UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

I, Lisa M. Mezzetti, declare and state, under penalty of perjury, that the following is true and correct to the best of my knowledge, information and belief:

1. I am a Partner with the law firm of Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein"), Court-appointed Lead Counsel for Lead Plaintiff Vincent J. Granatelli and the proposed Class in this action. I am admitted to practice in both the District of Columbia and New York and am admitted to practice in this Court. I have personal knowledge of the matters set forth herein and, if called upon, I could and would completely testify thereto.

2. I respectfully submit this Declaration under Rules 23(e), 23(h) and 54(d)(2) in support of Lead Plaintiff's Motion for: (1) final approval of the proposed Settlement; (2) approval of the Plan of Allocation, and (3) an award of Plaintiff's Counsel's fees and reimbursement of their expenses.

3. The purpose of this Declaration is to set forth the nature of the extensive investigation, legal briefing and other work performed in this case, and the negotiations that led to the Settlement with defendants NexCen Brands, Inc. ("NexCen" or the "Company"), Robert W. D'Loren, David B. Meister and David S. Oros (the latter three are referred to as the "Individual

Defendants" and together with NexCen are the "Defendants"). It sets forth the facts that (we and the Lead Plaintiff submit) demonstrate why the Settlement is fair, reasonable and adequate and should be approved by the Court.

4. I also submit this Declaration in support of the application by my firm and The Rosen Law Firm, P.A. -- which worked on this case under the direction of my firm -- for attorneys' fees equal to 30% of the Settlement Amount and for our out-of-pocket expenses incurred for the prosecution of this Action in the aggregate amount of $63,855.05. Together, Cohen Milstein and The Rosen Law Firm are defined as "Plaintiff's Counsel".

5. The Stipulation and Agreement of Settlement, filed with the Court on June 10, 2011 (Dkt. No. 131-1) (the "Stipulation"), provides for payment of $4,000,000 in cash from NexCen's liability insurer into escrow (the "Settlement Fund"). The $4,000,000 was deposited and has been earning interest since July 15, 2011.

6. On July 5, 2011, the Court entered an Order preliminarily approving the settlement of this action, preliminarily certifying it as a class action for the purposes of settlement, and approving the form and manner of providing notice to Class Members.

7. Pursuant to that Order, over 8,200 copies of the Notice and Proof of Claim form have been mailed to Class Members informing them of the proposed Settlement and requested fees and expenses. *See* Affidavit of Paul Mulholland CPA, CVA Concerning Notice by Mailing and Publication and Other Issues of Class Action Administration ¶ 8 (the "Mulholland Aff."), attached hereto as Exhibit 1. The Administrator also sent it to 1,936 brokerage firms, banks and other companies that may have purchased NexCen stock for their clients and thus may have contact information for Class Members. *Id.* ¶ 4. Several have provided addresses for Class Members to the Administrator, accounting for 7,043 of the notices sent to individual Class

Members. *Id.* ¶ 8. The Summary Notice was published in print in the *Investor's Business Daily* and the Press Release was issued on *Globe Newswire* on August 11, 2011. *Id.* ¶ 5. All of these documents and others relating to the Settlement were posted on the website created for this case, www.nexcensettlement.com, the Administrator's website, *id.* ¶ 4, and our law firms' two websites. As of the date of this Declaration, no one has objected to the Settlement, the Plan of Allocation, or Plaintiff's Counsel's request for attorneys' fees and reimbursement of expenses. *Id.* ¶ 10. In addition, no Class Member has excluded him/her/itself from the Class. *Id.*

I. SUMMARY

8. Beginning from Plaintiff's Counsel's pre-filing investigation of the action in 2008 and continuing throughout the case, Lead Plaintiff and his counsel have litigated this action vigorously. The Settlement was reached only after Plaintiff's Counsel: (a) conducted an extensive factual investigation prior to the Lead Plaintiff's filings, which included the review of publicly-available documents about NexCen and certain Individual Defendants, review of Generally Accepted Accounting Principles ("GAAP"), and related accounting literature; (b) researched, drafted and filed the operative Consolidated Amended Class Action Complaint; (c) briefed and argued the lead plaintiff motions; (d) worked with an investigator and developed leads on and identified and interviewed witnesses; (e) consulted with experts on the various GAAP and accounting rules implicated in the case; (f) consulted with a damages expert and worked with that company to develop and test a damages study; (g) researched and drafted an Opposition to Defendants' four Motions to Dismiss; (h) researched the status of the Company and the effect of its dissolution on the case and its resolution; and (i) engaged in settlement negotiations with Defendants' Counsel and Defendants' insurer, in both meetings and mediation sessions and in subsequent discussions.

9. Consequently, by the time the parties reached the Settlement, Lead Plaintiff had gained a detailed understanding of the strengths and weaknesses of the case.

10. The Settlement was reached after intense, concentrated and good faith negotiations among experienced counsel with the aid of a nationally-regarded mediator, retired U.S. District Judge Nicholas H. Politan (D.N.J.). Then, given the need to deal with a number of difficult issues, the negotiation and drafting of the Stipulation and supporting documents were long, spanning eight months and many drafts. Judge Politan has confirmed the hard-fought nature of the negotiations; his Declaration supporting the Settlement is attached as Exhibit 2.

11. Plaintiff's Counsel and Lead Plaintiff confirmed their assessment of the case by engaging in confirmatory discovery, reviewing thousands of documents that NexCen had produced to the SEC in connection with the SEC investigation that was closed without any enforcement action. Plaintiff's Counsel and Lead Plaintiff did not enter into a final, binding commitment to request the Court's approval of the Settlement until this confirmatory discovery had been completed and until they had concluded that the documents produced in that discovery supported their initial determination that the proposed Settlement was in the best interests of the Class.

12. The Settlement confers an immediate and substantial benefit on the Class. At the same time, the certainty of the Settlement eliminates the very serious risk that continued litigation against the Defendants might yield nothing or substantially less for Lead Plaintiff and the Class. Defendants vehemently denied acting with *scienter* and contended (and, they believed, showed) that there would be no ability to show any knowledge by the Company or management with regard to any of the statements on which Lead Plaintiff based his case. Thus, Lead Plaintiff faced substantial risk with regard to the filed Motions to Dismiss, ultimate

Motions for Summary Judgment, and certainly at trial. The Settlement avoids these pitfalls and provides for an immediate and substantial recovery.

13. Of special concern was the fact that Plaintiff's claims for some two-thirds of the alleged Class Period -- from March 13, 2007 through January 28, 2008 -- involved only alleged misstatements relating to NexCen's assertion that it was on track to meet its business plan to acquire three to five businesses a year. The most concrete of Defendants' alleged misrepresentations, an allegedly false statement about the terms and conditions of NexCen's credit facility, did not occur until January 29, 2008. Throughout the litigation, Defendants maintained the pre-January 29, 2008 statements were not false; were non-actionable statements of corporate optimism; were forward-looking statements with meaningful cautionary language; or were otherwise non-actionable predictions. Defendants also contended that even if such statements were material and false, Lead Plaintiff could not prove loss causation because the corrective disclosure at the end of the Class Period did not relate to these alleged misstatements, but rather concerned the amendment of the Company's credit facility that had occurred in January 2008. In other words, there was a real possibility that even if Lead Plaintiff's case survived one or more of the Motions to Dismiss, the period from March 13, 2007 through January 28, 2008 might have been eliminated from the Class Period. This would have reduced the Class' damage claims by millions of dollars.

14. Further, NexCen is no longer a going concern. In May of 2010, NexCen announced that it had entered into an agreement to sell all of its assets and management offices and would close its business in a dissolution. The sale and dissolution was overwhelmingly approved by NexCen's shareholders. In addition, the Individual Defendants owned substantial amounts of the Company's stock, and they lost substantial monies from the stock drop at the end

of the Class Period and the dissolution. This, of course, affected the ability to recover from them. In addition, they made presentations on their inability to make substantial payments for any verdict that might be received down the line. Finally, a full litigation of the case would have involved years of motions and discovery, trial and appeals, which would expend and maybe totally deplete the insurance policy monies available under Defendants' insurance. Therefore, even if Lead Plaintiff had successfully litigated the case through judgment and prevailed on his claims, he faced the real risk that no monies would be available from NexCen, the Individual Defendants, and insurance sources.

15. The Settlement also avoids the risk Lead Plaintiff and the Class would face in successfully pleading and proving liability and damages. As noted, Defendants have all along asserted that Lead Plaintiff did not adequately plead loss causation under *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), asserting that there was no disclosure tied to the alleged misstatements made in the first two-thirds of the Class Period. In addition, as to the entire case, the Supreme Court's decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) -- requiring that a plaintiff plead a cogent and compelling strong inference of *scienter* and instructing district courts to consider any competing inferences of nonculpability -- added significant challenges and risks to the case. Even if the Court found that Lead Plaintiff had adequately pleaded his claims, there was no guarantee that these claims could be proven and that a jury would accept his version of the facts. The Settlement avoids these risks of recovery.

16. The Settlement represents approximately 10.9% of Lead Plaintiff's maximum class-wide damages of approximately $36.7 million based on Lead Plaintiff's best case scenario damages (*i.e.*, prevailing on every claim and defeating every one of Defendants' arguments), as determined by Plaintiff's Counsel in consultation with Lead Plaintiff's damages expert, RSA

Group, Inc. If the class period were limited to the period January 29, 2008 through May 18, 2008, Plaintiff's expert estimates that damages would amount to $18.3 million. With this in mind, the recovery of $4,000,000 for the Class represents an excellent result and is well within the range of typical securities class action settlements.

17. The Plan of Allocation also is fair, reasonable and adequate. It was formulated with the aid of the damages expert, and distributes the settlement fund *pro-rata* to class members pursuant to the principles of *Dura Pharms., Inc.* Thus, each shareholder is treated fairly and equally, and compensated *pro-rata* based on the losses caused by the alleged fraud.

18. Lead Plaintiff and Plaintiff's Counsel also submit that the requested attorneys' fees of 30% of the $4,000,000 is appropriate, reasonable and within the range of fees awarded in class litigation of this type. I believe that the requested fee is fair in light of the results achieved, the risks involved in the litigation, and similar awards in this type of litigation. When cross-checked with the lodestar method, the reasonableness of the fee request is confirmed given the lodestar multiplier of 1.27.

19. The Notice to Class Members stated that Plaintiff's Counsel would seek a fee of up to 30% of the settlement fund of $4,000,000. The fact that, as of today, Class Members have filed no objections to the requested fee also supports a finding of its reasonableness.

20. Plaintiff's Counsel has also requested reimbursement of out-of-pocket expenses of $63,855.05; this is reasonable and fair and should be approved because these were required for and incurred only for the prosecution of this Action.

21. Thus, for the reasons set forth herein, we respectfully request that the Court approve the Settlement and Plan of Allocation, and award the requested attorneys' fees and reimbursement of expenses.

22. Lead Plaintiff, Mr. Vincent J. Granatelli, was fully involved in the litigation since the time he filed a Motion to be appointed Lead Plaintiff: he supervised our work, discussed the case with us on a regular basis, reviewed pleadings and briefs before they were filed, and was involved throughout the settlement discussion and mediation process and the drafting of the settlement papers. He fully supports final approval of the Settlement and the requested award of attorneys' fees and reimbursement of expenses. He sets forth the details of his work, and his approval and support of this Motion, in his Declaration dated October 25, 2011, attached as Exhibit 3.

II. FACTUAL AND PROCEDURAL BACKGROUND OF THE LITIGATION

A. Overview of Lead Plaintiff's Claims

23. Lead Plaintiff alleges claims under Sections 10(b), Rule 10b-5 thereunder, and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"). The Section 10(b) claims are asserted against all of the Defendants; the Section 20(a) control person claims are asserted against the Individual Defendants.

24. Lead Plaintiff alleges that during the period of time from March 13, 2007 through May 18, 2008 (the "Class Period"), Defendants falsely told investors that NexCen was on track to acquire three to five companies each year and had sufficient liquidity to complete those acquisitions while also sustaining existing operations. Lead Plaintiff alleges that the Company did not enjoy such liquidity and NexCen's substantial debt made its publicly-stated business plan unsustainable.

25. Lead Plaintiff also alleges that NexCen misled investors about the amendment of its credit facility on January 29, 2008, made in connection with NexCen's then-largest acquisition, the Great American Cookie Company, a transaction valued at $93 million. While

the Company announced that the credit facility had been amended to increase the borrowing limit from $150 million to $181 million, it failed to disclose that the amended credit facility contained an accelerated redemption feature and other provisions that severely impacted NexCen's liquidity.

26. Nearly four months later, on May 19, 2008, NexCen issued a press release announcing that it had failed to disclose the accelerated redemption feature that required NexCen to pay down $30 million of borrowings by October 2008 and that the amended credit facility required NexCen to pay previously-accrued but unpaid interest; that the Company would soon face a cash shortage of $7 million to $10 million; and that the public could no longer rely on the Company's reported 2007 financial results. As a result, NexCen reported that there was substantial doubt about the Company's ability to continue as a going concern. This announcement caused NexCen's stock to fall $1.95/share or 77%.

B. The Defendants

27. Defendant NexCen was a Delaware corporation headquartered at 1330 Avenue of the Americas, New York, New York. On May 13, 2010, NexCen announced that it had entered into an agreement to sell all of its franchise businesses and management offices to an investment firm, and would close its business in a dissolution. On July 29, 2010, NexCen shareholders approved the sale and dissolution of the Company. Pursuant to Delaware law, this dissolution is expected to be consummated on September 13, 2013. No distribution has yet been made to shareholders in connection with the dissolution, but counsel for Defendant NexCen advises us that NexCen anticipates making a first distribution by the end of the year and a final distribution in or around December 2013. The specific distribution amounts have not yet been determined, but I am informed that total distributions are not expected to exceed $0.09 per share. This

dissolution was not a bankruptcy proceeding.

28. Defendant Robert W. D'Loren at all relevant times was the Company's President, Chief Executive Officer, and a Director. He is a Certified Public Accountant.

29. Defendant David B. Meister served as the Company's Chief Financial Officer from the beginning of the Class Period until March 21, 2008. He is a Certified Public Accountant.

30. Defendant David S. Oros at all relevant times served as the Chairman of the Company's Board of Directors.

C. The Initial Complaint and Motions for Appointment of Lead Plaintiff

31. The first complaint in these consolidated matters was filed on May 28, 2008, alleging that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder (Dkt. No. 1). Notice was published as required under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(A)(i)(II), apprising the investing public of the pendency of the action, and of the right of any Class Member to move to serve as lead plaintiff on behalf of the Class.

32. In response to the notice, Mr. Granatelli sought appointment as lead plaintiff under the PSLRA, which provides for a presumption that the most adequate lead plaintiff is the class member with the largest financial stake in the outcome of the litigation. 15 U.S.C. § 78u-4(a)(3)(B)(iii). Competing motions were filed for appointment of lead plaintiff and lead counsel.

33. On March 5, 2009, the Court appointed Mr. Granatelli as Lead Plaintiff and appointed my firm as Lead Counsel (at the time of the appointment, Cohen Milstein was known as Cohen, Milstein, Hausfeld & Toll, P.L.L.C.) (Dkt. No. 64).

34. Cohen Milstein brought extensive class action experience to this case. Since our senior partners opened the firm's Washington, D.C. office in 1969, the firm's emphasis has been representation of individuals, small businesses, investors and employees in class actions brought for violations of securities, antitrust, consumer protection, discrimination, ERISA and human rights laws. Our firm biography and that of The Rosen Law Firm, and information on the attorneys who litigated the case, were filed with the Court on the motions for appointment as lead plaintiff, and are again submitted here as Exhibit 4 and as an attachment to Exhibit 5.

D. Lead Counsel's Investigation, of the Filing of the Amended Complaint And Motions to Dismiss

35. After entry of the Court's March 5, 2009 Order, Lead Counsel undertook an extensive investigation in anticipation of the filing of an amended complaint. During the course of this investigation, Lead Counsel and/or its investigator identified potential witnesses, including former employees of NexCen, and interviewed 14 confidential witnesses. Lead Counsel also reviewed the Company's Class Period SEC filings, public disclosures, and pertinent media reports.

36. After a delay caused by announcements expected to be made by the Company, on August 24, 2009, Lead Plaintiff filed the now-pending Consolidated Amended Class Action Complaint (the "Complaint") (Dkt. No. 76).

37. On October 8, 2009 Defendants each filed a motion to dismiss the Complaint with many supporting papers (Dkt. Nos. 83-87, 89-95). On December 14, 2009, Lead Plaintiff filed his opposition to the Defendants' Motions (Dkt. Nos. 100-101) and Defendants filed their reply papers on January 27, 2010 (Dkt. Nos. 104-108).

E. The Settlement Negotiations, Agreement, And Motion for Preliminary Approval

38. While the Defendants' Motions to Dismiss were fully-briefed and pending, but before the Court held its hearing on them, and during the time in which the Company announced its proposal to liquidate, the parties began to explore the possibility of settlement of the case.

39. The parties agreed to an in-person meeting that took place on June 2, 2010 in Manhattan. The parties exchanged information on their respective positions before and during that meeting, including presentations on the facts, potential showings on liability, the SEC investigation, and other factual issues. In addition to reviewing the arguments on the Motions to Dismiss, Defendants' Counsel told us why they strongly believed that Lead Plaintiff would be unable to demonstrate *scienter* or loss causation as to the alleged misstatements. In particular, they reminded us of a private investigation into the facts and background of the May 19, 2008 disclosure. This had been made by independent counsel for the Audit Committee of NexCen's Board of Directors. The Audit Committee concluded its investigation and reported it "did not find evidence that led it to conclude that there was an intentional effort to keep information concerning the terms of the financing from the board, the auditors or the public," as publicly reported in NexCen's Form 8-K filed on August 19, 2008 (Item 8.01).

40. Lead Plaintiff made a settlement demand as part of these discussions. The parties continued the discussions, and ultimately the Defendants proposed that we enter into a formal mediation process to advance them.

41. Prior to the mediation, the parties negotiated the mediation process and vetted and agreed on Judge Politan (ret) as the mediator.

42. The parties also exchanged mediation statements prior to the mediation. In Defendants' statement, they emphasized again that Lead Plaintiff would have great difficulties in

proving his case. They repeated the findings of the Audit Committee, and also noted that the SEC had closed its investigation without taking enforcement action. They made their arguments about the difficulties of alleging and proving *scienter*. They also made presentations on the length of the Class Period and argued that there was no false statement made between March 13, 2007 and January 29, 2008, and certainly not one that caused the losses that followed the May 19, 2008 disclosure. With regard to this, they argued on substance but also procedure: they claimed that Lead Plaintiff had no standing to bring claims for the later part of the Class Period based on his purchase dates but also that the early part of the Class Period could not stand because there were no misrepresentation during it. Thus, of course, they argued that no part of the case could go forward.

43. The Defendants gave Lead Plaintiff several charts and exhibits as part of their presentation. Lead Plaintiff reviewed those that related to damages with their damages expert, and Lead Counsel had the opportunity to pose questions to Defendants' Counsel.

44. On July 12, 2010 the parties and the Defendants' insurer engaged in an all-day mediation before Judge Politan. In addition to the parties' mediation, NexCen was involved in discussions with private litigants in separate cases. These included the Willow Creek entities, who had brought a case based on allegations similar to those in this class action. During the mediation, and in discussions before and after, Lead Plaintiff took the position that the Willow Creek parties could not participate in the class action settlement if they recovered separately. Politan Decl. ¶ 11. This was a required and specific term in the ultimate settlement here and in the separate settlement in the Willow Creek case. *Id.*

45. The parties made substantive presentations at the mediation, to Judge Politan and each other.

46. The purpose of all of these presentations and discussions was for both sides to gain a better appreciation of the underlying facts of the case and of each other's positions on the merits. The fact that the four Motions to Dismiss were fully-briefed and pending had a positive effect on the settlement discussions as it incentivized both sides to seek a resolution of the Action before either side's position might potentially weaken significantly, and reflected an acknowledgement of significant risk by both sides.

47. The mediation ended without an agreement. The discussions, through Judge Politan, continued with continual calls with him for another five weeks, when the parties finally agreed on the Settlement Amount of $4,000,000.

48. The negotiations were at arm's length and hard fought, and Lead Plaintiff in fact intended to continue the discussions, pressing for a higher amount. Judge Politan confirmed to us that no additional settlement monies were available. Politan Decl. ¶¶ 14-15.

49. Throughout the weeks leading to the settlement meeting and then the mediation, Lead Counsel frequently consulted Lead Plaintiff concerning the discussions with Defendants' Counsel and the relative merits of the case. Mr. Granatelli also made himself available throughout both days, and I called him several times during the settlement meeting and the mediation.

50. Over the course of the next eight months, the parties negotiated the additional terms of the Settlement and the Stipulation and all its exhibits. These were substantive discussions, on several issues of dispute among the parties.

51. After the parties agreed on the Stipulation, but before it was signed, Plaintiff's Counsel obtained from Defendants and reviewed thousands of documents that NexCen had produced to the SEC in connection with its investigation of NexCen. Plaintiff's Counsel's

review of these documents, combined with the facts known through the investigation and otherwise, gave us a full understanding of the issues in the case, confirmed Lead Counsel's and Lead Plaintiff's factual assessment of the case, and confirmed the fairness of the Settlement.

52. Thereafter, once this confirmatory discovery was completed, the parties signed the Stipulation and Lead Plaintiff filed his Motion for Preliminary Approval of the Settlement (Dkt. Nos. 129-132).

53. Lead Plaintiff, through Lead Counsel, carefully considered and analyzed legal precedents governing falsity, *scienter*, loss causation, and damages applicable to the alleged claims. Lead Plaintiff, through Lead Counsel, reviewed all publicly-available information, and information uncovered through the course of Lead Counsel's investigation in connection with the preparation of the Complaint, to determine the factual information in support of his claims. As confirmatory discovery, Lead Plaintiff further reviewed confidential documents relevant to the claims of the case. Through his damages consultant, Lead Plaintiff considered the theoretical damages suffered by the putative Class. Lead Plaintiff then evaluated the legal and factual strengths and weaknesses of his claims.

54. Lead Plaintiff, through Lead Counsel, also considered other factors, including the risks and costs of continuing to prosecute the case through motion practice and trial, and inevitable appeals.

55. On July 5, 2011, the Court entered an order: (i) preliminarily approving the class action settlement; (ii) preliminarily approving class certification for settlement; (iii) approving the form and manner of providing notice to the potential class members; and (iv) setting the final approval hearing for December 2, 2011. (Dkt. No. 133).

F. The Involvement of the Lead Plaintiff In the Action and His Approval of the Settlement

56. Mr. Granatelli was actively involved in the Action from the time he filed his motion to be Lead Plaintiff. He reviewed drafts of the Complaint and all filings made on the Motions to Dismiss and in the mediation. In addition, Lead Counsel had continuing phone calls with him. As noted above, he was also actively involved with us during the settlement discussions and meeting and the mediation and later discussions that ultimately led to the Settlement. In addition, Lead Plaintiff reviewed and approved the various drafts of the Stipulation and its exhibits. Lead Plaintiff recommends and endorses the Settlement as fair, reasonable and in the best interests of the Class. *See* Granatelli Decl. ¶¶ 4-6.

III. THE TERMS OF THE SETTLEMENT

57. In summary, the Settlement provided that Defendants would cause the $4,000,000 Settlement Amount to be paid to an account established for the benefit of the Class. That occurred on July 15, 2011 and it has been earning interest for the Class since that date. That amount, after deducting attorneys' fees, costs and expenses (the "Net Settlement Fund"), will be divided on a pro rata basis in proportion to the Recognized Loss, as determined by the Plan of Allocation set forth in the Notice (defined below), of each Class Member who sends in a valid, timely Proof of Claim form.

58. In exchange for the payment made on behalf of Defendants, they will receive a release of all "Released Claims" that Class Members may have against Defendants and certain other "Released Parties," as defined in the Stipulation and disclosed in the Notice. The Released Claims are essentially any and all claims concerning the purchase of NexCen common stock during the Class Period, any claims that could have been brought in this Action, any claims relating to the subject matter of the Action, and any claims related to the facts underlying the

Action.

IV. CONTINUED LITIGATION POSED CONSIDERABLE AND SERIOUS RISKS TO THE CLASS

59. It is a truism that the outcome of any litigation is never a certainty. Lead Plaintiff must sufficiently allege and later prove at the summary judgment and trial stages such issues as the falsity of the subject statements, Defendants' *scienter*, loss causation and damages. Here, Defendants will assert that their statements were truthful, and if they were false, they were not made with *scienter*. Defendants will continue to contend that they acted in good faith, and that when the truth of the alleged false statements entered the market, it did not proximately cause the price of NexCen securities to fall in value and did not harm Lead Plaintiff or the Class.

60. The Individual Defendants also will contend that they were not liable as controlling persons under Section 20(a) of the Exchange Act.

61. Despite Lead Plaintiff's belief that his allegations are correct and his confidence in the strengths of this case, the continued prosecution of this action is not without considerable risk. Based on the factual information obtained prior to the Settlement, during the course of the proceedings, and in confirmatory discovery, and for the reasons discussed in greater detail in Lead Plaintiff's Memorandum of Law in Support of this Motion, Lead Counsel and Lead Plaintiff believe that the Settlement Amount is fair and reasonable in light of all the relevant considerations, including the general risks and burdens of, and delays that will be caused by, continued litigation.

62. Lead Plaintiff and Lead Counsel analyzed the evidence available from their own investigation and from discovery concerning the merits of Lead Plaintiff's contention. The information we obtained indicated that Defendants would likely be able to present significant evidence supporting their defenses and version of the facts. We consulted accounting experts

to address the allegations on the GAAP issues and the expected defenses; it was clear that they would require complicated presentations on the rules and their interpretation and there would be conflicting presentations by the parties and their experts on them.

A. Risks of Proving Liability & Damages

63. There are real risks regarding Lead Plaintiff's ability to prove the materiality and falsity of NexCen's statements about its business plan to acquire three to five franchises a year and to prove NexCen's lack of liquidity prior to the amendment of the credit facility. Defendants noted questions as to whether such statements were false because NexCen's cash balances rose from $37.9 million in the first quarter of 2007 to $53.3 million at year end 2007, and at the end of 2007, NexCen had $39 million in borrowings available to it. Thus, Defendants assert there was no lack of liquidity. Defendants also noted that in fact NexCen did acquire three companies during that timeframe. Defendants also claimed that the amendment of the credit facility occurred only because the Company was attempting to complete its then-largest acquisition.

64. Additionally, Defendants maintained that the alleged misstatements about the Company's business plan were not material because they were general statements of corporate optimism, forward-looking statements with meaningful cautionary language, or otherwise non-actionable.

65. Defendants also maintained that there was no loss causation that could be shown for these statements because the May 19, 2008 announcement was unrelated to these alleged misstatements, and concerned only the amendment of the credit facility that occurred four months earlier in January of 2008.

66. While Lead Plaintiff believes that he adequately alleged loss causation as to all the misstatements in this case, and could prove it at trial, proving loss causation would have

posed significant risk and cost. Such an endeavor would have required extensive expert discovery, including depositions and rebuttal reports, and again resulted in the proverbial "battle of the experts."

67. In light of these substantial arguments, Lead Plaintiff faced a real risk that much of the alleged Class Period could be eliminated as the Action progressed. Judge Politan agrees with this assessment. Politan Decl. ¶¶ 9-10.

68. Lead Plaintiff also faced the real risk of alleging and proving each of the Defendants' *scienter*. *Scienter* is always difficult to allege, and equally difficult to prove as no party ever admits to knowingly false conduct.

69. Lead Plaintiff also faced the risk of establishing the proper measure and amount of damages. Lead Plaintiff's best case scenario, as estimated by his damages expert, was class-wide damages of $36.7 million. Defendants, of course, argued that there were no damages.

70. Although Lead Plaintiff remains confident that he could present reliable expert testimony to sustain his and the Class' burden on liability and damages, Lead Plaintiff cannot predict what the jury's decision would have been when faced with reports from competing experts. Settlement of this action eliminates the substantial risk posed by these complex and highly technical expert questions.

71. Lead Plaintiff also faced the risk and expense of obtaining class certification.

B. Complexity, Expense and Likely Duration of the Litigation

72. The resolution of this action required the assessment of many complex issues of fact and law. As demonstrated above, the further litigation of this action would require the parties to extensively explore, through expensive and time-consuming expert discovery, provisions of GAAP concerning the alleged accounting errors in the case, loss causation and

damages, and the financial metrics of NexCen's various franchises and credit facility to determine whether it was on track to meet its business plan prior to the amendment of the credit facility.

73. Lead Plaintiff and Plaintiff's Counsel have aggressively litigated this action. Given the complexity of the factual and legal issues in this case, the expense incurred through further pursuit of this action against Defendants would be substantial. Lead Plaintiff has already expended significant resources investigating his claims and assessing the legal strengths and weaknesses thereof. Considerably more time and money would need to be invested by Plaintiff's Counsel if Lead Plaintiff were required to obtain class certification and to complete documentary discovery, depositions and expert discovery, litigate eventual motions for summary judgment and, ultimately, to take this action to trial.

74. Assuming that Lead Plaintiff could successfully defeat Defendants' summary judgment motions, the trial that Lead Plaintiff will face would be lengthy and complicated. As noted, on liability alone, the trial would have involved substantial attorney and expert time, voluminous documentary and deposition evidence, vigorously-contested motions and the considerable use of judicial resources.

75. Even assuming that the Class could recover a larger judgment after one or more trials, the delay through the trial(s), post-trial motions and the appellate process would likely deny the Class any recovery for years and the continued costs of prosecution would erode any increased recovery. Moreover, if the case were to go to trial, Defendants' insurance coverage would have been substantially depleted, and there are no monies available from the Company's successor and recovery from the Individual Defendants would be very difficult. *See also* Politan Decl. ¶ 13.

C. Stage of Proceedings

76. Through Lead Plaintiff's investigation, including work with potential witnesses, review of documents, legal research and the expert analyses noted above, and the extensive briefing of the motions to dismiss, Plaintiff's Counsel have conducted a thorough evaluation of the strengths and weaknesses of the action.

77. Plaintiff's Counsel was able to marshal the results of their investigation to prepare the Complaint, oppose Defendants' Motions to Dismiss, and submit a compelling analysis of the action to Defendants and the mediator during settlement negotiations.

78. Plaintiff's Counsel's also reviewed the large number of documents Defendants produced to the SEC in connection with its investigation of NexCen. This review confirmed Lead Plaintiff's and Lead Counsel's evaluation of the strengths and weaknesses of the action, the risks of litigation, and the challenges the Class would face at trial.

D. Range of Reasonableness/Ability of Defendants to Withstand a Greater Judgment

79. Lead Counsel has analyzed the range of possible recovery against the probability of success. The determination of a reasonable settlement is not susceptible to a mathematical equation yielding a particularized sum, but we believe the Settlement is fair and reasonable.

80. In this case, Lead Plaintiff's expert calculated Class-wide damages of $36.7 million. The $4,000,000 settlement therefore represents a recovery of approximately 10.9% of the total damages if Lead Plaintiff's damages model is accepted in its entirety and Lead Plaintiff were to prevail on every claim. If the Class Period had been limited to the period January 29, 2008 through May 18, 2008, Lead Plaintiff's expert calculated class-wide damages would have been $18.3 million. The Settlement represents 21.9% of that amount. This percentage of recovery is increased further when one eliminates the damages of the Willow Creek entities, who

will not participate in the Settlement. Given the obstacles and uncertainties attendant to this complex litigation, Lead Plaintiff submits that the $4,000,000 Settlement falls well within the range of reasonableness for approval of a settlement in this action. *See* Politan Decl. ¶ 12 ("The settlement negotiated here satisfies all parties' concerns and appears in the range of reasonableness of other settlements I have mediated, and have seen courts approve.").

81. Settlement at this time avoids the risks of further costly litigation, and provides Class Members with the opportunity to receive an immediate, certain, and substantial recovery. It is, therefore, the opinion of Plaintiff's Counsel that the risks involved, balanced against the certainty of the benefits obtained by the current Settlement, justify the Court's approval of it.

V. THE NOTICE OF THE SETTLEMENT WAS PROPERLY MADE TO THE CLASS

82. As noted above, pursuant to the Court's Order preliminarily approving the Settlement, Lead Plaintiff caused 8,210 copies of the Notice and Proof of Claim form to be mailed to potential Class members. Mulholland Aff. ¶ 8 and Ex. 4 attached thereto. Notice was further provided to 1,936 brokerage firms, banks and other companies that may have purchased NexCen stock for their clients; some of them have provided contact information for their clients who may be Class Members and the Notice was mailed to them. *Id.* ¶ 4. Further, the Summary Notice was printed and the Press Release was issued. *Id.* ¶ 5 and Exs. 1 and 2 attached thereto. A settlement website, www.nexcensettlement.com was created and all the settlement papers and the Court's Order were posted to this website, the Administrator's website and Plaintiff's Counsel's two websites. *Id.* ¶¶ 4-5.

83. The Court-approved Notice describes the Settlement, explains the background to it and provides potential members of the Class with the date of the final approval hearing. The Notice also provides Class Members with full discussions of the Plan of Allocation, the

anticipated fee and expense requests, and their rights and options. This Notice complies with the requirements of the Federal Rules of Civil Procedure, the PSLRA, and due process, and it is similar to notices approved in other cases.

84. The Notice and Summary Notice advised Class Members that they could object, no later than November 14, 2011, to the Settlement, the Plan of Allocation, and/or the application for attorneys' fees and reimbursement of expenses. Class Members were further informed that they could exclude themselves from the Class on or before November 14, 2011.

85. The Notice provided Plaintiff's Counsel's estimates of the per share recovery to Class Members with and without the requested attorneys' fees and reimbursement of expenses. These calculations were made in consultation with Lead Plaintiff's damages expert.

VI. THE PLAN OF ALLOCATION SHOULD BE APPROVED AS IT IS FAIR AND REASONABLE

86. Lead Plaintiff also seeks the Court's approval of the Plan of Allocation as fair and reasonable, and believes that it provides a fair method to divide the Net Settlement Fund for distribution among Class Members. The Plan of Allocation allocates the Net Settlement Fund in a manner that accounts for the extent of artificial inflation present in the Company's stock price during the Class Period.

87. The Plan of Allocation provides that Class Members who file valid Proof of Claim forms, postmarked on or before January 31, 2012, evidencing a loss in their transactions in shares of NexCen common stock during the Class Period, are entitled to a recovery based upon the true value of the shares at the time they purchased them. The Plan of Allocation reflects Lead Counsel's allocation of the Settlement, in consultation with their damages consultant, based on the likely provable per-share damages had this case proceeded to trial. It is fair to all Class Members. In addition, it is designed to promote ease of claims administration with its attendant

reduced costs to the Class. The Plan of Allocation is similar to numerous other plans that have been approved in other securities class actions.

88. Under the proposed Settlement and Plan of Allocation, Class Members are required to submit a Proof of Claim form that sets forth all purchases and sales of NexCen shares during the Class Period, including the date(s) of purchase and sale, the price paid for the securities, and the net proceeds received from any sales, as well as the claimant's position in shares at the beginning and end of the Class Period. This allows a claim to be calculated in accordance with the Plan of Allocation. Under this Plan, the amount that any individual claimant receives will be represented by the proportion of his/her/its Recognized Loss to the aggregate Recognized Losses of all valid claims. Thus, if a Class Member had a Recognized Loss of $1.00, and the aggregate Recognized Losses of all valid claimants was $100, such Class Member would be entitled to 1% of the Net Settlement Fund.

89. The Plan of Allocation reflects Lead Counsel's view, in consultation with their damages consultant, about how disclosure of the Company's true financial condition corrected the artificial inflation in the Company's stock price.

90. The objective of the Plan of Allocation is to provide an equitable basis upon which to distribute the Net Settlement Fund among eligible Class Members. The Plan of Allocation is rationally based upon Lead Plaintiff's theory of loss causation and will result in a fair and equitable distribution of the available proceeds among Class Members who submit valid claims.

91. Lead Plaintiff and Lead Counsel thus submit that the Plan of Allocation is fair and equitable to all Class Members and deserves the Court's approval.

VII. THE REQUEST FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

92. Plaintiff's Counsel respectfully seeks an award of attorneys' fees in the amount of thirty percent (30%) of the Settlement Amount, $1,200,000. This fee award is sought with the consent and approval of Lead Plaintiff. *See* Granatelli Decl. ¶ 7. Plaintiff's Counsel have at all times litigated this Action for the Class on a fully contingent-fee basis, such that any attorneys' fees would be paid only upon achieving a recovery for the benefit of Lead Plaintiff and the Class by settlement or judgment. In contrast, it is Lead Counsel's understanding that Defendants' counsel were compensated on an ongoing basis by their clients or insurance monies throughout the pendency of the Action.

93. Cohen Milstein and The Rosen Law Firm each have decades of experience in class action litigation and specifically in securities class actions. My firm resume is attached as Exhibit 4 and The Rosen Law Firm's is attached to its declaration as Exhibit 5. We respectfully submit that our abilities and reputation in the field, and the services we provided here in litigating the Action, allowed for the Settlement.

94. Collectively, Cohen Milstein and The Rosen Law Firm spent 2,011.49 hours litigating this Action and securing the Settlement, resulting in a cumulative lodestar of $941,677. The fee requested represents a multiplier of approximately 1.27 to Plaintiff's Counsel's aggregate lodestar. These hours do not include any time spent preparing Plaintiff's Counsel's fee petition.

95. A detailed discussion itemizing the time spent and work performed by Cohen Milstein follows below and a schedule of Cohen Milstein's lodestar, by attorney, and its expenses, by category, is attached as Exhibit 6. A similar statement from The Rosen Law Firm is listed in Exhibit 5.

96. Attorneys, paralegals and other professionals of my firm were directly involved in all aspects of the prosecution of the Action from the filing of Mr. Granatelli's motion to be appointed Lead Plaintiff. As discussed above, services rendered and work performed by Cohen Milstein to date include the following: (a) research and investigation of the applicable facts and law underlying Lead Plaintiff's claims, including analysis of public information and interviews of witnesses on a confidential basis; (b) drafting of factual and legal allegations for the Complaint; (c) full briefing of the Motions to Dismiss; (d) drafting summaries of arguments and factual presentations for informal and formal settlement discussions with Defendants' Counsel; (d) research and drafting of the mediation statement and attendance at the settlement meeting and mediation; (e) discussions and other communications with consulting experts concerning accounting, loss causation and damages issues, and the Plan of Allocation; (f) discussions and other communications with counsel concerning litigation status and strategy; (g) extended negotiation with Defendants concerning a mutually-acceptable Stipulation and exhibits; (h) focused discovery in the interest of confirming the fairness, reasonableness and adequacy of the Settlement; (i) drafting of Lead Plaintiff's motions for preliminary and final approval of the Settlement; (j) attention to various matters relating to notice to the class and settlement administration, including consultations with the Claims Administrator, and (k) continual and on-going discussions with the Lead Plaintiff about the litigation and its possible settlement.

97. We reviewed and assigned this work carefully. Assignments on research, work with experts and confirmatory discovery were coordinated -- within Cohen Milstein and with The Rosen Law Firm -- to ensure that work was not duplicated and that projects were not assigned to too many attorneys or paralegals. Senior attorneys did not do work that could be completed by more junior associates; attorneys did not do work that paralegals could properly

perform with supervision.

98. Since the inception of this Action, in accordance with its normal business practices, Cohen Milstein has and does maintain detailed and contemporaneous records of the time spent by its lawyers, law clerks, paralegals and certain other personnel in their work on the firm's cases, including this litigation. Our timekeepers have been and are required to keep daily time records, both noting amounts of time spent on projects and providing descriptions of that work. These records then are computerized, checked, and maintained in databases. The chart attached as Exhibit 6 provides a summary of the time records for this Action.

99. As reflected there, the total number of hours expended by my firm in connection with the prosecution of this litigation is 1,325.50. The total lodestar of my firm is $655,032.50.

100. This lodestar calculation is based on our 2011 billing rates. For attorneys and employees no longer employed by the firm, the lodestar calculation is based upon the billing rate during his or her last year of employment with the firm.

101. The hourly rates set forth on this chart are the rates that have been or could be charged as usual and customary hourly rates for my firm's work performed for non-contingency fee clients. No adjustment has been made to the rates, notwithstanding the complexity of this litigation, the preclusion of other employment for my firm while we worked on this case, the expected delay in payment that the firm accepted, or the other factors present in class cases that might justify a higher rate of compensation. Cohen Milstein's billing rates have been paid by our hourly clients and/or, separately, approved for payment by federal and state courts in other class and derivative litigations, including securities and shareholder litigation, throughout the time this litigation has been pending.

102. Plaintiff's Counsel's lodestar figures are based upon the firms' billing rates, which rates do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in the firms' billing rates.

103. The Notice expressly stated that Lead Counsel would ask the Court, on behalf of Plaintiff's Counsel, to award attorneys' fees from the Settlement Fund in an amount of up to 30% of the Settlement Amount, and to award them reimbursement of their litigation expenses incurred in connection with the prosecution of the Action in an amount not to exceed $70,000. As of today, no one has objected to the fee and expense application.

104. The fee requested is well within the range of fees commonly awarded by Courts in this District and Circuit, evaluated either as a percentage of the recovery or as a function of counsel's lodestar. The level of contingency risk was high, and Plaintiff's Counsel faced a real risk that the Action might be dismissed at the pleading stage, or later at summary judgment or at trial, after their investment of substantial time and expense. Defendants also had substantial defenses, as set forth above and in Lead Plaintiff's accompanying Memorandum of Law. The result achieved -- an all-cash payment of 10.9% of Class Members' highest likely damages -- is excellent and justifies the award of fees requested.

105. Lead Counsel also respectfully seeks reimbursement of $63,855.05 in aggregate out-of-pocket expenses incurred by Plaintiff's Counsel. We were required to advance substantial funds in this Action for, among other items, investigators' fees and costs; consulting expert fees and costs; transportation, meals and lodging to attend hearings and the settlement meetings; photocopying; on-line legal and court docket research; and telephone and facsimile transmissions. My firm's reimbursable expenses, totaling $51,430.12, are categorized in Exhibit 6; the reimbursable expenses of The Rosen Law Firm are listed in Exhibit 5.

106. These expenses all were reasonably and necessarily incurred in connection with this litigation.

107. My firm recorded its expenses as they were incurred and all these charges are reflected on Cohen Milstein's computerized bookkeeping records. Our books and records are prepared on a daily basis from invoices, bills, receipts, credit card monthly bills, check records and similar documents; these are regularly kept and maintained by my firm, and they are an accurate record of our incurred expenses. We have files of the back-up invoices, bills and receipts, and proofs of payment, and will continue to maintain them.

108. I respectfully refer the Court to Lead Plaintiff's Memorandum of Law in Support of this Motion for additional factors supporting the request for an award of attorneys' fees and reimbursement of expenses.

VIII. ADDITIONAL EXHIBITS

109. I attach, as Exhibit 7, a true and correct copy of a research study published by NERA Economic Consulting titled *Trends 2010 Year-End Update*.

110. I attach, as Exhibit 8, a true and correct copy of a research study published by Cornerstone Research, Inc. titled *Securities Class Action Settlements: 2009 Review and Analysis*.

111. I attach, as Exhibits 9, 10, and 11, the proposed Final Order and Judgment negotiated by the parties as part of the Stipulation; a proposed Order approving the Plan of Allocation; and a proposed Order awarding attorneys' fees and expenses.

IX. CONCLUSION

112. For the reasons set forth herein, as well as the reasons set forth in the accompanying Memoranda of Law, and upon the full record of this Action, Lead Counsel respectfully submits that the proposed Settlement, and the proposed Plan of Allocation, are fair,

reasonable and adequate, and should be approved by the Court, and further, that the petition for an award of fees and for reimbursement of expenses should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of November, 2011, in Washington, D.C.

Lisa M. Mezzetti

CERTIFICATE OF SERVICE

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

/s/ Catherine A. Torell