UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARY CURRAN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. FRESHPET, INC., et al., Defendants.	Civil Action No. 16-2263(MCA)(LDW)

BRIEF IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF THE PLAN OF ALLOCATION

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Alaska Electrical Pension Fund ("Lead Plaintiff") respectfully submits this brief in support of its motion for final approval of the settlement of this class action ("Settlement") for $10,100,000 in cash and approval of the Plan of Allocation. The terms of the Settlement are set forth in the Stipulation of Settlement dated October 2, 2019 ("Stipulation"), which was previously submitted to the Court. ECF No. 137-2.[1] As discussed herein and in the Ellman Declaration,[2] Lead Plaintiff and its counsel have obtained a very good result for the Settlement Class. The Settlement is the result of extensive litigation, an advanced factual record, and was achieved through arm's-length negotiations between the parties with the substantial assistance of Michelle Yoshida of Phillips ADR Enterprises, a highly respected and experienced mediator.

This case has been carefully investigated and vigorously litigated since its inception in April 2016. At every stage of the Litigation, counsel for Defendants asserted aggressive defenses and expressed their belief that Lead Plaintiff could not and should not prevail on the claims asserted. By the time the Settlement was reached, Lead Plaintiff's Counsel had, *inter alia*: (a) conducted an extensive investigation relating to the claims asserted in the Litigation; (b) interviewed confidential witnesses with knowledge of the facts alleged by Lead Plaintiff; (c) prepared and filed a detailed Amended Complaint; (d) successfully opposed Defendants' comprehensive motion to dismiss the Amended Complaint; (e) fully briefed Lead Plaintiff's

[1] Unless otherwise defined herein, capitalized terms have the meanings ascribed to them in the Stipulation.

[2] The Court is respectfully referred to the accompanying Declaration of Alan I. Ellman in Support of: (1) Lead Plaintiff's Motion for Final Approval of Settlement and Approval of the Plan of Allocation; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Ellman Declaration" or "Ellman Decl.").

motion for class certification; (f) completed fact discovery, including numerous depositions and the review and analysis of approximately 800,000 pages of documents produced by Defendants and non-parties; (g) exchanged expert reports and initiated expert discovery; and (h) engaged in extensive arm's-length settlement negotiations, including mediation with Ms. Yoshida. Ellman Decl., ¶3.

The Settlement takes into account the specific risks and obstacles that Lead Plaintiff and the Settlement Class would face if litigation were to continue. Lead Counsel is highly experienced in prosecuting securities class actions and has concluded that the Settlement is a highly favorable recovery in light of the risks, delay, and expense of continued litigation. Lead Counsel also believes the Settlement is a good result in light of the risks and delay associated with class certification, summary judgment, trial, and probable post-trial motions and appeal(s); a complete analysis of the evidence adduced to date; past experience in litigating complex actions similar to the present action; and the serious disputes between the parties concerning the merits and damages, and the risk of collecting on a judgment after years of litigation. Ellman Decl., ¶¶4, 36. In addition, the Settlement has the support of the Lead Plaintiff. *See* accompanying Declaration of Gregory Stokes in Support of Lead Plaintiff's Motion for Final Approval of the Settlement and Plan of Allocation and for Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Stokes Decl.").

For all the reasons discussed herein and in the Ellman Declaration, it is respectfully submitted that the Settlement is eminently fair, reasonable, and adequate to the Settlement Class and should be finally approved by the Court. The Court should also approve the Plan of Allocation, which was set forth in the Notice that was sent to Settlement Class Members. The Plan of Allocation governs how Settlement Class Members' claims will be calculated, was developed with

the assistance of Lead Plaintiff's damages expert, and is consistent with an assessment of, among other things, the damages that Lead Plaintiff and its counsel believe were recoverable in the Litigation. Therefore, the Plan of Allocation is fair, reasonable, and adequate, and should likewise be approved.

II. FACTUAL BACKGROUND AND PROCEDURAL BACKGROUND

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Ellman Declaration for a detailed discussion of the factual background and procedural history of the Litigation, the extensive efforts undertaken by Lead Plaintiff and its counsel during the course of the Litigation, the risks of continued litigation, and the negotiations leading to the Settlement. *See generally* Ellman Decl.

III. THE STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

It is well settled that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998) ("*Prudential*"); *see also Nyby v. Convergent Outsourcing, Inc.*, 2017 U.S. Dist. LEXIS 122056, at *7 (D.N.J. Aug. 3, 2017). Settlement spares the litigants the uncertainty, delay, and expense of a trial and appeals while simultaneously reducing the burden on judicial resources. The Third Circuit Court of Appeals reiterated the long standing principle that there is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010). "This presumption is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" *Id*. at 595 (citation omitted).

Federal Rule of Civil Procedure 23(e) requires judicial approval of a class action settlement. Rule 23(e)(2), as recently amended, provides that courts should consider certain

factors when determining whether a class action settlement is "fair, reasonable and adequate" such that final approval is warranted:

> (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, in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Third Circuit advised district courts to consider the following factors in deciding whether to approve a proposed settlement of a class action under Rule 23(e):

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

Id. at 157 (citation omitted); *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.* ("*GMC Trucks*"), 55 F.3d 768, 782 (3d Cir. 1995); *Eichenholtz v. Brennan*, 52 F.3d 478, 488 (3d Cir. 1995); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990).

As set forth herein and in the Ellman Declaration, the Settlement is a highly favorable result, is presumptively fair, and clearly satisfies each element of Rule 23(e)(2) and the *Girsh* factors. Substantial doubt exists as to whether any greater recovery could have been obtained against Defendants in the absence of the Settlement, especially in light of the difficulty of proving the alleged statements were materially false, scienter, loss causation, and damages. Accordingly, the Settlement is superior to another very real possibility – little or no recovery.

IV. THE PROPOSED SETTLEMENT IS PROCEDURALLY AND SUBSTANTIVELY FAIR, ADEQUATE, AND REASONABLE

A. The Settlement Satisfies the Requirements of Rule 23(e)(2)

1. Lead Plaintiff and Lead Counsel Have Adequately Represented the Settlement Class

The determination of adequacy "primarily examines two matters: the interests and incentives of the class representatives, and the experience and performance of class counsel." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 392 (3d Cir. 2015). Here, Lead Plaintiff's interests are directly aligned with the interests of other Members of the Settlement Class. Additionally, Lead Plaintiff and Lead Counsel have adequately represented the Settlement Class by zealously prosecuting this action, including by, among other things, conducting an extensive investigation of the relevant factual events, drafting a highly detailed amended complaint, consulting with damages experts, successfully opposing Defendants' motion to dismiss the Amended Complaint, vigorously pursuing documentary and testimonial discovery, fully briefing a motion for class certification, exchanging expert reports and initiating expert discovery, and preparing for and participating in a hard-fought, in-person mediation session before an experienced mediator. Ellman Decl., ¶¶3, 32-35. Through each step of the Litigation, Lead Plaintiff and Lead Counsel have strenuously advocated for the best interests of the Settlement

Class. Lead Plaintiff and Lead Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

2. The Proposed Settlement Was Negotiated at Arm's Length Before an Experienced Mediator

The Settlement satisfies Rule 23(e)(2)(B) because it is the product of arm's-length negotiations between the parties' counsel before a neutral mediator, resulting in the successful resolution of the Litigation, for which there was no hint of collusion. Ellman Decl., at Section III. Indeed, a class action settlement is considered presumptively fair, where, as here, the parties, through capable counsel informed by meaningful discovery and motion practice, have engaged in arm's-length negotiations. *See, e.g.*, *In re Ocean Power Techs., Inc.*, 2016 U.S. Dist. LEXIS 158222, at *32 (D.N.J. Nov. 15, 2016); *Schuler v. Meds. Co.*, 2016 U.S. Dist. LEXIS 82344, at *16 (D.N.J. June 24, 2016); *In re ViroPharma Inc. Sec. Litig.*, 2016 U.S. Dist. LEXIS 8626, at *23-*24 (E.D. Pa. Jan. 25, 2016).

This action was actively litigated since its inception in April 2016, fact discovery had been completed, and the parties had the benefit of an advanced factual record before an agreement-in-principle was reached to resolve the action. The Settlement resulted from arm's-length negotiations between highly experienced and capable counsel after significant investigation and litigation with the substantial assistance of Ms. Yoshida. Ellman Decl., at Section III. The principal lawyers involved in the settlement negotiations are all well-known for their effective representation of their clients, and have many years of experience in the effective prosecution, defense, and resolution of complex securities actions. Importantly, the parties only reached an agreement-in-principle to settle after an all-day mediation session with Ms. Yoshida on July 11, 2019, and additional negotiations facilitated by the mediator. "'[T]he participation of an independent mediator in settlement negotiations virtually insures [sic] that the negotiations were

conducted at arm's length and without collusion between the parties.'" *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *24 (citation omitted); *see also Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *33.

3. The Proposed Settlement Is Adequate in Light of the Litigation Risks, Costs, and Delays of Trial and Appeal

Rule 23(e)(2)(C)(i) and the first, fourth, and fifth *Girsh* factors overlap, as they address the substantive fairness of the Settlement in light of the risks posed by continuing litigation. As set forth below, these factors weigh in favor of final approval.

a. The Risks of Establishing Liability at Trial

While Lead Plaintiff believes that it had a strong case on the merits, as in every complex case of this kind, it faced formidable obstacles to proving Defendants' liability. Lead Plaintiff's case centered on allegations that during the Settlement Class Period, Defendants knowingly or recklessly engaged in a fraudulent scheme to artificially inflate Freshpet's stock price by making materially false and misleading statements regarding issues with Freshpet's manufacturing and its ability to meet its forecast to install between 15,100 and 15,600 refrigerators by year-end 2015. Lead Plaintiff alleges that Defendants' scheme had the intended effect of artificially inflating the value of Freshpet stock throughout the Settlement Class Period.

Lead Plaintiff further contends that, upon the disclosure of the truth, the artificial inflation created by Defendants' fraudulent scheme was removed from the trading price of Freshpet's common stock, damaging Lead Plaintiff and Members of the Settlement Class. Amended Complaint, at ¶¶133, 149.

Although Lead Plaintiff cleared the pleading stage, there was no guarantee that it would be able to overcome Defendants' likely motion(s) for summary judgment and/or prove its claims at

trial. Defendants challenged each of Lead Plaintiff's allegations of falsity and scienter. Ellman Decl., ¶15.

Establishing scienter was particularly challenging. A defendant's state of mind in a securities case is often the most difficult element of proof and one which is rarely supported by direct evidence such as an admission. *See ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *35 ("'Since stockholders normally have "little more than circumstantial and accretive evidence to establish the requisite scienter,' proving scienter is an 'uncertain and difficult necessity for plaintiffs.'"") (quoting *Smith v. Dominican Bridge Corp.*, 2007 U.S. Dist. LEXIS 26903, at *17 (E.D. Pa. Apr. 11, 2007)).

Defendants had previously argued, and would be expected to argue again at summary judgment and/or trial, that Lead Plaintiff could not demonstrate scienter because Defendants had no "actual knowledge" of the allegedly undisclosed facts. Ellman Decl., ¶15. Likewise, Defendants have argued – and would likely argue again – that Lead Plaintiff's Item 303 claim is undermined by Defendants' lack of "actual knowledge" of the falsity of their statements in the pertinent Registration Statement or other Settlement Class Period statements. Thus, it was possible that Lead Plaintiff would not be able to adduce sufficient evidence to satisfy a jury on this issue. Clearly, the question of scienter was not without risk.

In short, Lead Plaintiff faced numerous obstacles in proving liability if litigation continued. There was no certainty, given Defendants' vigorously asserted defenses, that Lead Plaintiff and the Settlement Class would prevail on liability. The Settlement eliminates these and many other risks of continued litigation. *See In re Delphi Corp. Sec.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (discussing "the risk that Defendants could prevail with respect to certain legal or factual issues, which could result in the reduction or elimination of Plaintiffs' potential recoveries").

b. The Risks of Establishing Loss Causation and Damages Weighs in Favor of Final Approval

Even if Lead Plaintiff successfully established liability, it faced substantial risks in proving loss causation and damages. The determination of damages is a complicated and uncertain process, involving the analysis of many subjective factors. Damages for Lead Plaintiff's Exchange Act claims are measured by "the difference between the purchase price and the 'true value' of the security [*i.e.*, value absent the fraud] at the time of the purchase." *Semerenko v. Cendant Corp.*, 223 F.3d 165, 184 (3d Cir. 2000); *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *61. Damages for Lead Plaintiff's Securities Act claims are based on the statutory formula provided in Section 11(e) of the Securities Act of 1933.

To prevail on its Exchange Act claims, Lead Plaintiff must also show that the alleged false statements or omissions caused the damages or loss causation. *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *36.[3] Absent settlement, establishing loss causation could be a major risk faced by Lead Plaintiff. The Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), and the subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than in the past. *See Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *61. Several examples illustrate this point. The Eleventh Circuit in *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012), affirmed a lower court ruling that granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor. The Eleventh Circuit also upheld summary judgment

[3] With respect to Lead Plaintiff's Section 11 claim, Defendants have the burden to establish the absence of causation. *See In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3d Cir. 2004) ("Under sections 11 and 12(a)(2), plaintiffs do not bear the burden of proving causation. It is the defendants who may assert, as an affirmative defense, that a lower share value did not result for any nondisclosure or false statement.").

in favor of defendants on loss causation grounds in a case that had been litigated for eleven years. *See Phillips v. Sci.-Atlanta, Inc.*, 489 F. App'x 339 (11th Cir. 2012). In *In re Oracle Corp. Sec. Litig.*, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), the court granted summary judgment in defendants' favor holding that shareholder plaintiffs failed to present sufficient evidence to establish loss causation.

Here, Defendants have challenged loss causation as to the corrective disclosures alleged in the Amended Complaint, arguing that because the corrective disclosure was a downward guidance revision, loss causation was defeated. Ellman Decl., ¶15. Defendants also challenged Lead Plaintiff's theories of damages and the level of damages suffered by the Settlement Class as a result of the allegedly fraudulent scheme by arguing that the stock drops at issue were caused by other factors.

The determination of loss causation and damages almost always involves conflicting expert testimony from defendants and plaintiffs. Expert testimony could rest on many subjective assumptions, any of which could potentially be rejected by a jury as speculative or unreliable. Lead Plaintiff would have likely faced a motion *in limine* by Defendants to preclude Lead Plaintiff's damages expert's testimony under the *Daubert* test and risked a decision that a valuation model might not be admissible in evidence. Even if Lead Plaintiff survived the *Daubert* motion, at trial the loss causation and damage assessments of Lead Plaintiff's and Defendants' experts were sure to vary substantially, and in the end, this crucial element would be reduced to a "battle of experts," and it is impossible to predict how a jury might respond. *See ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *37. Lead Plaintiff's Counsel recognize the possibility that a jury could find that there were no damages or only a fraction of the amount of damages Lead Plaintiff contended or find that the losses were attributable to factors other than the alleged false and misleading statements. "Thus, even if [Lead] Plaintiff prevailed on the issue of liability, significant additional

risks would remain in establishing the existence of damages." *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *63.

c. The Risks of Maintaining the Class Action Through Trial Weigh in Favor of Approval

Lead Plaintiff's motion for class certification was fully briefed at the time this Settlement was reached. Lead Plaintiff is confident that the Court would grant its motion. Defendants vigorously opposed the motion, however, arguing, among other things, that Freshpet stock did not trade in an efficient market before or during the Settlement Class Period, and without an efficient market, Lead Plaintiff cannot avail itself of the fraud on the market presumption of reliance. Specifically, in their opposition to Lead Plaintiff's motion for class certification, Defendants argued that the market for Freshpet securities was not efficient because it failed to meet *Cammer* Factor 5 – the factor that demonstrates cause and effect.

d. The Settlement Eliminates the Additional Costs and Delay of Continued Litigation

The anticipated complexity, cost, and duration of the Litigation would be considerable. *See In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014) ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"). There is no doubt that this Litigation, like all securities class actions, is complex. *See, e.g.*, *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 U.S. Dist. LEXIS 124269, at *50-*51 (D.N.J. Dec. 9, 2008) ("Federal securities class actions by definition involve complicated issues of law and fact."). Indeed, courts have recognized that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). The resolution of this Litigation at summary judgment and/or trial might well have turned on close questions of law, evidence, and

fact. As discussed herein and in the Ellman Declaration, there clearly were substantial risks to Lead Plaintiff obtaining a more favorable judgment if litigation were to continue. But for the Settlement, the Court would have to rule on the pending motion for class certification and the parties would have litigated summary judgment motion(s), both of which would have presented the risk of adverse rulings and additional costs. With respect to Lead Plaintiff's Exchange Act claims, Lead Plaintiff would have to establish that Defendants made materially false or misleading statements with scienter and that the Settlement Class is entitled to recover damages under the securities laws as a result of Defendants' conduct. To prevail on Lead Plaintiff's Securities Act claims, Lead Plaintiff would need to show that the relevant Registration Statement contained a misstatement of material fact. These issues would involve complicated theories, statistical models, and competing experts.

If not for this Settlement, the case would have continued to be fiercely contested by all parties. While Lead Counsel has already expended substantial amounts of time and money to reach the point of settlement, further significant time and expenses would be incurred to complete pre-trial proceedings and conduct a trial. As the court noted in *Ikon*, which is equally applicable here:

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

194 F.R.D. at 179.

Moreover, even if the jury returned a favorable verdict after trial, there is no question that any verdict would be the subject of numerous post-trial motions and a complex multi-year appellate process. This is especially true because only a few PSLRA cases have proceeded to trial, and many of the issues specific to the application and effect of certain provisions of the PSLRA

are novel, with little or no appellate authority interpreting them. Taking into account the likelihood of appeals, absent this Settlement, this case likely would have continued for years despite the best efforts of the Court and the parties to speed the process. Thus, "[i]t is safe to say, in a case of this complexity, the end of that road might be miles and years away." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 837 (W.D. Pa. 1995); *see also Prudential*, 148 F.3d at 318 (settlement was favored where "the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court"). As a result, the Settlement secures a substantial and certain recovery for the Settlement Class undiminished by further expenses and without the delays, risks, and uncertainties of continued litigation. *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *38.

Accordingly, the Rule 23(e)(2)(C)(i) factor, as well as the first, fourth and fifth *Girsh* factors, weigh in favor of final approval.

4. The Proposed Method for Distributing Relief Is Effective

With respect to Rule 23(e)(2)(C)(ii), Lead Plaintiff and Lead Counsel have taken appropriate steps to ensure that the Settlement Class is properly notified about the Settlement. Pursuant to the Preliminary Approval Order (ECF No. 141), more than 15,600 copies of the Notice and Proof of Claim were mailed to potential Settlement Class Members and nominees, and the Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, ¶¶11-12 ("Murray Decl."), submitted herewith. Additionally, a settlement-specific website was created where key Settlement documents were posted, including the Stipulation, Notice, Proof of Claim, and Preliminary Approval Order. *Id.*, ¶14. Settlement Class Members have until February 12, 2020 to object to the Settlement or request exclusion from

the Settlement Class. While that date has not yet passed, to date, there have been no objections to the Settlement or requests for exclusion. *Id.*, ¶16. This claims process is similar to that typically used in securities class action settlements. *See Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *14 (S.D.N.Y. Oct. 16, 2019) ("[t]his type of claims processing and method for distributing settlement proceeds is standard in securities and other class actions and is effective"). This factor therefore supports final approval.

5. Lead Counsel's Request for Attorneys' Fees Is Reasonable

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Consistent with the Notice, and as discussed in Lead Counsel's fee brief, Lead Counsel seeks an award of attorneys' fees in the amount of 30% of the Settlement Amount, and expenses in the amount of $456,411.38, in addition to interest on both amounts.

As set forth in Lead Counsel's fee brief, this request is in line with, and in some cases below, fee awards in this District and the Third Circuit. *See, e.g.*, *Schwartz v. Urban Outfitters, Inc.*, 2016 U.S. Dist. LEXIS 181235, at *6 (E.D. Pa. Oct. 31, 2016) (awarding 30% of $8.5 million fund); *Bodnar v. Bank of Am., N.A.*, No. 14-3224, slip op. at 10 (E.D. Pa. Aug. 4, 2016) (awarding 33% of $27.5 million fund); *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *66-*67 (awarding 30% of $8 million fund); *Esslinger v. HSBC Bank Nev., N.A.*, 2012 U.S. Dist. LEXIS 165773, at *43 (E.D. Pa. Nov. 20, 2012) ("a fee award of 30% of the [$23.5 million] settlement here is reasonable and in keeping with similar precedent"); *W. Pa. Elec. Emps.' Pension Fund v. Alter*, No. 2:09-cv-04730-CMR, slip op. at 1 (E.D. Pa. Aug. 4, 2014) (court awarded 30% of $13.25 million settlement); *In re PAR Pharm. Sec. Litig.*, 2013 U.S. Dist. LEXIS 106150, at *30 (D.N.J. July 29, 2013) (court awarded 30% of an $8.1 million settlement to counsel noting that "Lead Counsel's fee request is comparable to fees typically awarded in analogous cases"); *In re Veritas Software*

Corp. Sec. Litig., 396 F. App'x 815 (3d Cir. 2010) (Third Circuit affirmed the 30% award of a $21.5 million settlement by the district court).[4]

Because Lead Counsel's fee request is reasonable, and because Lead Plaintiff has ensured that the Settlement Class is fully apprised of the terms of the proposed award of attorneys' fees, this factor supports final approval of the Settlement.

6. The Parties Have No Other Agreements Besides Opt-Outs

Rule 23(e)(2)(C)(iv) requires the consideration of any agreement required to be disclosed under Rule 23(e)(3). The parties have entered into a standard supplemental agreement providing that, in the event Settlement Class Members with a certain aggregate amount of valid claims opt out of the Settlement, Defendants shall have the option to terminate the Settlement. Because this agreement has no bearing on the fairness of the Settlement, this factor weighs in favor of final approval. *See Christine Asia Co.*, 2019 WL 5257534, at *15 (stating that opt-out agreements are "standard in securities class action settlements and ha[ve] no negative impact on the fairness of the Settlement").

7. The Settlement Ensures Settlement Class Members Are Treated Equitably

Rule 23(e)(2)(D), the final factor, considers whether Settlement Class Members are treated equitably. As discussed further below in Section VII, Lead Counsel developed the Plan of Allocation in consultation with its damages expert to treat Settlement Class Members equitably

[4] The Stipulation provides that any attorneys' fees and expenses awarded by the Court shall be paid to Lead Counsel when the Court executes the Judgment and order awarding such fees and expenses. *See* Stipulation, ¶6.2; *see also Pelzer v. Vassalle*, 655 Fed App'x 352, 365 (6th Cir. 2016) (finding the "quick-pay provision" did "not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys get paid"); *In re Genworth Fin. Sec. Litig.*, 2016 U.S. Dist. LEXIS 132269, at *28 (E.D. Va. Sept. 26, 2016) (ordering that "attorneys' fees and Litigation Expenses awarded above may be paid to Lead Counsel immediately upon entry of this Order").

relative to each other by: (i) taking into account the timing of their purchases, acquisitions, and sales of Freshpet securities; and (ii) providing that each Authorized Claimant shall receive his, her, or its *pro rata* share of the Net Settlement Fund based on their recognized losses. Lead Plaintiff will be subject to the same formula for distribution of the Net Settlement Fund as every other Settlement Class Member. This factor therefore merits granting final approval of the Settlement.

Based on the foregoing, Lead Plaintiff and Lead Counsel respectfully submit that each of the Rule 23(e)(2) factors support granting final approval of the Settlement.

B. An Analysis of the Remaining *Girsh* Factors Further Confirms that the Settlement Is Fair, Reasonable, and Adequate and Should Be Finally Approved

1. The Reaction of the Settlement Class Supports Approval of the Settlement

"'The second *Girsh* factor "attempts to gauge whether members of the class support the settlement."'" *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016) (citations omitted). "The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factors weighs in favor of the Settlement." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). Here, over 15,600 copies of the Notice and Proof of Claim were mailed to potential Settlement Class Members and nominees, a Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*, and relevant documents were posted to the website dedicated to the Settlement. *See* Murray Decl., ¶¶11-12, 14. To date, not a single objection has been filed.[5] This factor therefore weighs in favor of approval.

[5] The objection deadline is February 12, 2020. Should any timely objections be filed, Lead Counsel will address them in its reply brief, to be filed no later than February 26, 2020.

2. The Stage of the Proceedings Weighs in Favor of Final Approval

The third *Girsh* factor requires a court "to consider the degree to which the litigation has developed prior to settlement." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 502 (W.D. Pa. 2003). "The goal here is to determine 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Id.* (quoting *Cendant*, 264 F.3d at 235); *see also ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *30 (same).

Both the knowledge of Lead Plaintiff and its counsel and the proceedings themselves reached a stage where an intelligent evaluation of the strengths and weaknesses of the Settlement Class' claims and the propriety of the Settlement could be made. As discussed above and in the Ellman Declaration, by the time the Settlement was reached, Lead Plaintiff's Counsel had the benefit of their extensive investigation, including interviews of witnesses; had successfully opposed Defendants' motion to dismiss; had fully briefed Lead Plaintiff's motion for class certification; completed fact discovery, including deposing eleven fact witnesses, taking one expert deposition and defending three expert depositions, reviewing and analyzing approximately 800,000 pages of documents produced by Defendants and non-parties; and exchanged expert reports. *See generally* Ellman Declaration.

The parties also participated in a formal mediation session with Ms. Yoshida on July 11, 2019, where the strengths and weaknesses of the Settlement Class' claims were fully vetted. *Id.*, ¶3, Section III. Prior to the mediation, Lead Plaintiff and Defendants submitted to Ms. Yoshida and exchanged detailed mediation statements that further highlighted the factual and legal issues in dispute. *Id.* There is no question that Lead Plaintiff and its counsel were in an excellent position to evaluate the strengths and weaknesses of the claims asserted and defenses raised by Defendants, as well as the substantial risks of continued litigation and the propriety of settlement. Having

sufficient information to properly evaluate the case, the Litigation was settled on terms highly favorable to the Settlement Class.

Here, the Settlement Class had yet to be certified and there is no guarantee of success on the motion; this risk favors settlement. Moreover, Rule 23(c)(1) provides that a class certification order may be altered or amended any time before a decision on the merits. Thus, even if the Court granted the pending certification motion, there is always a risk that the Court's order would be modified or the Settlement Class decertified prior to a decision on the merits. Settlement at this juncture eliminates that risk.

3. The Settlement Is Reasonable in Light of the Ability of Defendants to Withstand a Greater Judgment

This factor evaluates whether Defendants "could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. The fact that Defendants could have paid more money does not render the Settlement unreasonable, however. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) ("[T]he fact that [the defendant] could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."). "This factor is not alone dispositive. '[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement.'" *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *38 (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 323 (3d Cir. 2011)).

Nevertheless, although Freshpet maintains D&O liability insurance, the policy was a wasting policy, funding legal fees as well as any potential judgment or settlement, and, thus, the

amount available to fund a settlement or a judgment was diminishing while the Litigation proceeded. This counseled in favor of settlement.

4. The Settlement Is Reasonable in Light of All the Attendant Risks of Litigation

The final two *Girsh* factors are typically considered in tandem, and ask "whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential*, 148 F.3d at 322. "In making this assessment, the Court compares the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, with the amount of the proposed settlement." *Par Pharm.*, 2013 U.S. Dist. LEXIS 106150, at *24 (citing *GMC Trucks*, 55 F.3d at 806). The Settlement provides for a substantial and certain cash payment of $10,100,000, plus any accrued interest, for the direct benefit of the Settlement Class.[6]

Lead Plaintiff faced considerable risks in proving its claims. And, even if it established liability, it faced the risk of a finding that the Settlement Class did not suffer any compensable damages. If Lead Plaintiff had ultimately prevailed at trial, there was still no guarantee of a recovery – for an appeal would surely follow. Lead Counsel's consulting damages expert has estimated that the Settlement Class sustained damages of approximately $64 million, assuming that liability and loss causation for the alleged corrective disclosures were proven, and based on

[6] The entirety of the Settlement Amount is for the benefit of the Settlement Class. Once the Settlement is effective, after payment of any attorneys' fees and expenses approved by the Court and incurred Notice and Administration Expenses and Taxes and Tax Expenses, distributions will be made to eligible claimants as many times as is economically feasible. *See* Stipulation, ¶5.10. This will maximize the recoveries of eligible claimants. If there is a remaining unclaimed balance after the distributions and the payment of any outstanding Taxes and Tax Expenses or Notice and Administration Expenses, which is uneconomical to distribute, as set forth in the Stipulation, the balance will be donated to appropriate non-profit charitable organization(s) serving the public interest.

various assumptions and modeling. Ellman Decl., ¶5. The Settlement, therefore, represents approximately 16% of estimated losses – a very good recovery in light of the risks of continued litigation. *Id.* This percentage far exceeds the median recovery in similar securities class actions in 2019 of 2.1%. *See* Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* (NERA Economic Consulting Jan. 21, 2020), at 20, Fig. 13;[7] *see, e.g.*, *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *41 (approving settlement of 9% to 10% of maximum estimated loss); *In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, 2008 U.S. Dist. LEXIS 95437, at *3, *9, *13 (E.D. Pa. Nov. 21, 2008); *Ikon*, 194 F.R.D. at 183-84 (approving settlement for 5.2% to 8.7% of claimed damages).

For all the foregoing reasons, it is respectfully submitted that the proposed Settlement satisfies the factors articulated by the Third Circuit and should be approved as fair, reasonable, and adequate.

V. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

In presenting its motion for preliminary approval, Lead Plaintiff requested that the Court preliminarily certify the Settlement Class for settlement purposes so that notice of the proposed Settlement, the final approval hearing, and the rights of Settlement Class Members to request exclusion, object, or submit Proofs of Claim could be issued. In its Preliminary Approval Order, this Court preliminarily certified the Settlement Class. *See* ECF No. 141. Nothing has changed to alter the propriety of the Court's certification, and no potential Settlement Class Member has objected to class certification. Accordingly, and for all the reasons stated in support of Lead Plaintiff's preliminary approval motion, *see* ECF No. 137-1 at 15-17, incorporated herein by

[7] Available at https://www.nera.com/publications/archive/2020/recent-trends-in-securities-class-action-litigation--2019-full-y.html.

reference, Lead Plaintiff now requests that the Court: (i) finally certify the Settlement Class for purposes of carrying out the Settlement; (ii) appoint Lead Plaintiff as class representative; and (iii) appoint Lead Counsel as class counsel.

VI. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice to the Settlement Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). "The Rule 23(e) notice is designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." *Dartell v. Tibet Pharms., Inc.*, 2017 U.S. Dist. LEXIS 100872, at *7 (D.N.J. June 29, 2017) (citation and internal quotations omitted).

Both the substance of the Notice and the method of its dissemination to potential Members of the Settlement Class satisfied these standards. The Court-approved Notice includes all the information required by Fed. R. Civ. P. 23(c)(2)(B) and the PSLRA, 15 U.S.C. §78u-4(a)(7), including: (i) an explanation of the nature of the Litigation and the claims asserted; (ii) the definition of the Settlement Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and expenses that will be sought; (vii) a description of Settlement Class Members' right to opt out of the Settlement Class or to object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Settlement Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, Gilardi & Co. LLC ("Gilardi"), the Court-appointed Claims Administrator, commenced the mailing of the Notice and Proof of Claim to potential Settlement Class Members, brokers and nominees on December 4, 2019. *See* Murray Decl., ¶¶5-8. As of January 27, 2020, over 15,600 copies of the Notice and Proof of Claim have been mailed. *Id.*, ¶11. Gilardi also caused the Summary Notice to be published in *The Wall Street Journal* and transmitted it over *Business Wire* on November 27, 2019. *Id.*, ¶12. Additionally, on November 27, 2019, Gilardi posted copies of the Notice, Proof of Claim, Stipulation, and Preliminary Approval Order on the website maintained for the Settlement. *Id.*, ¶14. This combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *8. *See also Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause.").

VII. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The Notice contains the Plan of Allocation, detailing how the Settlement proceeds are to be divided among claiming Settlement Class Members. A trial court has broad discretion in approving a plan of allocation. *See Sullivan*, 667 F.3d at 328. The test is simply whether the proposed plan, like the settlement itself, is fair, reasonable, and adequate. *Nyby*, 2017 U.S. Dist. LEXIS 122056, at *21; *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *73; *Walsh v. Great Atl. Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The court's principal obligation is simply to ensure that the fund distribution is fair and reasonable.").

"Courts 'generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.'" *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *73 (quoting *Sullivan*, 667 F.3d at 328). "In particular, pro rata distributions are consistently upheld, and there is no requirement that a plan of allocation 'differentiat[e] within a class based on the strength or weakness of the theories of recovery.'" *Id.* (quotations omitted). In determining whether a proposed plan is fair, courts may look primarily to the opinion of counsel. *See Moore v. GMAC Mortg.*, 2014 U.S. Dist. LEXIS 181431, at *14-*15 (E.D. Pa. Sept. 19, 2014) ("'As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable weight.'") (citation omitted). Here, working with its damages expert, Lead Plaintiff's Counsel developed the Plan of Allocation that is consistent with, among other things, Lead Plaintiff's and its counsel's assessment of damages that were recoverable in this Litigation. As a result, the Plan of Allocation will result in a fair distribution of the available proceeds among Settlement Class Members. To date, no Settlement Class Members have objected to the proposed Plan of Allocation.

VIII. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court approve the Settlement and the Plan of Allocation as fair, reasonable, and adequate.

DATED: January 29, 2020

Respectfully submitted,

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