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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT DE VITO, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. LIQUID HOLDINGS GROUP, INC., BRIAN M. STORMS, KENNETH D. SHIFRIN, RICHARD SCHAEFFER, BRAIN FERDINAND, and SANDLER O'NEILL & PARTNERS, L.P., Defendants.	Civ. No.: 15-6969 (KM) (JBC) CLASS ACTION **BRIEF IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION**

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I. PRELIMINARY STATEMENT

The Settlement pending before this Court is an exceptional result for the Class. As explained by Lead Plaintiffs in support of their motion for preliminary approval, the Settlement recovery of $4,062,500 represents a 28% recovery of overall damages. This did not come easily. Lead Plaintiffs fought with Defendants for four years, filed a series of amended complaints, briefed extensive motions to dismiss, and engaged in a mediation and negotiation process that lasted nearly half a year. Fortunately, the time and effort invested in this case by Lead Plaintiffs and Co-Lead Counsel has paid off and, with the Court's approval, the matter can finally reach a resolution that is in Class Members' best interests.

In exchange for the payment of $4,062,500 in cash for the benefit of the Settlement Class, the Settlement will release all Released Defendant Parties from all Released Claims, as set forth in the Stipulation. The Settlement is not "claims-made" and all proceeds of the Settlement, after the deduction of Court-approved fees and costs, will be distributed to eligible claimants. Given the facts, the applicable law, and the risk and expense of continued litigation, Lead Plaintiffs and Co-Lead Counsel submit that the proposed Settlement is fair, reasonable and adequate, represents a very favorable result, and is in the best interests of the Settlement Class.

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

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

II. LEGAL STANDARD

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be approved by the Court upon a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001). "The strong judicial policy in favor of class action settlement[s] contemplates a circumscribed role for the district courts in settlement review and approval proceedings." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010). Although this Court has discretion in determining whether to approve the Settlement, it should be hesitant to substitute its judgment for that of the parties who negotiated the Settlement. *See Sutton v. Med. Serv. Ass'n of Pennsylvania*, No. 92-4787, 1994 WL 246166, at *5 (E.D. Pa. June 8, 1994). "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. . . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Walsh v. Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 642-43 (D.N.J. 1983), *aff'd*, 726 F.2d 956 (3d Cir. 1983).

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

in taking any litigation to completion" *Id*. (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

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

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

Id. at 157 (citation omitted); *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006).

The Third Circuit also advises courts to consider, where applicable, the additional factors set forth in *In re Prudential Insurance Company America. Sales Practice Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998):

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

Id. at 323.

III. ARGUMENT

A. The Proposed Settlement Warrants Final Approval Because It Is Fair, Reasonable, and Adequate.

1. Plaintiffs' Motion for Preliminary Approval Demonstrated the Fairness, Reasonableness, and Adequacy of the Settlement.

In moving for preliminary approval of the Settlement, Lead Plaintiffs complied with Rule 23(e)(1)(A) by making an evidentiary showing that the Court would "likely be able to . . . approve the [Settlement] under Rule 23(e)(2)" and "certify the class for purposes of judgment." FED. R. CIV. P. 23(e)(1)(B). Lead Plaintiffs submitted a declaration from Adam M. Apton, one of the lead attorneys on the matter, that outlined the litigation and described the basis for the Settlement. In pertinent part, the declaration demonstrated the complexity of the case and the work that was performed in order to arrive at the proposed Settlement. Declaration of Adam M. Apton, Dkt. No. 268-2, ¶¶4-13. As evidence of the adequacy of the Settlement, Lead Plaintiffs provided the Court with information concerning past settlements in similar cases. *Id*. at ¶¶16-19. Significantly, relative to median settlement values of approximately 20% of overall damages, the Settlement at hand represents an estimated 28% recovery of overall damages. *Id*. at ¶16.

2. Additional Evidence Supports Granting Final Approval of the Settlement.

Lead Plaintiffs' motion for preliminary approval addressed each of the factors identified in Rule 23(e)(2). As additional evidentiary support for the Settlement, Lead Plaintiffs have submitted with their motion for final approval a supplemental declaration from Co-Lead Counsel (the "Supp. Apton Decl."), declarations from each of the Lead Plaintiffs, and a declaration from the Claims Administrator. These declarations, as explained below, strengthen Lead Plaintiffs' basis for seeking final approval.

Lead Plaintiffs' declarations are submitted by Lead Plaintiffs Michael Sanders and Sidney R. Berger. *See* Declaration of Sanders, ¶1; Declaration of Berger, ¶1. As described, Lead Plaintiffs were involved in the litigation from start to finish and assisted in (a) conferring with counsel concerning the issues and strategy in the case; (b) reviewing court filings in the Action and periodic reports from counsel concerning the work being done; (d) conferring with counsel with respect to settlement and mediation efforts; and (e) researching and collecting relevant documents in their possession. Declaration of Sanders, ¶2; Declaration of Berger, ¶2. Lead Plaintiffs support the Settlement and request that it be finally approved. Declaration of Sanders, ¶3; Declaration of Berger, ¶3.

3. Analysis of the *Girsh* Factors Confirms That the Settlement Is Fair, Reasonable and Adequate and Should Be Approved.

To determine whether a proposed settlement in a class action is fair, reasonable, and adequate, district courts in this Circuit consider the nine factors identified in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). These factors strongly support approval of the Settlement.

a) The Complexity, Expense and Likely Duration of This Action.

The first *Girsh* factor looks to the "complexity, expense, and likely duration of the litigation." *Girsh*, 521 F.2d at 157. This factor addresses the "probable costs, in both time and money, of continued litigation." *Cendant*, 264 F.3d at 233 (citation and internal quotation marks omitted). A settlement is favored where "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004). Courts have noted that "[s]ecurities fraud class actions are notably complex, lengthy, and expensive cases to litigate." *In re Par Pharm. Sec.*

Litig., No. 06 Civ 3226, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013). This case is no exception, which supports approval of the Settlement. *See, e.g.*, *In re Suprema Specialties, Inc. Sec. Litig.*, No. 02 Civ. 168, 2008 WL 906254, at *4-5 (D.N.J. Mar. 31, 2008) (finding complexity of securities class action supports final approval).

Here, achieving a litigated verdict in this Action for Lead Plaintiffs and the Settlement Class would require substantial additional time and expense. Lead Plaintiffs reasonably expect that the continued prosecution of this Action through class certification, the completion of discovery, summary judgment, and trial would have involved substantial additional work and expense that would not have necessarily resulted in a recovery for the Settlement Class. Additionally, Liquid Holdings Group, Inc. ("Liquid" or the "Company") is currently in bankruptcy proceedings and, as a result, obtaining documents and discovery from it would be difficult if not impossible.

To obtain a judgment at trial, Lead Plaintiffs would have had to complete and prevail on a contested motion for class certification, and any subsequent interlocutory appeals if a favorable decision was issued by this Court. Lead Plaintiffs would have to complete both fact and expert discovery. After the close of discovery, Lead Plaintiffs would then need to brief the inevitable summary judgment motions, *Daubert* motions, and other pre-trial motions. Trial would be complex and expensive, requiring significant factual and expert testimony to prove the elements of Lead Plaintiffs' claims. Importantly, even a jury verdict would not guarantee the recovery of damages for the Settlement Class that this $4,062,500 cash recovery does. *See, e.g., In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07 Civ. 61542, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (overturning jury verdict in favor of plaintiff class and granting judgment for defendants as a matter of law). Defendants would likely appeal any favorable verdict, and the appellate process could last several years, with no assurance of a favorable outcome for the Settlement

Class. Thus, even after additional protracted and expensive efforts, the Settlement Class might obtain a result less than the Settlement recovery, or even nothing at all.

b) The Reaction of the Settlement Class.

This factor "requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable." *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. 08 Civ. 397, 2013 WL 5505744, at *2 (D.N.J. Oct. 1, 2013). It is well-established that the lack of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members. *See In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003) ("unanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement").

Lead Plaintiffs submit in support of this motion a declaration from Lead Plaintiffs' claims administrator, Strategic Claims Services. As described, over 8,300 Notice packets were disseminated to potential Settlement Class Members. Declaration of Sarah Evans ("Evans Decl."), ¶5. Strategic Claims Services also published notice of the Settlement in *Investor's Business Daily* and on *PR Newswire*. *Id*. at ¶8. Moreover, Strategic Claims Services also created a website providing information about the Settlement that has been available for public viewing since November 7, 2019. *Id*. at ¶6. Having fully complied with the Court's Notice directives (as ordered in the Preliminary Approval Order), and not receiving any objections, exclusions, or complaints with regard to the Settlement (*id*. at ¶¶10, 11), the Court can infer that Liquid shareholders support approval of the Settlement.

"The Third Circuit Court of Appeals has recognized the practical conclusion that it is generally appropriate to assume that 'silence constitutes tacit consent to the agreement'" in the class settlement context." *Harlan v. Transworld Sys., Inc.*, No. 13-5882, 2015 WL 505400, at *8 (E.D. Pa. Feb. 6, 2015) (citing *Bell Atl. Corp. v.*

Bolger, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993). "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 . . ." *Cendant*, 264 F.3d at 235; *see also Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) (objections by 29 members of a class comprised of 281 "strongly favors settlement"). The fact that there are no objections to the proposed Plan of Allocation provides strong support for the plan, as well. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) (finding that "the favorable reaction of the Class supports approval of the proposed Plan of Allocation").[1]

c) The 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 (citation omitted); *see also Warfarin*, 391 F.3d at 537; *Devlin v. Ferrandino & Son, Inc.*, No. 15-4976, 2016 WL 7178338, at *5 (E.D. Pa. Dec. 9, 2016).

Here, Lead Plaintiffs and Co-Lead Counsel had a sound basis for assessing the strengths and weaknesses of the claims and Defendants' defenses when they entered into the Settlement. Co-Lead Counsel extensively investigated the merits of the case prior to filing the Complaint and reviewed thousands of Liquid emails on behalf of Lead Plaintiffs.

As set forth in the Declaration of Adam M. Apton in Support of Lead Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement, dated

[1] If any objections to the Settlement or requests for exclusions are received subsequent to the filing of this brief, Lead Plaintiffs will respond in their reply papers, on January 3, 2020.

October 29, 2019 (Dkt. No. 268-2) (the "Apton Decl."), Co-Lead Plaintiffs' efforts also included, among others, interviewing former Liquid employees, analyzing Liquid SEC filings, and reviewing news articles and other publicly available information and statements issued by or concerning Liquid. Apton Decl. ¶¶3, 5. Lead Plaintiffs and Co-Lead Counsel further obtained information about the strengths of the claims and the defenses asserted by Defendants through briefing of the motions to dismiss. *Id.* at ¶¶7-10. The Parties also participated in a formal mediation session with Ms. Yoshida where the strengths and weaknesses of the Settlement Class' claims were fully vetted, including vis-à-vis the claims of Liquid's Trustee in its bankruptcy proceedings. *Id.* at ¶11. Prior to the mediation, Lead Plaintiffs and Defendants submitted to Ms. Yoshida and exchanged detailed mediation statements which further highlighted the factual and legal issues in dispute. *Id.* There is no question that Lead Plaintiffs and their counsel were in an excellent position to evaluate the strengths and weaknesses of the claims asserted and defenses raised by Defendants, as well as the substantial risks of continued litigation and the propriety of settlement. *Id*. at ¶13. Having sufficient information to properly evaluate the case, the Action was settled on terms highly favorable to the Settlement Class.

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

This policy will be well-served by approval of the Settlement of this complex securities class action that, absent resolution, would consume years of additional time of this Court and likely, years of additional appellate practice.

d) The Risks of Establishing Liability.

The fourth *Girsh* factor looks to "the risks of establishing liability." *Girsh*, 521 F.2d at 157. Under this factor, "[b]y evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *GMC Trucks*, 55 F.3d at 814. In considering this factor, the Court has recognized that "[a] trial on the merits always entails considerable risks," *In re Schering-Plough/ Merck Merger Litig*., No. 09-cv-1099, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010), and "no matter how confident one may of the outcome of the litigation, such confidence is often misplaced." *In re Auto. Refinishing Paint Antitrust Litig*., 617 F. Supp. 2d 336, 343 (E.D. Pa. 2007). Indeed, "[c]lass action securities litigation cases are notoriously difficult cases to prove." *In re Viropharma Inc. Sec. Litig*., No. CV 12-2714, 2016 WL 312108, at *11 (E.D. Pa. Jan. 25, 2016); *see also In re Ikon Office Sols., Inc., Sec. Litig*., 194 F.R.D. 166, 179 (E.D. Pa. 2000) (noting that "[l]arge class actions alleging securities fraud" are "inherently complex"). Although Lead Plaintiffs believe that their claims have merit, the risks of establishing liability in this Action were particularly significant and weigh heavily in favor of approval of the Settlement.

To establish their Section 10(b) claim, Lead Plaintiffs must prove that Defendants: (1) made a misstatement or an omission of a material fact; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) upon which the plaintiffs reasonably relied; and (5) that proximately caused their injuries. *Ikon*, 277 F.3d at 667. Here, Defendants had numerous scienter arguments that posed significant hurdles to proving that they acted with an intent to commit securities

fraud or with severe recklessness. Scienter is commonly regarded to be the most difficult element to prove in a securities fraud case. *See, e.g.*, *ViroPharma*, 2016 WL 312108, at *12 (approving settlement and nothing that "proving scienter is an uncertain and difficult necessity for plaintiffs"); *In re Datatec Sys., Inc. Sec. Litig*., No. 04-CV-525 (GEB), 2007 WL 4225828, at *4 (D.N.J. Nov. 28, 2007) (proving scienter in a securities class action is a "formidable task" that supported final approval of the settlement).

As an initial matter, Defendants would note that Lead Plaintiffs face "substantial hurdles" in proving their scienter allegations. Defendants would likely argue at summary judgment, and/or trial, that Liquid had "extensive disclosures" about the risks that investors faced, including that QuantX generated the majority of Liquid's revenue and that Von Allmen was affiliated with QuantX.

Furthermore, although Lead Plaintiffs believe that documentary and testimonial evidence would support their claims as the case continued, proving scienter is a complex, nuanced, and evidence-intensive process, which would have presented significant challenges. There was no certainty that the jury would have ultimately credited Lead Plaintiffs' theories of the case and evidence concerning scienter over Defendants' counter-evidence.

e) The Risks of Establishing Loss Causation and Damages.

Even if Lead Plaintiffs successfully established liability, they also confronted challenges in establishing loss causation and ultimately proving damages, including arguments that the alleged misstatements had only a minimally inflationary effect on Liquid's stock price during the Class Period. Lead Plaintiffs bear the burden of proving loss causation and damages for their claims under Section 10(b) – that is, they must show that the alleged false statements or omissions caused investors' losses. *See ViroPharma*, 2016 WL 312108, at *12. The Supreme Court's decision

in *Dura Pharms., Inc.. v. Broudo*, 544 U.S. 336 (2005), and the subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than it was in the past. *See*, *e.g.*, *In re Ocean Power Techs., Inc.*, No. 14 Civ. 3799, 2016 WL 6778218, at *19 (D.N.J. Nov. 15, 2016) ("proving loss causation would be a major risk faced by Plaintiff").

Here, Lead Plaintiffs' estimated maximum aggregate damages are approximately $14.5 million for the Class Period of July 26, 2013 through September 24, 2015, inclusive. *See* Apton Decl. at ¶16. Although Lead Plaintiffs would have been able to present a cogent and persuasive expert's view establishing damages, there is little doubt that Defendants would have been able to present a well-qualified expert who would opine against Lead Plaintiffs' findings.

Indeed, Defendants would likely argue that aggregate damages for the Class Period are much less than Lead Plaintiffs' estimate of $14.5 million. If Defendants' damages arguments were accepted by the Court at summary judgment or by a jury after trial, recoverable damages would be greatly reduced well below the $14.5 million level.

"Courts in this district have recognized that competing expert testimony presents significant risks to Lead Plaintiff's success in establishing damages." *Par Pharm.*, 2013 WL 3930091, at *6 (citing *Cendant*, 264 F.3d at 239 ("[E]stablishing damages at trial would lead to a 'battle of experts' with each side presenting its figures to the jury and with no guarantee whom the jury would believe."). Lead Plaintiffs could not be certain which expert's view would be credited by the jury and, accordingly, this "battle of the experts" created an additional level of litigation risk. *See ViroPharma*, 2016 WL 312108, at *13 ("The conflicting damage theories of defendants and plaintiffs would likely have resulted in an expensive battle of the experts and it is impossible to predict how a jury would have responded."); *Schuler v. Medicines Co*., No. CV 14-1149 (CCC), 2016 WL 3457218, at *7 (D.N.J. June

24, 2016) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.") (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744–45 (S.D.N.Y. 1985)).

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

f) The Risks of Maintaining Class Action Status Through Trial.

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

Moreover, even if the class was certified for other than settlement purposes, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential*, 148 F.3d at 321; *see also In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506–07 (W.D. Pa. 2003) ("[A]s in any class action, there remains some risk of decertification in the event the Propose[d] Settlement is not approved. While this may not be a

particularly weighty factor, on balance it somewhat favors approve of the proposed Settlement.").

g) The Ability of Defendants to Withstand a Greater Judgment.

This factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240; *Ikon*, 194 F.R.D. at 183 (defendants' inability to pay a greater sum would support approval of settlement). Even the "fact that [defendants] could afford to pay more does not mean that [they are] obligated to pay any more than what the [] class members are entitled to under the theories of liability that existed at the time the settlement was reached." *Warfarin*, 391 F.3d at 538; *see also Schering-Plough*, 2009 WL 5218066, at *4 ("pushing for more in the face of risks and delay would not be in the interests of the class"). Here, Liquid is currently bankrupt and no longer a party to the Action, and while Defendants arguably could afford to pay more in their individual capacities, that was not a certain outcome. Insurance policy proceeds had already been significantly wasted by the time of settlement and were likely to exhaust even further as discovery intensified. Supp. Apton Decl. at ¶¶5, 6.

h) The Size of the Settlement Fund in Light of the Range of Possible Recovery and the Risks of Litigation.

The final two *Girsh* factors, typically considered in tandem, ask "whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential*, 148 F.3d at 322. "In making this assessment, the Court compares the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, with the amount of the proposed settlement." *Par Pharm.*, 2013 WL 3930091, at *7 (citing *GMC Trucks*, 55 F.3d at 806).

The proposed $4,062,500 Settlement is reasonable in light of the risks of litigation (as discussed above) and the best possible recovery. The Settlement is well-above the 14.1% median recovery for cases with damages under $25 million in 2018 securities cases. Apton Decl. at ¶17. Lead Plaintiffs estimate maximum aggregate damages of approximately $14.5 million for the Settlement Class Period. Measured against that yardstick, the Settlement recovery represents approximately 28% of maximum damages – an excellent recovery in light of the procedural posture of the case, Liquid's bankruptcy, Defendants' countervailing legal arguments, and the risk that continued litigation might result in a vastly smaller recovery or no recovery at all. *Id*. at ¶18.

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

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

When all the *Girsh* factors are considered, the proposed Settlement is fair, reasonable, and adequate and provides a certain outcome in the best interests of the Settlement Class. Co-Lead Counsel, on behalf of Lead Plaintiffs, have weighed the strengths and weaknesses of the relevant claims, defenses, and likelihood of recovery and, after extensive arm's-length negotiations through a mediator, reached this Settlement. Under these circumstances, Lead Plaintiffs respectfully submit that the Settlement should be finally approved.

4. The *Prudential* Considerations Also Support the Settlement

In addition to the traditional *Girsh* factors, the Third Circuit also advises courts to address considerations set forth in *Prudential*, 148 F.3d at 323, where applicable. With respect to the first consideration, Lead Plaintiffs and Co-Lead Counsel had a well-developed understanding of the strengths and weaknesses of the case gained through an extensive investigation, the drafting of a thorough and detailed amended complaint, motion practice, the review of approximately 50,000 internal emails of Liquid, consultations with experts in the fields of damages and loss causation, and the mediation process. *See* Section II above.

The remaining additional factors all support approval of the Settlement because Settlement Class Members were afforded the right to opt out of the Settlement (the fourth factor) and, to date, none have chosen to do so; Co-Lead Counsel's request for attorneys' fees is reasonable as set forth in the accompanying Brief in Support of Lead Plaintiffs' Motion for: (i) an Award of Attorneys' Fees and Reimbursement of Litigation Expenses; and (ii) Incentive Awards to Plaintiffs (the fifth factor) (and, in any event, approval of the Settlement is separate from and not dependent on any outcome of the motion for attorneys' fees and reimbursement of litigation expenses); and the Plan of Allocation, which will govern the processing of claims and the allocation of settlement funds (the sixth factor), is fair and reasonable as set forth in Part III.B. below.

B. The Plan of Allocation Is Fair, Reasonable, and Adequate.

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Merck & Co. Vytorin ERISA Litig.*, No. 08-CV- 285, 2010 WL 547613, at *6 (D.N.J. Feb. 9, 2010) (citing *Ikon*, 194 F.R.D. at 184). "In evaluating a plan of allocation, the opinion of qualified counsel is entitled to significant respect. The proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis." *Boyd v. Coventry Health Care Inc.*, No. DKC09-2661, 2014 WL 359567 (D. Md. Jan. 31, 2014).

Here, the proposed Plan of Allocation, which was developed by Co-Lead Counsel in consultation with Lead Plaintiffs' consulting damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who submit valid Claim Forms. Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of Liquid publicly traded common stock during the Settlement Class Period (July 26, 2013 through September 24, 2015, inclusive) that is listed in the Claim Form and for which adequate documentation is provided. *See* Stipulation, Exhibit A-1 at ¶¶52-66 (Dkt. No. 267). The calculation of Recognized Loss Amounts is generally based on the amount of the decline in Liquid's common stock price following the release of negative information about the Company related to the alleged fraud. *Id*. at ¶58. The sum of the Recognized Loss Amounts for all of a claimant's purchases of Liquid common stock during the Settlement Class Period is the claimant's "Recognized Claim" and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. *Id*. at ¶62. *See, e.g., In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001)

(deeming plan of allocation "even handed" where "claimants are to be reimbursed on a *pro rata* basis for their recognized losses based largely on when they bought and sold their shares of General Instrument stock"); *Ocean Power*, 2016 WL 6778218, at *23 ("*pro rata* distributions are consistently upheld, and there is no requirement that a plan of allocation 'differentiat[e] within a class based on the strength or weakness of the theories of recovery'") (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011)).

Co-Lead Counsel submit that the Plan of Allocation fairly and rationally allocates the proceeds of the Net Settlement Fund among Settlement Class Members based on the losses they suffered as a result of the conduct alleged in the Complaint. Moreover, to date, there have been no objections to the proposed Plan of Allocation.[3] Accordingly, for all of the reasons set forth herein and in the Joint Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

C. Notice to the Settlement Class Satisfies the Requirements of Rule 23, Due Process, and the PSLRA.

Notice to the Settlement Class of the proposed Settlement satisfied Rule 23's requirement of "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); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974).

In accordance with the Court's Preliminary Approval Order, the Claims Administrator completed mailing copies of the Notice Packet to potential Settlement Class Members and their nominees on November 15, 2019. Over 8,300 Notice Packets have been mailed to date. *See* Evans Decl. at ¶5. The Notice advised potential Settlement Class Members of, among other things: (i) their right to exclude

[3] If any objections to the Plan of Allocation are received subsequent to the filing of this brief, Lead Plaintiffs will respond in their reply papers due January 3, 2020.

themselves from the Settlement Class; (ii) their right to object to any aspect of the Settlement, the Plan of Allocation, or the attorneys' fee and expense request; and (iii) the method for submitting a Claim Form in order to be eligible to receive a payment from the proceeds of the Settlement. In addition, the Summary Notice was published in *Investor's Business Daily* on November 25, 2019 and transmitted over *PR Newswire* on November 25, 2019, and copies of the Notice, Claim Form, Stipulation, Preliminary Approval Order, and Complaint have been posted to the website established for the Action, www.liquidholdingssecuritiessettlement.com. *Id*. at ¶¶6, 8.

Notice programs such as this have been approved in a multitude of class action settlements. *See, e.g., In re Veritas Software Corp. Sec. Litig.*, 396 Fed. Appx. 815, 816 (3d Cir. 2010) (describing notice combining mail to known class members and publication in *Investor's Business Daily* and over newswire); *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause."). The Notice program satisfied Rule 23(e)(1)'s requirement that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings" (*Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 114 (2d Cir. 2005)), and it was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

D. Certification of the Settlement Class Remains Warranted

In presenting the proposed Settlement to the Court for preliminary approval, Lead Plaintiffs requested, for purposes of the Settlement only, that the Court certify the Settlement Class under Rules 23(a) and (b)(3). In Preliminary Approval Order, this Court certified the Settlement Class. *See* Dkt. No. 270 at ¶¶2-4. Nothing has

changed to alter the propriety of the Court's certification, and no Settlement Class Member has objected to class certification. For all the reasons stated in Lead Plaintiffs' Brief In Support of Lead Plaintiffs' Unopposed Motion for (I) Preliminary Approval of Settlement, (II) Certification of the Settlement Class, and (III) Approval of Notice to the Settlement Class (Dkt. No. 268-1, at 15-17), which is incorporated herein by reference, and in the Court's Preliminary Approval Order, Lead Plaintiffs request that the Court reaffirm its determinations in the Preliminary Approval Order and finally certify the Settlement Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and (b)(3), appoint Lead Plaintiffs Michael Sanders and Sidney R. Berger as Settlement Class Representatives, and appoint Lead Plaintiffs' counsel Levi & Korinsky, LLP and Cohen Milstein Sellers & Toll PLLC as Settlement Class Counsel.

IV. CONCLUSION

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

Dated: December 6, 2019

Respectfully submitted,

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