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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CITY OF STERLING HEIGHTS GENERAL EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. PRUDENTIAL FINANCIAL, INC., et al., Defendants.	)	No. 2:12-cv-05275-MCA-LDW CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff and Class Representative National Shopmen Pension Fund ("National Shopmen"), and Plaintiffs Heavy & General Laborers' Locals 472 & 172 Pension and Annuity Funds ("Heavy & General") and Roofers Local 149 Pension Fund ("Roofers Local") (collectively, "Plaintiffs") respectfully submit this memorandum in support of their motion for final approval of the Settlement of this class action for $33,000,000 in cash and approval of the Plan of Allocation of settlement proceeds. The terms of the Settlement are set forth in the Stipulation of Settlement dated April 18, 2016 (the "Stipulation"), which was previously submitted to the Court. Dkt. No. 425-2.[1] As discussed herein and in the accompanying Williams Declaration,[2] Plaintiffs and their counsel have obtained a very good result for the Class in a case that presented significant risks of success. The Settlement is also the result of extensive litigation and arm's-length negotiations between the parties with the substantial assistance of the Hon. Layn R. Phillips (Ret.), a highly respected and experienced mediator.

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

[2] The Court is respectively referred to the accompanying Declaration of Shawn A. Williams in Support of (1) Final Approval of Class Action Settlement; (2) Plan of Allocation of Settlement Proceeds; and (3) an Award of Attorneys' Fees and Expenses and Plaintiffs' Expenses ("Williams Decl."), which contains a detailed description of the history of the Litigation, including the claims asserted, the proceedings during the course of the Litigation, the investigation and discovery undertaken, the settlement negotiations, and the substantial risks of continued litigation, as well as the factors bearing on the reasonableness of the Settlement, the Plan of Allocation and the request for an award of attorneys' fees and expenses.

This case has been carefully investigated and vigorously litigated since its inception in August 2012. At every stage of the Litigation, counsel for Defendants asserted aggressive defenses and expressed their belief that Plaintiffs could not and should not prevail on the claims asserted. By the time the Settlement was reached, Plaintiffs' counsel had: *inter alia*: (a) conducted an extensive investigation relating to the claims asserted and underlying transactions of the Litigation; (b) prepared and filed a detailed Amended Class Action Complaint for Violations of the Federal Securities Laws ("Amended Complaint"); (c) opposed Defendants' comprehensive motion to dismiss, which motion was granted in part and denied in part; (d) successfully certified the Class over Defendants' opposition and prevailed on Defendants' *Daubert* motion with respect to Plaintiffs' market efficiency expert; (e) exchanged written discovery and received and analyzed over 3.7 million pages of documents produced by Defendants and third parties; (f) took 17 depositions[3] and engaged in substantial motion practice to resolve certain discovery disputes between the parties and a number of nonparties; (g) opposed Defendants' motion for interlocutory appeal regarding the order granting class certification; (h) consulted with experts on issues of insurance practices and unclaimed property, market efficiency, reliance, loss causation, and damages; and; (i) engaged in extensive arm's-length settlement negotiations, including mediation with Judge Phillips. Williams Decl., ¶4.

[3] Prudential Financial, Inc. ("Prudential" or the "Company") put forth three deponents for a single Rule 30(b)(6) deposition; therefore Plaintiffs took 19 days of deposition.

The Settlement takes into account the specific risks and obstacles that Plaintiffs and the Class would face if litigation continued, including the risk that the Third Circuit might overturn the order granting class certification. Plaintiffs' counsel are highly experienced in prosecuting securities class actions, and have concluded that the Settlement is a highly favorable recovery in the light of the risk, delay and expense of continued litigation. This conclusion is based on, among other things, the substantial and certain recovery obtained when weighed against the significant risk, expense, and delay presented in continuing the Litigation through the completion of discovery, resolution of Defendants' Rule 23(f) petition in the Third Circuit, Defendants' anticipated motion(s) for 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.

For all the reasons discussed herein and in the Williams Declaration, it is respectfully submitted that the Settlement is eminently fair, reasonable, and adequate to the Class and should be finally approved by the Court. The Court should also approve the Plan of Allocation of settlement proceeds, which was set forth in the Notice that was sent to Class Members. The Plan of Allocation governs how Class Members' claims will be calculated and was developed with the assistance of Plaintiffs' damages and economics consultant, and is consistent with an assessment of, among other things, the damages that Plaintiffs and their counsel believe were

recoverable in the Litigation. Therefore, the Plan of Allocation is fair, reasonable, and adequate, and should likewise be approved.

II. FACTUAL AND PROCEDURAL BACKGROUND

This securities fraud class action was brought pursuant to the Securities Exchange Act of 1934 (the "Exchange Act"). Plaintiffs alleged that Defendants violated the Exchange Act by, *inter alia,* issuing materially false and misleading financial statements concerning Prudential's true financial condition. Specifically, Plaintiffs alleged that Prudential, in violation of Generally Accepted Accounting Principles ("GAAP") and U.S. Securities and Exchange Commission ("SEC") rules, overstated reported income and understated expenses by failing to fully account for liabilities owed to the beneficiaries of policyholders listed as deceased on the Social Security Administration's Death Master File (the "DMF"), or required to be escheated to regulatory state authorities. Williams Decl., ¶19.

In addition, Plaintiffs alleged that statements regarding the Company's reported mortality experience, actuarial experience and risk management processes (and internal controls associated therewith) were materially false and misleading because Prudential knowingly or recklessly ignored credible evidence of policyholder deaths while failing to disclose it retained unclaimed benefits. *Id.*, ¶20. Plaintiffs allege that these materially false and misleading statements caused Prudential stock to trade at artificially inflated prices during the Class Period (May 5, 2010 through November 4, 2011, inclusive).

To avoid repetition, Plaintiffs respectfully refer the Court to the accompanying Williams Declaration for a detailed discussion of the factual

background and procedural history of the Litigation, the extensive efforts undertaken by Plaintiffs and their counsel during the course of the Litigation, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement.

III. THE SETTLEMENT IS PRESUMPTIVELY FAIR BECAUSE IT IS THE PRODUCT OF ARM'S-LENGTH NEGOTIATIONS AND IS SUPPORTED BY COUNSEL

A class action settlement is considered presumptively fair where the parties, through capable counsel informed by meaningful discovery, have engaged in arm's-length negotiations, and only a small fraction of the Class objected. *See, e.g.*, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*GMC Trucks*"); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983); *Schuler v. Meds. Co.*, No. 14-1149 (CCC), 2016 U.S. Dist. LEXIS 82344, at *16 (D.N.J. June 24, 2016); *In re ViroPharma Inc. Sec. Litig.*, No. 12-2714, 2016 U.S. Dist. LEXIS 8626, at *23-*24 (E.D. Pa. Jan. 25, 2016); *see also Manual for Complex Litigation* §30.41, at 237 (3d ed. 1995). To date, there have been no objections to the Settlement.

This action was actively litigated since its inception in August 2012 before an agreement-in-principle was reached in February 2016 to resolve the Litigation. The Settlement resulted from arm's-length negotiations between highly experienced and capable counsel after significant investigation and litigation, with the substantial assistance of Judge Phillips. 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 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 Judge Phillips on February 24, 2016. Williams Decl., ¶140. "'[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 In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-02509-LHK, 2015 U.S. Dist. LEXIS 26635, at *7 (N.D. Cal. Mar. 3, 2015) (finding Judge Phillips to be "an experienced mediator"); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (approving settlement where parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases").

"[T]he court is [also] entitled to rely heavily on the opinion of competent counsel." *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 325 (7th Cir. 1980); *see also Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995); *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995). Plaintiffs' counsel's "assessment of the [S]ettlement as fair and reasonable is entitled to considerable weight." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 509 (W.D. Pa. 2003). Plaintiffs' counsel, who have extensive experience prosecuting securities class actions, believe that the Settlement is a highly favorable result and in the best interest of the Class. In reaching this conclusion, Plaintiffs' counsel considered the strengths and weaknesses of Plaintiffs' claims based on the evidence adduced to date as well as Defendants' interpretations of that evidence and the risks that the Court or a jury may have ruled in favor of Defendants on some or all of the claims resulting in no

or little recovery for the Class. As a result, Plaintiffs' counsel's opinion should be afforded considerable weight. *See Alves v. Main*, No. 01-789 (DMC), 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd*, 559 F. App'x 151 (3d Cir. 2014) ("courts in this Circuit traditionally 'attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class'") (citations omitted).[4]

IV. THE STANDARDS FOR JUDICIAL 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 Sales*"); *Sherin v. Gould*, 679 F. Supp. 473, 474 (E.D. Pa. 1987). 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).

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[4] In addition, the Settlement has the support of the Plaintiffs. *See* Declaration of Timothy O'Connell in Support of Application for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses, ¶6; Declaration of Charles B. O'Neill in Support of Application for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses, ¶4; Declaration of Darris Garoufalis in Support of Application for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses, ¶4.

Federal Rule of Civil Procedure 23(e) provides that a class action shall not be dismissed or compromised without the approval of the court. *See also GMC Trucks*, 55 F.3d at 785. In a class action, the "court plays the important role of protector of the [absent members'] interests, in a sort of fiduciary capacity." *Id*. at 784. The ultimate determination whether a proposed class action settlement warrants approval is in the court's discretion. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968).

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. *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985). "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); *Walsh v. Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 642-43 (D.N.J.), *aff'd*, 726 F.2d 956 (3d Cir. 1983). A court may rely on the judgment of experienced counsel and should avoid transforming the hearing on the settlement into a trial on the merits. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 804 (3d Cir. 1974); *Walsh*, 96 F.R.D. at 642.

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. *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 630 (E.D. Pa. 1986). 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.'" *Fisher Bros., Inc. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (citation omitted). A court must therefore consider whether the proposed settlement is "'fair, reasonable, and adequate.'" *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001) (citation omitted). 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); *GMC Trucks*, 55 F.3d at 782; *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). The Third Circuit also advises courts to address the following considerations (the "*Prudential* considerations"):

> [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 facts 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.

Prudential Sales, 148 F.3d at 323. District Courts "'must make findings as to each of the *Girsh* factors, and the *Prudential* factors where appropriate' in an 'independent analysis of the settlement terms.'" *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *26-*27 (quoting *In re Pet Foods Prods. Liab. Litig.*, 629 F.3d 333, 350-51 (3d Cir. 2010)).

As set forth herein and in the Williams Declaration, the Settlement is a highly favorable result, is presumptively fair, and clearly satisfies the *Girsh* and applicable *Prudential* 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, and the risk that the Third Circuit would reverse the class certification order. Accordingly, the Settlement is superior to another very real possibility – little or no recovery.

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

A. The Complexity, Expense and Likely Duration of This Litigation Warrant Final Approval of the Settlement

"This factor is intended to capture 'the probable costs, in both time and money, of continued litigation.'" *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *27 (citation omitted). There is no doubt that this Litigation, like all securities class actions, is complex. *See, e.g.*, *In re Harnischfeger Indus., Inc.*, 212 F.R.D. 400, 409

(E.D. Wis. 2002) ("Shareholder class actions are difficult and unpredictable, and skepticism about optimistic forecasts of recovery is warranted."). 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 Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). The Third Circuit might have overturned the class certification order. The result 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 Williams Declaration, there clearly were substantial risks to Plaintiffs obtaining a more favorable judgment if litigation were to continue. But for the Settlement, the parties would have continued with litigation of the class certification order in the Third Circuit, and, if the class certification order was affirmed, completing deposition discovery, resolving discovery motion(s) where necessary, and summary judgment motion(s), all of which would have presented the risk of adverse rulings. Plaintiffs would have to establish that the Defendants made false or misleading statements with scienter and that the Class is entitled to recover damages under the securities laws as a result of Defendants' conduct. 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 Plaintiffs' counsel have 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 Private Securities Litigation Reform Act of 1995 ("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 (one of which was pending), 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). As a result, the Settlement secures a substantial and certain recovery for the Class undiminished by further expenses and without the delays, risks, and uncertainties of continued litigation.

Even if the Class recovered a larger judgment after trial, which is certainly not guaranteed, the additional delay, through summary judgment, trial, post-trial motions, and the appellate process, would deny the Class any recovery for years. The Settlement secures a substantial and certain benefit for the Class in this highly

complex and contested action, undiminished by further expenses, and without the delay, risk, and uncertainty of continued litigation. *See, e.g.*, *Prudential Sales*, 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").

B. The Reaction of the 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." *Cendant*, 264 F.3d at 235. Here, over 227,900 notices of the Settlement were mailed to potential Class Members, a summary notice was published in *The Wall Street Journal* and on the *PR Newswire*, and settlement documents were posted on the Claims Administrator's website. Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, ¶¶4-11, 14. To date, not a single objection has been filed.[5] This factor therefore weighs in favor of approval.

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[5] The objection deadline is September 8, 2016. Should any timely objections be filed, Plaintiffs' counsel will address them in their reply memorandum, to be filed no later than September 23, 2016.

C. 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." *Rent-Way*, 305 F. Supp. 2d at 502. "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).

In this Litigation both the knowledge of Plaintiffs and their counsel and the proceedings themselves reached a stage where an intelligent evaluation of the strengths and weaknesses of the Class' claims and the propriety of the Settlement could be made. As discussed above and in the Williams Declaration, by the time the Settlement was reached, Plaintiffs' counsel had the benefit of their extensive pre-filing investigation; opposed Defendants' motion to dismiss and obtained class certification; obtained through an arduous discovery process over 3.7 million pages of documents produced by Defendants and third parties which were reviewed and analyzed; conducted 17 depositions; and retained and met with experts in the insurance industry, and in the fields of materiality, market efficiency, loss causation and damages. Williams Decl., ¶4(d).

Lead and Liaison Counsel also participated in a formal mediation session with Judge Phillips where the strengths and weaknesses of the Class' claims were fully vetted. *Id.*, ¶140. Prior to the mediation, Plaintiffs and Defendants submitted to Judge Phillips and exchanged detailed mediation statements which further highlighted the factual and legal issues in dispute. There is no question that 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 Litigation was settled on terms highly favorable to the Class.

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

While Plaintiffs believe that they had a strong case as to liability, as in every complex case of this kind, they faced formidable obstacles to proving Defendants' liability. To establish a §10(b) claim, 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 their injuries. *In re IKON Office Sols., Inc.*, 277 F.3d 658, 667 (3d Cir. 2002).

Plaintiffs' case centered on allegations that during the Class Period, Defendants made material false and misleading statements to the market concerning the Company's true financial condition. Williams Decl., ¶19. More specifically, Plaintiffs alleged that the Company, in violation of GAAP and SEC rules, overstated reported income and understated expenses by failing to fully account for liability owed to the beneficiaries of policyholders listed as deceased on the DMF, or required to be escheated to regulatory state agencies. *Id.* Plaintiffs also alleged that statements regarding the Company's reported mortality experience, actuarial experience and risk management processes (and internal controls associated

therewith) were materially false and misleading because Prudential knowingly or recklessly ignored credible evidence of policyholder deaths while failing to disclose that it retained unclaimed benefits. *Id.*, ¶20. Plaintiffs alleged that these materially false or misleading statements caused Prudential stock to trade at artificially inflated prices during the Class Period. *Id.*

Plaintiffs maintain that the truth was not disclosed to investors until November, 2011, when, on November 2, 2011, the Company reported its third quarter 2011 financial results and disclosed that it would take a charge to earnings of $99 million (or $0.15 per share) to increase reserves related to expanded matching criteria to match its policies against the DMF. *Id.*, ¶21. On November 4, 2011, the Company disclosed that it would increase reserves by another $40 million related to the DMF. *Id.*[6] Plaintiffs alleged that, upon these disclosures, the artificial inflation in Prudential stock created by Defendants' false and misleading public statements was removed from the trading price of Prudential's common stock, damaging Plaintiffs and members of the Class. *Id.*, ¶22.

Although Plaintiffs partially cleared the pleading stage, and believe they have substantial evidence to support their claims such that they would prevail at summary judgment and trial (*see, e.g.*, *id.*, ¶143), Defendants were equally confident that they would defeat Plaintiffs' claims. Defendants believed that they would present sufficient evidence to the Court and a jury to prove that: (i) Plaintiffs ignored settled

[6] In a Form 10-Q filed with the SEC on November 8, 2012, Prudential acknowledged that its initial calculation of the November 2011 reserve charge was understated by an additional $61 million because it had excluded certain extended term life policies from the analysis used to identify potential claims. *Id.*, ¶25.

insurance and unclaimed property law; (ii) Prudential's unclaimed property practices exceeded legal requirements; (iii) Prudential's reserves were appropriate; (iv) Plaintiffs' Amended Complaint alleged fraud by hindsight using new and novel protocols from a regulatory settlement that was agreed to and implemented after the Class Period to critique Prudential's historical unclaimed property practices, even though those practices were lawful and went beyond industry customs, and because Plaintiffs impermissibly used revised reserve estimates associated with the new business practices to claim that prior reserves were fraudulent; and (v) even if the fraud had occurred, it did not cause any recoverable damages to the Class. *Id.*, ¶144. Defendants would also likely argue at summary judgment or at trial that the alleged misrepresentations concerning Prudential's reserves constituted inactionable opinions under *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, ___ U.S. ___, 135 S. Ct. 1318 (2015). Moreover, because the Third Circuit granted Defendants leave to appeal the class certification order, Plaintiffs faced the significant risk that the appellate court would overturn the favorable class certification order. *Id.*, ¶145. A reversal may well have ended the Litigation.

Thus, while Plaintiffs believe that based on the evidence adduced to date, including review of more than 3.7 million pages of documents, deposition testimony, the opinions of their experts, and the settlement negotiations where the parties' respective positions were fully vetted, they had a strong case as to liability and would be able to prove that Defendants made material false and misleading statements and/or omissions with the requisite scienter that caused damage to the Class, they are aware that establishing liability at trial would by no means be guaranteed.

Indeed, Defendants have adamantly denied any liability and have asserted from the outset of the Litigation that they possess absolute defenses to Plaintiffs' claims. Plaintiffs were aware that Defendants would present counter evidence and other substantial obstacles to obtaining a judgment in their favor at trial. Moreover, there was no certainty that additional discovery would tend to support or disprove Plaintiffs' allegations. In order to prove their case, Plaintiffs would have to rely on significant testimony from current and former Prudential employees and other witnesses, many of whom would be testifying about matters that occurred some years ago. As a result of the time between the events of interest and any deposition or trial, the ability, as well as willingness, of many witnesses to testify completely about those events would be impaired. These issues did and would continue to seriously affect Plaintiffs' ability to successfully prosecute their claims.

In short, Plaintiffs faced numerous obstacles in proving liability if litigation continued. There was no certainty, given Defendants' vigorously asserted defenses, that Plaintiffs and the 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 Plaintiff's potential recoveries").

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

Even if Plaintiffs were successful in establishing liability, they 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 in a §10(b) action 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).

Plaintiffs 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. Absent settlement, proving loss causation would be a major risk faced by Plaintiffs. 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 Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) ("Proving loss causation would be complex and difficult."). 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. And that is not an aberration. In another case, litigated since 2001, the Eleventh Circuit upheld summary judgment in favor of defendants on loss causation grounds. *See Phillips v. Sci.-Atlanta, Inc.*, 489 F. App'x 339 (11th Cir. 2012). In *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 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.

Defendants here strongly contested loss causation and damages by arguing that non-fraud related disclosures announced on November 2, 2011 caused the decline in Prudential's stock price. Specifically, Defendants and their expert testified that Prudential's stock price declined not because of fraud-related disclosures, but instead because of firm-specific information unrelated to the fraud, including, among other factors, the announcement of an increase in guaranteed minimum income benefit and guaranteed minimum death benefit reserves by $435 million and 2012 earnings guidance below analyst expectations. Williams Decl., ¶152. While Plaintiffs believed they had compelling responses to this evidence, including their expert's testimony which would have sought to disaggregate information from the confounding non-fraud-related disclosures and other arguments Defendants would make at trial, recoverable damages could have been significantly reduced or eliminated altogether if the jury credited Defendants' arguments.

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. Plaintiffs likely would have faced a motion *in limine* by Defendants to preclude Plaintiffs' damages expert's testimony under the *Daubert* test and risked a decision that a valuation model might not be admissible in evidence.[7] Even if Plaintiffs survived renewed *Daubert* motions, at trial the loss

[7] In fact, in connection with their opposition to the motion for class certification, Defendants moved to exclude the expert report and opinions of Plaintiffs' expert,

causation and damage assessments of Plaintiffs' and Defendants' experts were sure to vary substantially, and in the end, this crucial element at trial 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. The reaction of a jury to such expert testimony is highly unpredictable and in such a battle, Plaintiffs' counsel recognize the possibility that a jury could be swayed by convincing experts for the Defendants, and find that there were no damages or only a fraction of the amount of damages Plaintiffs contended or to show that the losses were attributable to factors other than the alleged false and misleading statements.[8]

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

Although Plaintiffs' motion for class certification was granted on January 11, 2016, the Third Circuit had granted Defendants' Rule 23(f) petition. Even if the Third Circuit affirmed the class certification order – as Plaintiffs believe it would – Defendants would likely make a pre-trial motion under Federal Rule of Civil Procedure 23(c)(1), which provides that a class certification order may be altered or amended any time before a decision on the merits. Thus, in any class action suit, even if a class is initially certified, there is always a risk that a class will be modified

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Dr. Feinstein. Williams Decl., ¶¶113-114. The Court denied the motion (*id.*, ¶120), but it likely would be renewed at summary judgment.

[8] *See also In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) ("it is virtually impossible to predict with any certainty which [experts'] 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"), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

or decertified prior to a decision on the merits, and there would still be a risk that a class certification order would be reversed or modified on appeal after judgment. Settlement at this juncture eliminates that risk.

G. 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)). There is no question that Prudential ***could*** have paid more here, but, that fact does not render the Settlement unreasonable where all of the other *Girsh* factors support approval.

H. 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 Sales*, 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." *In re Par Pharm. Sec. Litig.*, No. 06-3226 (ES), 2013 WL 3930091, at *7 (D.N.J. July 29, 2013) (citing *GMC Trucks*, 55 F.3d at 806). As explained herein and in the Williams Declaration, the Settlement provides for a substantial and certain cash payment of $33,000,000, plus any accrued interest, for the direct benefit of the Class.[9]

Here, as set forth above and in the Williams Declaration, Plaintiffs faced considerable risks in proving their claims. And even if they established liability, they faced the risk of a finding that the Class did not suffer any compensable damages. If Plaintiffs ultimately prevail at trial, there was still no guarantee of a recovery – for an appeal would surely follow. This Settlement represents approximately 13.2% of Plaintiffs' estimate of maximum losses – an excellent recovery in light of the risks of continued litigation, and 165% of the amount that it could be recovered under Defendants' assessment of a plaintiff-style damage calculation. Williams Decl., ¶163. These percentages far exceed the 1.8% median

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[9] The entirety of the Settlement Amount is for the benefit of the Class. Once the Settlement is effective, after payment of any attorneys' fees and expenses approved by the Court and incurred Notice and Administration 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 or Notice and Administration Expenses, which is uneconomical to distribute, as set forth in the Stipulation and Notice, the balance will be donated to non-sectarian, non-profit charitable organizations serving the public interest selected by Lead Counsel.

recovery in similar securities class actions settled in 2015. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2015 Review and Analysis* at 8, Figure 7 (Cornerstone Research 2016).[10]

The Settlement Amount is also far higher than the median reported settlement amounts since the passage of the PSLRA, which have ranged from $5.6 million in 1996 (adjusted for inflation) to $7.3 million in 2015. *See* Svetlana Starykh & Stephen Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* at 28, Figure 26 (NERA Jan. 2016).

VI. THE *PRUDENTIAL* CONSIDERATIONS SUPPORT THE SETTLEMENT

As in *ViroPharma*, each of the *Prudential* considerations weighs in favor of the Settlement:

> (1) following extensive briefing on substantive issues, expedited discovery, and an arm's-length mediation process, Lead Plaintiff, and Lead Counsel, appropriately understood the merits of the case such that they could knowingly enter into the Settlement; (2) given that there were no objections by the Settlement Class and that no persons opted out of the Settlement Class,[11] there are no claims by other classes or subclasses related to the underlying facts of the case; (3) there are no known other claimants beyond those represented by the Settlement Class; (4) Settlement Class members were accorded the right to opt out of the Settlement, and none chose to do so; (5) as discussed in greater detail *infra*, the demand for attorneys' fees is reasonable; and (6) the Plan of Allocation is fair and reasonable.

ViroPharma, 2016 U.S. Dist. LEXIS 8626, at *42.

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[10] Available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2015-Review-and-Analysis.pdf.

[11] As of the date of this memorandum, only three Class Members have opted out of the Class.

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.

VII. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

The Notice contains the Plan of Allocation of settlement proceeds, detailing how the settlement proceeds are to be divided among claiming Class Members. A trial court has broad discretion in approving a plan of allocation. *See Sullivan*, 667 F.3d at 328; *In re Chicken Antitrust Litig*., 810 F.2d 1017, 1019 (11th Cir. 1987). The test is simply whether the proposed plan, like the settlement itself, is fair, reasonable, and adequate. *Ikon*, 194 F.R.D. at 184; *Walsh*, 726 F.2d at 964 ("The court's principal obligation is simply to ensure that the fund distribution is fair and reasonable.").

In determining whether a proposed plan is fair, courts look primarily to the opinion of counsel. *Moore v. GMAC Mortgage*, No. 07-4296, 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 their damages and economic consultant, Plaintiffs' counsel developed the Plan of Allocation of Settlement proceeds that reflects, among other things, Plaintiffs' and Lead 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 Class

Members. To date, no Class Members have objected to the proposed Plan of Allocation.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the Settlement and the Plan of Allocation as fair, reasonable and adequate.

DATED: August 24, 2016

Respectfully submitted,

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