UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE CITY OF PROVIDENCE, Individually and on Behalf of All Others Similarly Situated,	)	No. 11-CV-7132 (CM)(GWG)
Plaintiff,	)	CLASS ACTION
vs.	)	
AÉROPOSTALE, INC., THOMAS P. JOHNSON and MARC D. MILLER,	)	
Defendants.	)	

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

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Pursuant to Rules 23(b)(3) and 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, the City of Providence ("Providence" or "Lead Plaintiff"),[1] respectfully moves this Court for an order approving the proposed settlement of the above-captioned class action (the "Action") and approving the proposed Plan of Allocation, each of which this Court preliminarily approved by its Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement dated January 30, 2014 (the "Preliminary Approval Order") (ECF No. 55).

PRELIMINARY STATEMENT

This Action was commenced on October 11, 2011 by the filing of an initial complaint alleging that Defendants violated the federal securities laws. ECF No. 1. On January 29, 2014, after more than two years of litigation, the Parties signed a settlement Stipulation resolving Lead Plaintiff's and the Class' claims for fifteen million dollars ($15,000,000). Under the terms of the proposed Settlement, these funds will be allocated to all eligible Class Members[2] allegedly impacted by Defendants' alleged violations of the federal securities laws.

Lead Counsel respectfully submits that the Settlement is an outstanding recovery for the Class. As set forth in detail in the accompanying Declaration of Jonathan Gardner in Support of (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (B) Lead Counsel's Motion for Attorneys' Fees and Payment of Litigation

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[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation and Agreement of Settlement dated January 29, 2014 (the "Stipulation"), filed with the Court on January 29, 2014. ECF No. 54-1.

[2] On July 17, 2013, the Court entered an order that certified a class consisting of "all persons and entities that purchased or otherwise acquired the publicly traded common stock of Aeropostale from March 11, 2011 through August 18, 2011, inclusive, and who were damaged thereby." ECF No. 40.

Expenses, dated April 4, 2014 (the "Gardner Declaration" or "Gardner Decl."),[3] when viewed in light of the risks that Lead Plaintiff would not prevail on Defendants' likely summary judgment motion or at trial, the Settlement is a very favorable result for the Class. In addition, the Settlement also saves the Class the delay posed by continued litigation through summary judgment, trial, and any subsequent appeals.

The Parties reached the Settlement only after aggressively, extensively, and thoroughly litigating this Action. Lead Plaintiff's efforts are detailed in the Gardner Declaration and include, *inter alia*: (i) a detailed pre-filing investigation that included the review and analysis of documents filed publicly by Aéropostale with the SEC as well as other publicly available information about Aéropostale and the retail industry and interviewing 40 former Aéropostale employees—a number of whose accounts were included in the Complaint as confidential witness ("CW") accounts; (ii) responding to and defeating Defendants' motion to dismiss;[4] (iii) fact discovery that involved, among other things, numerous meet and confer sessions to ensure the efficient production of relevant material, the collection and review of over 1.3 million pages of documents from Defendants and third parties, and five weeks of depositions, including a 30(b)(6) deposition and those of 12 current or former employees of Aéropostale; (iv) negotiation of a stipulation with Defendants regarding class certification after Lead Plaintiff had filed its motion for class certification, Providence and its investment advisors produced over 20,000

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[3] The Gardner Declaration is an integral part of this submission and the Court is respectfully referred to the Gardner Declaration for a detailed description of, *inter alia*, a summary of the allegations and claims, the procedural history of the Action, the investigation and discovery to date, the events that led to the Settlement, and the risks and uncertainties of continued litigation.

[4] Indeed, Lead Plaintiff investigated and developed its case theory sufficiently to defeat Defendant's motion to dismiss without the benefit of formal discovery (stayed pursuant to the Private Securities Litigation Reform Act ("PSLRA")) or any government investigation.

pages of documents, and after Defendants took the deposition of Providence as well as two representatives of its investment manager; and (v) a protracted mediation session before Judge Weinstein preceded by the exchange of detailed mediation statements and verbal presentations by counsel that culminated in an arm's-length agreement in principle to settle the claims against Defendants. *See* Gardner Decl. ¶¶6-7, 19-75, 93-95.

In light of Lead Counsel's informed assessment of the strengths and weaknesses of the claims and defenses asserted and the considerable risks and delays associated with continued litigation and trial, Lead Plaintiff and Lead Counsel believe that the Settlement is fair, reasonable, and adequate and provides a substantial result for the Class. Accordingly, Lead Plaintiff respectfully requests that the Court grant final approval of the Settlement. In addition, the Plan of Allocation, which was developed with the assistance of Lead Plaintiff's damages expert, is a fair and reasonable method for distributing the Net Settlement Fund to Class Members and should also be approved by the Court.

NOTICE TO THE CLASS SATISFIED RULE 23 AND DUE PROCESS

On January 30, 2014, the Court entered its Preliminary Approval Order (ECF No. 55), which directed that a hearing be held on May 9, 2014 to determine the fairness, reasonableness, and adequacy of the Settlement (the "Settlement Hearing"). The Notice provided to the 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). The Notice also satisfied Rule 23(e)(1), which requires that notice must be provided in a "reasonable manner"—*i.e.*, it must "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores, Inc. v.*

VISA U.S.A. Inc., 396 F.3d 96, 114 (2d Cir. 2005) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

Pursuant to the Preliminary Approval Order, the Notice was mailed to all known potential Class Members on February 20, 2014 and Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on March 6, 2014. *See* Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice ("Mailing Declaration" or "Mailing Decl."), Ex. 3 ¶¶ 2-11.[5] The Notice contains a detailed description of the nature and procedural history of the Action, as well as the material terms of the Settlement, including, *inter alia*: (i) the total recovery under the Settlement; (ii) the manner in which the Net Settlement Fund will be allocated among eligible Class Members; (iii) a description of the claims that will be released in the Settlement; (iv) the right and mechanism for Class Members to opt out or exclude themselves from the Class; and (v) the right and mechanism for Class Members to object to the Settlement, the Plan of Allocation, or the request for attorneys' fees and expenses.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Standard for Evaluating Class Action Settlements

Rule 23(e) requires review and approval by the Court for any class action settlement to be effective. A settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Sony Corp SXRD*, 448 Fed. App'x. 85, 86 (2d Cir. 2011). This

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[5] All exhibits referenced herein are annexed to the Gardner Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. __-__." The first numerical references refers to the designation of the entire exhibit itself attached to the Gardner Declaration and the second reference refers to the exhibit designation with the exhibit itself.

evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores*, 396 F.3d at 116; *Wright v. Stern*, 553 F. Supp. 2d 337, 343 (S.D.N.Y. 2008); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 165 (S.D.N.Y. 2007).

While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a general policy favoring settlement exists, especially with respect to class actions. *Wal-Mart,* 396 F.3d at 116 ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted); *see also In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2004 WL 2338151, at *5 (S.D.N.Y. Oct. 18, 2004).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (McMahon, J).

In addition to a presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors that courts should consider in deciding whether to approve a proposed settlement of a class action:

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

> settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted). "[N]ot every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 4526593, at *13 (S.D.N.Y. Dec. 20, 2007). Here, the Settlement satisfies the criteria for approval articulated by the Second Circuit.

B. <u>The Settlement Is Procedurally Fair</u>

A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations. *See Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.); *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 315 (E.D.N.Y. 2006). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (quoting *Weinberger,* 698 F.2d at 74)*; In re PaineWebber P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement."), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (citation omitted).

This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations and, ultimately, with the assistance of Judge Weinstein, one of the premier mediators in complex, multi-party, high stakes litigation. *See In re Flag Telecom Holdings*, *Ltd. Sec. Litig* No. 02-CV-

3400 (CM) (PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (noting that the "presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation supervised by Judge Weinstein"); *In re Wachovia Equity Sec. Litig.,* No. 08 Civ. 617 (RJS), 2012 WL 2774969, at *3 (S.D.N.Y. June 12, 2012) (noting the procedural fairness of settlement mediated by Judge Weinstein); *see also Silverman v. Motorola, Inc.*, No. 07 C 4507, 2012 WL 1597388, at *3 (N.D. Ill. May 7, 2012), *aff'd sub nom. Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956 (7th Cir. 2013) (approving settlement and describing Judge Weinstein as "a nationally-recognized and highly-respected mediator"); Gardner Decl. ¶5.

Moreover, the recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is entitled to an even greater presumption of reasonableness." *Veeco*, 2007 WL 4115809, at *5 (internal citation omitted). "'Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.'" *Id*. at *5 (citation omitted). Lead Plaintiff Providence is a sophisticated institutional investor managing approximately $300.8 million in retirement fund assets. *See* Declaration of Jeffrey Padwa, Ex. 2 ¶1. Lead Plaintiff took an active role in all aspects of this Action, as envisioned by the PSLRA, including extensive efforts in discovery and participation in settlement negotiations. *Id*. ¶¶3-4. Lead Plaintiff approves of the Settlement without reservation. *Id*. ¶5.

Lead Counsel, who has extensive experience prosecuting complex securities class actions and is intimately familiar with the facts of this case, believes that the Settlement is not just fair, reasonable, and adequate, but is an excellent result for Lead Plaintiff and the Class. See Gardner

Decl. ¶8. This opinion is entitled to "great weight." *PaineWebber*, 171 F.R.D. at 125 (citation omitted); *see also Veeco*, 2007 WL 4115809, at *12.

All of these considerations confirm the reasonableness of the Settlement and that the Settlement is entitled to the presumption of procedural fairness.

C. Application of the *Grinnell* Factors Supports Approval of the Settlement

1. The Complexity, Expense and Likely Duration of the Litigation Support Final Approval of the Settlement

"This factor captures the probable costs, in both time and money, of continued litigation." *Shapiro,* 2014 WL 1224666, at *8. Here, the litigation was complex and likely would have lasted for quite some time in the absence of settlement. Indeed, securities class actions are by their very nature complicated and district courts in this Circuit have "long recognized" that securities class actions are "notably difficult and notoriously uncertain" to litigate. *In re Bear Stearns Cos. Inc. Sec., Derivative & ERISA Litig*., 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999).

Lead Plaintiff's claims raise numerous complex legal and factual issues concerning the retail industry, inventory account, and loss causation. *See generally* Gardner Decl. ¶¶76-92. It would be costly and time-consuming to pursue this litigation all the way through to trial, with no guarantee of success. Even if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation ... the passage of time would introduce yet more risks ... and would in light of the time value of money, make future recoveries less valuable than this current recovery."). Furthermore, even winning at a trial does not

guarantee a recovery to the Class, because there is always a risk that the verdict could be reversed on appeal. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action). Thus, this factor weighs strongly in favor of approval of the Settlement.

2. The Reaction of the Class to the Settlement Supports Final Approval of the Settlement

The reaction of the Class to the Settlement is a significant factor in assessing its fairness and adequacy, and "'the absence of objections may itself be taken as evidencing the fairness of a settlement.'" *PaineWebber*, 171 F.R.D. at 126 (citation omitted); *see also Luxottica Grp.*, 233 F.R.D. at 311-12. This Court has previously noted that the reaction of the class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *Veeco*, 2007 WL 4115809, at *7 (citation omitted). Here, pursuant to the Preliminary Approval Order, a total of 39,429 copies of the Notice have been mailed to potential Class Members and the Summary Notice was published in *Investor's Business Daily* and issued over the *PR Newswire*. *See* Ex. 3 ¶¶10-11. While the deadline set by the Court for Class Members to exclude themselves from the Class or object to the Settlement has not yet passed, to date, only one request for exclusion has been received (*see id*. ¶16)[6] and no objections have been received. If any objections or additional requests for exclusion are received subsequent to filing this brief, Lead Plaintiff will respond in its reply papers due May 2, 2014.

[6] The one exclusion request received to date is from an individual investor and represents less than 1.5 shares of Aéropostale stock.

3. The Stage of the Proceedings and Discovery Completed Support Final Approval of the Settlement

In considering this factor, "the question is whether the parties had adequate information about their claims,' such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *Bear Stearns,* 909 F. Supp. 2d at 266 (citing *In re IMAX Sec. Litig*., 283 F.R.D. 178, 190 (S.D.N.Y. 2012) (internal citations, quotation marks and alterations omitted)). To satisfy this factor, parties need not have even engaged in formal or extensive discovery. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 363 (S.D.N.Y. 2002) (McMahon, J.).

Here, Lead Counsel conducted its own initial investigation without the benefit of any government investigation to formulate its theory of the case and develop sufficient detail to defeat Defendants' motion to dismiss. As set forth in the Gardner Declaration, the investigation included, *inter alia*, reviewing and analyzing publicly available information and data concerning Aéropostale; interviewing numerous former Aéropostale employees and other persons with relevant knowledge after locating over a hundred potential witnesses; and consulting with experts about the retail industry, accounting, valuation, and causation issues. Gardner Decl. ¶¶6, 19-20.

In addition, Lead Plaintiff and Lead Counsel have conducted extensive formal discovery, including the review and analysis of over 1.3 million pages of documents from Defendants and various third parties as well as substantially completing fact depositions. *See* Gardner Decl. ¶¶36-55, 59-60, 61-64. Lead Counsel has worked extensively with Lead Plaintiff's damages and liability experts, including a retail industry expert and an accounting expert, in order to analyze the strengths and weaknesses of Lead Plaintiff's claims. *Id.* ¶74. Indeed, this Action settled

only three days before the close of fact discovery and only three weeks before Lead Plaintiff was set to serve its expert reports. *Id*.

Lead Plaintiff also filed its motion for class certification, arguing that the Action was particularly well-suited for class action treatment and that all the requirements of Federal Rule of Civil Procedure 23 were satisfied. *See* ECF No. 31. Accompanying Lead Plaintiff's class certification motion were numerous exhibits supporting that the market for Aéropostale common stock was efficient during the Class Period. Lead Plaintiff also submitted a declaration from Providence demonstrating Lead Plaintiff's adequacy to represent the proposed class in connection with its class certification motion. *See* ECF No. 34. Class discovery was conducted, including the deposition of Lead Plaintiff, after which Defendants ultimately stipulated to class certification. *See* ECF No. 40.

Accordingly, Lead Plaintiff and Lead Counsel have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had "a clear view of the strengths and weaknesses of their case" and of the range of possible outcomes at trial. *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (quotation omitted). Accordingly, this factor supports approval of the Settlement.

4. The Reasonableness of the Settlement in Relation to the Risk of Establishing Liability Supports Approval of the Settlement

In assessing the Settlement, the Court should balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *Veeco*, 2007 WL 4115809, at **8-9. Although Lead Plaintiff and Lead Counsel believe that they had a reasonable likelihood of prevailing on the claims at summary judgment and at trial, they also recognize that there were considerable risks involved in

pursuing the litigation against Defendants that could have led to a substantially smaller recovery or no recovery at all.

As set forth in detail in the Gardner Declaration (¶¶76-92), Lead Plaintiff faced numerous hurdles to establishing liability. In particular, Defendants have raised a number of arguments and defenses (which they would likely raise at summary judgment and trial) involving, *inter alia*: whether there were actionable misstatements and omissions; the ability of Lead Plaintiff to establish that Defendants acted with scienter; whether the market was fully aware during the Class Period of the issues the Company was having with its inventory, before the alleged corrective disclosures; and whether the market reacted to general negative earnings disclosures, not revelations of any allegedly fraudulent statements or omissions. *See id*.

For example, with respect to the falsity of statements, Defendants would have likely argued that, in a March 2011 investor call, well in advance of the first alleged corrective disclosure, Defendants explained to investors that the Company was aggressively clearing through an "overhang" in inventory caused by "women's assortment" issues that would not be recalibrated until its "fall and holiday product." As a result of such warnings, and others, Defendants would likely contend that the market knew, and Defendants did not conceal, the facts and risks that Lead Plaintiff claims were allegedly not disclosed. *Id*. ¶¶78-82.

Additionally, Defendants would have continued to challenge Lead Plaintiff's ability to prove that Defendants acted with scienter. In particular, Defendants would likely contend that they lacked any fraudulent motive, illustrated by the lack of insider trading during the Class Period. Additionally, Defendants would argue that Aéropostale repurchased $100 million worth of stock at the beginning of the Class Period, thereby showing that the Company believed that the stock was undervalued. *Id*. ¶¶84-86.

Defendants undoubtedly would have also continued to argue that any potential investment losses suffered by Lead Plaintiff and the Class were actually caused by external, independent factors, and not caused by Defendants' alleged conduct. In particular, Defendants would undoubtedly argue that Aéropostale's guidance misses were attributable to market forces and other macroeconomic considerations, including, among others, that during the Class Period (i) Aéropostale's competitors in the teen retail market adopted Aéropostale's "highly promotional" strategy which historically gave it a competitive edge, and (ii) its core customer base had not responded to a slow and bifurcated economic recovery. *Id*. ¶¶87-88.

Defendants would also have argued that Lead Plaintiff could not establish liability with respect to Aéropostale's 2Q2011 earnings miss. If successful, this defense would have eliminated two of the four alleged corrective disclosure dates in the case, and would have reduced the Class's maximum damages by $91 million. Among the facts that did not favor Lead Plaintiff in this regard, the Company issued conservative guidance for 2Q2011,[7] highlighted the increasingly promotional nature of the Company's competition in public statements to the market, and warned that the Company continued to face margin pressure resulting from a buildup of unsold inventory. *Id*. ¶¶8, 81.

Although Lead Plaintiff is optimistic in its ability to ultimately prove the claims asserted in the Action, the risks of the case being lost or its value diminished on a pre-trial motion or at

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[7] Indeed, the Company issued EPS guidance in 2Q2011 of $0.11 to $0.16, dramatically lower than 2Q2010 results of $0.46, citing margin pressure from the inventory overhang and assortment issues. The Company ultimately reported 2Q2011 EPS of $0.04. *Id*. ¶81.

trial, when weighed against the immediate benefits of settlement, reinforce Lead Plaintiff's judgment that the Settlement is in the best interest of the Class.

5. The Reasonableness of the Settlement in Relation to the Risk of Establishing Damages Supports Final Approval of the Settlement

Even if Lead Plaintiff successfully established liability, it also faced substantial risk in proving damages. Once causation is established, damages remain "a complicated and uncertain process, typically involving conflicting expert opinion about the difference between the purchase price and [share]s true value absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (internal quotation omitted). Should Lead Plaintiff have succeeded in proving liability, considerable risk remained with proving damages at trial. The elimination of even one alleged corrective disclosure would have material consequences. As noted above, if, for example, a jury were to find no loss causation or artificial inflation with respect to Aéropostale's 2Q2011 earnings miss, this would have eliminated two of the four alleged corrective disclosure dates and would have drastically reduced the Class's damages. A jury might also have credited Defendants' argument that macroeconomic conditions led to the Company's earnings miss at the end of the Class Period – significantly reducing or eliminating the Class' damages.

Undoubtedly, the Parties' competing expert testimony on damages would inevitably reduce the trial of these issues to a risky "battle of the experts" and the "jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable." *Flag Telecom*, 2010 WL 4537550, at *18. The complex issues surrounding damages, therefore, support final approval of the Settlement.

6. The Risks of Maintaining the Class Action Through Trial Supports Final Approval of the Settlement

Had the Settlement not been reached, there is no assurance that Class status would be maintained. Indeed, at the time of Settlement, the Parties were involved in ongoing discussions concerning the scope of further discovery including depositions by Defendants of certain Providence board members. Accordingly, although Lead Plaintiff does not rely heavily upon this factor in support of final approval of the Settlement, there remains a risk that, absent the Settlement, Lead Plaintiff may not have been able to maintain class certification through trial, and the Settlement avoids any uncertainty with regard to this issue.

7. The Ability of Defendant to Withstand a Greater Judgment

Lead Counsel does not dispute the viability of Aéropostale and has no reason to believe that Defendants could not withstand a greater judgment. Courts, however, generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement.

8. The Amount of the Settlement Supports Final Approval

The last two substantive factors courts consider are the range of reasonableness of a settlement in light of (i) the best possible recovery and (ii) litigation risks. *Grinnell*, 495 F.2d at 463. In analyzing these last two factors, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. The court "'consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.'" *Id*. at 462 (citation omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *PaineWebber*, 171 F.R.D. at 130 (citation

and internal quotation marks omitted). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

The Settlement here provides a recovery well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. According to analyses prepared by Lead Plaintiff's consulting damages expert, using certain assumptions and modeling, the maximum damages recoverable by the Class would be approximately $163 million (assuming 100% recovery for all four alleged corrective disclosure dates), but the most realistic maximum provable damages would likely be as low as $72 million. Gardner Decl. ¶8. The $15 million Settlement therefore represents a recovery in the range of approximately 9.2% to 21% of estimated damages. This recovery, particularly in view of the risks and uncertainties discussed above, falls well within the range of possible approval and courts have generally approved other settlements in PSLRA cases that recover a comparable or smaller percentage of estimated damages. *See, e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving $40.3 million settlement with a recovery of approximately 6.25% of estimated damages and noting that this is at the "higher end of the range of reasonableness of recovery in class actions securities litigations"); *In re Gilat Satellite Networks, Ltd.*, No. CV 02-1510 (CPS), 2007 WL 2743675, at *12 (E.D.N.Y. Sept. 18, 2007) (approving $20 million settlement representing 10% of maximum damages); *see also In re Omnivision Techs., Inc. Sec. Litig.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

Moreover, the $15 million Settlement is well above the $9.1 million median settlement amount of reported securities class action settlements in 2013, and greater than the median

reported settlement amounts since the passage of the PSLRA, which have ranged from $3.7 million in 1996 to $9.1 million in 2013 (with a peak of $12.3 million in 2012). *See* Gardner Decl. ¶8; Ex. 1 at 28.

This factor therefore strongly supports final approval of the Settlement.

* * *

Accordingly, Lead Counsel submits that this Court should find that the *Grinnell* factors, taken together, weigh in favor of Settlement and that the Settlement should be approved.

II. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The standard for approval of a plan of allocation is the same as the standard for approving the settlement as a whole: "'namely, it must be fair and adequate.'" *Maley*, 186 F. Supp. 2d at 367 (citation omitted); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 343 (S.D.N.Y. 2005). "As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003) (citation omitted), *aff'd sub nom. Wal- Mart Stores, Inc.*, 396 F.3d 96 (2d Cir. 2005). A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Am. Bank Note Holographics Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001); *see also WorldCom*, 388 F. Supp. 2d at 344 (same).

The Plan of Allocation, which was fully described in the Notice, was prepared with the assistance of Lead Plaintiff's consulting damages expert. It provides for the distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata basis* based upon each Class Member's "Recognized Loss," as calculated by the formulas described in the Notice. These formulas are tied to the amount of alleged artificial inflation in the share prices, as quantified by Lead Plaintiff's expert. Accordingly, the proposed Plan of Allocation is designed to fairly and

rationally allocate the proceeds of this Settlement among the Class. *See* Gardner Decl. ¶¶103-07. Notably, no Class Member has objected to this straightforward Plan of Allocation.[8] Accordingly, Lead Counsel respectfully requests that this Court approve the Plan of Allocation.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court grant final approval to the proposed Settlement, approve the Plan of Allocation of the Net Settlement Fund, and enter the proposed Final Judgment and Order and proposed Order approving the Plan of Allocation of Net Settlement Fund. Proposed orders will be submitted with Lead Plaintiff's reply papers, after the deadline for objecting and seeking exclusion has passed.

Dated: April 4, 2014

Respectfully submitted,

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[8] If any objection to the Plan of Allocation is received subsequent to filing this brief, Lead Plaintiff will respond in its reply papers due May 2, 2014.

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I caused the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION to be served electronically on all ECF participants.

s/ *Jonathan Gardner*
JONATHAN GARDNER