IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE ADVANCE AUTO PARTS, INC. SECURITIES LITIGATION	Case No. 18-CV-00212-RTD-SRF CLASS ACTION

BRIEF IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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Court-appointed Class Representative the Public Employees' Retirement System of Mississippi ("Class Representative") respectfully submits this Brief in support of its motion, pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rules"), for: (i) final approval of the proposed settlement of this securities class action on the terms set forth in the Stipulation and Agreement of Settlement dated December 23, 2021 (D.I. 355-1) ("Stipulation"); and (ii) approval of the proposed plan for allocating the net proceeds of the Settlement to the Class ("Plan of Allocation" or "Plan").[1]

I. INTRODUCTION

Subject to Court approval, Class Representative has agreed to settle all claims asserted in the Action against Advance Auto Parts, Inc. ("AAP" or the "Company"), Thomas R. Greco, and Thomas Okray (collectively, "Defendants") in exchange for a $49,250,000 cash payment. As detailed in the Nirmul Declaration and summarized below, the Settlement: (i) is the culmination of more than three years of highly contentious and vigorous litigation efforts; (ii) is the product of extensive settlement negotiations under the guidance of an experienced class-action mediator and, ultimately, the Parties' acceptance of the mediator's recommendation to resolve the Action for the Settlement Amount; and (iii) represents a meaningful percentage of the Class's estimated damages. Class Representative respectfully submits that the Settlement provides an excellent result for the Class and readily satisfies the standards for final approval under Rule 23(e)(2).

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Stipulation and in the Declaration of Sharan Nirmul ("Nirmul Declaration" or "Nirmul Decl.") filed herewith. The Nirmul Declaration is an integral part of this submission and, for the sake of brevity herein, Class Representative respectfully refers the Court to the Nirmul Declaration for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation. Citations to "¶ _" herein refer to paragraphs in the Nirmul Declaration and citations to "Ex. _" herein refer to exhibits to the Nirmul Declaration. All internal citations, quotation marks, and footnotes have been omitted and emphasis has been added unless otherwise indicated.

At the time of settlement, the Parties were at an advanced stage of litigation—fact and expert discovery had concluded, and summary judgment briefing had commenced. As such, Class Representative and Class Counsel had a well-developed understanding of the strengths and weaknesses of their claims. While Class Representative believes the Class's claims are meritorious and supported by evidence developed during discovery, it also recognized that there were substantial risks to obtaining a larger recovery for the Class through further litigation. Indeed, when the Settlement was reached, several critical motions—Defendants' renewed motion for reconsideration of the Court's motion to dismiss ruling, Defendants' motion for summary judgment, and *Daubert* motions to exclude Class Representative's two experts, were pending. ¶¶ 7-8, 96-97, 134-44. An adverse ruling for the Class on any of these motions could have precluded *any* recovery for the Class, let alone a recovery greater than the Settlement Amount.

Even if successful on these motions, Class Representative still faced substantial risks at trial. As explained below, Defendants were prepared to present significant arguments, supported by their three experts, that Class Representative could not establish either liability or damages. *See also* ¶¶ 158-69. The Settlement avoids the risks of adverse findings on liability and damages—as well as the delay and expense of continued litigation—while providing a substantial (and certain) near-term benefit to the Class. Moreover, the Settlement is not "claims-made" and all Settlement proceeds, after the deduction of Court-approved fees and costs, will be distributed to Class Members who submit Claims accepted by the Court for payment.

The Settlement has the full support of the Court-appointed Class Representative, which is a sophisticated institutional investor that took an active role in supervising the litigation and participating in the settlement negotiations through the office of the Mississippi Attorney General. *See* Ex. 1, ¶¶ 2, 6. The reaction of the Class has also been positive. While the May 23, 2022

deadline to object or request exclusion from the Class has not yet passed, following a robust notice campaign, there have been no objections and only one request for exclusion. *See* ¶ 11.

Given the foregoing considerations and the factors addressed below, Class Representative and Class Counsel respectfully submit that: (i) the Settlement meets the standards for final approval under Rule 23, and is a fair, reasonable, and adequate result for the Class; and (ii) the Plan is a fair and reasonable method for equitably allocating the Net Settlement Fund.

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e)(2) requires judicial approval of any class action settlement. Whether to grant such approval lies within the district court's discretion. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). This discretion should be guided by this Circuit's strong judicial policy favoring settlement, which policy "is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010); *see also McDonough v. Horizon Blue Cross Blue Shield of N.J.*, 641 F. App'x 146, 150 (3d Cir. 2015) (noting "overriding public interest in settling class action litigation").

Under Rule 23(e)(2), the Court should approve a proposed class action settlement if it finds it to be "fair, reasonable, and adequate." *See also In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016). In making this determination, Rule 23(e)(2) provides that a court should consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;

> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment;
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Consistent with this guidance, courts in this Circuit have long considered the factors enumerated in *Girsh v. Jepson* in deciding whether to approve a class action settlement:

> (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 . . . .

521 F.2d 153, 157 (3d Cir. 1975) (ellipses in original); *In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *4 (D. Del. Nov. 19, 2018).[2] The Third Circuit also advises courts to consider, where applicable, the additional factors set forth in *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998). *See infra* Section II.D.[3]

At the preliminary approval stage, this Court considered the Rule 23(e)(2) factors in assessing the Settlement, and found it to be fair, reasonable, and adequate, subject to further

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[2] "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2020 WL 3166456, at *7 (D.N.J. June 15, 2020).

[3] The Advisory Committee Notes to the 2018 Rule 23 Amendment explain that the four Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23 Advisory Comm. Notes to 2018 Amendment, Subdivision (e)(2). Accordingly, Class Representative discusses below the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four Rule 23(e)(2) factors, but also discusses the application of the *Girsh* and *Prudential* factors.

consideration at the Settlement Hearing. D.I. 356, ¶ 1. Nothing has changed to alter the Court's previous findings, and the factors supporting the Court's determination to preliminarily approve the Settlement apply equally now. Accordingly, Class Representative and Class Counsel respectfully submit that the Settlement is fair, reasonable, and adequate and warrants final approval under the Rule 23(e)(2) factors and Third Circuit law.

A. Class Representative and Class Counsel Have Adequately Represented the Class in This Action

The first Rule 23(e)(2) factor—whether Class Representative and Class Counsel "have adequately represented the class"—favors approval of the Settlement. *See also Vinh Du v. Blackford*, 2018 WL 6604484, at *4 (D. Del. Dec. 18, 2018) ("The Third Circuit applies a two-prong test to assess the adequacy of the proposed class representatives. First, the court must inquire into the qualifications of counsel to represent the class, and second, it must assess whether there are conflicts of interest between named parties and the class they seek to represent.").

In certifying the Class in November 2020, the Court found Class Representative and Class Counsel had satisfied Rule 23(a)(4)'s adequacy requirement, and appointed Class Counsel pursuant to Rule 23(g). D.I. 151 at 12-13 ("Lead Plaintiff understands its duties and responsibilities as class representative, has taken an active role in managing the litigation, and understands the core allegations and claims" and "lead counsel fairly and adequately represent the interests of the class[.]"). Since this time, Class Representative and Class Counsel have continued to adequately represent the Class in their aggressive prosecution of the Action and in negotiating the Settlement.

Here, Class Representative has diligently supervised and participated in the Action on behalf of the Class and through its efforts, has provided valuable and meaningful assistance to Class Counsel. Class Representative's efforts included, *inter alia*, communicating regularly with counsel, reviewing pleadings and briefs, gathering and reviewing documents and information in

response to Defendants' discovery requests, preparing and sitting for depositions, and participating in settlement negotiations. *See* Ex. 1, ¶ 5. In addition, Class Representative—whose claims are based on a common course of alleged wrongdoing by Defendants and are typical of other Class Members—has no interests antagonistic to the Class. *See Vinh*, 2018 WL 6604484, at *4 ("Plaintiff's interests are coextensive with, and not antagonistic to, the interests of the class since they all raise the same claims and seek the same relief.").[4]

Likewise, Class Representative retained counsel who is highly experienced in securities litigation. *See* Ex. 3-C. Class Counsel actively pursued the Class's claims to an advanced stage of litigation and aggressively negotiated a favorable Settlement through mediation. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) ("[C]ourts in this Circuit traditionally attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class."), *aff'd*, 559 F. App'x 151 (3d Cir. 2014).

B. The Settlement Was Negotiated at Arm's Length with the Assistance of an Experienced Mediator

A presumption of fairness attaches where, as here, the Parties engaged in arm's-length negotiations following years of litigation that included extensive fact and expert discovery and consultation with numerous experts. *See, e.g.*, *Nat'l Football League*, 821 F.3d at 436; *Warfarin*, 391 F.3d at 535, 537. This presumption is further supported where a neutral mediator is involved in the process. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2021) ("The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.").

[4] *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

Here, the Settlement was reached after intensive, good-faith and arm's-length bargaining facilitated by David Murphy of Phillips ADR Enterprises, P.C., with all Parties represented by highly experienced counsel, which satisfies Rule 23(e)(2)(A)-(B). More specifically, following fact discovery and just weeks before the completion of expert discovery and with Defendants' Renewed Motion for Reconsideration pending, the Parties participated in a formal mediation with Mr. Murphy on September 9, 2021. ¶ 145. The mediation was attended by the Parties and their counsel, as well as Defendants' D&O insurance carriers and their independent counsel. *Id.* Prior to the mediation, the Parties exchanged mediation statements and, at the mediation, made extensive presentations, supported by evidence adduced during discovery, regarding the strengths and weaknesses of their respective positions. *Id*. Despite their best efforts at the mediation, the Parties could not reach a resolution of the Action; but continued negotiating over the next seven weeks through Mr. Murphy, who ultimately issued a recommendation to resolve the Action for $49,250,000 in cash. ¶ 145-47. The Parties accepted Mr. Murphy's proposal and executed a term sheet on November 5, 2021. ¶¶ 147-48. The Parties then spent additional weeks negotiating the specific terms of the Stipulation. ¶ 150.

The Settlement was negotiated by counsel with extensive experience in securities litigation and who were well versed in the strengths and weaknesses of the case.[5] Prior to settlement, Class Counsel had, *inter alia*: exhaustively investigated the Class's claims, including 120 interviews with 96 former AAP employees (¶¶ 24-25), researched and prepared the detailed Amended Complaint (¶¶ 24-27), opposed motions to dismiss and Defendants' Renewed Motion for Reconsideration (¶¶ 32, 96), completed substantial fact discovery, including the review of more

[5] *See Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (opinion of counsel "experience[d] in prosecuting complex class actions [who] strongly believe the Settlement is in the best interests of the Class . . . is entitled to great weight.").

than 1.3 million pages of documents (¶¶ 43-89), taken or defended 32 depositions (¶¶ 73, 89, 102, 125, 133), consulted extensively with various experts and assisted in the preparation of eight expert reports (¶¶ 120-32), successfully moved for class certification and defeated a Rule 23(f) petition (¶¶ 98-113), and made significant progress in researching and drafting an opposition to Defendants' Summary Judgment Motion (¶ 136). Clearly, the Action had reached a stage where Class Representative and Class Counsel could make a well-founded assessment of the strength of the claims and propriety of settlement. *See* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:49 (5th ed. 2021) (approval warranted "[w]here a court can conclude that the parties had sufficient information to make an informed decision about settlement.").

C. The Settlement Provides the Class Adequate Relief, Considering the Costs, Risks, and Delay of Litigation and Other Relevant Factors

Rule 23(e)(2)(C) overlaps considerably with many of the factors articulated in *Girsh*. All of these factors entail "a 'substantive' review of the terms of the proposed settlement" and evaluate the fairness of the "relief that the settlement is expected to provide to" the Class, *see* Fed. R. Civ. P. 23(e)(2), Advisory Comm. Notes to 2018 Amendment, and weigh in favor of the Settlement.

1. The Complexity, Expense, and Likely Duration of the Litigation

Rule 23(e)(2)(C)(i) and the first *Girsh* factor look to "the complexity, expense and likely duration of the litigation." *Girsh*, 521 F.2d at 157. "This factor is intended to capture the probable costs, in both time and money, of continued litigation." *In re ViroPharma Inc. Sec. Litig.*, 2016 WL 312108, at *9 (E.D. Pa. Jan. 25, 2016). "Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015).

Courts consistently acknowledge that securities class actions are "notably complex, lengthy, and expensive cases to litigate," *see In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at

*4 (D.N.J. July 29, 2013), and this case was no exception. Moreover, achieving a litigated verdict for the Class in this Action would have required substantial additional time and expense. At the time of settlement, Class Counsel was in the midst of briefing oppositions to Defendants' Summary Judgment Motion and motions to exclude the expert reports and testimony of Class Representative's two experts. ¶¶ 136, 144. Had the Action continued, Class Counsel would have expended considerable time and expense litigating these motions as well as preparing for trial. Post-trial motions and appeals would invariably have followed, resulting in additional years of complex and expensive litigation. This factor underscores the Settlement's fairness.

2. The Risks of Continued Litigation

In assessing a settlement, a court should also consider "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." *Girsh*, 521 F.2d at 157. "These [*Girsh*] factors balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *Wilmington Tr.*, 2018 WL 6046452, at *5. Here, while Class Representative largely prevailed at the initial motion to dismiss stage, it still faced the possibility that the Court would grant one of Defendants' pending motions, or that Defendants might prevail at trial. Class Representative is fully aware that many securities actions are lost at summary judgment, at trial, or on post-trial appeals. *See Nobles v. MBNA Corp.*, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) (noting that, although "[p]laintiff's claim has survived a motion to dismiss, [] success is not guaranteed if this matter were to proceed to jury trial.").[6] As set forth below, these risks favor the Settlement.

[6] *See also, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (overturning jury verdict and award in favor of plaintiff on loss causation grounds); *In re Apollo Grp., Inc. Sec. Litig.*, 2010 WL 5927988 (9th Cir. June 23, 2010) (granting judgment to defendants and nullifying an unanimous jury verdict for plaintiff following trial).

i. Risks to Establishing Liability and Damages

As detailed in the Nirmul Declaration and summarized herein, Class Representative faced a number of substantial risks to proving liability and the Class's full amount of damages.

First, in their pending motions, Defendants contended that the Court had erroneously permitted Class Representative's claims to proceed based on allegations that AAP's FY17 Guidance was contradicted by negative internal 2017 sales projections. ¶ 158. Defendants argued that Class Representative would be unable to prove liability under the theory pled because the negative internal forecasts never existed. *Id*. Had the Court ultimately sided with Defendants on this issue, the Action could have been dismissed in its entirety.

Second, this case involved forward-looking statements subject to the PSLRA safe harbor. 15 U.S.C. § 78u-5(c); *In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 281 (3d Cir. 2010) ("Statements about future profitability and assumptions underlying management's expectations about the future fall squarely within the definition of forward-looking statement."). Under the safe harbor, forward-looking statements are exempted from liability if they are identified as forward looking and accompanied by "meaningful cautionary statements." *Id.* at 282. Defendants would continue to argue that their forward-looking statements were protected under the safe harbor as they were accompanied by cautionary language that AAP's FY17 projections might not be met. ¶¶ 159-60.

Third, even if Class Representative succeeded in convincing the Court, or a jury, that Defendants' statements were exempted from liability under the PSLRA safe harbor, Defendants would argue that Class Representative could not meet the heightened scienter standard applicable to forward-looking statements—that their statements were made with "actual knowledge" that they were false and misleading—because they did not know for sure that they would miss the forecasts at the time they were made, and their projections were the product of a sound, bottoms-up forecasting process involving stakeholders from various divisions of AAP as well as multiple

external consultants. ¶¶ 161-62. At trial, Defendants would offer expert testimony to support the narrative that their forecasting process was reasonable, fully comported with industry standards, and that the forecasts generated by this process supported AAP's 2017 Guidance. ¶ 162. In addition, Defendants would assert that AAP missed its projections not because they were unrealistic, but because of unanticipated industry headwinds in 2017, which also caused AAP's competitors to miss their sales projections by equal measure. ¶ 163.

Finally, throughout the Action, Defendants maintained that the price declines in AAP common stock on the corrective disclosure dates were unrelated to the alleged fraud and, instead, the result of "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events"[7]—the most significant being industry-specific headwinds. ¶ 167. Defendants would further argue that the relevant "truth" concealed by their misleading statements was revealed prior to the end of the Class Period. ¶ 168. Resolution of these issues—and ultimately, the Class's damages—would have hinged upon extensive expert discovery and testimony. Thus, "establishing damages at trial would lead to a battle of experts . . . with no guarantee whom the jury would believe." *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001); *see also Lazy Oil, Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997) ("[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and complicated battle of experts."), *aff'd*, 166 F.3d 581 (3d Cir. 1999).

ii. Risks to Maintaining the Class Action through Trial

The Court certified the Class on November 6, 2020, and Class Representative successfully defended that certification against Defendants' Rule 23(f) petition. ¶¶ 105-13. In light of the strong arguments supporting the appropriateness of class certification in this case, Class Representative

[7] *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343 (2005).

believes that the risk of decertification was minimal here. Nevertheless, there is always a risk that the Action, or particular claims in the Action, might not have been maintained as a class through trial. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 322 (3d Cir. 2011) (a "district court retains the authority to decertify or modify a class at any time during the litigation").

3. The Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and the Risks of Litigation

The eighth and ninth *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; *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved . . . [r]ather, the percentage recovery, must represent a material percentage recovery to plaintiff in light of all the risks[.]"). The $49,250,000 cash Settlement meets this threshold.

Here, Class Representative's damages expert has estimated maximum aggregate Class damages in this Action to be approximately $669 million. ¶ 10. This recovery exceeds the median recovery in comparable cases[8] even *before* considering the myriad risks to establishing liability and damages—any of which could have resulted in the Class recovering less than the Settlement Amount, or nothing at all. ¶¶ 154-69. If, for example, Defendants were able to successfully knock

[8] *See generally Wilmington Tr.*, 2018 WL 6046452, at *8 (noting "Third Circuit median recovery of 5% of damages in class action securities litigation").

out even one of the two corrective disclosures at summary judgment, or prove that Class Representative's expert had not adequately disaggregated the stock price declines resulting from fraud-related disclosures from the impact of the industry downturn generally, the Class's aggregate damages would be greatly reduced. Further, if Class Representative was unable to prove liability for the November 14, 2016 alleged misstatement, the Class Period would have been shortened and the Class's estimated aggregate damages would also be reduced. ¶¶ 166-68. Thus, the Settlement provides a substantial recovery given these risks (and others) and this supports its approval.

4. Stage of the Proceedings and Amount of Discovery Completed

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 an adequate appreciation of the merits of the case before negotiating" the settlement. *Cendant*, 264 F.3d at 235. A settlement following sufficient discovery and genuine arms-length negotiation is "presumptively valid." *Devlin v. Ferrandino & Son, Inc.*, 2016 WL 7178338, at *5 (E.D. Pa. Dec. 9, 2016) (settlement "generally recognized as "presumptively valid" where "the parties engaged in arm's length negotiations after meaningful discovery").

From the commencement of this Action in February 2018 through its resolution in November 2021, Class Representative and Class Counsel spent substantial time and resources zealously litigating the factual and legal issues involved in the Action. ¶¶ 18-152. Before reaching the Settlement, Class Representative through Class Counsel had completed both fact and expert discovery—which included analyzing more than 1.3 million pages of documents from Defendants and third parties; serving and responding to numerous discovery requests and subpoenas; litigating discovery disputes; preparing and exchanging class certification and merits expert reports; and taking or defending 32 depositions. ¶¶ 43-133. Class Counsel also briefed motions to dismiss and Defendants' Renewed Motion for Reconsideration, moved for class certification and briefed a

related Rule 23(f) petition, and were in the process of drafting an opposition to Defendants' Summary Judgment Motion. ¶¶ 90-104, 109-13, 136. In addition, Class Counsel prepared a detailed mediation statement, as well as a detailed evidence-based mediation presentation, and participated in hard-fought settlement negotiations, including formal mediation. ¶¶ 145-48. This substantial record demonstrates that, when the Settlement was reached, Class Representative and Class Counsel had more than enough information to make an informed decision about settlement based on the "strengths and weaknesses of their case." *Dartell v. Tibet Pharms., Inc.*, 2017 WL 2815073, at *5 (D.N.J. June 29, 2017) (finding factor favored settlement where parties had "fully briefed motions to dismiss, a motion for class certification, and [had] engaged in discovery," as well as the "engage[ment of] two experts"). This factor strongly supports the Settlement.

5. The Ability of Defendants to Withstand a Greater Judgment

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240. However, 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. Here, while Defendants theoretically could afford to pay more, this factor does not render the significant amount recovered through the Settlement any less fair, reasonable, or adequate.[9]

6. The Reaction of the Class to Date

In assessing a settlement, courts in this Circuit also consider "the reaction of the class to the settlement." *Girsh*, 521 F.2d at 157. The deadline for Class Members to object to the Settlement

[9] *See In re Schering-Plough Corp. Sec. Litig.*, 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").

or request exclusion from the Class is May 23, 2022. ¶ 11. As of this filing, there have been no objections to the Settlement and only one request for exclusion. *Id*.; Ex. 2, ¶ 12. Class Representative will address objections, if any, and all requests for exclusion in its reply.

7. The Relevant *Prudential* Factors Also Support the Settlement

In addition to Rule 23(2)(e) and the traditional *Girsh* factors, the Third Circuit also advises courts to address, where applicable, the following factors set forth in *Prudential*:

> [1] the 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; [2] the existence and probable outcome of claims by other classes and subclasses; [3] 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; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

148 F.3d at 323. Each of the *Prudential* factors weighs in favor of the Settlement. With respect to the first *Prudential* factor, Class Representative and Class Counsel had a well-developed understanding of the strengths and weaknesses of the case based on their extensive investigation of the Class's claims, consultation with experts, substantial discovery, and mediation efforts. *See supra* Section II.C.4. With respect to the second and third *Prudential* factors, Class Counsel is not aware of other classes or other claimants asserting related securities fraud claims. With respect to the fourth *Prudential* factor, Class Members were afforded the opportunity to opt out of the Class and, so far, only one has chosen to do so. With respect to the fifth and sixth *Prudential* factors, Class Counsel's request for attorneys' fees is reasonable as set forth below in Section II.E. and in the accompanying Fee Brief, and the Plan of Allocation, which will govern the allocation of the Net Settlement Fund, is fair and reasonable as set forth below in Section III.

D. The Remaining Rule 23(e)(2) Factors Support Final Approval

In evaluating the Settlement, Rule 23 instructs courts to also consider: (i) the effectiveness of the proposed method of distributing the relief provided to the class, including the method of processing class member claims; (ii) the terms of any proposed award of attorney's fees, including the timing of payment; (iii) any other agreement made in connection with the proposed settlement; and (iv) whether class members are treated equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv) & (e)(2)(D). These factors also support final approval.

First, the proposed method of distribution and claims processing ensures equitable treatment of Class Members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii) & (e)(2)(D). The Claims Administrator, Kurtzman Carson Consultants LLC ("KCC") will review and process all Claims received, provide Claimants with an opportunity to cure any deficiencies or request judicial review of the denial of their Claims, if applicable, and will ultimately mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund, as calculated under the Plan. *See infra* Section III; ¶¶ 177-85. Importantly, none of the Settlement proceeds will revert to Defendants. *See* Stip., ¶ 14.

Second, the relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees, including the timing of any such Court-approved payments. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). As discussed in the Fee Brief, the 25% fee request, to be paid upon the Court's approval, is reasonable in light of counsel's efforts over the past three plus years, the recovery obtained, and the risks in the litigation.[10] Additionally, the 25% fee request is fully supported by Third Circuit case law. *See Wilmington Tr.*, 2018 WL 6046452, at *9 (finding 28% to be a "typical fee percentage" in the Third Circuit); *In re Datatec Sys., Inc. Sec. Litig.*, 2007

[10] Class Counsel also seeks payment from the Settlement Fund of Plaintiff's Counsel's Litigation Expenses in the total amount of $2,387,545.01, which amount *includes* a request for reimbursement to Class Representative in the amount of $13,737.50. ¶ 185.

WL 4225828, at *8 (D.N.J. Nov. 28, 2007) (providing that fees of 25% to 33 1/3% are typical in similar cases). Further, the approval of attorneys' fees is entirely separate from approval of the Settlement, and neither Class Representative nor Class Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to fees. Stip., ¶ 16.[11]

Lastly, as previously disclosed, the only agreement the Parties entered into in addition to the Term Sheet and the Stipulation was a confidential Supplemental Agreement regarding requests for exclusion. *See* Stip., ¶ 37; *see also* Fed. R. Civ. P. 23(e)(2)(C)(iv).[12] The Supplemental Agreement provides Defendants with the option to terminate the Settlement in the event Class Members who timely and validly request exclusion from the Class meet certain conditions. Stip., ¶ 37. This type of agreement is standard in securities class actions and has no negative impact on the fairness of the Settlement. *See, e.g.*, *Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *11 (N.D. Cal. Sept. 4. 2018) ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").

For the reasons set forth above and in the Nirmul Declaration, the Settlement is fair, reasonable, and adequate when evaluated under any standard, or set of factors and, therefore, warrants the Court's final approval.

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[11] Pursuant to the Stipulation, attorneys' fees will be paid upon issuance of such an award. Stip., ¶ 17. Such provisions in class action settlements, sometimes referred to as "quick-pay" provisions, "have generally been approved by other federal courts." *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020) (finding objection to "quick-pay provision" "border[ed] on frivolous" as there was "no reason to buck" the trend of other federal courts approving such provisions).

[12] As is typical practice, the full terms of the Supplemental Agreement are not made public to avoid incentivizing the formation of a group of opt-outs for the sole purpose of triggering the opt-out threshold and attempting to extract an individual settlement. *See, e.g.*, *Thomas v. Magnachip Semiconductor Corp.*, 2017 WL 4750628, at *5 (N.D. Cal. Oct. 20, 2017) ("[t]here are compelling reasons to keep this information confidential in order to prevent third parties from utilizing it for the improper purpose of obstructing the settlement and obtaining higher payouts").

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

Approval 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 Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2021 WL 358611, at *3 (D.N.J. Feb. 1, 2021). Further, an allocation formula recommended by experienced and competent class counsel "need only have a reasonable and rational basis." *PAR Pharm.*, 2013 WL 3930091, at *8. Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *see also 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 [eligible] stock").

Here, the Plan (set forth in Appendix A to the Notice) was developed by Class Counsel in consultation with Class Representative's damages expert, Dr. Nye, and his team at Stanford Consulting Group, Inc. ¶ 179. The Plan is designed to equitably distribute the Net Settlement Fund to Class Members who timely submit valid Claims demonstrating they suffered economic losses as a result of Defendants' alleged violations of the federal securities laws set forth in the Amended Complaint, as opposed to economic losses caused by unrelated market or industry factors. *Id*.

The Plan is based upon the estimated amount of alleged artificial inflation in the per share price of AAP common stock over the course of the Class Period. ¶ 179. To have a loss, a Claimant must have purchased/acquired their AAP stock during the period that the stock was allegedly artificially inflated (i.e., after market close on November 14, 2016 to before market open on August

15, 2017, inclusive)[13] and held it through at least one of the alleged corrective disclosures that removed artificial inflation from AAP's stock price (May 24, 2017 and August 15, 2017). ¶ 180. Further, a Claimant's loss will depend on what date(s) the Claimant purchased/acquired their AAP stock during the Class Period, and whether such shares were sold and if so, when and at what price, taking into account the PSLRA's statutory limitation on recoverable damages. *Id*. Authorized Claimants will recover their proportional "pro rata" amount of the Net Settlement Fund based on their calculated losses. *See Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 105 (D.N.J. 2018) ("[P]ro rata distributions are consistently upheld . . . ."). Comparable plans of allocation are routinely approved by Courts in this Circuit. *See, e.g.*, *Viropharma*, 2016 WL 312108, at *15.

The Plan was fully disclosed in the Notice and, to date, no objections to the Plan have been received. ¶ 183. Accordingly, Class Representative and Class Counsel believe the Plan is fair, reasonable, and adequate and should be approved. Fed. R. Civ. P. 23(e)(2)(C)(ii) & (e)(2)(D).

IV. NOTICE SATISFIED RULE 23, DUE PROCESS, AND THE PSLRA

Class Representative has provided the Class with adequate notice of the Settlement. Here, notice satisfied both: (i) Rule 23, as it was "the best notice . . . practicable under the circumstances" and directed "in a reasonable manner to all class members who would be bound by the" Settlement, Fed. R. Civ. P. 23(c)(2)(B) & (e)(1)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); and (ii) due process, as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present

[13] Because the earliest alleged materially false and misleading statements occurred *after* market close on November 14, 2016, the alleged artificial inflation in AAP common stock begins the next trading day on November 15, 2016. Accordingly, there is no loss for shares purchased on November 14, 2016. Likewise, because the last alleged corrective disclosure that removed the alleged artificial inflation in AAP common stock occurred *prior* to market open on August 15, 2017, the alleged artificial inflation in AAP common stock ends the prior trading day on August 14, 2017. Accordingly, there is no loss for shares purchased on or after August 15, 2017.

their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) ("Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class."). Collectively, the notices also provide all information specifically required by Rule 23 and the PSLRA. *See* ECF No. 354 at 19; Ex. 2-A.

In accordance with the Preliminary Approval Order, KCC has mailed a total of 92,267 Postcard Notices and 323 Notice Packets to potential Class Members and Nominees through May 6, 2022. *See* Cavallo Decl., ¶ 8. In addition, KCC caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over *PR Newswire* on February 9, 2022, and established a website, www.AAPSecuritiesLitigation.com, to provide information about the Settlement as well as access to downloadable copies of the Notice and Claim Form and other Settlement-related documents. *Id*., ¶¶ 9, 11. Defendants also issued notice pursuant to CAFA. D.I. 357.

In sum, the notice campaign utilized here provides sufficient information for Class Members to make informed decisions regarding the Settlement, fairly apprises them of their rights with respect to the Settlement, represents the best notice practicable under the circumstances, and complies with the Court's Preliminary Approval Order, Rule 23, the PSLRA, and due process. Comparable notice programs are routinely approved by Courts in this Circuit.[14]

V. CONCLUSION

For the reasons herein and in the Nirmul Declaration, Class Representative respectfully requests that the Court grant final approval of the Settlement and approve the Plan of Allocation.

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[14] *See, e.g.*, *In re Horsehead Holding Corp. Sec. Litig.*, 2021 WL 2309689, at *2 (D. Del. June 4, 2021) (approving similar notice program); *SEB Inv. Mgmt. AB v. Endo Int'l PLC, et al.*, No. 2:17-CV-3711-TJS, slip. op. (D.I. 96), ¶ 6 (E.D. Pa. Dec. 13, 2019) (same).

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Respectfully submitted,

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