UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE PTC THERAPEUTICS, INC. SECURITIES LITIGATION	Civil Action No. 16-1224 (KM)(MAH)

BRIEF IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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PRELIMINARY STATEMENT

Pursuant to Rules 23(b)(3) and 23(e) of the Federal Rules of Civil Procedure, Court-appointed lead plaintiffs Boston Retirement System ("Boston") and Si Nguyen, Hong-Luu Nguyen, John Nguyen, and the Si Tan Nguyen Trust (the "Nguyen Family") (collectively, "Lead Plaintiffs"), on behalf of themselves and additional plaintiff Retail Wholesale Department Store Union Local 338 Retirement Fund, and the Settlement Class, respectfully submit this brief in support of their motion for final approval of the proposed Settlement of the above-captioned class action (the "Action"), approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation"), and final certification of the Settlement Class.[1]

As set forth herein and in the accompanying Joint Declaration of James W. Johnson and Nicholas I. Porritt in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Joint Declaration" or "Joint Decl.")[2], the Settlement was negotiated on an informed basis and under the direct supervision of an experienced mediator. In exchange for the payment of $14,750,000 in cash for the benefit of the Settlement Class, the Settlement will release all Released Defendant Parties from all Released Claims, as set forth in the Stipulation. The Settlement is not "claims-made" and all proceeds of the Settlement, after the deduction of Court-approved fees and costs, will be distributed to

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[1] All capitalized terms not otherwise defined herein have the same meanings as set forth in the Stipulation and Agreement of Settlement, dated as of March 1, 2018 (ECF No. 84-3) (the "Stipulation").

[2] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this Brief, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action and a description of the services Co-Lead Counsel provided for the benefit of the Settlement Class; the nature of the claims asserted; the negotiations leading to the Settlement; the risks and uncertainties of continued litigation; and the terms of the Plan of Allocation for the Settlement proceeds.

eligible claimants. Given the facts, the applicable law, and the risk and expense of continued litigation, Lead Plaintiffs and Co-Lead Counsel submit that the proposed Settlement is fair, reasonable and adequate, represents a very favorable result, and is in the best interests of the Settlement Class.

Lead Plaintiffs also request that the Court approve the Plan of Allocation, which is set forth in the Notice that has been sent to Settlement Class Members. The Plan of Allocation, which was developed by Lead Plaintiffs' consulting damages expert in consultation with Co-Lead Counsel, provides a reasonable method for allocating the Net Settlement Fund among Settlement Class Members who submit valid claims based on the losses they suffered as result of the conduct alleged in the Action. For the reasons set forth below, the Plan of Allocation is fair and reasonable, and should likewise be approved.

Accordingly, Lead Plaintiffs respectfully request that the Court approve the Settlement, the Plan of Allocation, and finally certify the Settlement Class.

LEGAL ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND WARRANTS FINAL APPROVAL

A. The Law Favors and Encourages Settlement of Class Action Litigation

Within the Third Circuit and throughout the country, "a strong public policy exists, which is particularly muscular in class action suits, favoring settlement of disputes, finality of judgments and the termination of litigation." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010); *see also In re Gen. Motors Corp. Pick-Up Trucks Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*GMC Trucks*") ("[t]he law favors settlement"). The Third Circuit has noted that this strong presumption in favor of voluntary settlement agreements "is especially strong 'in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" *Ehrheart*, 609 F.3d at 595 (quoting *GMC Trucks*, 55 F.3d at 784). This policy will be well-served by approval of the Settlement of this complex securities class action that, absent resolution, would consume years of additional time of this Court and likely, years of additional appellate practice.

B. The Standards for Final Approval

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be approved by the Court upon a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) ("*NFL Players*"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001). "The strong judicial policy in favor of class action settlement[s] contemplates a circumscribed role for the district courts in settlement review and approval proceedings." *Ehrheart*, 609 F.3d at 595. While this Court has discretion in determining

whether to approve the Settlement, it should be hesitant to substitute its judgment for that of the parties who negotiated the Settlement. *See Sutton v. Med. Serv. Ass'n of Pennsylvania*, No. 92-4787, 1994 WL 246166, at *5 (E.D. Pa. June 8, 1994). "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. . . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Walsh v. Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 642-43 (D.N.J. 1983), *aff'd*, 726 F.2d 956 (3d Cir. 1983).

In determining the adequacy of a proposed settlement, a court should ascertain whether the settlement is within a range that responsible and experienced attorneys could accept, considering all relevant risks. *In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *4 (D.N.J. Nov. 9, 2005) (citing *Walsh v. Great Atlantic and Pacific Tea Co.*, 96 F.R.D. 632, 642 (D.N.J. Nov. 9, 2005)). That analysis recognizes the "uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Id.*[3]

The Court should also assess the reasonableness of the settlement pursuant to the factors set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975):

> (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.

[3] All internal quotations and citations are omitted unless otherwise noted.

Id. at 157; *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006). The Third Circuit also advises courts to consider, where applicable, the additional factors set forth in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998):

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. at 323.

As set forth herein and in the Joint Declaration, the Settlement is a very favorable result for the Settlement Class, is presumptively fair, and the *Girsh* factors and applicable *Prudential* considerations weigh strongly in favor of approval of the Settlement.

II. THE SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS

A proposed class action settlement is entitled to a presumption of fairness where it was reached by experienced counsel following arm's-length negotiations and adequate discovery. *See, e.g., NFL Players*, 821 F.3d at 436; *In re ViroPharma Inc. Sec. Litig.*, No. 12 Civ. 2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016). Indeed, the "[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 WL 312108, at *8.

Here, the proposed Settlement is the product of arms'-length negotiations between experienced counsel and a well-respected mediator, Hunter Hughes, Esq., who has significant experience in mediating complex litigation including securities class action litigation. Joint

Decl. ¶32. The Parties engaged in a mediation session before Mr. Hughes on December 4, 2017. *Id*. Although a settlement was not reached at the mediation session, Mr. Hughes' efforts were pivotal in bringing the Parties closer to a resolution. Following the December 4, 2017 mediation, Mr. Hughes made a mediator's proposal which was rejected by Lead Plaintiffs. However, further discussions between Co-Lead Counsel, Defendants' Counsel, and Defendants' carriers, continued until the Parties reached an agreement-in-principle to settle the Action on December 21, 2017. *Id*. ¶¶32-34.

Likewise, it is appropriate to give "substantial weight to the recommendations of experienced attorneys" who have engaged in arm's-length negotiations. *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 255 (D.N.J. 2000) (affording "significant weight" to counsel's recommendation), *aff'd*, 264 F.3d 201 (3d Cir. 2001); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 509 (W.D. Pa. 2003) (lead counsel's "assessment of the settlement as fair and reasonable is entitled to considerable weight"). Co-Lead Counsel, who have extensive experience in prosecuting securities class actions, believe that the Settlement is a very favorable result and in the best interest of the Settlement Class.

Additionally, the Settlement has the full support of Lead Plaintiffs. *See* Declaration of Timothy J. Smyth, Executive Officer of the Boston Retirement System, dated August 2, 2018, attached as Exhibit 1 to the Joint Declaration and Declaration of the Nguyen Family, dated July 29, 2018, attached as Exhibit 2 to the Joint Declaration.[4]

[4] All exhibits referenced herein are annexed to the Joint Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The

III. ANALYSIS OF THE *GIRSH* FACTORS CONFIRMS THAT THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED

To determine if a proposed settlement in a class action is fair, reasonable, and adequate, district courts in this Circuit consider the nine factors identified in *Girsh*, 521 F.2d at 157. These factors strongly support approval of the Settlement.

A. Complexity, Expense and Likely Duration of this Action Support Approval of the Settlement

The first *Girsh* factor looks to the "complexity, expense, and likely duration of the litigation." *Girsh*, 521 F.2d at 157. This factor addresses the "probable costs, in both time and money, of continued litigation." *Cendant*, 264 F.3d at 233 (citation and internal quotation marks omitted). A settlement is favored where "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004). Courts have noted that "[s]ecurities fraud class actions are notably complex, lengthy, and expensive cases to litigate." *In re Par Pharm. Sec. Litig.*, No. 06 Civ 3226, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013). This case is no exception, which supports approval of the Settlement. *See, e.g.*, *In re Suprema Specialties, Inc. Sec. Litig.*, No. 02 Civ. 168, 2008 WL 906254, at *4-5 (D.N.J. Mar. 31, 2008) (finding complexity of the securities class action supports final approval).

Here, achieving a litigated verdict in this Action for Lead Plaintiffs and the Settlement Class would require substantial additional time and expense. Lead Plaintiffs reasonably expect that the continued prosecution of this Action through class certification, the completion of

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first numerical reference is to the designation of the entire exhibit and the second alphabetical reference is to the exhibit designation within the exhibit.

discovery, summary judgment, and trial would have involved substantial additional work and expense that would not have necessarily resulted in a recovery for the Settlement Class.

To obtain a judgment at trial, Lead Plaintiffs would have had to complete and prevail on a contested motion for class certification, and any subsequent interlocutory appeals if a favorable decision was issued by this Court. Lead Plaintiffs would have to complete both fact and expert discovery. After the close of discovery, Lead Plaintiffs would then need to brief the inevitable summary judgment motions, *Daubert* motions, and other pre-trial motions. Trial would be complex and expensive, requiring significant factual and expert testimony to prove the elements of Lead Plaintiffs' claims. Importantly, even a jury verdict would not guarantee the recovery of damages for the Settlement Class that this $14,750,000 cash recovery does. *See, e.g., In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07 Civ. 61542, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (court granted defendants' judgment as a matter of law on the basis of loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd*, 688 F.3d 713 (11th Cir. 2012). Defendants would likely appeal any favorable verdict, and the appellate process could last several years, with no assurance of a favorable outcome for the Settlement Class. Thus, even after additional protracted and expensive efforts, the class might obtain a result less than the Settlement recovery, or even nothing at all.

B. The Reaction of the Settlement Class

This factor "requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable." *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. 08 Civ. 397, 2013 WL 5505744, at *2 (D.N.J. Oct. 1, 2013). It is well-established that the lack of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members. *See In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 578

(E.D. Pa. 2003) ("unanimous approval of the proposed settlement[] by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement").

Pursuant to the Court's Preliminary Approval Order, as of August 1, 2018, the Court-appointed Claims Administrator, A.B. Data Ltd. ("A.B. Data"), began mailing copies of the Notice and Proof of Claim to potential Settlement Class Members and their nominees. *See* Declaration of Adam D. Walter Regarding: (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion and Objections (the "Mailing Decl."), attached as Exhibit 3 to the Joint Declaration. As of August 1, 2018, A.B. Data had mailed a total of 36,692 copies of the Notice Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and their nominees. *See id*. ¶¶2-8. In addition, Summary Notice was published in *Investor's Business Daily* on June 11, 2018 and issued over *PR Newswire* on June 13, 2018. *Id*. ¶9. The Notice set out the essential terms of the Settlement and informed potential Settlement Class Members of their right to opt out of the Settlement Class or object to any aspect of the Settlement. *See generally* Ex. 3-A.

Although the August 17, 2018 deadline to file objections or requests for exclusion has not yet passed, as of the date of this motion, there have not been any objections to the Settlement or requests for exclusion. *See* Joint Decl. ¶42. Accordingly, the reaction of the Settlement Class to date supports approval of the Settlement.[5]

C. The Stage of the Proceedings and Amount of Discovery Completed Support Approval of the Settlement

The third *Girsh* factor requires a court to consider "the degree of case development that class counsel have accomplished prior to settlement" in order to "determine whether counsel had

[5] If any objections to the Settlement or requests for exclusions are received subsequent to the filing of this brief, Lead Plaintiffs will respond in their reply papers, on August 31, 2018.

an adequate appreciation of the merits of the case before negotiating" the settlement. *Cendant*, 264 F.3d at 235; *see also Warfarin*, 391 F.3d at 537; *Devlin v. Ferrandino & Son, Inc.*, No. 15-4976, 2016 WL 7178338, at *5 (E.D. Pa. Dec. 9, 2016).

Here, Lead Plaintiffs and Co-Lead Counsel had a sound basis for assessing the strengths and weaknesses of the claims and Defendants' defenses when they entered into the Settlement. Although no formal discovery was conducted,[6] on behalf of Lead Plaintiffs, Co-Lead Counsel extensively investigated the merits of the case prior to filing the Complaint.

As set forth in the Joint Declaration, their efforts included, among others, interviewing former PTC employees, analyzing PTC SEC filings, reviewing news articles and other publicly available information and statements issued by or concerning PTC, and reviewing FDA briefing documents and rules related to the FDA new drug approval process, including documents related Translarna. Joint Decl. ¶¶4, 15. Co-Lead Counsel also consulted extensively with experts on FDA and EMA approval, valuation, damages, and causation issues. *Id.* ¶15. Lead Plaintiffs and Co-Lead Counsel further obtained information about the strengths of the claims and the defenses asserted by Defendants through briefing of the motions to dismiss. *Id.* ¶¶19-26. The Parties also participated in a formal mediation session with Mr. Hughes where the strengths and weaknesses of the Settlement Class' claims were fully vetted. *Id.* ¶¶32-35. Prior to the mediation, Lead Plaintiffs and Defendants submitted to Mr. Hughes and exchanged detailed mediation statements

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[6] Courts in this Circuit frequently approve class action settlements despite the absence of formal discovery. *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 297 (E.D. Pa. 2012) (approving settlement where no formal discovery was taken, finding that lead counsel conducted informal discovery by independently investigating facts prior to filing complaint and where co-lead counsel "are extremely experienced in class action litigation"); *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 483 (D.N.J. 2012) ("Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties.").

which further highlighted the factual and legal issues in dispute. *Id.* ¶32. There is no question that Lead Plaintiffs and their 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 Action was settled on terms highly favorable to the Settlement Class.

D. The Risks of Establishing Liability Weigh in Favor of Final Approval

The fourth *Girsh* factor looks to "the risks of establishing liability." *Girsh*, 521 F.2d at 157. Under this factor, "[b]y evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *GMC Trucks*, 55 F.3d at 814. In considering this factor, the Court has recognized that "[a] trial on the merits always entails considerable risks," *In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010), and "no matter how confident one may of the outcome of the litigation, such confidence is often misplaced." *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 343 (E.D. Pa. 2007). Indeed, "[c]lass action securities litigation cases are notoriously difficult cases to prove." *Viropharma*, 2016 WL 312108, at *11; *see also In re Ikon Office Sols. Inc. Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) (noting that "[l]arge class actions alleging securities fraud" are "inherently complex"). While Lead Plaintiffs believe that their claims have merit, the risks of establishing liability in this Action were particularly significant and weigh heavily in favor of approval of the Settlement.

To establish their §10(b) claim, Lead Plaintiffs must prove that Defendants: (1) made a misstatement or an omission of a material fact; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) upon which the plaintiffs reasonably relied; and (5) that

proximately caused the injuries. *In re Ikon Office Sols., Inc. Sec. Litig.*, 277 F.3d 658, 667 (3d Cir. 2002). Here, Defendants had numerous scienter arguments that posed very significant hurdles to proving that they acted with an intent to commit securities fraud or with severe recklessness. *See* Joint Decl. ¶¶44-46. Scienter is commonly regarded to be the most difficult element to prove in a securities fraud case. *See, e.g., ViroPharma*, 2016 WL 312108, at *12 (approving settlement and nothing that "proving scienter is an uncertain and difficult necessity for plaintiffs"); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 WL 4225828, at *4 (D.N.J. Nov. 28, 2007) (proving scienter in a securities class action is a "formidable task" that supported final approval of the settlement).

As an initial matter, Defendants would note that Lead Plaintiffs' scienter allegations on the ACT DMD results survived the motion to dismiss based only on what the Court characterized as "circumstantial evidence of scienter" and noting that "plaintiffs' version of events is [not] factually bulletproof." *In re PTC Therapeutics, Inc. Sec. Litig.*, No. 16 Civ. 1124, 2017 WL 3705801, at *19 (D.N.J. Aug. 28, 2017); Joint Decl. ¶44. Defendants would also likely argue at summary judgment and/or trial, that the evidence will show that Defendants' interpretation of the ACT DMD results and optimism regarding Translarna's prospects were genuinely believed given that, among other things, (i) the EMA approved Translarna for commercial sale in August 2014 after PTC's Phase 2b clinical trial and has subsequently renewed its authorization (Defendants would also note that Translarna is commercially available for treatment of DMD patients in over 25 countries in Europe); (ii) Defendants engaged in extensive efforts and the expenditure of millions of dollars in preparation for the commercial launch of Translarna in the United States following FDA approval; (iii) PTC personnel were genuinely shocked and disappointed by the February 22, 2016 RTF; (iv) the flexibility that the

FDA had shown to two of PTC's competitors' NDAs in 2015, including one which was granted full review, also illustrates that Defendants had reason to believe that the FDA would give Translarna full review; and (v) the fact that PTC continued to aggressively advocate for approval of Translarna, including filing a formal appeal of the decision to the FDA, and filing a request for dispute resolution, reflects the Company's belief that the FDA unfairly refused to grant PTC the flexibility that it afforded others. Joint Decl. ¶45.

Furthermore, while Lead Plaintiffs believe that documentary and testimonial evidence would support their claims as the case continued, proving scienter within the context of pharmaceutical development is a very complex, nuanced, and evidence-intensive process, which would have presented significant challenges. The technical nature of the underpinning of the claims asserted necessitated very heavy reliance by Lead Plaintiffs on scientific expert testimony which would be critical to establishing liability. The acceptance of such testimony by the jury was far from certain. *In re Vicuron Pharms., Inc. Sec. Litig*. 512 F. Supp. 2d 279, 285 (E.D. Pa. 2007) (recognizing that "the technical nature of the subject matter would undoubtedly have reduced the case to a battle of experts" where "[e]ach side would have offered extensive testimony from expert witnesses on the efficacy of drugs, relapse rates, clinical studies, EC, causation, and damages"). There was no certainty that the jury would have ultimately credited Lead Plaintiffs' theories of the case and evidence concerning scienter over Defendants' counter-evidence.

With respect to proving materially false statements, Defendants would have likely argued at summary judgment that there are no disputed issues of material fact concerning the falsity of the remaining alleged false and misleading statements concerning the results of the ACT DMD study, especially those statements pertaining to the Company's disclosed interpretations of the

ACT DMD results. Joint Decl. ¶47. Defendants would likely argue that the evidence will show that throughout the Company's presentations regarding the ACT regarding the ACT DMD results, the Company repeatedly and accurately *disclosed* that the trial failed to achieve statistical significance at its primary endpoint. For example, Defendants would argue that PTC disclosed its belief that the "totality" of the data supporting Translarna's clinically meaningful benefit was reflected by the improvement in ambulation and timed tests (secondary endpoints) in several groups of participants across both trials and used a slide to illustrate the data that comprised that totality. Additionally, PTC would argue that it emphasized in its disclosures the robustness of results for the 300-400 meter subgroup and that it would be submitting that data to the FDA as evidence of Translarna's efficacy. Defendants would point out that they never stated that the FDA approved this approach; rather, PTC made express risk disclosures warning that the FDA might not agree with PTC's interpretation of the data. *Id*. ¶48.

E. The Risks of Establishing Loss Causation and Damages Weigh in Favor of Final Approval

Even if Lead Plaintiffs successfully established liability, they also confronted challenges in establishing loss causation and ultimately proving damages, including arguments that the alleged misstatements had only a minimally inflationary effect on PTC's stock price during the shortened class period. Lead Plaintiffs bore the burden of proving loss causation and damages for their claims under Section 10(b) – that is, they must show that the alleged false statements or omissions caused investors' losses. *See ViroPharma*, 2016 WL 312108, at *12. 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 it was in the past. *See, e.g., In re Ocean Power Techs., Inc. Sec. Litig.*, No. 14 Civ. 3799, 2016 WL

6778218, at *19 (D.N.J. Nov. 15, 2016) ("proving loss causation would be a major risk faced by Plaintiff").

Here, Lead Plaintiffs' estimated maximum aggregate damages is approximately $390 million for the Settlement Class Period of November 6, 2014 through February 23, 2016. *See* Joint Decl. ¶52. However, given the Court's dismissal of the statements made in November 2014 regarding Translarna's review timeline and the statements made in early to mid-2015 regarding the risks of the ACT DMD study, resulting in a shortened class period of October 15, 2015 through February 23, 2016, Lead Plaintiffs estimated maximum recoverable aggregate damages are approximately $185 million, assuming the Settlement Class prevails on all remaining claims. *Id.* Although Lead Plaintiffs would have been able to present a cogent and persuasive expert's view establishing damages, there is little doubt that Defendants would have been able to present a well-qualified expert who would opine against Lead Plaintiffs' findings.

Indeed, Defendants would likely argue that aggregate damages for the shortened class period are much less than Lead Plaintiffs' estimate of $185 million, contending that even assuming Lead Plaintiffs could prove inflation in PTC's stock price on October 16, 2015 (the next trading day after the October 15, 2015 teleconference and presentation announcing the ACT DMD results), on October 19, 2105 (the following business day), it decreased after analysts published their reports regarding the ACT DMD results. *Id.* ¶53. Therefore, when the October 16, 2015 price increase and the October 19, 2015 price decrease are aggregated, the result is not statistically significant and plaintiffs are left with an inflation period that does not begin until November 10, 2015. *Id.* If Defendants' damages arguments were accepted by the Court at summary judgment or by a jury after trial, recoverable damages would be greatly reduced well below the $185 million level. *Id.*

Lead Plaintiffs would have argued, based on their consulting damages expert's analysis, that Defendants' methodology improperly limits damages to statistically significant increases in prices, not the losses actually caused once Defendants' statements were revealed to be false, and that Courts have established that inflation can increase, or exist, in a stock's price even where there may not be any statistically significant increases.

"Courts in this district have recognized that competing expert testimony presents significant risks to Lead Plaintiff's success in establishing damages." *Par Pharm.*, 2013 WL 3930091, at *6. *See also Cendant*, 264 F.3d at 239 ("[E]stablishing damages at trial would lead to a 'battle of experts' with each side presenting its figures to the jury and with no guarantee whom the jury would believe."). Lead Plaintiffs could not be certain which expert's view would be credited by the jury and, accordingly, this "battle of the experts" created an additional level of litigation risk. *See ViroPharma*, 2016 WL 312108, at *13 ("The conflicting damage theories of defendants and plaintiffs would likely have resulted in an expensive battle of the experts and it is impossible to predict how a jury would have responded."); *Schuler v. Medicines Co.*, No. 14 Civ. 1149, 2016 WL 3457218, at *7 (D.N.J. June 24, 2016) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.") (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744–45 (S.D.N.Y. 1985)).

In short, Lead Plaintiffs and Co-Lead Counsel recognized the possibility that a jury could be swayed by experts for the Defendants, and find that there were no damages or only a fraction of the amount of damages Lead Plaintiffs might have sought at trial.

F. Risks of Maintaining Class Action Status Through Trial Weigh in Favor of Approval

The risk of obtaining and maintaining class certification through trial also supports approval of the Settlement. Lead Plaintiffs have not yet moved for class certification at the time of the Settlement and, absent the Settlement there would have been a contested motion for class certification. While Co-Lead Counsel believe that the requirements for Rule 23 are satisfied in this case and would vigorously argue for class certification, class-certification discovery would have been conducted and Defendants, without doubt, would have opposed the motion. The process would have added time and expense to the proceedings, and the outcome of such a contested motion was far from certain.

Moreover, even if the class was certified for other than settlement purposes, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential*, 148 F.3d at 321; *see also Rent-Way*, 305 F. Supp. 2d at 506-07 ("[A]s in any class action, there remains some risk of decertification in the event the Propose[d] Settlement is not approved. While this may not be a particularly weighty factor, on balance it somewhat favors approve of the proposed Settlement.").

G. The Ability of Defendants to Withstand a Greater Judgment

This factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240; *Ikon Office Sols.*, 194 F.R.D. at 183 (defendants' inability to pay a greater sum would support approval of settlement). Even the "fact that [defendants] could afford to pay more does not mean that [they are] 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." *Warfarin*, 391 F.3d at 538; *see also In re Schering-Plough Corp. Sec. Litig.*, No. 01 Civ. 0829, 2009 WL 5218066, at *5 (D.N.J. Dec. 31,

2009) ("pushing for more in the face of risks and delay would not be in the interests of the class"). Here, while Defendants arguably could afford to pay more, Lead Plaintiffs respectfully submit that this factor should not be viewed as determinative by this Court in light of the other factors supporting approval of the Settlement.

H. The Size of the Settlement Fund in Light of the Range of Possible Recovery and the Risks of Litigation Support Approval of the Settlement

The final two *Girsh* factors, typically considered in tandem, 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 WL 3930091, at *7 (citing *GMC Trucks*, 55 F.3d at 806).

The proposed $14,750,000 Settlement is reasonable in light of the risks of litigation (as discussed above) and the best possible recovery. The Settlement is well-above the $6 million median settlement amount in securities cases in 2017.[7]

Furthermore, as detailed above and in the Joint Declaration, Lead Plaintiffs estimate maximum aggregate damages of approximately $390 million for the Settlement Class Period. Under the shortened class period, however, Lead Plaintiffs estimate potential recoverable damages of approximately $185 million, assuming Lead Plaintiffs prevailed on all of their remaining claims. Joint Decl. ¶52. Measured against that yardstick, the Settlement recovery represents between approximately 4% and 8% of maximum damages – a very favorable recovery

[7] *See* Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review*, at 30 (NERA Jan. 2018) ("NERA Report") (reporting median settlement value of $6 million in 2017), attached as Ex. 11 to the Joint Decl.

in light of the procedural posture of the case, Defendants' countervailing legal arguments, and the risk that continued litigation might result in a vastly smaller recovery or no recovery at all. *Id*.

That percentage recovery is also very favorable when compared to the percentage of damages recovered in other securities class action settlements. *See, e.g.*, *Par Pharm.*, 2013 WL 3930091, at *2 (approving settlement with total sum of $8.1 million, which amounted to approximately 7% of class-wide damages); *Schuler*, 2016 WL 3457218, at *8 (approving $4,250,000 securities fraud settlement that reflects approximately 4.0% of the estimated recoverable damages and noting percentage "falls squarely within the range of previous settlement approvals").[8] This is particularly true when considered in view of the substantial risks and obstacles to recovery if the Action were to continue through class certification, summary judgment, to trial, and through likely post-trial motions and appeals.

When all the *Girsh* factors are considered, the proposed Settlement is fair, reasonable, and adequate and provides a certain outcome in the best interests of the Settlement Class. Lead Plaintiffs' Co-Lead Counsel have weighed the strengths and weaknesses of the relevant claims, defenses, and likelihood of recovery and, after extensive arm's-length negotiations through a

[8] *See also In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, No. 05 Civ. 232, 2008 WL 4974782, at *13 (E.D. Pa. Nov. 21, 2008) (approving $16,767,500 settlement representing 2.5% of damages); *Medoff v. CVS Caremark Corp.*, No. 09 Civ. 554, 2016 WL 632238, at *6-7 (D.R.I. Feb. 17, 2016) (approving $48 million settlement representing approximately 5.33% of estimated recoverable damages and noting that this is "well above the median percentage of settlement recoveries in comparable securities class action cases"); *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 12 Civ. 1609, 2015 WL 965693, at *9 (W.D. La. Mar. 3, 2015) (finding reasonable a $7,850,000 settlement in securities fraud action providing 7.4% to 10.3% of class's potential recovery); *In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

mediator, reached this Settlement. Under these circumstances, Lead Plaintiffs respectfully submit that the Settlement should be finally approved.

IV. THE *PRUDENTIAL* CONSIDERATIONS ALSO SUPPORT THE SETTLEMENT

In addition to the traditional *Girsh* factors, the Third Circuit also advises courts to address considerations set forth in *Prudential*, where applicable. With respect to the first consideration, Lead Plaintiffs and Co-Lead Counsel had a well-developed understanding of the strengths and weakness of the case gained through an extensive investigation, the drafting of a thorough and detailed amended complaint, motion practice, consultations with experts in the fields of pharmaceutical regulation, damages, and loss causation, and the mediation process. *See* Section II above. With respect to the second and third considerations, Co-Lead Counsel are not aware of any related claims asserted by other classes or other claimants.

The remaining additional factors all support approval of the Settlement because Settlement Class Members were afforded the right to opt out of the Settlement (the Fourth Factor) and, to date, none have chosen to do so; Co-Lead Counsel's request for attorneys' fees is reasonable as set forth in the accompanying Fee Brief (the fifth factor) (and, in any event, approval of the Settlement is separate from and not dependent on any outcome of the motion for fees and expenses); and the Plan of Allocation, which will govern the processing of claims and the allocation of settlement funds (the sixth factor), is fair and reasonable as set forth in Part V below.

V. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Merck & Co. Vytorin ERISA Litig.*, No. 08-CV- 285, 2010 WL 547613, at *6 (D.N.J. Feb. 9, 2010) (citing *Ikon Office Sols.*,

194 F.R.D. at 184). "In evaluating a plan of allocation, the opinion of qualified counsel is entitled to significant respect. The proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis." *Boyd v. Coventry Health Care Inc.*, No. DKC09-2661, 2014 WL 359567, at *8 (D. Md. Jan. 31, 2014).

Here, the proposed Plan of Allocation, which was developed by Co-Lead Counsel in consultation with Lead Plaintiffs' consulting damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who submit valid Claim Forms. Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of PTC publicly traded common stock during the Settlement Class Period (November 6, 2014 through February 23, 2016) that is listed in the Claim Form and for which adequate documentation is provided. *See* Ex. 3-A at ¶¶58-59. The calculation of Recognized Loss Amounts is generally based on the difference between the amount of estimated alleged artificial inflation in the PTC common stock on the date the stock was purchased and the amount of estimated alleged artificial inflation on the date of sale. *Id*. at ¶56. Lead Plaintiffs calculated the estimated alleged artificial inflation by considering price changes in PTC common stock in reaction to the alleged corrective disclosures and adjusting for changes attributable to other factors. *Id*. The sum of the Recognized Loss Amounts for all of a claimant's purchases or acquisitions of PTC common stock during the Settlement Class Period 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. *Id*. at ¶¶58-59. *See e.g.*, *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) (deeming plan of allocation "even handed" where "claimants are to be reimbursed on a *pro rata* basis for their

recognized losses based largely on when they bought and sold their shares of General Instrument stock"); *In re Ocean Power Techs. Inc.*, 2016 WL 6778218, at *23 ("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'") (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011)).[9]

Co-Lead Counsel submit that the Plan of Allocation fairly and rationally allocates the proceeds of the Net Settlement Fund among Settlement Class Members based on the losses they suffered as a result of the conduct alleged in the Complaint. Moreover, to date, there have been no objections to the proposed Plan of Allocation to date. Accordingly, for all of the reasons set forth herein and in the Joint Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

VI. CERTIFICATION OF THE SETTLEMENT CLASS REMAINS WARRANTED

In presenting the proposed Settlement to the Court for preliminary approval, Lead Plaintiffs requested, for purposes of the Settlement only, that the Court certify the Settlement Class under Rules 23(a) and (b)(3). In Preliminary Approval Order, this Court certified the Settlement Class. *See* ECF No. 89 at ¶3. Nothing has changed to alter the propriety of the Court's certification, and no Settlement Class Member has objected to class certification. For all the reasons stated in Lead Plaintiffs' Brief In Support of Lead Plaintiffs' Unopposed Motion for (I) Preliminary Approval of Settlement, (II) Certification of the Settlement Class, and (III) Approval of Notice to the Settlement Class (ECF No. 84-1, at 11-18), which is incorporated herein by reference, and in the Court's Preliminary Approval Order, Lead Plaintiffs request that

[9] If any objections to the Plan of Allocation are received subsequent to the filing this brief, Lead Plaintiffs will respond in their reply papers due August 31, 2018.

the Court reaffirm its determinations in the Preliminary Approval Order and finally certify the Settlement Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and (b)(3), appoint Boston and the Nguyen Family as Settlement Class Representatives, and appoint Lead Plaintiffs' counsel Labaton Sucharow LLP and Levi & Korinsky LLP as Settlement Class Counsel and Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C. as Liaison Counsel for the Settlement Class.

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

Notice to the Settlement Class of the proposed Settlement satisfied Rule 23's requirement of "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974).

In accordance with the Court's Preliminary Approval Order, the Claims Administrator began mailing copies of the Notice Packet to potential Settlement Class Members and their nominees on May 30, 2018 and 36,292 Notice Packets have been mailed to date. *See* Ex. 3 at ¶¶2-8. The Notice advised potential Settlement Class Members of, among other things: (i) their right to exclude themselves from the Settlement Class; (ii) their right to object to any aspect of the Settlement, the Plan of Allocation, or the attorneys' fees and expense request; and (iii) the method for submitting a Claim Form in order to be eligible to receive a payment from the proceeds of the Settlement. *See generally* Ex. 3-A. In addition, the Summary Notice was published in *Investor's Business Daily* on June 11, 2018 and transmitted over *PR Newswire* on June 13, 2018, and copies of the Notice, Claim Form, Stipulation, Preliminary Approval Order, and Complaint have been posted to the website established for the Action, www.PTCTherapeticsSecuritiesLitigation.com. Ex. 3 at ¶¶9, 11.

Notice programs such as this have been approved in a multitude of class action settlements. *See, e.g., In re Veritas Software Corp. Sec. Litig.*, 396 F. App'x. 815, 816 (3d Cir. 2010) (describing notice combining mail to known class members and publication in *Investor's Business Daily* and over newswire); *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 in the press fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause."). The Notice program satisfied Rule 23(e)(1)'s requirement that notice of a settlement be "reasonable" – *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)), and it was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

VIII. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court: (i) grant final approval of the Settlement and Plan of Allocation; and (ii) reaffirm its determination to finally certify the Settlement Class for purposes of carrying out the Settlement.

Dated: August 3, 2018

Respectfully submitted,

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