UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LANDMEN PARTNERS INC., Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BLACKSTONE GROUP L.P., et al., Defendants.	Civil Action No. 08-cv-03601-HB-FM CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PROPOSED PLAN OF DISTRIBUTION OF SETTLEMENT PROCEEDS

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SECONDARY AUTHORITY

Pursuant to FED. R. CIV. P. 23(e), and the Court's Order Preliminarily Approving Settlement and Providing for Notice, dated August 30, 2013 ("Preliminary Approval Order"), Lead Plaintiffs and Class Representatives Martin Litwin and Francis Brady ("Plaintiffs"), by and through their counsel ("Plaintiffs' Counsel"), respectfully move this Court for an order approving the proposed settlement ("Settlement")[1] of the above-captioned class action ("Action") and approving the proposed Plan of Distribution of the settlement proceeds.

I. PRELIMINARY STATEMENT

Plaintiffs and Plaintiffs' Counsel respectfully submit that the proposed $85,000,000 cash settlement is an outstanding recovery for the Class.[2] Plaintiffs pressed their claims for more than five years, beginning with a thorough investigation of the facts, and were only three weeks away from trial when this Settlement was reached. This Settlement comes after the Second Circuit's reversal of this Court's order granting Defendants'[3] motion to dismiss, complete fact and expert discovery, full briefing and argument on Defendants' summary judgment motion (which was pending at the time the Settlement was reached), substantially completed trial preparation, and three attempts to mediate

[1] The Settlement is set forth in the Settlement Agreement, dated Aug. 28, 2013 ("Stipulation"). Dkt. No. 171. Unless otherwise indicated, the definitions used in the Stipulation are the same as those used herein.

[2] "Class" means all persons and entities (other than those persons and entities who timely and validly request exclusion) who purchased common units of Blackstone in Blackstone's initial public offering of such common units in the United States ("IPO") or in the open market on the New York Stock Exchange between June 21, 2007 and March 12, 2008, inclusive, and who sustained compensable damages in connection with any such purchases of Blackstone units pursuant to Sections 11 and 15 of the Securities Act of 1933 ("Securities Act"). Excluded from the Class are (i) Defendants; (ii) members of the immediate family of each of the Defendants; (iii) any entity that acted as an underwriter of the IPO; (iv) any natural person who sold Blackstone common units to the public in the IPO or who serves or served as an officer or director of Blackstone or as a partner of any predecessor or director of Blackstone or as a partner of any predecessor to Blackstone, the members of immediate families of any such persons, and any entity in which any Defendants have or had a controlling interest; and (v) the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party.

[3] Defendants are The Blackstone Group, L.P. ("Blackstone"), Stephen A. Schwarzman, Peter J. Peterson, Hamilton E. James, and Michael A. Puglisi.

a settlement. Thus, as demonstrated below, a review of the Second Circuit's criteria for consideration of approval of a class action settlement makes it clear that the Settlement is not only fair, adequate, and reasonable, *see Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974), but an extraordinary result.

II. THE TERMS OF THE SETTLEMENT

The Settlement Amount is $85,000,000 in cash to be held in interest bearing segregated account for the benefit of the Class. The entire Settlement Fund, less payment of taxes, notice and administrative costs, and attorneys' fees and expenses, will be distributed to claiming Class Members who file allowed Proofs of Claim ("Authorized Claimants"), allocated based upon the relationship that each Authorized Claimant's Recognized Loss (as calculated under the Plan of Distribution) bears to the total of all Authorized Claimants' claims, as explained in the Notice. *See* Brower Decl., Ex. A (Declaration of Carole K. Sylvester, at Gilardi & Co., LLC ("Gilardi"), court-appointed claims administrator, re A) Mailing of the Notice of Proposed Settlement of Class Action and the Proof of Claim and Release Form, B) Publication of the Summary Notice, and C) Internet Posting ("Sylvester Decl."), Ex. A at pp. 3-5).[4]

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

A. The Law Favors and Encourages Settlements

Fed. R. Civ. P. 23(e) requires that the settlement of a class action be approved by the court. A court may approve a settlement that is binding on the class only if it determines that the settlement is

[4] For a full discussion of the Action, including the strengths and weaknesses of Plaintiffs' claims, the amount recovered compared to the best likely recovery at trial, the likely cost and duration of continued litigation, and the negotiations leading to the Settlement, the Court is respectfully referred to the Declaration of David A.P. Brower in Support of Plaintiffs' Motions for Final Approval of Class Notice, Final Approval of the Proposed Settlement, Final Approval of the Proposed Plan of Distribution and Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, dated October 10, 2013 ("Brower Declaration"), submitted herewith.

"fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *Wright v. Stern*, 553 F. Supp. 2d 337, 343 (S.D.N.Y. 2008); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 165 (S.D.N.Y. 2007). While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a general policy favoring settlement exists, especially with respect to class actions. *Wright*, 553 F. Supp. 2d at 344; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at *16 (S.D.N.Y. Nov. 7, 2007); *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 U.S. Dist. LEXIS 9144, at *13-*14 (S.D.N.Y. Jan. 31, 2007); *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (finding a general policy favoring the settlement of class action litigations).

To determine whether to approve a settlement, "[c]ourts examine procedural and substantive fairness in light of the 'strong judicial policy in favor of settlement' of class action suits." *Tiro v. Public House Investments, LLC*, 11 Civ. 7679 (CM), 2013 U.S. Dist. LEXIS 129258, at *16 (S.D.N.Y. Sept. 10, 2013) (emphasis added); *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214 (DAB), 2011 U.S. Dist. LEXIS 143773, at *4 (S.D.N.Y. Dec. 13, 2011). Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006); *see also Weinberger*, 698 F.2d at 73 ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.").

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a

proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Grinnell*, 495 F.2d at 462; *see also Veeco*, 2007 U.S. Dist. LEXIS 85629, at *17. As the Second Circuit has stated:

> [T]he role of a court in passing upon the propriety of the settlement of a derivative or other class action is a delicate one. . . . [W]e recognized that since "'the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation', the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial'."

Newman v. Stein, 464 F.2d 689, 691-92 (2d Cir. 1972) (citations omitted). "The Court gives weight to the parties' judgment that the settlement is fair and reasonable." *Aponte v. Comprehensive Health Mgmt.*, No. 10 Civ. 4825 (JLC), 2013 U.S. Dist. LEXIS 47637, at *8 (S.D.N.Y. Apr. 2, 2013).

B. The Settlement Is Procedurally Fair

A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See In re Citigroup Inc. Bond Litig.*, No. 08 Civ. 9522, 2013 U.S. Dist. LEXIS 117838, at *21 (S.D.N.Y. Aug. 10, 2013); *Luxottica Grp.*, 233 F.R.D. at 315; *see also In re Alloy, Inc., Sec. Litig.*, No. 03 Civ. 1597 (WHP), 2004 U.S. Dist. LEXIS 24129, at *5 (S.D.N.Y. Dec. 2, 2004). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations" and "plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 U.S. Dist. LEXIS 53007, at *10-*11 (S.D.N.Y. May 13, 2011) (court must pay close attention to the negotiating process, that it was at arm's length, and that class counsel had the requisite experience and ability); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.) ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of

fairness attaches to the proposed settlement."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations only after one mediation sessions with the Second Circuit Staff Counsel, numerous discussions before the parties over the years, and two formal mediation sessions followed by numerous informal telephonic mediation sessions with the Honorable (Ret.) Judge Daniel Weinstein. *See* Brower Decl., ¶¶5, 219-28, 283. *See Aponte*, 2013 U.S. Dist. LEXIS 47637, at *9 ("Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement achieved meets the requirements of due process.") (citations omitted); *see also In re Am. Int'l. Grp., Inc. Sec. Litig.*, 04 Civ. 8141 (DAB), 2013 U.S. Dist. LEXIS 131288, at *15 (S.D.N.Y. Sept. 11, 2013). That the Settlement was reached only three weeks before trial after five years of extremely hard-fought and adversarial litigation further supports the arms'-length nature of the negotiations and resulting compromise.

Given the procedural stage of the Action, there can be no question that Plaintiffs' Counsel were fully informed of the merits and weaknesses of the case by the time the Settlement was reached. Armed with the fruits of their knowledge gained from their extensive pre-Amended Complaint investigation, the briefing on Defendants' motion to dismiss, the briefing on Plaintiffs' appeal in the Second Circuit, the briefing on Defendants' petition for certiorari to the US Supreme Court, the discovery, briefing and negotiations concerning class certification, the results of complete fact and expert discovery, the briefing on Defendants' summary judgment motion, the briefing of numerous motions *in limine*, preparing the joint pretrial order (including exhibit lists, witness lists, and jury instructions), as well as discussions during the mediation and the more informal discussions between the parties and the mediators, Plaintiffs and their counsel were well suited to evaluate the strengths and weaknesses of Plaintiffs' factual and legal claims, the risks, delays, and complexities

that still faced Plaintiffs, and the likely value of the case. Plaintiffs' Counsel submit that all of these considerations confirm the reasonableness of the Settlement, and thus, there is little doubt that this Settlement is entitled to the presumption of procedural fairness dictated by Second Circuit law.

C. The Settlement is Substantively Fair

As stated above, courts within the Second Circuit observe the universal standard for determining whether a proposed class settlement is substantively fair: whether the proposed settlement is "'fair, reasonable, and adequate.'" *Luxottica Grp.*, 233 F.R.D. at 310 (citation omitted). The Second Circuit in *Grinnell* identified nine factors that courts should consider in deciding whether to approve a proposed settlement of a class action:

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

Grinnell, 495 F.2d at 463 (citations omitted). "These factors ought not be applied in a formulaic manner." *Tiro*, 2013 U.S. Dist. LEXIS 129258, at *20. Moreover, all nine factors need not be satisfied. Instead, the court should look at the totality of these factors in light of the specific circumstances involved. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 U.S. Dist. LEXIS 93423, at *25-*26 (S.D.N.Y. Dec. 20, 2007); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

As demonstrated below, the Settlement here easily satisfies the *Grinnell* factors and, in the judgment of Plaintiffs' Counsel, is an extraordinary result in a case where there is serious doubt whether a more favorable result would have been attained if the case were litigated through trial and the inevitable post-trial motions and appeals processes. As such, Plaintiffs' Counsel submits that the

Settlement clearly warrants the Court's final approval.

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

"The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *see Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("'[I]t is beyond cavil that continued litigation in this multi-district securities class action would be complex, lengthy, and expensive, with no guarantee of recovery by the class members.'") (citation omitted). "The more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Sec. Litig.*, No. 07 Civ. 9901, 2013 U.S. Dist. LEXIS 108115, at *9 (S.D.N.Y. Aug. 1, 2013). Here, Defendants' adamant contention that they did no wrong would likely have contributed to a lengthy and expensive trial (and further appeals regardless of the trial's outcome) should Plaintiffs have survived Defendants' motion for summary judgment.

The claims advanced by Plaintiffs involve numerous complex factual issues relating to the operations, performance and prospects for certain Blackstone portfolio investments, including FGIC and Freescale, and Blackstone's funds' real estate investments. Brower Decl., ¶¶257-58, 260. Generally, Plaintiffs alleged that FGIC, Freescale, and Blackstone's real estate segment were facing adverse trends and/or uncertainties at the time of the IPO that would likely negatively impact Blackstone's ability to earn management and incentive fees from its private equity and real estate funds that, in turn, would have a materially adverse impact on Blackstone's financial condition, and results, and that Defendants were obligated, but failed to, disclose these trends and uncertainties in Blackstone's Registration Statement in violation of the Securities Act.

Defendants, for their part, vigorously disputed Plaintiffs' allegations regarding the known trends or uncertainties in FGIC, Freescale and real estate segment and whether Blackstone made any materially false or misleading statements. Specifically, Defendants argued that: (i) there was no evidence to support the existence of any trends or uncertainties at the time of the IPO; (ii) even if known trends or uncertainties existed at the time of the IPO, they were not reasonably likely to have a material adverse impact on Blackstone's financial condition, due to the relative sizes of the investments and the fact that Blackstone did not own the investments; and (iii) the decline in Blackstone's unit price was not due to the alleged disclosure of any of the allegedly concealed or misrepresented information, but rather the result of deteriorating market-wide conditions.

Underscoring the complexity of this case is that many of Plaintiffs' allegations, and Defendants' defenses, required analysis by experts. Both sides designated experts on complex securities, financial and market issues, supported by lengthy and complex reports and exhibits.

There can be no doubt that because this Action is settling against the Defendants at this time, the litigants and the Court have been spared the delay and expense of continued litigation. Even if Plaintiffs prevailed on Defendants' motion for summary judgment and at trial, the additional delay through trial, post-trial motions, a post-trial, pre-judgment claims administration, a post-judgment appellate proceedings would have denied Class Members any recovery for years, further reducing its value. *See In re Vivendi Universal, S.A. Sec. Litig*., No. 02. Civ. 5571 (SAS) (trial in October 2009 and jury verdict in January 2010; judgment still not entered or appeal commenced because of ongoing claims process); *see also In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 U.S. Dist. LEXIS 36093, at *17-*18 (S.D.N.Y. May 1, 2008); *Strougo*, 258 F. Supp. 2d at 261 ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce

yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *16 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."). The Settlement avoids these additional risks.

Thus, the $85 million cash Settlement at this juncture results in an immediate and substantial tangible recovery for the Class without the considerable risk, expense, and delay of proceeding with the Action. Plaintiffs' Counsel submit that the Court should find this first *Grinnell* factor weighs heavily in favor of the proposed Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the Class to the Settlement is another factor in assessing its fairness and adequacy. While even a large number of objections does not indicate that a settlement is not fair, reasonable and adequate as that phrase is understood under FED. R. CIV. P. 23(e), "'the absence of objectants may itself be taken as evidencing the fairness of a settlement.'" *PaineWebber*, 171 F.R.D. at 126 (citation omitted); *see also In re Citigroup Bond Litig.*, 2013 U.S. Dist. LEXIS 117838, at 24 ("Minimal objections and few requests for exclusion from class members are evidence that a settlement is fair and reasonable.").

Here, in response to a wide-ranging Court-approved notice program, approximately 216,667 notices have been mailed to putative Class Members. Sylvester Decl. ¶10. In addition, a Summary Notice was published in INVESTOR'S BUSINESS DAILY on September 17, 2013, and it was transmitted over *BusinessWire* on three separate days (September 13, 17, and 20, 2013). Sylvester Decl. ¶13. Gilardi also posted copies of the relevant case documents, including the Notice, Proof of Claim, Stipulation and Preliminary Approval Order on the website established for this Settlement:

www.BlackstoneIPOcase.com. Sylvester Decl. ¶12. Although the deadline for objecting to the Settlement or seeking exclusion from the Class has not yet passed, to date, no Class Member has objected to approval of the Settlement and only four potential Class Members have sought exclusion.[5] Thus, Plaintiffs' Counsel submits that the favorable reaction of the Class, to date, strongly supports the approval of the Settlement.

3. The Stage of the Proceedings and Discovery Completed

Consideration of the stage of the proceedings and the extent of discovery completed is "intended to assure the Court that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them." *In re Citigroup Bond Litig.*, 2013 U.S. Dist. LEXIS 117838, at *25. "There is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. . . . At minimum, the court must possess sufficient information to raise its decision above mere conjecture." 4 Alba Conte, Herbert B. Newberg, NEWBERG ON CLASS ACTIONS §11.45, at 127, 128 (4th ed. 2002); *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (noting it is not necessary for a court to find parties engaged in extensive discovery; a court must merely find that they engaged in sufficient investigation to enable the court to make intelligent appraisal of the case) (citing *Plummer v. Chem. Bank*, 668 F.2d 654 (2d Cir. 1982)), *aff'd sub nom. D'Amato*, 236 F.3d 78 (2d Cir. 2001).

Here, of course, the Action was settled almost literally on the eve of trial, and after five years of contentious litigation, complete merits and expert discovery, and all pre-trial and virtually all trial preparation. *See* Brower Decl., *passim*. The volume and substance of Plaintiffs' Counsel's

[5] If any objections are received, they will be addressed in a reply memorandum, which will be filed and served by December 11, 2013.

knowledge of this case far exceeded that which courts typically find adequate for plaintiffs' counsel to properly value their case. *See Veeco*, 2007 U.S. Dist. LEXIS 85629, at *22-*23 ("the parties need not have engaged in full discovery for a settlement to be approved as fair"); *Sony*, 2008 U.S. Dist. LEXIS 36093, at *20-*21 (same). Indeed, Plaintiffs' Counsel had a very clear picture of the strengths and weaknesses of this case and of the legal and factual defenses that Defendants would likely raise at trial. *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 U.S. Dist. LEXIS 8608, at *10 (S.D.N.Y. May 14, 2004) (finding action had advanced to a stage where parties "'have a clear view of the strengths and weaknesses of their cases'") (citation omitted). As such, Plaintiffs' Counsel certainly had sufficient information to intelligently negotiate the terms of the Settlement that is before the Court for approval. *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 426 (S.D.N.Y. 2001). Therefore, the Court should find that this factor also supports the Settlement.

4. The Substantial Risks of Establishing Liability

In assessing this factor, the Court should balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *Veeco*, 2007 U.S. Dist. LEXIS 85629, at *25; *Austrian & German Bank*, 80 F. Supp. 2d at 177. While Plaintiffs' Counsel believe that Plaintiffs would have prevailed over Defendants' motion for summary judgment and subsequently at trial, it is also clear that ultimate success is not assured, and this Settlement, when viewed in light of the risks of proving liability and damages, is undoubtedly fair, adequate, and reasonable. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (when evaluating securities class action settlements, courts have long recognized such litigation to be "'notably difficult and notoriously uncertain'") (quoting *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973)); *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("Stockholder litigation is notably difficult and unpredictable.").

Plaintiffs faced numerous hurdles to establishing liability. This Action involves claims for relief under the Securities Act. To prevail, Plaintiffs had to establish that the Registration Statement for Blackstone's IPO contained misstatements or omissions of material fact. Based on the defenses that Defendants have raised, Plaintiffs' Counsel recognize that establishing liability at trial, assuming Plaintiffs even would have had that opportunity, was not guaranteed. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 U.S. Dist. LEXIS 17588, at *39 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation."). Here, Plaintiffs' greatest hurdle was proving that the alleged misstatements and omissions were materially false or misleading. *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *In re Time Warner Sec. Litig.*, 9 F.3d 259, 264-66 (2d Cir. 1993) (to prove materiality, plaintiff has the burden of demonstrating defendants' misrepresentations and omissions were materially false or misleading when made). If the litigation continued, Defendants would have argued at trial – as they did in their motion to dismiss and in their motion for summary judgment – that they did not make any material false or misleading statements and that the Registration Statement adequately described the then known risks of investing in Blackstone's common units.

Moreover, as discussed further below, Defendants had strenuously argued that Plaintiffs could not trace any decline in the price of Blackstone common units to the disclosure of any allegedly previously concealed or misrepresented information – and, consequently, that Plaintiffs and the Class had no cognizable damages. If the litigation continued, Defendants would no doubt have attempted to convince the jury that the decline in Blackstone's post-IPO unit price was the result of deteriorating (unexpected) macroeconomic conditions, which would have given rise to a quintessential "battle of the experts."

Plaintiffs, on the other hand, would respond with expert testimony that Defendants' loss causation arguments fail because Plaintiffs can and did identify losses in Blackstone units related to the misrepresentations and omissions alleged by plaintiffs separate from losses in Blackstone units suffered as a result of a worldwide economic meltdown. While Plaintiffs were confident in their experts and the data, they nonetheless recognized the very real risk the jury might have accepted some or all of Defendants' arguments, and that uncertainty presented a real risk to recovery. And while Plaintiffs believe they could rebut Defendants' arguments with expert testimony, survive summary judgment, and prevail at trial, battles between experts are notoriously difficult to assess. Therefore, a very lengthy and complex battle of the parties' experts likely would have ensued at trial, with highly unpredictable results. In sum, the risks in demonstrating liability militate in favor of the Settlement. *Maley*, 186 F. Supp. 2d at 3645 (noting the many obstacles to plaintiff's ability to prevail on the merits).

Accordingly, when viewed in light of the risks of proving liability and damages, the Settlement is undoubtedly fair, adequate, and reasonable.[6]

5. The Considerable Risk of Establishing Damages

Even if successful in establishing liability, Plaintiffs also faced substantial risk in proving the existence and the amount of damages. *See In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689 (SAS), 2003 U.S. Dist. LEXIS 17090, at *11-*12 (S.D.N.Y. Sept. 29, 2003) (noting difficulty of proving damages in securities cases). Under Section 11 of the Securities Act, damages are established by statute. However, if a defendant can prove that the decline in the value of the security in question was not caused by the material omissions or misstatements in the Registration Statement,

[6] *See Milken*, 150 F.R.D. at 53 (when evaluating securities class action settlements, courts have long recognized such litigation to be "'notably difficult and notoriously uncertain'") (quoting *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973)); *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("Stockholder litigation is notably difficult and unpredictable.").

such portion of damages are not recoverable.

Plaintiffs' Counsel, with the assistance of their damages expert, calculated the damages suffered by the Class attributable to the alleged misstatements and omissions. This figure assumes that every element of the Class's damages theory is accepted by a jury as being correct. As such, its viability as an actual calculation for damages could be affected by many factors. The determination of damages in this litigation is a complex matter that required the presentation of extensive expert testimony – and a "battle of the experts" in which no party is ever assured to prevail. While Plaintiffs' Counsel believe that reliable and convincing expert testimony can be provided on the damages question, and that a judgment could ultimately be obtained for the full amount of damages available under the law, meaningful obstacles remained.

For example, the jury must determine whether Plaintiffs' or Defendants' model is more accurate. It is then possible that, in the unavoidable "battle of experts," a jury might disagree with the Class's expert, or merely find Defendants' expert more persuasive. *See, e.g.*, *In re Bear Stearns Cos.*, No. MDL 1963, 2012 U.S. Dist. LEXIS 161269, at *18 (S.D.N.Y. Nov. 9, 2012) ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured.").[7]

[7] *See also In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *61-*62 (S.D.N.Y. Nov. 26, 2002) ("The reaction of a jury to such complex expert testimony is highly unpredictable. Expert testimony about damages could rest on many subjective assumptions, any one of which could be rejected by a jury as speculative or unreliable. Conceivably, a jury could find that damages were only a fraction of the amount that Plaintiffs contended."); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) ("In the context of securities class actions, '[c]alculation of damages is a complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud.'") (quoting *Global Crossing*, 225 F.R.D. at 459); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 U.S. Dist. LEXIS 23170, at *5 (S.D.N.Y. Dec. 4, 2002) ("Establishing damages from the drop in the relevant stock price, would, Plaintiffs claim, have degenerated into a 'battle of the experts' and thus posed a risk to Plaintiffs."); *PaineWebber*, 171 F.R.D. at 129 (noting unpredictability of outcome of battle of damage experts); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions."), *aff'd*,

The risk is especially prevalent here because Defendants have argued – and would continue to argue – that the decline in Blackstone's unit price and resulting losses incurred by shareholders were caused by other factors, and were not related to any misstatements or omissions from the Registration Statement. Specifically, Defendants' expert, Professor Ball, opined that Blackstone's unit price decline over the Class Period is explained almost entirely by deteriorating macroeconomic and financial market conditions and by Blackstone-specific events unrelated to the Plaintiffs' allegations.

Because of these considerations, the likelihood of proving loss causation and damages, even assuming the Class prevailed on the liability issue, is and would always be in flux. *See Veeco*, 2007 U.S. Dist. LEXIS 85629, at *29. As a result, this factor also weighs in favor of the Settlement.

6. The Risks of Maintaining the Class Action Through Trial

Had the Settlement not been reached, there is no assurance that Class status would be maintained, since a court may exercise its discretion to re-evaluate the appropriateness of class certification at any time. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."); *see also Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5th Cir. 2001) (decertifying class, finding proposed class representatives did not sufficiently remain apprised of status and claims of litigation). Here, while Defendants did stipulate to class certification and the Court entered an order certifying the Class, the Court was free to alter or amend its order any time before final judgment. FED. R. CIV. P. 23(c)(1)(C). For instance, as discussed in the Brower Declaration, under Section 11 of the Securities Act, Defendants have the right to attempt to show that individual Class Member knew the allegedly false or omitted information before they acquired their Blackstone common units. Had Plaintiffs

798 F.2d 35 (2d Cir. 1986); *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("establishing damages at trial would lead to a 'battle of experts' . . . with no guarantee whom the jury would believe").

succeeded at trial, Defendants may well have sought to reduce the size of the Class or demonstrate that common questions no longer predominated due to their right to examine every claiming Class Member on their reliance and knowledge to prove out this defense. *See, e.g., Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 42-44 (2d Cir. 2006). Under such circumstances, the Class could very well have been decertified. The Settlement avoids any uncertainty with respect to these issues.

7. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).[8] "[T]he Court is not to compare the terms of the Settlement with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion." *Veeco*, 2007 U.S. Dist. LEXIS 85629, at *33. The Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted); *Newman*, 464 F.2d at 693 ("[I]n any case there is a range of reasonableness with respect to a settlement."); *see also Indep. Energy*, 2003 U.S. Dist. LEXIS 17090, at *13 (noting few cases tried before a jury result in the full amount of damages claimed).

The Second Circuit has described the "'range of reasonableness'" as "'a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and

[8] Courts typically collapse into this inquiry the following two *Grinnell* factors: "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463. *Accord Global Crossing*, 225 F.R.D. at 460.

costs necessarily inherent in . . . any litigation.'" *Wal-Mart Stores*, 396 F.3d at 119 (quoting *Newman*, 464 F.2d at 693); *PaineWebber*, 171 F.R.D. at 125 ("Fundamental to analyzing a settlement's fairness is 'the need to compare the terms of the compromise with the likely rewards of litigation.' . . . This determination 'is not susceptible of a mathematical equation yielding a particularized sum,' but turns on whether the settlement falls within 'a range of reasonableness.'") (citations omitted); *see also Indep. Energy*, 2003 U.S. Dist. LEXIS 17090, at *13 (noting few cases tried before a jury result in full amount of damages claimed). In making this determination, a reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462.

There are numerous risks involved in litigation – especially litigation involving the extremely complex issues inherent in securities class actions – and they have already been discussed above and are set forth in further detail in the Brower Declaration. In light of these difficulties and risks, as well as the more typical risks associated with the types of complex legal and factual issues present in securities class actions, the unpredictability of a lengthy and complex trial, and the appellate process that would most likely follow, the fairness of the Settlement is clearly apparent. *Maley*, 186 F. Supp. 2d at 366.

As the Second Circuit has cautioned, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. Thus, the fact that a proposed settlement "may only amount to a fraction of the potential recovery" does not necessarily suggest that the settlement is inadequate. *Global Crossing*, 225 F.R.D. at 455. Here, the Settlement represents an excellent percentage recovery for the Class and is well within (and, indeed, far above) percentages that have

been found within the range of reasonableness, particularly given the risks of proceeding to an immediate trial. Based on the estimates of Plaintiffs' market and damages expert, assuming Plaintiffs were completely successful on the issues of both liability and damages for the entire Class at trial, the maximum recoverable damages at trial would be approximately $691.5 million. Thus, the $85,000,000 Settlement Amount represents a recovery of approximately 12.3% of individual Class Members' most likely recoverable damages at trial based on Plaintiffs' expert's estimates and assuming complete success on the issues of liability and damages, a 100% claim rate, and collectability of the judgment. At the other end of the spectrum, using Defendants' damages estimate of $502.9 million under the same assumptions and methodology – keeping in mind Defendants' expert's primary position was that there were no damages attributable to any alleged misrepresentation or omission in the Registration Statement – the $85 million fund represents a recovery of approximately 16.9% of individual Class Members' damages. When the typical claims participation rate is taken into account, these percentages increase to 19% (using Plaintiffs' damages estimates) and 26.1% (using Defendants' damages estimates). *See* Brower Decl., ¶¶249, 251, 278-81 & Tables 1 & 2 to the Declaration of Steven Feinstein.

Courts have frequently found percentage recoveries far lower than the recovery here to be within the range of reasonableness for settlement. *See, e.g., Hicks*, 2005 U.S. Dist. LEXIS 24890, *19 (settlement representing 3.8% of plaintiffs' damage estimate was "within the range of reasonableness"); *Blech*, 2000 U.S. Dist. LEXIS 6920, at *11 (approving settlement representing as much as 5% of estimated damages). In fact, the range of recovery here is extremely high when compared to the percentage of damages recoveries in other similar securities class action settlements. For example, one recent analysis by Cornerstone Research found that for cases where estimated damages were in the range of $500-999 million (like this one), the median settlement as a percentage

of estimated damages was 1.9% of estimated damages for 1996-2011, and falling to 1.1% in 2012. Securities Class Action Filings--2012 Year in Review (Cornerstone Research), *available at* www.cornerstone.com. Additionally, for cases alleging only Section 11 and/or 12(a)(2) claims (like this one), the median settlement amount for the period 1996 through 2012 was $3.3 million or 7.5% of the "estimated damages." *Id*. Thus, the high percentage recovery of Class Members' recoverable damages represented by the Settlement here compared to other similar cases may alone suffice to demonstrate that the Settlement is fair, reasonable, and adequate.

Finally, in analyzing the reasonableness of the Settlement, the Court should consider that the Settlement provides for payment to the Class now, rather than a speculative payment many years down the road, without any further risk to the Class. *See AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *44 (where the settlement fund is in escrow and earning interest for the class, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"); *see also Tino*, 2013 U.S. Dist. LEXIS 129258, at *30 ("Moreover, when settlement assures immediate payment of substantial amounts to class members 'even if it means sacrificing "'speculative payment of a hypothetically larger amount years down the road'" settlement is reasonable under this factor"). This case has been pending for more than five years, and was expected to last several additional years had the Settlement not been reached and an appeal been pursued after trial. In light of the complex legal and factual issues typically present in securities class actions and the unpredictability of a lengthy and complex trial, post-trial proceedings, and post-judgment appellate proceedings that would most likely follow, the fairness of this substantial Settlement is clearly apparent. *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002).

8. The Ability of the Defendants to Withstand a Greater Judgment

Plaintiffs' Counsel have no reason to believe that Defendants could not withstand a judgment

far in excess of the Settlement amount, if obtained. Courts, however, generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement, and in fact, the ability of a defendant to pay potentially more money does not render a settlement unreasonable. *See D'Amato*, 236 F.3d at 86 (confirming that the defendant banks' ability to withstand a greater judgment, "standing alone, does not suggest that the settlement is unfair," particularly "given that other *Grinnell* factors weigh heavily in favor of settlement"); *In re Citigroup Bond Litig.*, 2013 U.S. Dist. LEXIS 117838, at *28-*29 (same); *PaineWebber*, 171 F.R.D. at 129 (observing that although "evidence that the defendant will not be able to pay a larger award at trial tends to weigh in favor of approval of a settlement . . . the converse is not necessarily true," and finding that "this element of the *Grinnell* test weighs neither for nor against approval of the Settlement").[9]

* * *

In sum, the fairness, reasonableness, and adequacy of the proposed Settlement is best analyzed in view of the substantial risks Plaintiffs faced in proving liability and damages, and the fact that it is well above – in fact, four to eleven times higher than – the percentage of estimated damages typically recovered in securities class action settlements. Plaintiffs therefore submit that the Court should find that the *Grinnell* factors, taken together, weigh in favor of the Settlement and that the Settlement should be approved.

In this context, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838

[9] *See also Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) ("'[t]he fact that a defendant is able to pay more [than] it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate'") (citation omitted); *McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y. 2006) ("the ability of defendants to pay more, on its own, does not render the settlement unfair"); *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *42 ("the mere ability to withstand greater judgment does not suggest that the Settlement is unfair").

(W.D. Pa. 1995). As the court stated in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971):

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

See also Milken, 150 F.R.D. at 65 ("[I]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success," citing case where a "multimillion dollar judgment was reversed.").

Plaintiffs' Counsel, based on their intimate knowledge of the issues presented in this Action, and after careful consideration of the relevant factors, strongly recommend approval of the proposed Settlement that provides benefits that outweigh any that could otherwise be achieved through continued litigation. *See* Brower Decl., ¶¶254, 270. "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007).

IV. THE PLAN OF DISTRIBUTION OF THE NET SETTLEMENT FUND IS FAIR AND REASONABLE AND SHOULD BE APPROVED BY THE COURT

The standard for approval of a plan of distribution is the same as the standard for approving the settlement as a whole: "'namely, it must be fair and adequate.'" *Maley*, 186 F. Supp. 2d at 367 (citation omitted); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 343 (S.D.N.Y. 2005). "'As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003) (citation omitted), *aff'd sub nom. Wal-*

Mart Stores, Inc., 396 F.3d 96 (2d Cir. 2005). A plan of distribution "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Citigroup Bond Litig.*, 2013 U.S. Dist. LEXIS 117838, at *31 (approving plan of allocation for claims under Securities Act); *Am. Bank Note*, 127 F. Supp. 2d at 429-30; *see also WorldCom*, 388 F. Supp. 2d at 344 (same); *see also In re Am. Int'l. Group*, 2013 U.S. Dist. LEXIS 131288, at *19. Further, courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978).

The proposed Plan of Distribution was designed in consultation with Plaintiffs' rebuttal damages expert to ensure its fairness and reliability. *See Veeco*, 2007 U.S. Dist. LEXIS 85629, at *39. The Plan allocates the Net Settlement Fund among members of the Class who submit Proofs of Claim that are approved for payment. Brower Decl., ¶272. The Plan will calculate Recognized Loss amounts for transactions in Blackstone common units during the Class Period based principally on Plaintiffs' damages expert's trial report calculations of the differences in the estimated amounts of the declines in the prices of Blackstone units on the days when alleged partially curative disclosures were made that could reasonably have been linked to prior alleged misstatements or omissions, capped by the difference between the purchase prices of those units and the sale prices. *Id.*[10] This formula tracks the statutory formula for awarding damages under Section 11 of the Securities Act and reflects the same formula contained in Plaintiffs' damages expert's final damages report on May

[10] There is no rule that a settlement benefit all class members equally. *Veeco*, 2007 U.S. Dist. LEXIS 85629, at *39; *Global Crossing*, 225 F.R.D. at 462. Indeed, it is appropriate for interclass distributions to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strengths and values of different categories of claims."); *In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001). Otherwise, certain class members may receive an inequitable windfall, to the detriment of others. *PaineWebber*, 171 F.R.D. at 133.

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Since the Plan of Distribution reflects the formula that Plaintiffs would have ultimately offered at trial to prove Class Members' damages, Brower Decl. ¶¶11, 271-77, it is *ipso facto* a fair and equitable method to allocate the Net Settlement Fund to eligible Class Members. Finally, in response to the approximately 216,667 Notice Packets that have been mailed to potential Class Members, to date, no objections have been received to the Plan of Distribution. *See Veeco*, 2007 U.S. Dist. LEXIS 85629, at *40; *Maley*, 186 F. Supp. 2d at 367.

Accordingly, for all of the reasons set forth herein and in the Brower Declaration, the proposed Plan of Distribution is fair and equitable, and should be approved.

V. CONCLUSION

The Settlement reached in this Action is an outstanding result. For the foregoing reasons, (1) the proposed $85 million cash Settlement is fair, reasonable and adequate and should be granted final approval pursuant to FED. R. CIV. P. 23(e) by the Court; and (2) the proposed Plan of Distribution of the net Settlement proceeds is fair and equitable and should be approved by the Court.

DATED: October 10, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2013, I served true and correct copies of the foregoing Memorandum of Law In Support of Plaintiffs' Motion for Final Approval of Proposed Settlement and Proposed Plan of Distribution of Settlement Proceeds on Defendants' counsel by causing copies to be sent by the ECF system and by electronic mail on the following:

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