IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JET CAPITAL MASTER FUND, L.P., Plaintiff, v. HRG GROUP, INC. ET AL., Defendants.	No. 21-cv-552-jdp

MEMORANDUM OF LAW IN SUPPORT OF HRG SUBCLASS LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Jet Capital Master Fund, L.P. ("Jet Capital" or "Lead Plaintiff"), on behalf of itself and the other members of the HRG Subclass, respectfully submits this memorandum of law in support of Jet Capital's motion under Federal Rule of Civil Procedure 23(e)(2) asking the Court to grant final approval of the proposed settlement of this Action (the "Settlement") and the proposed plan of allocation of the net proceeds of the Settlement (the "Plan of Allocation").

PRELIMINARY STATEMENT

This is a securities class action against Spectrum Brands, a consumer-goods company. HRG Group, Inc. ("HRG") was the controlling shareholder of Spectrum Brands Legacy, Inc. ("Old Spectrum"). During the relevant period, Old Spectrum merged into HRG, which was then renamed Spectrum Brand Holdings, Inc. ("Spectrum").

In *In re Spectrum Brands Securities Litigation*, No. 19-cv-347-jdp (the "*Spectrum* Action"), the Public School Teachers' Pension and Retirement Fund of Chicago and the Cambridge Retirement System (together, the "Spectrum Subclass Lead Plaintiffs") brought class claims on behalf of purchasers of Old Spectrum, Spectrum and (purportedly) HRG stock. While Defendants' motion to dismiss the *Spectrum* Action was pending, the Spectrum Subclass Lead Plaintiffs reached a proposed settlement of all claims for $39 million (the "Prior Settlement"). But that settlement imposed a 75% discount for claims of HRG stock purchasers. Jet Capital, along with two other institutional HRG investors represented by Lead Counsel, objected to the Prior Settlement on numerous grounds, including that the Spectrum Lead Counsel had no authority to prosecute—let alone settle—claims of HRG stockholders. The Court refused to approve the Prior Settlement and held, *inter alia*, that the Spectrum Subclass Lead Plaintiffs could not represent HRG stock purchasers. Jet Capital was subsequently appointed Lead Plaintiff of the HRG Subclass and the claims of the HRG Subclass were severed from the *Spectrum* Action and this

Action was created.

Jet Capital and Defendants[1] (collectively, the "Parties") then negotiated at arm's length, with the assistance of an experienced and well-regarded private mediator, a proposed $7,250,000 cash settlement of the securities fraud claims asserted by the HRG Subclass in this Action. The Court preliminarily approved the Settlement and directed that notice of the Settlement be provided to the HRG Subclass. (ECF No. 102.)

As detailed in the Rolnick Declaration, this Court should grant final approval of the proposed Settlement, which will resolve the claims of the HRG Subclass in their entirety and will dismiss this Action.[2]

The Settlement is an excellent result for the HRG Subclass. The Settlement is an excellent result for HRG Subclass Members in the face of significant litigation risk—including a standing challenge that turned on unsettled law—that could have eliminated or substantially reduced any eventual recovery and that would have required, even if successful, years of protracted litigation before payment. The Prior Settlement would have provided HRG Subclass Members an estimated recovery of just 33 cents per HRG share. The proposed Settlement will provide HRG Subclass Members an estimated recovery of 50 cents per HRG share. This represents a ***51% increase in recovery*** for HRG Subclass Members versus the prior Settlement, despite *increased* litigation risks. No HRG Subclass Members objected to the amount of the Prior Settlement (other than to the 75% discount imposed on HRG purchasers). Although the objection and exclusion

[1] Defendants are Spectrum, Old Spectrum, HRG and Individual Defendants Andreas R. Rouvé, David M. Maura, and Douglas L. Martin.

[2] The Declaration of Lawrence M. Rolnick, filed herewith ("Rolnick Declaration") is an integral part of this submission and Lead Plaintiff respectfully refers the Court to the Rolnick Declaration for a detailed description of the topics discussed herein, including Lead Plaintiff's objection to the prior settlement, the prosecution and settlement of this Action, the HRG standing issue, and the risks of continued litigation, among other topics.

deadline has not passed, no HRG Subclass Members have objected to the Settlement and none have validly excluded themselves.

The litigation risks faced by the HRG Subclass were not hypothetical or attenuated. Defendants challenged whether the HRG Subclass even had standing to bring their claims in the first place. This Court characterized the standing issue as an open question and observed that there is "no controlling law" on the issue. (ECF No. 74 at 5.) Thus, this Action could have been dismissed as a matter of law on a motion to dismiss, leaving the HRG Subclass with no recovery at all. Indeed, Defendants sought to do just that after first settling the Spectrum Subclass. In addition, Defendants had an arsenal of other potential arguments to escape liability or reduce any recovery, including some that they believed had been bolstered by decisions issued after the Prior Settlement was reached.

The Settlement was achieved through hard-fought negotiations, overseen by a mediator experienced in securities litigation. Here, the Parties reached the Settlement only after arm's-length negotiations between experienced and informed counsel and with the assistance of Mr. Melnick, a mediator experienced in settling securities class actions. After an initial three-way formal mediation session did not result in any settlement, the HRG Subclass and Defendants ceased settlement discussions. But unbeknownst to counsel for the HRG Subclass, the Spectrum Subclass continued to discuss resolution, and within only two weeks signed a term sheet reaching a settlement-in-principle. Having resolved the much greater exposure represented by the Spectrum Subclass, the Defendants believed they had a tactical advantage to first litigate a motion to dismiss against the HRG Subclass, before resuming settlement discussions, including the issue of whether the HRG Subclass had standing to bring their claims. Defendants were optimistic that they could prevail on this issue as a matter of law and that it represented an existential threat to the HRG

Subclass. Indeed, the settlement of the *Spectrum* Action put enormous pressure on the HRG Subclass because the Defendants were able to resolve their greatest exposure and seek dismissal on standing grounds before resuming any discussions with the HRG Subclass. But with great persistence—and the invaluable assistance of Mr. Melnick, Lead Counsel was able to convince Defendants to re-open discussions and after nearly a month of contentious negotiations, Lead Counsel was able to strike a deal to settle this Action for $7.25 million, delivering HRG class members a 51% improvement over the Prior Settlement.

In sum, the Settlement is a very good deal for the HRG Subclass. The Prior Settlement would have discounted their claims by 75% and resulted in an estimated per-share recovery of just 33 cents. The proposed Settlement eliminates the draconian 75% discount and delivers an estimated per-share recovery of 50 cents per share, representing an improvement of 51%. This increased recovery is guaranteed, versus the uncertain prospects of recovery after protracted litigation, including the acute possibility that the HRG Subclass' claims might be dismissed at the outset for purported lack of standing. The fact that the Settlement was reached through arm's-length negotiations with the assistance of a mediator experienced in settling securities class actions further underscores why final approval is warranted. This Court should grant final approval of the Settlement as fair, reasonable, and adequate.

In addition, the Court should approve the proposed Plan of Allocation, which was detailed in the Notice sent out to potential HRG Subclass Members (and available on the public website dedicated to this Settlement). The Plan of Allocation, which was developed by Lead Counsel's damages, provides a reasonable method for allocating the Net Settlement Fund among HRG Subclass Members who submit valid claims based on damages they suffered that were attributable to Defendants' alleged fraud.

ARGUMENT

I. THE PROPOSED SETTLEMENT DESERVES FINAL APPROVAL.

As the Seventh Circuit has stated, "[f]ederal courts favor the settlement of class action litigation." *Freeman v. Berge*, 68 F. App'x 738, 741 (7th Cir. 2003); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 811 (E.D. Wis. 2009) ("Federal courts look favorably upon the settlement of class action lawsuits."). There is also "an overriding public interest in favor of settlement of class action suits." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 307 (7th Cir. 1985); *see, e.g.*, *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1012-13 (E.D. Wis. 1984) (same). This makes sense, because, among other things, "[s]ettlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Jones v. Milwaukee Cty.*, 85 F.R.D. 715, 719 (E.D. Wis. 1980) (internal quotation marks omitted).

Federal Rule of Civil Procedure 23(e)(2) sets forth the factors that address the "core concerns of procedure and substance that should guide the decision whether to approve" a proposed class action settlement. Fed. R. Civ. P. 23 advisory committee notes to 2008 amendments. Specifically, a court should consider whether:

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

> (D) the proposal treats class members equitably relative to each other.

In addition, district courts should evaluate: "(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed." *Daluge v. Cont'l Cas. Co.*, 2018 WL 6040091, at *2 (W.D. Wis. Oct. 25, 2018) (quoting *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014)).

A. Jet Capital and Its Counsel Have Adequately Represented the HRG Subclass

"The two key factors relevant to the determination of adequacy are an absence of potential conflict between the named plaintiff and absent class members, and . . . vigorous prosecution on behalf of the class." *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 408 (E.D. Wis. 2002).

Lead Plaintiff Jet Capital and Lead Counsel Rolnick Kramer Sadighi LLP have adequately represented the HRG Subclass. When the Prior Settlement imposed a 75% discount for the claims of HRG stock purchasers—and unfairly benefited the claims of Spectrum stock purchasers—Jet Capital objected and sought to intervene to protect the interests of HRG Subclass Members. Jet Capital then offered to step forward to assume the Lead Plaintiff mantle and negotiated a settlement that provides for a 50% greater recovery for HRG Subclass Members than did the Prior Settlement. In sum, Jet Capital has valiantly defended the interests of all members of the HRG Subclass during this litigation, and has achieved an excellent result, especially in light of the acute risks of continued litigation.

Jet Capital's claims are typical of and coextensive with those of other members of the HRG

Subclass. A class representative is considered "typical" "when [its] claims arise from the same practice or course of conduct that gives rise to the claims of other class members and [its] claims are based on the same legal theory." *Great Neck*, 212 F.R.D. at 408. Here, Jet Capital "meet[s] this standard," because it "purchased [HRG] common stock during the class period and [its] claims are based on the same unlawful conduct as those members of the class sought to be represented," including that "class members were injured when they purchased [HRG] common stock during the class period at artificially inflated prices caused by defendants' conduct." *Id.*; *see Fox v. Iowa Health Sys.*, 2021 WL 826741, at *2 (W.D. Wis. March 4, 2021) (class representative typical where it "suffered the same harm that all members of the proposed Class suffered"). In addition, Jet Capital lacks any interests that are antagonistic to the interest of any other members of the HRG Subclass. Given this, Jet Capital and all other HRG Subclass members "share the same interest, which is obtaining as much money as possible from" Defendants. *In re Northfield Labs., Inc. Sec. Litig.*, 2012 WL 366852, at *3 (N.D. Ill. Jan. 31, 2012). Moreover, unlike the Prior Settlement, the claims of Jet Capital are being treated no differently than the claims of every other member of the class.

Jet Capital is a sophisticated institutional investor and has diligently supervised its counsel and participated in the litigation on behalf of the HRG Subclass, including objecting to the Prior Settlement, which would have delivered substantially less recovery to HRG stockholders. Jet Capital retained as counsel Rolnick Kramer Sadighi LLP, whose attorneys are highly experienced in securities litigation and have successfully prosecuted many complex securities actions across the country. Lead Counsel has vigorously pursued the claims on behalf of the HRG Subclass, including objecting to the Prior Settlement, acting as Lead Counsel and then aggressively negotiating a favorable Settlement through mediation (while at the same time avoiding

Defendants' stated preference to litigate the standing issue).

B. The Settlement Was Reached Through Contentious, Good-Faith, Arm's-Length Negotiations Among Experienced Counsel Aided by a Mediator.

The proposed Settlement is the result of an extended and contentious negotiation among experienced securities litigators. The negotiations were arm's-length negotiations and assisted by an experienced and well-regarded mediator (Jed D. Melnick, Esq. of JAMS). *See, e.g.*, *Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 5627171, at *6 (S.D. Ind. Sept. 18, 2020) (Mr. Melnick is "leading mediator[]" in the "field" of securities litigation); *Lewis v. YRC Worldwide Inc.*, 2021 WL 4123315, at *3 (S.D.N.Y. Sept. 9, 2021) (Mr. Melnick is "respected and experienced mediator[]"). A "strong presumption of fairness attaches to a settlement agreement when it is the result of" "arms-length negotiations by competent counsel" aided by "experienced mediator." *Great Neck*, 212 F.R.D. at 410; *see, e.g.*, *Binissia v. ABM Indus., Inc.*, 2017 WL 4180289, at *6 (N.D. Ill. Sept. 21, 2017) ("[T]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.").

Here, the Parties reached the Settlement only after protracted and hard-fought negotiations between experienced and informed counsel and with the assistance of Mr. Melnick, an experienced mediator well-versed in settling securities class actions. After the Court rejected the Prior Settlement and Jet Capital was appointed Lead Plaintiff for the HRG Subclass, on July 22, 2021, Lead Counsel, Lead Counsel for the Spectrum Subclass and Defendants conducted a formal, all-day remote mediation session before Mr. Melnick. In advance of that session, Lead Counsel, Lead Counsel for the Spectrum Subclass and Defendants submitted mediation briefs, and the mediation session itself involved discussion of the merits of the action, including liability and damages. The three-way mediation session did not result in an agreement to settle the claims of either the HRG Subclass or the Spectrum Subclass.

After the July 22 three-way mediation session ended, Lead Counsel did not have any additional discussions with Defendants to resolve the claims of the HRG Subclass. However, unbeknownst to Lead Counsel, after the July 22 failed mediation session, the Spectrum Subclass and Defendants continued to negotiate the terms of a settlement and executed a term sheet to settle the Spectrum Action on August 3, 2021. As a tactical matter, settlement with the Spectrum Subclass allowed counsel for Defendants to litigate the standing issue against the HRG Subclass, a legal defense they believed to be extremely strong, without jeopardizing the settlement of the much larger exposure presented by the Spectrum Subclass.

On August 4, 2021, the Spectrum Subclass Lead Plaintiffs and Defendants informed the Court of their settlement-in-principle of the Spectrum Subclass. (No. 19-cv-347-jdp, ECF No. 88.) Consistent with their strategy to litigate the standing issue before resuming any settlement discussions with the HRG Subclass, Defendants and the Spectrum Subclass Lead Plaintiffs told the Court "that the two subclasses should now proceed on completely separate tracks for all purposes going forward so as not to delay the settlement approval process for the Spectrum Subclass." That same update also presented to the Court a proposed schedule for further litigation of the HRG Subclass. Specifically, the update included a suggested deadline for the filing of any amended complaint on behalf of the HRG Subclass and a schedule for Defendants' desired motion to dismiss.

On August 6, 2021, the Court issued an order to show cause why the Spectrum Subclass and the HRG Subclass should not be severed "so that each subclass can be resolved separately." The Court's order stated that "Defendants and lead counsel for the Spectrum subclass ask that the two subclasses 'proceed on completely separate tracks' because defendants plan to file a motion to dismiss the claims of the HRG subclass." (ECF No. 89.)

The Defendants strategy to settle with the Spectrum Subclass but litigate against the HRG Subclass put tactical pressure on the HRG Subclass. By first resolving the vast exposure represented by the Subclass, the Defendants could test the standing defense with the HRG Subclass before returning to settlement discussions. This strategy presented a clear risk to the HRG Subclass because it forced it to take the chance of forfeiting any recovery—an risk an outcome even worse than the draconian 75% discount imposed through the prior settlement.

At the urging of Lead Counsel, Mr. Melnick thereafter inquired as to whether settlement discussions might resume with Defendants to settle the claims of the HRG Subclass. Again, as Mr. Melnick explains, "Defendants initially expressed little interest in settlement discussions with the HRG Subclass and consistent with the representations made to this Court indicated that they intended to litigate a motion to dismiss with the HRG Subclass." (Melnick Decl. ¶__.)

Through substantial efforts by Lead Counsel and Mr. Melnick, Defendants were ultimately convinced to return to settlement discussion. After about a month of extremely contentious and hard-fought negotiations, Mr. Melnick issued a mediator's recommendation to settle the Action for $7.25 million. Because such a settlement improved the recovery to the HRG Subclass by over 50% and avoided litigation of the standing issue, Lead Plaintiff authorized Lead Counsel to accept the recommendation. On September 3, 2021, Mr. Melnick informed the Parties that both sides had accepted the mediator's proposal. Mr. Melnick has submitted a declaration recounting his experience and the Parties' mediation efforts, including his opinion that the Settlement is "fair, reasonable, and adequate under all of the circumstances." (Melnick Decl. ¶__.)

The Court should presume the fairness of the proposed Settlement, given that it was achieved after arm's-length negotiations between experienced and informed counsel with the assistance of an experienced mediator. *See, e.g.*, *Great Neck*, 212 F.R.D. at 410; *Isby v. Bayh*, 75

F.3d 1191, 1200 (7th Cir. 1996) ("the district court was entitled to give consideration to the opinion of competent counsel that the settlement was fair, reasonable and adequate"); *Smoot v. Wieser Bros. Gen. Contractors, Inc.*, 2016 WL 1736498, at *5 (W.D. Wis. Apr. 29, 2016) (same).

In addition, Jet Capital is a sophisticated institutional investor—the very type of class representative that Congress favored when it passed the PSLRA—that closely supervised all aspects of this litigation, and recommends that the Settlement be approved. "A settlement reached under the supervision and with the endorsement of a sophisticated institutional investor . . . is entitled to an even greater presumption of reasonableness." *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *4 (S.D.N.Y. July 21, 2020); *see In re Fed. Nat'l Mortgage Assoc. Sec., Deriv., & "ERISA" Litig.*, 4 F. Supp. 3d 94, 107 (D.D.C. 2013) (endorsement of settlement by "sophisticated institutional investors" "militates in favor of approval"). As a result of the mandatory discovery stay imposed by the PSLRA, Lead Counsel was not able to conduct discovery until after resolution of the motion to dismiss. However, given the risk presented by adjudication of the motion to dismiss (particularly on the legal question of standing), Lead Counsel and Lead Plaintiff concluded that it was in the best interests of the class to guarantee recovery prior to adjudication of the motion. Although this prevented Jet Capital from conducting formal discovery in the Action, it undertook substantial due diligence into the claims of the HRG Subclass and possessed sufficient information to confirm that the $7.25 million settlement was fair, reasonable, and adequate for the HRG Subclass. *See, e.g.*, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 588 (N.D. Ill. 2011) ("pertinent inquiry" is "what facts and information have been provided"; "that Class Counsel negotiated a fair settlement is evidence that he had enough information to effectively represent the class").

C. The Settlement Enhances the HRG Subclass Recovery by Over 50% from the Prior Settlement in the Face of Acute Litigation Risk and Delay.

Under Rules 23(e)(2)(C), the Court should also consider whether "the relief provided for the class is adequate." Similarly, courts in this Circuit also consider "the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer" and "the complexity, length, and expense of further litigation." *Daluge*, 2018 WL 6040091, at *2. Here, the proposed Settlement is very favorable to HRG Subclass members and the proposed plan of allocation treats all HRG Subclass members equally.

1. The Settlement Improves Recovery for the HRG Subclass by Over 50% Above the Prior Settlement.

As this Court has recognized, "[t]he most important settlement approval factor is the strength of plaintiffs' case on the merits balanced against the amount offered in the settlement." *Smoot*, 2016 WL 1736498, at *5. The proposed Settlement, which provides for a cash payment of $7.25 million, is an excellent result for HRG Subclass Members.

The Prior Settlement would have provided HRG Subclass Members an estimated recovery of just 33 cents per HRG share. The proposed Settlement will provide HRG Subclass Members an estimated recovery of 50 cents per HRG share. This represents a ***51% increase in recovery*** for HRG Subclass Members over the prior Settlement. This improvement in recovery occurred even as the litigation risks for the HRG Subclass *increased* following the settlement of the *Spectrum* Action, because, with the *Spectrum* Action settled, Defendants were able to resolve the greatest exposure and still litigate a potentially case-ending standing defense against the HRG Subclass. Moreover, Defendants would be able to devote all of their resources towards defending this Action. In addition, no HRG Subclass Members opted-out of the Prior Settlement and only Jet Capital (and two other institutions represented by Lead Counsel) objected on the basis of the 75% discount for HRG claims. The proposed Settlement eliminates that punitive discount and provides for a 51%

greater recovery than the Prior Settlement. To date, no objections or valid opt-outs to the proposed Settlement have been received.[3]

2. The HRG Subclass' Liability and Damages Case Faced Substantial and Acute Litigation Risks.

The Settlement was achieved without this Court ruling on Defendants' anticipated motion to dismiss the claims of the HRG Subclass. In that motion, Defendants would have urged dismissal on numerous bases. Notably, Defendants would have argued (as they did in their prior motion to dismiss in the *Spectrum* Action) that the HRG Subclass lacked legal standing to bring *any* claims, because they did not purchase Old Spectrum or Spectrum securities. While Jet Capital strongly believed that it and the other HRG Subclass Members had standing under the Exchange Act to bring their claims (Rolnick Decl. ¶ 114), the bottom line is that, as this Court has already recognized, there is "no controlling law" on this issue. (ECF No. 74 at 5.) Thus, there was a serious and acute risk that this Court would have ruled in Defendants' favor and dismissed the claims of the HRG Subclass in their entirety, which would have eliminated any recovery for HRG Subclass Members.

In addition to the threshold standing issue, Jet Capital faced numerous other significant risks to its claims:

First, there was significant risk that Defendants' statements about the progress of Spectrum's consolidations would be found inactionable under the federal securities laws. For example, Defendants would have continued to argue that their statements about the consolidation-efforts progress, including the "transitory" nature of the consolidation issues, were not false.

[3] The positive reaction of the HRG Subclass to the Settlement militates in favor of final approval. *See Daluge*, 2018 WL 6040091, at *2 (considerations for settlement approval include "the amount of opposition to the settlement" and "the reaction of members of the class to the settlement").

Defendants argued that the consolidations were progressing adequately during much of the Class Period. Similarly, Defendants also claimed that issues facing the consolidations were, in fact, transitory, because those issues were significantly resolved by the end of the Class Period. Indeed, Defendants would likely point to several decisions issued after Defendants' never-decided motion to dismiss to bolster their position. For example, two recent district court decisions within this Circuit held inactionable statements about "significant progress" on a key corporate initiative, touting the "compelling financial benefits" of a merger, describing an integration project as "on target," a corporate project's "success and effects." *City of Warren Police & Fire Ret. Sys. v. ZebraTech Corp.*, 2020 WL 6118571, at *6-7 (N.D. Ill. Oct. 16, 2020); *W. Palm Beach Firefighters' Pension Fund v. Conagra Brands, Inc.*, 495 F. Supp. 3d 622, 649, 653 (N.D. Ill. 2020). And both the Ninth and Eleventh Circuits have affirmed dismissal of securities fraud claims based on challenged statements that included statements about the "progress" or "on track" nature of corporate projects. *Wochos v. Tesla, Inc.*, 985 F.3d 1180 (9th Cir. 2021); *Carvelli v. Ocwen Fin. Corp.*, 943 F.3d 1307 (11th Cir. 2019). These arguments, if adopted by the Court or later by the jury, would have made certain of Defendants' statements about the consolidations true, and, therefore, inactionable under the Exchange Act.

Second, there was a risk that Defendants might be found to have made the challenged statements without the scienter necessary to establish a claim under the federal securities laws. For example, Defendants argued that Spectrum was making adequate progress in consolidating its distribution networks, and that Defendants were only made aware of any deeper issues directly before Defendants disclosed those issues to the market. Given this, Defendants would argue, the requisite scienter to support a securities fraud claim could not be established. These arguments would potentially be supported by decisions issued after the briefing on Defendants' never-

adjudicated motion to dismiss. Thus, in *In re Target Corp. Securities Litigation*, the Eighth Circuit affirmed the dismissal of securities claims alleging that Target had pervasive inventory-control issues in its Canadian stores, because the challenged statements were "perfectly consistent with the narrative that Target had serious problems that none of its executives understood" and "[t]hat every time one issue was fixed, others sprang up hydra-like to replace it further supports the non-fraudulent explanation for Target's statements to investors." 955 F.3d 738, 745 (8th Cir. 2020). Moreover, the scienter allegations in the Complaint were supported in part by confidential witness allegations. In discovery, it may have turned out that none of these witnesses reported their concerns to senior management. Again, if these arguments were accepted by the Court or a jury, they might negate a scienter, which is a required element of a Section 10(b) claim.

Third, even if liability were successfully established, Jet Capital still faced defenses based on loss causation and damages. "Defendants would assert that the losses were due to market, industry and general economic conditions rather than wrongful conduct." *Great Neck*, 212 F.R.D. at 410. For example, Defendants have argued that a significant portion of the declines in the stock prices of HRG and Spectrum on the corrective disclosure dates reflected investors' reaction to poor performance of Spectrum as a company, based on a number of factors entirely unrelated to the financial impact caused by issues related to the consolidations. Defendants would also have argued that those stock-price declines were attributable to information about other business units of Spectrum not implicated in the Complaint's allegations. Moreover, Defendants would have argued to cut-off the class in April 2018, based on the alleged disclosure in that month of problems with the consolidations, which would preclude purchasers of HRG stock after that date from recovering any damages. If Defendants prevailed on these arguments, recoverable damages might be eliminated or significantly reduced.

The Settlement is also reasonable when considered in relation to the range of potential recoveries for the HRG Subclass had it prevailed at trial—which was far from certain, given the numerous defenses outlined above. As one court observed about a securities class action settlement, "if the settlement was disapproved and the case tried, plaintiffs would face substantial risks. The factual and legal issues in the case are not simple, and a jury would have to evaluate conflicting evidence on such issues as scienter, materiality, causation and damages, as well as conflicting expert testimony." *Great Neck*, 212 F.R.D. at 409. Jet Capital's damages expert estimates that the Prior Settlement represented a recovery of 3.3% of the realistic maximum recoverable damages for the HRG Subclass. This proposed Settlement represents an approximate 5% recovery of the realistic maximum damages for the HRG Subclass. This is a ***51% increase in recovery from the Prior Settlement*** and an excellent result for the HRG Subclass, given the risks of litigation—including the unique risks faced by the HRG Subclass that Old Spectrum and Spectrum stock purchasers did not face. Indeed, "shareholder class actions are difficult and unpredictable, and skepticism about optimistic forecasts of recovery is warranted." *Great Neck*, 212 F.R.D. at 409.

3. Further Litigation Would Have Been Complex, Lengthy and Expensive.

In considering a proposed settlement, courts also consider the likely "complexity, length, and expense of further litigation." *Daluge*, 2018 WL 6040091, at *2. "Securities fraud litigation is long, complex and uncertain." *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *2 (N.D. Ill. Dec. 10, 2001). Continued litigation here would have undoubtedly stretched on for many years. In the absence of the Settlement, litigation of this Action would have required determination of Defendants' motion to dismiss, extensive fact discovery, including written discovery, document production and depositions, extensive and complex expert discovery, including about falsity, materiality, causation, and damages, class certification proceedings,

summary judgment proceedings, *Daubert* proceedings, trial, and appeal.

Had litigation continued, Jet Capital would have faced all of the above arguments from Defendants at the motion-to-dismiss, summary judgment, trial and appeal stages. At any of those stages, the claims of the HRG Subclass could have been substantially reduced or eliminated. The Settlement avoids these risks and will provide and prompt and certain benefit to the HRG Subclass—one that is more than 50% greater than the Prior Settlement—rather than the mere possibility of recovery after additional *years* of litigation.

D. The Proposed Settlement Treats All HRG Subclass Members Equally.

Unlike the Prior Settlement, the proposed Settlement does not give preferential treatment to Jet Capital or any other member of the HRG Subclass. Rather, all HRG Subclass Members will receive a distribution from the Net Settlement Fund under a plan of allocation approved by the Court. The proposed Plan of Allocation *eliminates* the punitive 75% discount for HRG stock purchasers that was contained in the Prior Settlement and provides for payment of *pro rata* recovery amounts to eligible HRG Subclass Members who submit valid and timely Claims. Lead Plaintiff will receive the exact same level of *pro rata* recovery based on the application of the Plan of Allocation to its HRG stock transactions as all other HRG Subclass Members.

E. Other Relevant Factors Support Approval of the Settlement

Rule 23(e)(2)(C) also requires courts to evaluate whether the settlement consideration is adequate given "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," "the terms of any proposed award of attorney's fees, including timing of payment," and "any agreement required to be identified under Rule 23(e)(3)." Here, none of these factors suggest that the Settlement is inadequate in any respects.

Claims Procedure. The claims-processing procedures for the HRG Subclass under the

Settlement are consistent with those used in virtually all other securities class actions that settle. The Court-appointed Claims Administrator, JND Legal Administration ("JND"), will evaluate Claim Forms submitted by HRG Subclass Members and distribute settlement proceeds according to the Plan of Allocation, assuming it is approved by the Court. JND is an independent company that has extensive experience processing securities-class-action claims. The procedure JND will use is standard in securities class actions, and is discussed more fully below.

Attorneys' Fees. The Settlement consideration is also adequate even when taking into account the proposed attorneys' fees that Lead Counsel is seeking. As discussed in the accompanying Fee Memorandum, the proposed attorneys' fees of 22% of the Settlement Fund (net of Court-awarded Litigation Expenses and estimated Notice and Administration Costs), to be paid only upon Court approval, are reasonable in light of Lead Counsel's efforts, the result achieved, and the risks of continued litigation. No Party can terminate the Settlement based on this court's ruling with respect to attorneys' fees.

Other Agreements. Besides the Stipulation, the only other agreement to be identified under Federal Rule of Civil Procedure 23(e)(2)(C)(iv) is the confidential Supplemental Agreement between Lead Plaintiff and Spectrum, which sets forth an agreement as to the conditions under which Spectrum would be able to terminate the Settlement if a certain threshold of exclusions is satisfied. This type of agreement (commonly known as a "blow provision") is standard in securities class action settlements and has no relevance to the fairness of the Settlement.[4]

[4] *See, e.g.*, Catherine Galley and Erin McGlogan, Cornerstone Research, *Drafting Blow Provisions In Securities Class Settlements* (Jan. 3, 2017) ("Many securities class action settlement agreements include what is commonly referred to as a 'blow provision.' Blow provisions are structured to give defendants the option to terminate a conditional class settlement agreement if a specified threshold is reached in terms of investors opting out of the settlement (opt-outs)."), https://www.cornerstone.com/wp-content/uploads/2021/12/Drafting-Blow-Provisions-In-Securities-Class-Settlements.pdf.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE.

Lead Plaintiff also respectfully requests that the Court approve the proposed Plan of Allocation for the Settlement proceeds. The Plan is set forth in full in the Notice. Jet Capital's damages expert, in consultation with Lead Counsel, developed the Plan, which is comparable to plans of allocation that courts have approved in numerous other securities class action. The Plan is based on the Complaint's allegations that Defendants' materially false and misleading statements and omissions artificially inflated the price of HRG common stock during the Class Period and that a series of public disclosures that partially corrected the challenged statements removed the inflation from HRG and Spectrum stock.

The Plan calculates a "Recognized Loss Amount" for each purchase or acquisition of HRG common stock during the Class Period that is listed in the Claim Form and for which adequate documentation is provided by the claimant. The calculation of Recognized Loss Amounts under the proposed Plan will depend on when the claimant purchased and/or sold the shares, whether the claimant held the shares through the statutory 90-day look-back period, *see* 15 U.S.C. § 78u-4(e), and the value of the shares when the claimant purchased, sold, or held them. Under the Plan, the sum of a claimant's Recognized Loss Amounts is the Claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. Unlike in the Prior Settlement, there are no discounts imposed on the claims of any HRG investors in this Settlement and all class members are treated equally.

The Claims Administrator will calculate claimants' Recognized Loss Amounts using the transaction information that class members provide to the Claims Administrator in their Claim Forms. If an HRG Subclass Member already submitted a claim form in the Prior Settlement, they will not be required to submit another claim form. Once the Claims Administrator has processed all submitted claims, notified claimants of deficiencies or ineligibility, processed responses, and

made claim determinations, the Claims Administrator will make distributions to eligible Authorized Claimants in the form of checks and wire transfers. If any monies remain in the Net Settlement Fund, the Claims Administrator will conduct additional re-distributions until it is no longer cost effective. At that time, any remaining balance will be contributed to non-sectarian, not-for-profit, 501(c)(3) organization(s), recommended by Lead Counsel and approved by the Court.

"A plan of allocation of settlement proceeds in a class action must also be fair and reasonable." *Great Neck*, 212 F.R.D. at 410. Here, the Plan of Allocation "provides that members of the class who submit acceptable proof of claim forms evidencing a loss in their transactions in [HRG] stock during the class period are entitled to a recovery. The plan is similar to those utilized in other securities class action cases and provides an equitable basis for distributing the fund to eligible class members." *Id.* As in *Shah*, where the court approved a similar allocation plan, "what each individual class member receives is determined by an allocation model devised by [Lead Plaintiff's] counsel and their retained expert[]. The allocation model is admittedly complex but was explained in detail in the notice that went out to class members. Each settlement class member will have a 'recognized loss' calculated which takes into account factors such as when they purchased or sold [HRG] shares, . . . the price of [HRG or Spectrum] shares purchased or sold, as well as the 'artificial inflation or deflation" of the price at the time of the trade.'" 2020 WL 5627171, at *6 (citations omitted).

The proposed Plan is a fair and reasonable method for allocating the Net Settlement Fund to eligible HRG Subclass Members. Thus, the Court should approve the Plan of Allocation.

III. THE HRG SUBCLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES.

In the Settlement, the Parties stipulated to the certification of the HRG Subclass for purposes of the Settlement. Lead Plaintiff explained in its preliminary approval papers why the

HRG Subclass satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) and this Court preliminarily approved the Settlement, which included a finding that it would likely be able to certify the HRG Subclass in connection with the Settlement. Nothing has changed since the Court made that ruling, and there has been no objection to certification to date. Thus, for the reasons previously set forth (*see* ECF No. 99 at 15-19), Lead Plaintiff respectfully requests that the Court certify the HRG Subclass for Settlement under Rules 23(a) and (b)(3).

IV. NOTICE TO THE HRG SUBCLASS SATISFIED RULE 23 AND DUE PROCESS.

The Notice to the HRG Subclass satisfied Rule 23, the PSLRA and due process. Rule 23(c)(2)(B) requires the court to direct to a class certified under Rule 23(b)(3) "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Similarly, Rule 23(e)(1) requires the court to "direct notice in a reasonable manner to all class members who would be bound" by a proposed settlement. As detailed in the accompanying Declaration of Luiggy Segura, the Court-approved Claims Administrator, JND, mailed via first-class mail the Notice and Claim Form (the "Notice Packet") to all potential HRG Subclass Members identified through reasonable and diligent efforts. JND began mailing Notice Packets on December 9, 2022. Through February 3, 2022, JND mailed 85,407 Notice Packets to potential HRG Subclass Members and nominees. In addition, JND (i) published the Summary Notice in *Investor's Business Daily* and transmitted it via PR Newswire on December 15, 2021, (ii) set up and maintains a toll-free information number that potential HRG Subclass Members can call for information; and (iii) set up and maintains a publicly accessible website containing information about the Settlement including the Notice. Under the circumstances, this notice campaign satisfies Rule 23 and due process. *See, e.g.*, *Pension Trust Fund for Operating Eng'rs v. Assisted Living Concepts, Inc.*, 2013 WL 12180866, at *2 (E.D. Wis. Sept. 25, 2013) (authorizing notice by first-class mail and publication in Investors' Business Daily

and over PR Newswire); *Beezley v. Fenix Parts, Inc.*, 2019 WL 6463154, at *2-3 (N.D. Ill. Nov. 26, 2019) (same).

CONCLUSION

The proposed $7.25 million Settlement results in an estimated per-share recovery for HRG Subclass Members that is 51% higher than the Prior Settlement and avoids adjudication of the potentially case-dispositive standing issue. It represents an excellent outcome in the face of substantial litigation risks and years-long delay had the litigation continued. For the foregoing reasons, as well as those set forth in the Rolnick Declaration, Jet Capital respectfully requests that the Court grant final approval of the proposed Settlement and approve the proposed Plan of Allocation.

Dated: February 7, 2022

Respectfully submitted,

ROLNICK KRAMER SADIGHI LLP

/s/ Lawrence M. Rolnick

Lawrence M. Rolnick (admitted pro hac vice)
Marc B. Kramer (admitted pro hac vice)
Matthew Peller
1251 Avenue of the Americas
New York, New York 10020
Tel. 212-597-2800

Counsel for Jet Capital Master Fund, L.P. and the HRG Subclass