

LEO SHUMACHER, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

OSMOTICA PHARMACEUTICALS PLC, et  
al.,

Defendants.

JEFFREY TELLO and JASON GELLATI,  
Individually and on Behalf of All Others  
Similarly Situated,

Plaintiffs,

vs.

OSMOTICA PHARMACEUTICALS PLC,  
BRIAN MARKISON, ANDREW EINHORN,  
DAVID BURGSTAHLER, SRIRAM  
VENKATARAMAN, CARLOS SIELECKI,  
JUAN VERGEZ, JEFFERIES LLC,  
BARCLAYS CAPITAL INC., RBC CAPITAL  
MARKETS, LLC, and WELLS FARGO  
SECURITIES, LLC,

Defendants.

: SUPERIOR COURT OF NEW JERSEY  
: LAW DIVISION: SOMERSET COUNTY

: DOCKET NO. SOM-L-000540-19  
: **(Consolidated)**

: CIVIL ACTION

: SUPERIOR COURT OF NEW JERSEY  
: LAW DIVISION: SOMERSET COUNTY

: DOCKET NO. SOM-L-617-19

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ORDER PRELIMINARILY APPROVING SETTLEMENT  
AND PROVIDING FOR NOTICE

WHEREAS, on May 14, 2021, the Parties to the above-entitled action (the “Action”) entered into a Stipulation of Settlement (the “Stipulation”), which is subject to review by this Court and which, together with the exhibits thereto, sets forth the terms and conditions for the Settlement and dismissal of the claims alleged in the Action; and the Court having read and considered the Stipulation and the accompanying documents; and the Parties to the Stipulation having consented to the entry of this Notice Order; and all capitalized terms used herein having the meanings defined in the Stipulation;

NOW, THEREFORE, IT IS HEREBY ORDERED, this 11th day of June, 2021, that:

1. The Court preliminarily finds that:

(a) the Settlement resulted from informed, extensive arm’s-length negotiations, including mediation among Plaintiffs and Defendants under the direction of a very experienced mediator, Jed Melnick, Esq.; and

(b) the Settlement is sufficiently fair, reasonable, and adequate to warrant providing notice of the Settlement to the Settlement Class.

2. For purposes of the Settlement only, and preliminarily, for purposes of this Order, the Action shall proceed as a class action, pursuant to Rule 4:32-1(a) and (b)(3) of the New Jersey Rules of Court, on behalf of a settlement class (the “Settlement Class”) consisting of all Persons who acquired Osmotica common stock pursuant and/or traceable to the Registration Statement or IPO. Excluded from the Settlement Class are Defendants, the officers and directors of Osmotica and the Underwriter Defendants (at all relevant times), members of Defendants’ immediate families, Defendants’ legal representatives, heirs, successors or assigns, and any entity in which any Defendant has a majority ownership interest. Also excluded from the Settlement Class are those Persons who would otherwise be Settlement Class Members but who timely and validly exclude themselves therefrom in accordance with this Order.

3. The Court finds that for the purposes of this Settlement only, and preliminarily for purposes of this Order, the prerequisites for a class action under New Jersey Court Rules 4.32-1(a) and (b)(3) have been satisfied in that: (a) the members of the Settlement Class are so numerous that joinder of all Settlement Class Members in the Action is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the Plaintiffs are typical of the claims of the Settlement Class; (d) the Plaintiffs and Plaintiffs' Counsel have represented, and will fairly and adequately represent, the interests of the Settlement Class; (e) the questions of law and fact common to the members of the Settlement Class predominate over any questions affecting only individual members of the Settlement Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. For purposes of the Settlement only, and preliminarily, for purposes of this Order, Plaintiffs are hereby certified as the Settlement Class Representatives, and Robbins Geller Rudman & Dowd LLP is appointed as Lead Counsel.

5. A Settlement Fairness Hearing is hereby scheduled to be held before the Court at the Somerset County Courthouse, 20 North Bridge Street, Somerville, NJ 08876, on a date and time to be scheduled by the civil division, for the following purposes:

(a) to determine whether the proposed Settlement is fair, reasonable, and adequate, and should be approved by the Court;

(b) to determine whether the Judgment as provided under the Stipulation should be entered;

(c) to determine whether the proposed Plan of Allocation for the distribution of the Net Settlement Fund should be approved by the Court as fair, reasonable and adequate;

(d) to determine whether to grant final certification of a Settlement Class for purposes of the Settlement;

- (e) to consider Plaintiffs' Counsel's application for an award of attorneys' fees and expenses;
- (f) to consider Plaintiffs' requests for awards for their efforts in prosecuting this Action on behalf of the Settlement Class;
- (g) to consider any objections or opt outs received by the Court in accordance with this Order; and
- (h) to rule upon such other matters as the Court may deem appropriate.

6. The Court reserves the right to approve the Settlement with or without modification and with or without further notice to the Settlement Class and may adjourn the Settlement Fairness Hearing without further notice to the Settlement Class.<sup>1</sup> The Court reserves the right to enter the Judgment approving the Stipulation regardless of whether the Court has approved the Plan of Allocation, Plaintiffs' Counsel's request for an award of attorneys' fees and expenses and Plaintiffs' requests for awards for their representation of the Settlement Class.

7. The Court approves the form, substance and requirements of the Notice of Pendency and Proposed Settlement of Class Action (the "Notice"), the Proof of Claim and Release (the "Proof of Claim"), and the Summary Notice of Proposed Settlement of Class Action (the "Summary Notice"), annexed hereto as Exhibits 1, 2 and 3, respectively.

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<sup>1</sup> In light of the outbreak of the Coronavirus (COVID-19), the Court may decide to conduct the Settlement Fairness Hearing by video or telephone conference, or otherwise allow Settlement Class Members to appear at the hearing by telephone without further notice to the Settlement Class. No further notice of such decision will be provided to the Settlement Class. In order to determine whether the date and time of the Settlement Fairness Hearing have changed, or whether Settlement Class Members must or may participate by phone or video, it is important that Settlement Class Members monitor the Settlement website, [www.osmoticasecuritiessettlement.com](http://www.osmoticasecuritiessettlement.com), before making any plans to attend the Settlement Fairness Hearing. Any updates will be posted to the Settlement website.

8. The Court approves the appointment of Gilardi & Co. LLC as the Claims Administrator to supervise and administer the notice procedure in connection with the proposed Settlement as well as the processing of Proofs of Claim as more fully set forth below.

9. The Claims Administrator shall cause the Notice and the Proof of Claim, substantially in the forms annexed hereto, to be mailed, by first class mail, postage prepaid, within twenty-one (21) calendar days of this Notice Order, to all Settlement Class Members who can be identified with reasonable effort (the "Notice Date"). Within ten (10) business days of this Notice Order, Osmotica shall provide or cause to be provided to the Claims Administrator, at no cost, reasonably available record shareholder lists as appropriate for providing notice to the Settlement Class. The Claims Administrator shall use reasonable efforts to give notice to nominee purchasers such as brokerage firms and other Persons who acquired Osmotica common stock pursuant and/or traceable to the Registration Statement or IPO as record owners but not as beneficial owners. Such nominee purchasers are directed, within fourteen (14) business days of their receipt of the Notice, to either forward copies of the Notice and Proof of Claim to their beneficial owners or to provide the Claims Administrator with lists of the names and addresses of the beneficial owners, and the Claims Administrator is ordered to send the Notice and Proof of Claim promptly to such identified beneficial owners. Nominee purchasers who elect to send the Notice and Proof of Claim to their beneficial owners shall send a statement to the Claims Administrator confirming that the mailing was made as directed. Additional copies of the Notice shall be made available to any record holder requesting such for the purpose of distribution to beneficial owners, and such record holders shall be reimbursed from the Settlement Fund, upon receipt by the Claims Administrator of proper documentation, for the reasonable expense of sending the Notice and Proof of Claim to beneficial owners.

10. The Claims Administrator shall cause the Summary Notice to be published once in *The Wall Street Journal* and once over a national newswire service, within ten (10) calendar days after the mailing of the Notice.

11. Lead Counsel shall, at least seven (7) calendar days before the Settlement Fairness Hearing, file with the Court and serve on the Parties proof of mailing of the Notice and Proof of Claim and proof of publication of the Summary Notice.

12. The form and content of the Notice and the Summary Notice, and the method set forth herein of notifying the Settlement Class of the Settlement and its terms and conditions, meet the requirements of New Jersey law, due process, and all other applicable laws and constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all Persons entitled thereto and reasonably calculated under the circumstances to describe the terms and effect of the Settlement and to apprise the Settlement Class Members of their right to object to the proposed Settlement and to exclude themselves from the Settlement Class. No Settlement Class Member will be relieved from the terms and conditions of the Settlement, including the releases provided pursuant thereto, based upon the contention or proof that such Settlement Class Member failed to receive actual or adequate notice.

13. In order to be entitled to participate in the Net Settlement Fund, in the event the Settlement is consummated in accordance with its terms set forth in the Stipulation, each Settlement Class Member shall take the following actions and be subject to the following conditions:

(a) Within ninety (90) calendar days after such time as set by the Court for the Claims Administrator to mail the Notice to the Settlement Class, each Person claiming to be an Authorized Claimant shall be required to submit to the Claims Administrator a completed Proof of Claim, substantially in a form contained in Exhibit 2 attached hereto and as approved by the

Court, signed under penalty of perjury and supported by such documents as are specified in the Proof of Claim and as are reasonably available to the Authorized Claimant.

(b) Except as otherwise ordered by the Court, all Settlement Class Members who fail to timely submit a Proof of Claim within such period, or such other period as may be ordered by the Court, shall be forever barred from receiving any payments pursuant to the Stipulation and the Settlement set forth therein, but will in all other respects be subject to and bound by the provisions of the Stipulation, the releases contained therein, and the Final Judgment. Notwithstanding the foregoing, Lead Counsel may, in its discretion, accept for processing late submitted claims so long as the distribution of the Net Settlement Fund to Authorized Claimants is not materially delayed. In connection with processing the Proofs of Claim, no discovery shall be allowed on the merits of the Action or the Settlement. No Person shall have any claim against Plaintiffs, Plaintiffs' Counsel, Claims Administrator, any other Person designated by Plaintiffs' Counsel, or any of the Released Parties by reason of the decision to exercise such discretion whether to accept late-submitted claims.

(c) As part of the Proof of Claim, each Settlement Class Member shall submit to the jurisdiction of the Court with respect to the claim submitted, and shall (subject to effectuation of the Settlement) release all Released Claims as provided in the Stipulation.

14. Settlement Class Members shall be bound by all determinations and judgments in this Action, whether favorable or unfavorable, unless they request exclusion from the Settlement Class in a timely and proper manner, as hereinafter provided. A Settlement Class Member wishing to make such request shall, no later than sixty (60) calendar days after the Notice Date, mail a request for exclusion in written form by first class mail postmarked to the address designated in the Notice. Such request for exclusion shall clearly indicate the name, address and telephone number of the Person seeking exclusion, that the sender requests to be excluded from the

Settlement Class, and must be signed by such Person. Such Persons requesting exclusion are also directed to state the date(s), price(s), and number of shares of Osmotica common stock they acquired pursuant and/or traceable to the Registration Statement or IPO. Group opt-outs, including “mass” or “class” opt outs, are not permitted. The request for exclusion shall not be effective unless it is made in writing within the time stated above, and the exclusion is accepted by the Court. Settlement Class Members requesting exclusion from the Settlement Class shall not be entitled to receive any payment out of the Net Settlement Fund as described in the Stipulation and Notice.

15. The Court will consider objections to the Settlement, the Plan of Allocation, the awards to Plaintiffs, and/or the award of attorneys’ fees and expenses. Any Person wanting to object must do so in writing and may also appear at the Settlement Fairness Hearing. Any such objections and any supporting papers, accompanied by proof of Settlement Class membership, shall be filed with the Superior Court of the State of New Jersey, Law Division: Somerset County, 20 North Bridge Street, Somerville, NJ 08876, and copies of all such papers served no later than sixty (60) calendar days after the Notice Date, to each of the following: Ellen Gusikoff Stewart, Robbins Geller Rudman & Dowd LLP, 655 West Broadway, Suite 1900, San Diego, CA 92101 on behalf of the Plaintiffs and the Settlement Class, and, Gregg L. Weiner, Ropes & Gray LLP, 1211 Avenue of the Americas, New York, NY 10036, on behalf of the Osmotica Defendants. Persons who intend to object in writing to the Settlement, the Plan of Allocation, the request for an award of attorneys’ fees and expenses and/or Plaintiffs’ request for payment for representing the Settlement Class and desire to present evidence at the Settlement Fairness Hearing must include in their written objections copies of any exhibits they intend to introduce into evidence at the Settlement Fairness Hearing. If an objector hires an attorney to represent him, her or it for the purposes of making an objection, the attorney must both effect service of a notice of appearance



on counsel listed above and file it with the Court by no later than sixty (60) calendar days after the Notice Date. A Settlement Class Member who files a written objection does not have to appear at the Settlement Fairness Hearing for the Court to consider his, her or its objection. If the Settlement Class Member intends to appear at the Settlement Fairness Hearing, the Settlement Class Member shall identify any witnesses the Settlement Class Member may seek to call and exhibits the Settlement Class Member intends to offer at the Settlement Fairness Hearing in the papers served as set forth above no later than sixty (60) calendar days after the Notice Date. Any member of the Settlement Class who does not make his, her, or its objection in the manner provided in this Notice shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the Settlement set forth in the Stipulation, to the Plan of Allocation, and to the award of attorneys' fees and expenses to Plaintiffs' Counsel and Plaintiffs' request for an award, unless otherwise ordered by the Court.

16. Any Person that submits a request for exclusion may thereafter submit to the Claims Administrator and to Plaintiffs' Counsel a written and signed revocation of that request for exclusion, provided that it is received no later than five (5) business days before the Settlement Fairness Hearing, in which event that Person will be included in the Settlement Class and which cannot be further revoked once submitted to the Claims Administrator and to Plaintiffs' Counsel.

17. All papers in support of the Settlement, the Plan of Allocation, and any application by Plaintiffs' Counsel for attorneys' fees and expenses and awards to Plaintiffs shall be filed fourteen (14) calendar days prior to the deadline in ¶15 for objections to be filed. All reply papers shall be filed and served at least seven (7) calendar days prior to the Settlement Fairness Hearing.

18. All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Stipulation and/or further order(s) of the Court.

19. The Claims Administrator, Defendants' Counsel, and Plaintiffs' Counsel shall promptly furnish each other with copies of any and all objections that come into their possession.

20. Pending final determination of whether the Settlement should be approved, the Plaintiffs, all Settlement Class Members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute, commence, maintain or prosecute, and are hereby barred and enjoined from instituting, continuing, commencing, maintaining or prosecuting any action in any court or tribunal that asserts Released Claims against any of the Released Parties. Unless and until the Stipulation is terminated pursuant to its terms, all proceedings in the Action, other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement, are hereby stayed and suspended until further order of the Court.

21. All reasonable expenses incurred in identifying and notifying Settlement Class Members, as well as administering the Settlement Fund, shall be paid as set forth in the Stipulation and herein. In the event the Settlement is not approved by the Court, or any other event precludes the occurrence of the Effective Date, neither Plaintiffs nor any of their counsel shall have any obligation to repay any amounts actually and properly disbursed from the Settlement Fund, except as provided for in the Stipulation.

22. If any specified condition to the Settlement set forth in the Stipulation is not satisfied and Plaintiffs or Defendants elect to terminate the Settlement in accordance with the Stipulation, then, in any such event, the Stipulation, including any amendment(s) thereof, shall be null and void and of no further force or effect (except to the extent otherwise expressly provided in the Stipulation), without prejudice to any Party, and may not be introduced as evidence or referred to in this Action, or any action or proceeding by any Person for any purpose, and each Party shall be restored to his, her or its respective position as it existed on December 15, 2020.

23. Neither the Stipulation nor the terms of the Settlement, nor any of the negotiations or proceedings connected with it, nor this Order, shall be construed as evidence of, or evidence supporting any presumption, concession, or admission by any Defendant of the truth of any allegations by Plaintiffs or any Settlement Class Member or the validity of any claim that has been or could have been or could in the future be asserted in the Action, or the deficiency of any defense that has been or could have been or could in the future be asserted in the Action or in any other litigation or proceeding.

24. The Court may adjourn or continue the Settlement Fairness Hearing without further written notice.

25. The Court retains exclusive jurisdiction over the Action to consider all further matters arising out of or connected with the Settlement. The Court may approve the Settlement, with such modifications as may be agreed to by the Parties, if appropriate, without further notice to the Settlement Class.

DATED: June 11, 2021

**/S/ THOMAS C. MILLER, A.J.S.C.**  
THE HONORABLE ■HOMAS C. MILLER, ■J.S.C.

**SEE ATTACHED STATEMENT OF REASONS**

Shumacher v. Osmotica Pharmaceuticals PLC  
Docket No.: SOM-L-540-19  
Tello and Gellati v. Osmotica Pharmaceuticals PLC, et al  
Docket No. SOM-L-617-19  
Motion for Preliminary Approval of Settlement and Class Notice  
UNOPPOSED  
Returnable: June 11, 2021

**I. PARTIES AND RELIEF SOUGHT**

Plaintiffs, Leo Shumacher, Jeffrey Tello and Jason Gellati, by and through their counsel as listed below, move for preliminary approval of settlement and class notice.

Plaintiff, Leo Shumacher, is represented by Peter S. Pearlman, Esq., Audra DePaolo, Esq. and Matthew F. Gately, Esq. of COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP; Samuel H. Rudman, Esq., Mary K. Blasy, Esq., Noam Mandel, Esq., Ellen Gusikoff Stewart, Esq., Brian J. Robbins, Esq., Stephen J. Oddo, Esq. and Jonathan D. Boback, Esq. of ROBBINS GELLER RUDMAN & DOWD LLP.

Plaintiffs, Jeffrey Tello and Jason Gellati, are represented by Corey D. Holzer, Esq. and Marshall P. Dees, Esq. of HOLZER & HOLZER, LLC.

**II. SUMMARY OF PLAINTIFFS' REQUEST**

Plaintiffs submit their motion for preliminary approval of the parties' Stipulation of Settlement dated May 14, 2021 (the "Stipulation").<sup>1</sup> The settlement resolves all issues in dispute in this litigation. The proposed settlement provides for the payment of \$5,250,000 to the Settlement Class as described in the Stipulation and this memorandum, a very favorable result under the circumstances.

Plaintiffs indicate that as all issues have been resolved, the parties request the Court enter an order (the "Preliminary Approval Order") submitted herewith, which will: (1) preliminarily approve the terms of the settlement as set forth in the Stipulation; (2) certify the Settlement Class for settlement purposes only; (3) certify Plaintiffs as Settlement Class Representatives and appoint Robbins Geller Rudman & Dowd LLP as Lead Counsel; (4) approve the form and method for providing notice of the settlement to the Settlement Class; and (5) schedule a hearing (the "Settlement Fairness Hearing") at which the Court will consider the request for final approval of (a) the settlement set forth in the Stipulation; (b) the proposed Plan of Allocation of settlement

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<sup>1</sup> All capitalized terms that are not defined herein have the same meanings as set forth in the Stipulation. Emphasis is added and internal citations are omitted throughout unless otherwise noted.

proceeds; and (c) Plaintiffs' Counsel's application for an award of attorneys' fees and expenses and Plaintiffs' application for incentive awards.

### III. PROCEDURAL BACKGROUND

This case arises under §§11 and 15 of the Securities Act of 1933 (the "Securities Act"). Plaintiffs allege that the Registration Statement issued in connection with Osmotica Pharmaceuticals plc's ("Osmotica" or the "Company") October 19, 2018 initial public offering ("IPO") contained materially false and misleading information concerning the alleged declining price of one of Osmotica's drugs; and the alleged overstatement of the value of the Company's goodwill.<sup>2</sup> The initial complaint was filed on April 26, 2019, and Plaintiffs' consolidated amended complaint was filed on July 22, 2019.

On September 3, 2019, Defendants filed a Motion to Dismiss the Action. Plaintiffs opposed the motion on November 5, 2019, and Defendants filed their reply on December 20, 2019. Oral argument on the motion to dismiss was heard on January 30, 2020, and on June 1, 2020, the Court (Judge Ciccone) denied the motion. Defendants moved for reconsideration of the Court's decision, which Plaintiffs opposed. Oral argument on the motion for reconsideration was heard on July 24, 2020, and on August 7, 2020, the Court (Judge O'Neill) denied the motion for reconsideration.

On September 11, 2019, Defendants filed a Motion to Stay Discovery during the pendency of the motion to dismiss. Plaintiffs opposed the motion on October 2, 2019, and Defendants filed a reply in support of their motion on October 15, 2019. Oral argument on the stay motion was heard on October 31, 2019, and on November 8, 2019, the Court denied the motion. On December 16, 2019, Defendants filed a motion seeking leave to appeal this denial to the Appellate Division. Plaintiffs opposed the motion on January 6, 2020, and on January 13, 2020, Defendants sought leave to file a reply to Plaintiffs' opposition. On January 28, 2020, the Appellate Division denied Defendants' motion for leave to appeal.

Throughout this litigation, Plaintiffs and their counsel conducted an extensive investigation regarding their claims for relief, including opposing Defendants' attempts to dismiss the case and stay discovery, preparing and negotiating a discovery plan, preparing and serving initial disclosures, and preparing and serving discovery requests. Plaintiffs also engaged in formal mediation with the Osmotica Defendants, and retained Jed Melnick, Esq., a nationally-recognized mediator. In connection with the mediation, each side provided to Mr. Melnick and exchanged with each other submissions setting forth their respective positions on the issues of liability and

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<sup>2</sup> Defendants deny all of Plaintiffs' allegations.

damages. On December 15, 2020, Plaintiffs and the Osmotica Defendants attended an all-day mediation with Mr. Melnick via video conference. At the end of the mediation, both sides reached an agreement in principle to resolve the litigation. As part of that agreement, Osmotica agreed to pay or cause to be paid \$5.25 million into a Settlement Fund to be distributed to the Settlement Class after payment of certain costs of notice and administration and payment of Plaintiffs' Counsel's fees and expenses, and awards to Plaintiffs in connection with their representation of the Settlement Class, subject to the terms and conditions embodied in the Stipulation.

#### **IV. TERMS OF THE SETTLEMENT**

The Settlement, the precise terms of which are set forth in the Stipulation, resolves the claims of the Settlement Class against Defendants. The Settlement Class and its counsel have diligently and thoroughly litigated the Action, and after extensive arm's-length negotiations, have reached an agreement to settle this litigation for \$5,250,000 in cash. Plaintiffs and Plaintiffs' Counsel have concluded, after a thorough investigation of the factual and legal issues in the litigation, including the factual and legal defenses raised by Defendants in their motion to dismiss and their motion for reconsideration and in their mediation materials, as well as the expense and risks of continued litigation, that the certain recovery obtained for the benefit of the Settlement Class is a very favorable result and is in the best interests of the Settlement Class.<sup>3</sup>

#### **V. DOES THE SETTLEMENT MEET THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL?**

##### *A. The Role of the Court in the Preliminary Approval of a Class Action Settlement*

Rule 4:32-2(e)(1)(A) requires court approval of "any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." This involves two stages: preliminary approval followed by notice to the class and then final approval after hearing. *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974); *Udeen v. Subaru of Am., Inc.*, 2019 U.S. Dist.

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<sup>3</sup> The Settlement Class is defined as: all Persons who acquired Osmotica common stock pursuant and/or traceable to the Registration Statement or IPO. Excluded from the Settlement Class are Defendants, the officers and directors of Osmotica and the Underwriter Defendants (at all relevant times), members of Defendants' immediate families, Defendants' legal representatives, heirs, successors or assigns, and any entity in which any Defendant has a majority ownership interest. Also excluded from the Settlement Class are those Persons who would otherwise be Settlement Class Members but who timely and validly exclude themselves therefrom in accordance with the Preliminary Approval Order.

LEXIS 172460, at \*5 (D.N.J. Oct. 4, 2019); *Shapiro v. Alliance MMA, Inc.*, 2018 U.S. Dist. LEXIS 108132, at \*4 (D.N.J. June 28, 2018).<sup>4</sup>

At this juncture, the parties request only that the Court preliminarily certify the Settlement Class for settlement purposes only and grant preliminary approval of the Stipulation so that notice may be sent to the Settlement Class. The Court will have before it more extensive pleadings submitted in support of the proposed settlement at the Settlement Fairness Hearing and then will be asked to make a determination as to whether the settlement is fair, reasonable, and adequate and should be finally approved. The determination of whether the proposed settlement is fair, reasonable, and adequate is made only after notice of the settlement has been given to the members of the Settlement Class and after they have been given an opportunity to voice their views of the settlement. *See* 5 James Wm. Moore, *Moore's Federal Practice* §23.83[1], at 23-336.2 to 23-339 (3d ed. 2002).

*B. Factors to Be Considered in Granting Preliminary Approval*

A number of factors should be considered in evaluating a settlement for purposes of preliminary approval. Such approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995); *Udeen*, 2019 U.S. Dist. LEXIS 172460, at \*6. No one factor should be determinative, but rather all factors should be examined. These criteria have been summarized as follows:

“In evaluating a settlement for preliminary approval, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute.” Instead, the court must determine whether “the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval. . . .” This analysis often focuses on whether the settlement is the product of “arms-length negotiations.”

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<sup>4</sup> New Jersey's class action rule is modeled after Fed. R. Civ. P. 23 and, as relevant to this application, remains so. Thus, New Jersey courts have borrowed repeatedly from federal decisions interpreting its federal analogue, and it is appropriate to do so here. *See, e.g., Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 103 (2007); *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 424 (1983); *Delgozzo v. Kenny*, 266 N.J. Super. 169, 185 (App. Div. 1993); *Morris Cnty. Fair Housing Council v. Boonton Tp.*, 197 N.J. Super. 359, 369 (Law Div. 1984), *aff'd*, 209 N.J. Super. 108 (App. Div. 1986).



*Curiale v. Lenox Group, Inc.*, 2008 U.S. Dist. LEXIS 92851, at \*10-\*11 (E.D. Pa. Nov. 14, 2008); *accord Shapiro*, 2018 U.S. Dist. LEXIS 108132, at \*5.

Here, the settlement meets all of these criteria. Moreover, preliminary examination of the criteria for final approval supports this conclusion.

First, there are no “deficiencies” in the settlement such as “unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys.” *Curiale*, 2008 U.S. Dist. LEXIS 92851, at \*11 (citing *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995)). There are no preferred segments among members of the Settlement Class. All members of the Settlement Class are treated the same, save for awards to the Plaintiffs for their service to the Settlement Class. Attorneys’ fees and expenses, as well as the awards to Plaintiffs, will be awarded by the Court, and the settlement is not contingent upon the Court’s adoption of any particular fee, expense or award. *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (quoting *Manual for Complex Litigation (Third)*, §30.41 (1995)).

That settlement of litigation is favored is a long standing and highly regarded principle of New Jersey jurisprudence. *Lahue v. Pio Costa*, 263 N.J. Super. 575 (App. Div. 1993); *Pascarella v. Bruck*, 190 N.J. Super. 118, 125 (App. Div. 1983). This is so not merely because of its benefit to an overburdened judiciary, but because of the acknowledgement that parties to a dispute are in the best position to determine how to resolve their disputes. This settlement is the result of arm’s-length negotiations conducted by an experienced mediator with sophisticated counsel for all parties. *See Alves v. Main*, 2012 U.S. Dist. LEXIS 171773, at \*74 (D.N.J. Dec. 4, 2012) (“The participation of an independent mediator in settlement negotiations ‘virtually [e]nsures that the negotiations were conducted at arm’s length and without collusion between the parties.’”), *aff’d*, 559 F. App.x 151 (3d Cir. 2014). This settlement was reached only after Plaintiffs’ Counsel diligently investigated the claims of the Settlement Class. Based upon Plaintiffs’ Counsel’s familiarity with the factual and legal issues of this litigation, Plaintiffs’ Counsel ultimately were able to negotiate an excellent result for the Settlement Class, representing more than 24% of Plaintiffs’ Counsel’s estimate of maximum recoverable damages taking into account the costs, delay, and risks of continued litigation.

Courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *Shapiro*, 2018 U.S. Dist. LEXIS 108132, at \*6-\*7. Here, Plaintiffs’ Counsel have extensive experience in complex, class action litigation and believe this settlement is fair, reasonable, and adequate in light of the circumstances of this litigation.



A review of the standards governing final approval supports the conclusion that there are no “grounds to doubt” the fairness of the settlement. The question of whether a proposed settlement is fair, reasonable, and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of “the terms of the compromise with the likely rewards of litigation.” *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)); *Chattin v. Cape May Greene, Inc.*, 216 N.J. Super. 618, 627 (App. Div. 1987). An evaluation of the costs and benefits of settlement also must be tempered by recognition that any compromise involves concessions on the part of all of the settling parties. Indeed, “the very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice v. Civ. Serv. Comm’n of City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982). Here, a settlement for \$5,250,000 in cash has been obtained for the Settlement Class in the face of a determined defense that, if successful, would have precluded any recovery at all.

The risk of establishing liability is another factor courts consider in determining the fairness of a settlement. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 235 (D.N.J. 2005). Defendants vehemently denied any and all liability, contending that the Registration Statement contained no material misrepresentations or omissions and that the Settlement Class suffered no damages. In short, the Settlement Class faced numerous obstacles in proving Defendants were liable and in establishing damages. There was no certainty, given Defendants’ vigorously asserted defenses, the Settlement Class would prevail on liability or, if it did, it would receive damages in the amount asserted. The proposed settlement eliminates these and many other risks of continued litigation.

“[T]he stage of the proceedings and the amount of discovery completed” is another factor which courts consider in determining the fairness of a settlement. *Girsh*, 521 F.2d at 157. Here, Plaintiffs’ Counsel conducted extensive investigation of the facts and circumstances, and litigated a number of substantive motions prior to the commencement of settlement discussions and the execution of the Stipulation.

## **VI. SHOULD THE COURT PRELIMINARILY CERTIFY THE PROPOSED SETTLEMENT CLASS FOR SETTLEMENT PURPOSES ?**

For settlement purposes only, the parties request that the Court preliminarily certify a class (the “Settlement Class”), subject to final Court approval at the Settlement Fairness Hearing, consisting of:

all Persons who acquired Osmotica common stock pursuant and/or traceable to the Registration Statement or IPO. Excluded from the Settlement Class are Defendants,

the officers and directors of Osmotica and the Underwriter Defendants (at all relevant times), members of Defendants' immediate families, Defendants' legal representatives, heirs, successors or assigns, and any entity in which any Defendant has a majority ownership interest. Also excluded from the Settlement Class are those Persons who would otherwise be Settlement Class Members but who timely and validly exclude themselves therefrom in accordance with the Preliminary Approval Order.

Certification of the Settlement Class for the purposes of the settlement will further both the interests of the Settlement Class Members and Defendants, but need not entail a dispositive determination by the Court. Although provisionally certifying a class for settlement purposes carries the "necessary implication that the action complies with [the rules]," courts have viewed the creation of provisional settlement classes as a "tentative assumption indulged in by the court to facilitate the amicable resolution of the litigation." *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979). In order to obtain final court approval, the requirements of Rule 4:32-1(a)-(b) must be met. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). In determining compliance with the applicable rules, the Court may take the settlement itself into account since there is no need for the Court to consider, for example, the manageability of trying the case. *See id.*

As will be shown conclusively at the Settlement Fairness Hearing, the Settlement Class clearly satisfies the requirements of Rule 4:32-1. Rule 4:32-1(a) provides that the general prerequisites to a class action are as follows:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Plaintiffs maintain that the proposed Settlement Class, for purposes of settlement, meets all four of these requirements:

(1) Joinder of all members of the Settlement Class is impracticable since over 7.49 million shares of Osmotica common stock were issued in the IPO, likely to hundreds, if not thousands, of Settlement Class Members.

(2) There are common questions of law and fact because the alleged misrepresentations in the Registration Statement affected each Settlement Class Member similarly.

(3) The claims asserted in the Action by Plaintiffs are typical of the claims of the other members of the Settlement Class since Plaintiffs acquired Osmotica common stock in the IPO.

(4) Because Plaintiffs acquired Osmotica common stock in the IPO, they have no conflict of interest with other similarly situated Settlement Class Members and are thus adequate representatives of the Settlement Class. Moreover, they have acted fairly and adequately protected the interests of the Settlement Class in the prosecution of the litigation.

In addition, the proposed Settlement Class also satisfies the requirements of Rule 4:32-1(b) which states, in relevant part, as follows:

Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk either of:

(A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief, with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.

## VII. REGARDING NOTICE

### A. *Is the Form of Notice Sufficient?*

To ensure due process to members of the Settlement Class, Rule 4:32-2(e)(1)(B) requires:

The court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

Rule 4:32-2(b)(2) requires the “best notice practicable under the circumstances, consistent with the due process of law.” Adequate notice is such notice as is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The notice must be adequate both as to its content and its manner of distribution. Here, the proposed notice complies with Rule 4:32-2(e)(1)(B) and due process. The substance of the proposed notice clearly communicates its purpose; the nature of the litigation; the Settlement Class which has been preliminarily certified by the Court for purposes of settlement; the Settlement Class’s claims and Defendants’ defenses; the nature of the Settlement; the attorneys’ fees sought; the date, time, and place of the Settlement Fairness Hearing; and the method by which to object or request exclusion. *See Builders League of S. Jersey, Inc. v. Gloucester Cnty. Utilities Auth.*, 386 N.J. Super. 462, 470 (App. Div. 2006) (approving of notice that provided potential objectors with “time and place of the hearing” as well as the opportunity to be heard).

*B. Is the Method of Notice Appropriate?*

While Rule 4:32-2(e)(1)(B) requires that “[t]he court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise,” the actual “mechanics of the notice process are left to the discretion of the court.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975). The notice required in a class action is the “best notice practicable under the circumstances, consistent with due process of law.” *Sulcov v. 2100 Linwood Owners, Inc.*, 303 N.J. Super. 13, 36 (App. Div. 1997).

Here, the proposed method of giving notice of the settlement is the best method practicable under the circumstances. The Stipulation requires that a copy of the Notice of Pendency and Proposed Settlement of Class Action (the “Notice”) and Proof of Claim and Release form (the “Proof of Claim”) be sent via first-class mail to all Settlement Class Members who can be identified with reasonable effort. Osmotica shall provide, or cause to be provided, the last known addresses of Settlement Class Members to the Claims Administrator. The Claims Administrator shall also use reasonable efforts to give notice to the nominee purchasers such as brokerage firms and other persons and entities who acquired Osmotica common stock pursuant and/or traceable to the Registration Statement or IPO as record owners but not beneficial owners. Such nominees are directed to either forward copies of the Notice and Proof of Claim form to their beneficial owners

or to provide the Claims Administrator with lists of the names and addresses of the beneficial owners, in which case the Claims Administrator will send the Notice and Proof of Claim form to such identified beneficial owners. *See* Preliminary Approval Order, ¶9. First-class mailing to the Settlement Class, though not mandatory (*Sulcov*, 303 N.J. Super. at 36), is the best method of notifying Settlement Class Members. *See Johnson v. GMAC Mortgage Group, Inc.*, 2006 U.S. Dist. LEXIS 74931, at \*12 (N.D. Iowa Oct. 13, 2006) (first class mail to class members’ last known addresses satisfies notice requirement); *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 356 (E.D.N.Y. 2006) (first class mail to each class member is sufficient when all class members are identifiable through reasonable efforts). Moreover, a summary form of notice will be published on one occasion in *The Wall Street Journal* and over a national newswire service. *See* Preliminary Approval Order, ¶10.

Clearly this is the best notice practicable and ensures due process to those persons and entities who will be bound by this settlement.

### VIII. REGARDING THE PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the settlement, the Court must set a final approval hearing date, dates for mailing of the Notice and publication of the Summary Notice, and deadlines for objecting to the Settlement, opting out of the Settlement Class, and filing papers in support of the Settlement. The parties propose the following schedule, to become effective upon the Court’s satisfaction that the standards for preliminary approval have been met and the Preliminary Approval Order has been entered:

Notice mailed	Within 21 days following entry of the Preliminary Approval Order (the “Notice Date”)
Summary Notice published	Once within 10 days following the Notice Date
Deadline for filing papers in support of the settlement, and request for an award of attorneys’ fees and expenses	14 days before the Objection Deadline
Deadline for objecting to the settlement, or request for an award of attorneys’ fees and expenses and for opting out of the Settlement Class	60 days after the Notice Date
Reply papers in support of the settlement and request for an award of attorneys’ fees and expenses	7 days before the Settlement Fairness Hearing

Settlement Fairness Hearing

At the Court's convenience, but at least 7 days after the date for reply papers in support of the settlement, and request for an award of attorneys' fees and expenses

Deadline for submitting Proof of Claim forms 90 days after the Notice Date

### **CONCLUSION**

For the reasons set forth above, the Court issues its preliminary approval of the proposed settlement. The Court will enter the Preliminary Approval Order.