IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE HORSEHEAD HOLDING CORP. SECURITIES LITIGATION	Civil. Action No. 16-292-LPS-CJB Consolidated CLASS ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR (I) FINAL APPROVAL OF SETTLEMENT AND (II) PLAN OF ALLOCATION

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Lead Plaintiffs Raymond Cook and Paul Dyson/Dyson Capital Management ("Lead Plaintiffs") and additional plaintiff Ross O. Swimmer (with Lead Plaintiffs, "Plaintiffs") respectfully submit this memorandum in support of their Motion for Final Approval of (a) the settlement of this action for a cash payment of $14.75 million (the "Settlement") pursuant to the parties' Stipulation and Agreement of Settlement, dated January 5, 2021 (the "Stipulation"); and (b) the plan of allocation of the Settlement proceeds (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

After five years of hard-fought litigation, Plaintiffs present the Court with the Settlement. This settlement is more than fair, reasonable, and adequate, which is the standard against which it is to be measured. It is exceptional.

As detailed below and in the accompanying Declaration of Gregory B. Linkh ("Linkh Decl."), which further details the procedural history and discovery conducted in this action, Plaintiffs were well-informed of the strength and weaknesses of both their case and Defendants' at the time of settlement. Over the course of four and one-half years of litigation Plaintiffs: (i) researched and prepared a comprehensive 74 page Consolidated Class Action Complaint, [ECF No. 45], which was based on a review of thousands of pages of Horsehead Holding Corp. ("Horsehead") SEC filings and thousands of pages of filings and hearing transcripts from Horsehead's bankruptcy, plus interviews of witnesses by Plaintiffs' Counsel and private investigators; (ii) successfully opposed Defendants' Motion to Dismiss and objections to Judge Burke's Report and Recommendation to deny that motion; (iii) engaged in comprehensive written and document discovery, including the review of half a million pages of documents; (iv) took or

[1] All capitalized terms that are not defined in this memorandum shall have the meanings ascribed to them in the Stipulation, ECF No. 185-1, which has also been posted on the case's settlement website at https://horseheadlitigation.com/wp-content/uploads/2021/02/Stipulation-and-Agreement-of-Settlement.pdf

attended over 30 depositions of Parties and third parties, at which over 400 exhibits were introduced; (v) successfully petitioned the Court to issue a request for judicial assistance and pursued an action for issuance of Letters Rogatory with respect to three Spanish-resident witnesses, before a court in Madrid, Spain; and (vi) fully briefed a motion for class certification and an associated *Daubert* motion.

Though this litigation has substantially advanced, with fact discovery completed and the class certification motion fully briefed, absent settlement Plaintiffs would have faced numerous further challenges by defendants James M. Hensler and Robert D. Scherich ("Defendants") that would have lasted at least another year, if not two or more. While Plaintiffs believe that their claims are meritorious, they recognize the delay, risk, and uncertainty of continued litigation. For example, while Plaintiffs believe that the Court would likely have granted their motion for class certification (which was pending at the time of Settlement), they recognize Defendants' vigorous opposition, including a *Daubert* challenge to Plaintiffs' expert economist. The battles on causation and damages detailed at class certification would undoubtedly recur at later stages, including summary judgment, trial, post-trial proceedings, and appeals. Although victorious so far, Plaintiffs' ultimate victory was not guaranteed.

The Settlement has the full support of the Plaintiffs, who are a sophisticated, institutional investor, a former partner in a law firm, and a military/security specialist, who each suffered substantial losses at issue and were involved throughout the litigation, including submitting to depositions and participating in two mediations.

In light of the above, and the legal considerations discussed below, Plaintiffs and their counsel respectfully submit that the Settlement is fair, reasonable, and adequate, satisfies the standards of Rule 23, and provides a significant recovery for the Class. Accordingly, Plaintiffs

respectfully request that the Court grant final approval of the Settlement, approve the Plan of Allocation as set forth in the mailed Settlement Notice and described herein, and finally certify the Settlement Class.

ARGUMENT

POINT I

LEAD PLAINTIFFS HAVE PROVIDED NOTICE TO THE CLASS IN COMPLIANCE WITH RULE 23 AND DUE PROCESS

Rule 23(e) governs notice requirements for class action settlements, requiring "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). In addition, Rule 23(c)(2)(B) requires members of a certified class to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

Here, the Court-approved distribution of the Postcard Notice, the Summary Notice, and the Long-Form Notice (collectively, the "Notices") complies with Rule 23.[2] The Notices apprise Settlement Class Members of the nature of the Litigation, the definition of the Settlement Class, the claims and issues in the Litigation, and the claims that will be released in the Settlement. The Long Form Notice, which was made available on a dedicated case website, www.horseheadlitigation.com, also: (i) advises that a Settlement Class Member may enter an appearance through counsel if desired; (ii) describes the binding effect of a judgment on Settlement Class Members under Rule 23(c)(3); (iii) states the procedures and deadline for Settlement Class Members to exclude themselves from the Settlement Class and for objection to the proposed

[2] The Court's Preliminary Approval Order found that the form and content of the Notices, as well as the methods for notifying the Settlement Class, "meet the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure and Section 21D(a)(7) of the Exchange Act, 15 U.S.C. § 78u-4(a)(7), as amended by the Private Securities Litigation Reform Act of 1995; constitutes the best notice practicable under the circumstances; and, shall constitute due and sufficient notice to all persons and entities entitled thereto." Preliminary Approval Order, ¶ 13.

Settlement, the proposed Plan of Allocation, and the requested attorneys' fees and expenses; (iv) states the procedures and deadline for submitting a Proof of Claim and Release form to recover from the Settlement; and (v) provides the date, time, and location of the Settlement Hearing.

In addition, the Long Form Notice satisfies the PSLRA's separate disclosure requirements (15 U.S.C. §78u-4(a)(7)) by stating: (i) the amount of the Settlement determined in the aggregate and on an average per-share basis; (ii) that the Settling Parties do not agree on the average amount of damages per share that would be recoverable in the event Plaintiffs prevailed at trial, and stating the issue(s) on which the Settling Parties disagree; (iii) that Lead Counsel intends to make an application for an award of attorneys' fees and expenses, including the amount of the requested fees and expenses determined on an average per-share basis; (iv) contact information for Lead Counsel; and (v) the reasons the Settling Parties are proposing the Settlement. The contents of the Notices therefore satisfy all applicable requirements.

Pursuant to the Preliminary Approval Order, the Claims Administrator, Strategic Claims Services ("SCS"), commenced mailing the Notice and Proof of Claim and Release form ("Notice Package") on February 16, 2021. *See* accompanying Declaration of Josephine Bravata at ¶ 5 (attached as Exhibit 1 to the Linkh Declaration). On February 23, 2021, SCS published the Summary Notice over GLOBE WIRE. *Id.* at ¶ 12. Additionally, on February 12, 2021, SCS posted copies of the Notice, Proof of Claim and Release, Stipulation, and Preliminary Approval Order on www.horseheadlitigation.com. *Id.* at ¶ 13.

This combination of (1) individual Postcard Notice by first class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by (2) Long Form Notice available on a website, as well as (3) summary notice transmitted over a newswire, is typical of notice plans in securities class actions and constituted "the best notice . . . practicable under the

circumstances." Fed. R. Civ. P. 23(c)(2)(B). Courts routinely find that a combination of a mailed postcard directing class members to a more detailed online notice is sufficient to satisfy due process requirements. *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 183 n.3 (S.D.N.Y. 2014) (citing cases). Accordingly, the Notices satisfy all applicable requirements.

POINT II

THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Applicable Standards Under Rule 23(e), *Girsh*, and the Third Circuit's Fairness Presumption

Settlement of class action litigation has long been favored in this Circuit. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010) (noting that the "strong presumption in favor of voluntary settlement agreements" is "especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation'") (quoting *In re Gen. Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)).

Fed. R. Civ. P. 23(e)(2) identifies the factors to be considered at final approval:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees including timing of payment; and

> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

These factors are considered alongside the Third Circuit's *Girsh* factors, which partially overlap:[3]

> (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.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975).[4]

Furthermore, the Third Circuit has held that there is a "presumption of fairness" for the Settlement if certain of the factors are met, namely: "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are

[3] The *Girsh* factors "'are a guide and the absence of one or more does not automatically render the settlement unfair'." *In re Schering-Plough/Merck Merger Litig.*, No. 09-CV-1099, 2010 WL 1257722, at *5 (D.N.J. Mar. 26, 2010) (quoting *In re Am. Family Enterprises*, 256 B.R. 377, 418 (D.N.J. 2000)).

[4] The Third Circuit also advises courts to consider, where applicable, the additional factors set forth in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998). These additional factors are applicable to mass tort cases and are inapposite here.

experienced in similar litigation; and (4) only a small fraction of the class objected." *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). For the reasons discussed below, a presumption of fairness applies and each relevant factor is met.

B. Class Representatives And Class Counsel Have Adequately Represented

Rule 23(e)(2)'s first factor considers the adequacy of representation provided to the Settlement Class. This factor also ties to the third *Girsh* factor, which focuses on the stage of the proceedings and the amount of discovery completed. *Girsh*, 521 F.2d at 157. Courts in this circuit generally consider two components of adequacy: "(1) the qualifications, experience, and general abilities of the plaintiffs' lawyers to conduct the litigation and (2) whether the interests of the lead plaintiffs are sufficiently aligned with the interests of the absentees." *Schuler v. Medicines Co.,* No. 14-1149 (CCC), 2016 WL 3457218, at *4 (D.N.J. June 24, 2016).

Here, after receiving competing lead plaintiff motions, Magistrate Judge Burke issued a Report and Recommendation appointing Lead Plaintiffs and appointing Lead Counsel Glancy Prongay & Murray LLP ("GPM") to represent the Class. The Court adopted Judge Burke's Report in full, over objection. Thereafter, Plaintiff Ross Swimmer was included as a proposed class representative in the Consolidated Amended Complaint to ensure that purchasers of notes were adequately represented. *See In re New Jersey Tax Sales Certificates Antitrust Litig*., No. 12-1893 (MAS)(TJB), 2016 WL 5844319, at *5 (D.N.J. Oct. 3, 2016) (holding adequacy met where plaintiffs represented interests for both types of claims alleged arising from the same allegations).

Like the other Class Members, all Plaintiffs sought damages under the federal securities laws for losses suffered by their purchases of Horsehead securities during the Class Period at prices that were allegedly inflated by Defendants' false and misleading statements. Because Plaintiffs are highly incentivized to pursue the same claims for the same damages as the Class, and have

retained highly-competent counsel, they adequately represent the Settlement Class. *See, e.g.*, *In re Schering-Plough Corp./ENHANCE Sec. Litig*., No. 8-397 (DMC)(JAD), 2012 WL 4482032, at *6 (D.N.J. Sept. 25, 2012) (holding adequacy met where lead plaintiff and the class both "claim that they purchased [the] securities during the Class Period and have been injured by the allegedly wrongful course of conduct at issue").

Exemplifying their adequacy, Plaintiffs and Plaintiffs' Counsel have diligently prosecuted this case, including:

- briefing the lead plaintiff motion and responding to objections to Magistrate Judge Burke's Report and Recommendation appointing Lead Plaintiffs and Lead Counsel;
- preparing a Consolidated Amended Complaint, which relied upon both an exhaustive analysis of SEC filings, bankruptcy filings and transcripts, as well as information provided by multiple confidential witnesses;
- Successfully opposing Defendants' motion to dismiss, and responding to Defendants' objections to Magistrate Judge Burke's Report and Recommendation denying Defendants' motion to dismiss;
- exchanging initial disclosures;
- subpoenaing several dozen third parties;
- preparing and responding to multiple sets of written discovery;
- reviewing well over half a million pages of documents that were produced by the Parties and third parties;
- taking or attending over 30 depositions of Parties and third parties, at which hundreds of exhibits were introduced;
- defending Plaintiffs' depositions;

- pursuing an action for issuance of Letters Rogatory on three witnesses domiciled in Spain and associated with Tecnicas Reunidas, an engineering firm retained by Horsehead;
- briefing class certification, including opening and reply memoranda in support;
- coordinating the preparation of an expert report by Dr. Adam Werner;
- opposing Defendants' motion to strike portions of Dr. Werner's expert testimony;
- preparing multiple mediation briefs, and engaging in two separate mediation sessions with Robert Meyer, Esq., a seasoned mediator of securities class actions;
- preparing the Stipulation and Agreement of Settlement and exhibits, Plan of Allocation, and motion for preliminary approval; and
- coordinating the administration of the Settlement with SCS.

Linkh Decl. ¶ 11-51.

As detailed above, Lead Plaintiff and Lead Counsel have adequately represented the Class under Rule 23(e)(2)(A), and, in satisfaction of the third *Girsh* factor, completed sufficient litigation and discovery to have "'an adequate appreciation of the merits of the case.'" *See Warfarin*, 391 F.3d at 537; *In re Lucent Techs., Inc., Sec. Litig.,* 307 F. Supp. 2d 633, 644 (D.N.J. 2004) (approving settlement where plaintiffs had conducted a thorough investigation, analyzed three million pages of documents, and retained relevant experts).

"[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.'" *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); *In re Viropharma Inc. Sec. Litig*., No. 12-2714, 2016 WL 312108, at *11 (E.D. Pa. Jan. 25, 2016) (same). Lead Counsel has decades of experience litigating securities class actions. *See* Linkh Decl. Ex. 8 (including GPM's résumé). The "qualifications, experience, and general abilities" of Lead Counsel should be beyond question.

C. Fed. R. Civ. P. 23(e)(2)(B): The Settlement Was Negotiated At Arm's-Length

The Settlement is the product of arm's-length negotiations between well-informed and experienced counsel, under the auspices of a respected mediator. The parties only agreed to the settlement after completing fact discovery and engaging in some expert discovery, as detailed above. *See Schuler,* 2016 WL 3457218, at *7 (noting that "Lead Counsel had ample information" where it conducted an extensive investigation and consulted with an expert). Accordingly, Lead Plaintiffs had a fulsome basis for assessing the strengths and weaknesses of the Settlement Class's claims and Defendants' defenses before entering into the Settlement. The Settlement was reached following two mediation sessions, held four months apart with many depositions conducted in the interim. Only after the second session and the completion of fact discovery did the mediator provide a proposal that was acceptable to both parties. Linkh Decl. ¶ 48. The Settlement was undoubtedly reached at arm's-length and is not the product of collusion.

D. Fed. R. Civ. P. 23(e)(2)(C): The Settlement Provides Adequate Relief To The Settlement Class

The third factor of Rule 23(e)(2), which overlaps with several of the *Girsh* factors (*i.e*., factors 1, 4-9), instructs courts to consider the adequacy of the settlement relief in light of the costs, risks, and delay that trial and appeal would inevitably impose. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). "This factor is intended to capture 'the probable costs, in both time and money, of continued litigation.'" *Viropharma*, 2016 WL 312108, at *9 (citation omitted).

This factor also weighs in favor of final approval, as the relief is appropriate considering the costs, risks, and delay of continued litigation, which would require Plaintiffs to prove (and defeat Defendants' counter-arguments regarding) falsity, materiality, scienter, loss causation, and damages at summary judgment, trial, and probable appeal.

1. The Risks of Establishing Liability and Damages

"Securities fraud class actions are notably complex, lengthy, and expensive cases to litigate." *In re Par Pharm. Sec. Litig.,* No. 06-3226 (ES), 2013 WL 3930091, at *4 (D.N.J. July 29, 2013). This case was no exception. The evidence to support Defendants' liability turns on technical engineering and finance issues, including: (1) issues relating to Defendants' knowledge of design flaws in the bleed treatment area, (2) interpretation of the materiality of one of the components of the "borrowing base" of the Macquarie credit agreement, and (3) interpretation of Horsehead's internal projections of liquidity. Linkh Decl. ¶ 70.

Proof of causation and damages will likewise depend on dueling expert opinions, as previewed in the parties' respective expert reports in support of and in opposition to class certification. *See In re Datatec Sys., Inc. Sec. Litig.*, No. 4-525, 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) ("This securities fraud class action involves accounting and damages issues [] which would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on these issues would [be] lengthy and costly to the parties."). Having been already litigated for four-and-a-half years, this case would undoubtedly require at least a year or two of hard-fought litigation (including completion of class certification proceedings, proceedings in respect to Fed. R. Civ. P. 23(f), further costly expert discovery, and summary judgment) before trial, to say nothing of the inevitable post-verdict motions and appeals. Indeed, absent settlement, this case is unlikely to conclude for at least several more years. Linkh Decl. ¶ 77.

Ultimately, each side would rely on expert testimony to present their loss causation and damages evidence to a jury at trial. In the resulting "'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions'." *Schuler*, 2016 WL 3457218, at *7 (quoting *In re Warner Commc'ns. Sec. Litig.*, 618 F. Supp. 2d 744-45 (S.D.N.Y. 1985)); *see also Par Pharm.*, 2013 WL 3930091, at *6 (noting "the inherent unpredictability and risk associated with damage assessments in the securities fraud class-action context").

a. Risks As To Liability

The factual matter associated with Plaintiffs' claims is complex. The operative documents and testimony relate to zinc engineering and plant design processes, capital budgets, liquidity analyses, and breaches of a credit facility's borrowing base provisions. Thus, there is a substantial risk that a jury would not understand Plaintiffs' theories of the case and their intersection with economic and statistical analyses that undergird causation and damages issues, as further detailed in the next section. Thus, in complex cases such as this, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. Mercedes-Benz of North Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995).[5]

Plaintiffs' risks are compounded by the fact that they would be forced to tell their story to the jury largely through incriminating documents and adverse witnesses. Conversely, Defendants would be able to obtain testimony from Defendants themselves, as well as many other witnesses who still work at Horsehead's successor company, and these witnesses might try to provide non-

[5] The risks of a jury trial in complex litigation are known to lead counsel. In 2018, in *In re Korean Ramen Antitrust Litigation*, 13cv4115 (N.D. Cal.), several attorneys from GPM, including Greg Linkh, represented direct purchaser plaintiffs pursuing federal antitrust claims. For six weeks, the case was tried to verdict, but the jury found against the plaintiffs. Linkh Decl. ¶ 82.

incriminating explanations of the issues raised in these documents. Linkh Decl. ¶ 72. Thus, in this case, like many securities fraud cases "scienter is often the most difficult and controversial aspect." *Fishoff v. Coty Inc.*, No. 09-628, 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011).

b. Risks As To Damages

Plaintiffs also faced substantial risks to establishing causation and damages. Defendants have argued that Plaintiffs' damages theory is flawed. While Plaintiffs have identified seven corrective disclosure dates, Defendants argue that (1) the price drops for several of those dates were not statistically significant, and (2) some or all of the drops on those dates were due to confounding issues other than Defendants' alleged fraud. Linkh Decl. ¶ 74. Accordingly, there is a significant risk that, even if Plaintiffs prevailed on liability, it would be a pyrrhic victory, because the jury would find that the misstatements resulted in minimal or no damage to the Class.

c. Risks As To Class Certification

Defendants have continued to argue that the Horsehead notes should be excluded in their entirety from the Class because they were thinly-traded and there is a lack of data demonstrating causation. Accordingly, there is a chance that (1) the notes would be excluded from the Class, or (2) the jury would not award any damages to noteholders. Linkh Decl. ¶ 76. This risk is compounded by recent decisions, including in this district, that have certified classes of common stock holders, but declined to certify classes of noteholders. *See Lord Abbett Affiliated Fund v. Navient Corp*., No. 16-112, 2020 WL 5026553, at *6 (D. Del. Aug. 25, 2020) (finding that plaintiffs failed to carry their burden at class certification to show that the notes traded in an efficient market); *In re Global Brokerage, Inc. f/k/a FXCM Inc. Sec. Litig*, 17cv916 (RA)(BCM),

2021 WL 1160056, at *21 (S.D.N.Y. Mar. 18, 2021) (refusing to certify a class of noteholders because the noteholders failed to satisfy the numerosity requirement).

d. Limited Maximum Recovery Because of Horsehead's Bankruptcy

The financial recovery in this case is most remarkable when evaluated in the context of Horsehead's bankruptcy, which relates directly to *Girsh* factor number seven. *Girsh*, 521 F.2d at 157 (listing "the ability of the defendants to withstand a greater judgment" as a factor for final approval).

As to the seventh *Girsh* factor, there was a maximum of $51 million remaining under directors' and officers' liability insurance from five different insurers. This figure would have been materially depleted if the parties proceeded and Defendants continued to incur millions of dollars of further defense and expert costs. The $14.75 million settlement exhausted the primary policy and substantially depleted the first excess policy. Further protracted litigation costs would have reduced or eliminated the substantial recovery from the primary and first excess policies and created a risk of non-engagement by other excess carriers. The policies at issue are "wasting" policies, in which costs expended on defense are not available to satisfy judgments or settlements. As each layer is exhausted, the next layer must decide whether to engage in negotiations.

Similarly, Plaintiffs would have spent not only additional time on the case, but would also incur upwards of $1 million in additional expenses on engineering, financial, and damages experts through trial, thus increasing risk and delay without necessarily providing a corresponding benefit to the Class. Linkh Decl. ¶ 80. Accordingly, while there was a possibility for Defendants, through their insurance, to withstand a greater judgment, that analysis must be made in consideration of the significant risks of diminished or non-recovery discussed above.

e. The Settlement Falls Within The Range Of Reasonableness

In accordance with the eighth and ninth *Girsh* factors, the Settlement easily falls within "a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and . . . in light of all the attendant risks of litigation (the ninth factor)." *In re Merck & Co., Inc. Vytorin Erisa Litig.*, No. 8-285, 2010 WL 547613, at *9 (D.N.J. Feb. 9, 2010). In making a "range of reasonableness" assessment, courts do not need a precise estimate of damages. *See New Jersey Tax Sales,* 2016 WL 5844319, at *8 (granting final approval where "it is not possible to predict the precise value of damages that Plaintiffs would recover if successful").

Notwithstanding these significant risks, Lead Plaintiffs recovered nearly 29% ($51 million available insurance divided by $14.75 million settlement) of the Class's maximum likely recoverable damages. As courts in this Circuit have explained, "courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor)." *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *12. As a percentage of maximum provable damages, this recovery far outstrips the range of approved settlements. Maximum theoretical damages were estimated at $141 million, Linkh Decl. at ¶ 79, and the recovery represents over 10% of this. *See Nichols v. SmithKline Beecham Corp.,* No. CV 00-6222, 2005 WL 950616, at *20 (E.D. Pa. Apr. 22, 2005) (approving settlement between 9.3% and 13.9% of alleged damages as consistent with those approved in other complex class action cases); *see also* Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis*, at 19-20 (2018) (median recovery of damages in Third Circuit from 2008-2017 was 5%).[6]

[6] https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2017-Review-and-Analysis.pdf.

Here, while the theoretical damages could reach $141 million[7], Linkh Decl. ¶ 79, the costs and risks of ongoing litigation clearly favor the $14.75 million Settlement, particularly since "the best possible recovery" is for practical purposes limited to available insurance proceeds. *Lucent*, 307 F. Supp. 2d at 648 (D.N.J. 2004) (noting that although losses were likely "billions of dollars," the "best possible recovery here depended entirely on Lucent's ability to pay" and approving settlement because it "represents 'a very substantial portion of the likely recovery in this case'"). The Settlement is an excellent result, representing nearly 29% of the Class's maximum likely recoverable damages. Thus, the Settlement falls well within the "range of reasonableness" and meets the eighth and ninth *Girsh* factors.

E. Fed. R. Civ. P. 23(e)(2)(D): The Settlement Treats Settlement Class Members Equitably Relative To Each Other

The remaining factors of Rule 23(e)(2) include: (i) the effectiveness of the proposed method for distributing relief; (ii) the terms of the proposed attorneys' fees, including the timing of payment; (iii) the existence of any other "agreements"; and (iv) whether the settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv); Fed. R. Civ. P. 23(e)(2)(D). These factors are also readily met.

1. The Proposed Method for Distributing Relief Is Effective

As discussed above in Point I and in the Bravata Declaration, the method of the proposed notice and claims administration process is effective and provides Settlement Class Members with the necessary information to receive their *pro rata* share of the Settlement. The notice and claims processes are similar to that commonly used in securities class action settlements and provide for straightforward cash payments based on the trading information provided.

[7] Even using this number, the Settlement represents 10% of the damages.

2. Attorneys' Fees Are Reasonable

As set forth in the accompanying Fee Brief, Lead Counsel's request for an award of attorneys' fees was fully disclosed in the Notice, and is reasonable and appropriate. Since this is an all-cash settlement and the entire Settlement Fund will be distributed to Settlement Class Members until it is no longer economically feasible to do so, there is no risk that counsel will be paid but Settlement Class Members will not.

3. The Parties Have No Other Agreements

The Settling Parties have entered into no other agreements, such as a supplemental agreement concerning treatment of exclusions.

4. Settlement Class Members Are Treated Equitably and the Reaction of the Class Supports Final Approval

Settlement Class Members are treated equitably under the terms of the Stipulation, which provides that each Settlement Class Member that properly submits a valid Proof of Claim and Release form will receive a *pro rata* share of the monetary relief based on the terms of the Plan of Allocation.

Related to this Rule 23(e)(2)(D) factor, a final *Girsh* factor considers the reaction of the class in connection with the final approval of a class action settlement. *See Girsh*, 521 F.2d at 157. This factor "gauge[s] whether members of the class support the settlement." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016). While the deadline to submit claims or object has not yet passed, the reaction of the Settlement Class to the Settlement to date has been overwhelmingly positive, which supports the reasonableness of the Settlement and equitable treatment of Settlement Class Members.

Specifically, while 37,411 potential Class Members were notified either by mailed Postcard or emailed Summary Notice/link to Notice and Claim Form, and the Summary Notice has been published, no objections to final approval of the Settlement and no objections to the fee have been received to date. Bravata Decl. at ¶ 8. "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 . . . in favor of the Settlement." *In re Cendant Corp. Litig*., 264 F.3d 201, 235 (3d Cir. 2001); *see also Lucent*, 307 F. Supp. 2d at 643-44 (finding reaction of class favored final approval where court had received "about ten objections to the Settlement" and noting case where final approval was granted where "'only' 29 members of a class of 281 objected").

POINT III

THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The Long Form Notice contains the Plan of Allocation, detailing how the Settlement proceeds are to be divided among claiming Settlement Class Members. *See* Bravata Decl. at Ex. D, p. 10-14. "The '[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable, and adequate.'" *Merck/Vytorin*, 2010 WL 547613, at *6 (citing cases). In determining whether a plan of allocation is fair, reasonable, and adequate, "courts give great weight to the opinion of qualified counsel." *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-1432 (DMC)(JAD), 2012 WL 1964451, at *6 (D.N.J. May 31, 2012) (approving plan of allocation). Indeed, "[a]s numerous courts have held, a plan of allocation need not be perfect" and "'need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *Christine Asia Co., Ltd. v. Yun Ma*, No. 1:15-md-02631(CM)(SDA), 2019 WL 5257534, at *15 (S.D.N.Y. Oct. 16, 2019).

Here, the Plan of Allocation was drafted in consultation with SCS,[8] using analyses from Plaintiffs' damages expert's opinion to distribute fairly the available Settlement proceeds based on Lead Plaintiffs' theory of damages. *See* Linkh Decl. ¶ 91. For each class of securities, the Plan of Allocation distributes the Net Settlement Fund on a *pro rata* basis, as determined by the ratio that the Authorized Claimant's Recognized Claim bears to the total Recognized Claims of all Authorized Claimants. *Id.* at 94. Calculation of a Recognized Claim will depend upon several factors, including when the securities were purchased, acquired, or sold. *Id.* at 93.

The Plan of Allocation provides for losses based on drops during the corrective disclosures. For purposes of the Plan of Allocation, the common stock, as well as the AB3 convertible notes and AC1 notes, had a recognized loss calculated at 100% of the inflation during each of the corrective disclosures. The recognized loss for the other three notes, AE7, AF4, and AG2 notes, were calculated differently. The recognized losses for these three notes were discounted to 30% because of (1) anticipated difficulties in getting a class of these notes certified (discussed in Point II D, 1, c. above), and (2) low trading volume causing difficulties in calculating losses. *Id.* at 95.

Accordingly, this method of distributing settlement funds is fair, reasonable, and adequate, and has the support of Lead Counsel. *See also, e.g., Par Pharm.,* 2013 WL 3930091, at *8 (approving plan of allocation in securities class action settlement that was developed "with the assistance of [lead plaintiff's] damages expert" and provides for distribution "on a *pro rata* basis based on a formula tied to liability and damages"); *Viropharma*, 2016 WL 312108, at *15 (approving similar plan of allocation). The Plan of Allocation should be approved.

[8] SCS drafted a similar plan of allocation, consisting of both common stock and notes, in *In re DVI Securities Litigation*, No. 03-cv-5336 (E.D. Pa.) which was approved by the district court in the Eastern District of Pennsylvania, 2015 WL 12803587 (E.D. Pa. June 24, 2015).

POINT IV

THE SETTLEMENT CLASS SHOULD BE CERTIFIED

This Court preliminarily certified the Settlement Class in its Preliminary Order. There have been no objections to date to class certification. All the requirements for class certification have been met, as stated in Plaintiffs' Memorandum in Support of Preliminary Approval, and the Settlement Class should be finally certified.

CONCLUSION

For the foregoing reasons, the Court should approve the Settlement and Plan of Allocation and certify the settlement class.

Dated: April 30, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE HORSEHEAD HOLDING CORP. SECURITIES LITIGATION	Civil. Action No. 16-292-LPS-CJB Consolidated CLASS ACTION

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I caused true and accurate copies of the foregoing papers to be served upon all counsel of record via CM/ECF.

/s/ Sidney S. Liebesman
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