses to testify completely about those events could be
20 impaired. In addition, due to the age of the case, many of the documents that Lead Plaintiffs would
21 seek to be produced could turn out to be lost or otherwise unavailable for production. These issues
22 could seriously affect Lead Plaintiffs' ability to successfully prosecute their claims.

23 The fact that the operative complaint in this Action is the Fifth Amended Complaint, and that
24 there were five motions to dismiss and an appeal to the Ninth Circuit, amply demonstrates the fact
25 that the case entailed a number of complex issues. Assuming Lead Plaintiffs survived Defendants'
26 anticipated motion for summary judgment after completion of discovery, presenting these complex
27 issues to a jury posed a particular risk to Lead Plaintiffs' hopes for success at trial. Lead Plaintiffs
28 could not be certain that a jury would see through the complexity of the underlying facts to the heart

1 of the alleged fraud. Moreover, the risks of establishing liability posed by complex issues with
2 conflicting testimony and evidence would be exacerbated by the following risks inherent in all
3 shareholder litigation, including the unpredictability of a lengthy and complex jury trial, the risk that
4 witnesses could be unavailable or jurors could react to the evidence in unforeseen ways, the risk that
5 a jury would find that some or all of the alleged misrepresentations were not material, and the risk
6 that the jury could find that Defendants believed in the appropriateness of their actions at the time.

7 **2. The Risks of Proving Loss Causation and Damages**

8 Defendants vigorously argued throughout the Action that Lead Plaintiffs failed to set forth a
9 provable theory of loss causation, and were steadfast in their position that Lead Plaintiffs would not
10 be able to prove any damages resulting from the alleged false and misleading statements because any
11 stock price declines were caused by outside market forces or were caused by factors wholly
12 unrelated to the alleged fraud.

13 Lead Plaintiffs' theory of loss causation was the stock price drop at the end of the Class
14 Period was attributable, at least in part, to Defendants' false and misleading statements concerning
15 the true driver of Viread sales – off-label marketing. When the truth regarding Viread sales was
16 revealed, physicians were less eager to prescribe Viread to their patients causing a drop in Viread
17 sales, which caused the wholesalers to draw down their inventories. When the public finally realized
18 the impact of the off-label marketing and the FDA Warning Letter, the artificial inflation came out of
19 Gilead's stock price. In reversing the District Court's opinion and remanding the Action, the Ninth
20 Circuit held that Lead Plaintiffs sufficiently alleged loss causation and economic loss. While Lead
21 Plaintiffs and Plaintiffs' Co-Counsel believe, and the Ninth Circuit has held, that their theory of loss
22 causation satisfied the pleading standard set out by the Supreme Court in *Dura Pharms., Inc. v.*
23 *Broudo*, 544 U.S. 336, 346 (2005), Lead Plaintiffs' ability to prove the essential element of loss
24 causation on summary judgment or at trial was uncertain in light of, among other things, the
25 temporal gap between the time the FDA Warning Letter was revealed and the subsequent decline in
26 Gilead's stock value as well as the substantial hurdle of proving that physicians stopped prescribing
27 Viread as a result of the FDA Warning Letter.

28

1 Moreover, *Dura*, and subsequent cases interpreting *Dura*, have made proving loss causation
2 even more difficult and uncertain than in the past. Two recent examples illustrate this point. In *In re*
3 *Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), this
4 Court granted summary judgment in defendants' favor holding that shareholder plaintiffs failed to
5 present sufficient evidence to establish loss causation under Rule 10b-5. While the Ninth Circuit
6 recently reversed the decision, the court in *In re Apollo Group, Inc. Sec. Litig.*, No. CV 04-2147-
7 PHx-JAT, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 U.S.
8 App. LEXIS 14478 (9th Cir. June 23, 2010), on a motion for judgment as a matter of law, overturned
9 a jury verdict in favor of shareholders based on insufficient evidence presented at trial to establish
10 loss causation.

11 Also, the amount of damages incurred by Class Members would have been hotly- contested
12 at trial. Damages in cases such as these are always difficult to prove. At trial, the damage
13 assessments of Lead Plaintiffs' and Defendants' experts were sure to vary substantially, and in the
14 end, this crucial element at trial would have been reduced to a "battle of the experts." The
15 determination of damages is a complicated and uncertain process involving conflicting expert
16 testimony. Expert testimony could rest on many subjective assumptions, any of which could
17 potentially be rejected by a jury as speculative or unreliable. Lead Plaintiffs would have likely faced
18 a motion *in limine* by Defendants to preclude Lead Plaintiffs' damage experts' testimony under the
19 *Daubert* test and risked a decision that a valuation model might not be admissible in evidence. The
20 reaction of a jury to battling expert testimony is highly unpredictable and in such a battle, Plaintiffs'
21 Co-Lead Counsel recognize the possibility that a jury could be swayed by convincing experts for the
22 Defendants, and find that there were no damages or only a fraction of the amount of damages Lead
23 Plaintiffs contended. *See, e.g., Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (finding no
24 loss causation and overturning \$81 million jury verdict).

25 While it is possible that Lead Plaintiffs could present evidence at trial that the aggregate
26 damages exceed the amount of the proposed Settlement, that assumes that most, if not all, of the
27 significant liability and damage issues would have been resolved in the Class's favor. Even if Lead
28 Plaintiffs prevailed and obtained a substantial judgment after trial, there is little doubt that

1 Defendants would have appealed. The appeals process would have likely spanned several years,
2 during which the Class would have received no distribution on any damage award. In addition, an
3 appeal of any verdict would carry the risk of reversal, in which case the Class would receive no
4 recovery after having prevailed on the claims at trial.

5 Finally, even with a judgment in hand, in today's corporate environment there is no
6 guarantee that a significant judgment entered years down the road would be collectable. Therefore,
7 the amount of damages the Class would actually recover if successful at trial is uncertain.

8 **3. The Complexity, Expense, and Likely Duration of the**
9 **Litigation Justifies the Settlement**

10 The immediacy and certainty of a recovery is a factor for the Court to balance in determining
11 whether this proposed Settlement is fair, adequate, and reasonable. Courts consistently have held
12 that "[t]he expense and possible duration of the litigation should be considered in evaluating the
13 reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *see*
14 *also Officers for Justice*, 688 F.2d at 626.

15 Here, Defendants have demonstrated a commitment to defend this case through and beyond
16 trial, if necessary, and are represented by well-respected and highly capable counsel from Cooley
17 LLP. If not for this Settlement, the case would have continued to be fiercely contested by all parties.
18 The expense and time of continuing litigation would have been substantial. As the court noted in
19 *Ikon*, which is applicable here:

20 In the absence of a settlement, this matter will likely extend for . . . years longer with
21 significant financial expenditures by both defendants and plaintiffs. This is partly
22 due to the inherently complicated nature of large class actions alleging securities
23 fraud: there are literally thousands of shareholders, and any trial on these claims
24 would rely heavily on the development of a paper trial [sic] through numerous public
25 and private documents.

26 194 F.R.D. at 179.

27 The securities claims advanced by Lead Plaintiffs involve complex legal and factual issues,
28 which would require document discovery, numerous depositions, and extensive expert discovery and
29 testimony. After completion of discovery, Defendants' expected motion for summary judgment
30 would have to be briefed and argued, a pre-trial order would have to be prepared, proposed jury
31 instructions would have to be submitted, and motions *in limine* would have to be filed and argued.

1 Substantial time and expense would need to be expended in preparing the case for trial. The trial
2 itself would have been long, expensive, and uncertain and no matter the outcome, appeals would be
3 virtually assured. This would add considerably to the expense and duration of the Action.

4 The legal issues are equally as complex – proving falsity, materiality, scienter, causation, and
5 damages, would likely require expert testimony, as discussed above. There exists no doubt that the
6 Settlement will spare the litigants the significant delay, risk, and expense of continued litigation.
7 Many hours of the District Court’s time and resources have also been spared. Moreover, even if the
8 Class could recover a larger judgment after a trial, the additional delay through trial, post-trial
9 motions, and the appellate process could deny the Class any recovery for years, which would further
10 reduce its value. The \$8,250,000 settlement, at this juncture, results in an immediate and substantial
11 tangible recovery, without the considerable risk, expense, and delay of discovery, summary
12 judgment motion(s), and trial and post-trial litigation. *See Reynolds v. Beneficial Nat’l Bank*, 288
13 F.3d 277, 284 (7th Cir. 2002) (“To most people, a dollar today is worth a great deal more than a
14 dollar ten years from now.”).

15 **B. Lead Plaintiffs Have Engaged in Sufficient Informal Discovery and a**
16 **Thorough Investigation to Identify the Strengths and Weaknesses of**
17 **Their Case and the Propriety of Settlement**

18 The stage of the proceedings and the amount of discovery completed – is another factor
19 which the courts consider in determining the fairness, reasonableness, and adequacy of a settlement.
20 *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit has held that “in the context of class action
21 settlements, “formal discovery is not a necessary ticket to the bargaining table” where the parties
22 have sufficient information to make an informed decision about settlement.” *In re Mego Fin. Corp.*
23 *Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, both the knowledge of Plaintiffs’ Co-Lead
24 Counsel and the proceedings themselves have reached a stage where Plaintiffs’ Co-Lead Counsel
25 could make an intelligent evaluation of the Action and propriety of this Settlement.

26 As detailed herein and in the Joint Declaration, Plaintiffs’ Co-Lead Counsel conducted
27 significant informal discovery and a thorough investigation on the matters alleged, even though
28

1 throughout much of the litigation, discovery was stayed pursuant to the PSLRA. For instance,
2 Plaintiffs' Co-Lead Counsel:

- 3 • thoroughly reviewed and analyzed publicly available information regarding Gilead,
4 including its filings with the Securities and Exchange Commission ("SEC"),
5 financial statements, press releases, conference call transcripts, analysts' reports,
6 notes prepared by securities firms, and United States Food and Drug Administration
7 ("FDA") public notices concerning Gilead;
- 8 • thoroughly investigated, with the assistance of in-house and private investigators, the
9 facts underlying the allegations in five consolidated and amended complaints,
10 including devoting considerable resources to locating and conducting detailed
11 investigative interviews of dozens of witnesses in various states who provided
12 detailed information for the case;
- 13 • thoroughly reviewed and analyzed documents produced by various sources which
14 required understanding the many highly technical and scientific issues in the Action;
- 15 • thoroughly researched the law pertinent to the claims and defenses asserted;
- 16 • consulted extensively with medical experts on issues related to pharmaceutical
17 marketing and FDA rules, regulations and procedures, and related issues; and
- 18 • analyzed the damages in this Action and consulted with economic experts regarding
19 the calculation of damages, loss causation, materiality, and movements in the price of
20 Gilead stock.

21 Plaintiffs' Co-Lead Counsel also prepared five fact-specific complaints. The parties also
22 fully briefed five rounds of Defendants' motions to dismiss, and an appeal to the Ninth Circuit,
23 which highlighted the fact that there were several unsettled legal and factual issues that could be
24 adversely decided against Lead Plaintiffs and the Class.

25 Also, the parties prepared for and participated in extensive settlement negotiations, including
26 mediation where the strengths and weaknesses of the parties' respective claims and defenses were
27 fully explored. Thus, at the time of Settlement, Plaintiffs' Co-Lead Counsel had a full understanding
28 of the strengths and weaknesses of the Class's claims, as well as the difficulties they would have
faced in obtaining a more favorable result after continued litigation. Having sufficient information
to properly evaluate the case, Plaintiffs' Co-Lead Counsel have managed to settle the Action on
terms highly favorable to the Class. *See Mego Fin.*, 213 F.3d at 459.

1 **C. The Recommendations of Experienced Counsel After Extensive**
2 **Litigation and Arm’s-Length Settlement Negotiations Favor the**
3 **Approval of the Settlement**

4 As the Ninth Circuit recently observed in *Rodriquez v. West Publishing Corp.*, 563 F.3d 948
5 (9th Cir. 2009), “[t]his circuit has long deferred to the private consensual decision of the parties” and
6 their counsel in settling an action. *Id.* at 965. Courts have recognized that “[g]reat weight is
7 accorded to the recommendation of counsel, who are most closely acquainted with the facts of the
8 underlying litigation.” *Nat’l Rural*, 221 F.R.D. at 528. Indeed, “[t]he recommendation of
9 plaintiffs’ counsel should be given a presumption of reasonableness.” *Omnivision*, 559 F. Supp. 2d
10 at 1043. Plaintiffs’ Co-Lead Counsel, having carefully considered and evaluated, *inter alia*, the
11 relevant legal authorities and evidence to support the claims asserted against Defendants, the
12 likelihood of prevailing on these claims, the risk, expense, and duration of continued litigation, and
13 the likely appeals and subsequent proceedings necessary if Lead Plaintiffs did prevail against
14 Defendants at trial, have concluded that the Settlement is a highly favorable result for the Class.
15 Plaintiffs’ Co-Lead Counsel have significant experience in securities and other complex class action
16 litigation and have negotiated numerous other substantial class action settlements throughout the
17 country. Where, as here, the settlement is the product of serious, informed non-collusive
18 negotiations after some six years of litigation, significant weight should be attributed to the belief of
19 experienced counsel that settlement is in the best interest of the class. *See Rodriquez*, 563 F.3d at
20 965 (“[The Ninth Circuit] put[s] a good deal of stock in the product of an arms-length, non-
21 collusive, negotiated resolution.”); *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, No.
22 MDL 901, 1992 U.S. Dist. LEXIS 14337, at *12 (C.D. Cal. June 10, 1992) (finding belief of counsel
23 that the proposed settlement represented the most beneficial result for class compelling factor in
24 approving settlement).

25 Moreover as set forth above, and in the Joint Declaration, the Settlement is also the result of
26 mediation conducted with the assistance of Judge Phillips, a highly-respected private mediator with
27 substantial experience in the mediation of complex actions. Therefore, there is no doubt that
28 settlement was reached without collision and after good-faith negotiation by experienced counsel for

1 Lead Plaintiffs and Defendants with a firm understanding of both the strengths and weaknesses of
2 their clients' respective claims and defenses, which also supports a finding that the Settlement is fair,
3 adequate, and reasonable.

4 **D. The Risks of Maintaining the Class Action Through Trial Support the**
5 **Settlement**

6 This factor also supports the Settlement. Here, a class had not yet been certified. Therefore,
7 risk existed that the Court would not certify the Class as defined. In addition, even if a class were
8 certified upon Lead Plaintiffs' motion (which Defendants indicated they would contest), there would
9 be no assurance of its maintaining this status since courts may exercise their discretion to re-evaluate
10 the appropriateness of class certification at any time. The risk of maintaining class certification
11 through trial favors settlement in this Action.

12 **IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE**

13 Lead Plaintiffs also seek approval of the Plan of Allocation of the Settlement proceeds. The
14 Plan of Allocation is set forth in full in the Settlement Notice mailed to potential Class Members.

15 Assessment of a plan of allocation of settlement proceeds in a class action under Rule 23 of
16 the Federal Rules of Civil Procedure is governed by the same standards of review applicable to the
17 settlement as a whole – the plan must be fair and reasonable. *See Ikon*, 194 F.R.D. at 184; *Class*
18 *Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). District courts enjoy “broad supervisory
19 powers over the administration of class-action settlements to allocate the proceeds among the
20 claiming class members . . . equitably.” *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978);
21 *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). An allocation
22 formula need only have a reasonable, rational basis, particularly if recommended by “experienced
23 and competent” class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf*
24 *Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992).

25 The Plan of Allocation provides an equitable basis to allocate the Net Settlement Fund
26 among all Class Members who submit an acceptable Proof of Claim. Here, the Plan of Allocation
27 was developed by Plaintiffs' Co-Lead Counsel with the assistance of their materiality and damages
28 experts and reflects an assessment of the damages that could have been recovered at trial under the

1 theories asserted in the case by Lead Plaintiffs. The Plan of Allocation will result in a fair
2 distribution of the available proceeds among Class Members who submit valid claims and therefore
3 should be approved.

4 **V. CONCLUSION**

5 For all the reasons set forth above and in the Joint Declaration, the proposed Settlement and
6 Plan of Allocation warrants this Court's final approval.

7 DATED: September 16, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2010, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following Designated Internet Site at: <http://securities.stanford.edu>.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 16, 2010.

s/ JEFFREY D. LIGHT
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