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LEO SHUMACHER, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. OSMOTICA PHARMACEUTICALS PLC, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY DOCKET NO. SOM-L-000540-19 **(Consolidated)** CIVIL ACTION
JEFFREY TELLO and JASON GELLATI, Behalf of All Others Similarly Situated, Plaintiffs, vs. OSMOTICA PHARMACEUTICALS PLC, BRIAN MARKISON, ANDREW EINHORN, DAVID BURGSTAHLER, SRIRAM VENKTARAMAN, 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-617-19

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITIES

I. INTRODUCTION

Plaintiffs Leo Shumacher, Jeffrey Tello, and Jason Gellati (collectively, "Plaintiffs" and individually a "Plaintiff") respectfully submit this memorandum in support of their motion for final approval of the Settlement of the above-captioned class action and for approval of the proposed Plan of Allocation.[1] This Settlement completely resolves the disputes against Defendants arising out of Osmotica's October 2018 initial public offering (the "IPO"). Plaintiffs and their counsel ("Plaintiffs' Counsel") firmly believe that the Settlement, which provides for a substantial monetary recovery for Settlement Class Members (as defined herein), is fair and reasonable and recommend its approval. Plaintiffs also respectfully refer the Court to the Certified Statement of Noam Mandel in Support of: (1) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Expenses and Awards to Plaintiffs ("Mandel Cert."), submitted together with this memorandum.

II. BACKGROUND OF THE LITIGATION[2]

The initial complaint was filed on April 26, 2019, and a consolidated amended complaint (the "Amended Complaint") was filed on July 22, 2019. Plaintiffs allege claims against Defendants for violations of the Securities Act of 1933 (the "Securities Act") on behalf of all Persons who acquired Osmotica common stock pursuant and/or traceable to the Registration Statement and Prospectus for the IPO (the "Offering Documents").

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[1] Capitalized terms not otherwise defined herein shall have the meanings provided in the Stipulation of Settlement (the "Stipulation"), filed on May 18, 2021.

[2] The Mandel Cert. contains a more-detailed description of the history of the litigation, the efforts of Plaintiffs' Counsel and the settlement negotiations, and that discussion is respectfully incorporated herein.

Plaintiffs allege that Defendants violated §§11 and 15 of the Securities Act by reason of materially untrue statements or materially misleading omissions in the Offering Documents. Specifically, Plaintiffs allege that the Offering Documents included untrue material statements about, and failed to disclose material information regarding: (i) the declining pricing of Osmotica's most profitable drug, M-ER; and (ii) the overstatement in the value of the Company's goodwill and other intangible assets, which were written down and reduced by nearly $100 million shortly after the IPO. Mandel Cert., ¶16.

Defendants moved to dismiss the Amended Complaint on September 3, 2019, and Plaintiffs opposed the motion on November 5, 2019. Defendants filed their reply brief on December 20, 2019. The Court heard oral argument on January 30, 2020, and on June 1, 2020, the Court issued an order denying the motion in its entirety. Defendants moved for reconsideration of the Court's decision, and Plaintiffs filed an opposition brief. On August 7, 2020, the Court denied Defendants' motion for reconsideration.

Defendants moved to stay discovery during the pendency of the motion to dismiss. The Court denied the motion on November 8, 2019. On December 16, 2019, Defendants sought leave from the Appellate Division to appeal this denial. Plaintiffs filed their opposition to the requested relief on January 6, 2020, and on January 13, 2020, Defendants sought leave to file a reply brief. On January 28, 2020, the Appellate Division denied Defendants' motion for leave to appeal.

In order to attempt to resolve this matter in their respective interests and conserve judicial resources, Plaintiffs and Defendants agreed to explore an early resolution of the Action and engaged the services of Jed Melnick, Esq. of JAMS, a nationally-recognized mediator experienced in complex shareholder litigation. In advance of 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 damages. On December 15, 2020, the Parties attended an all-day mediation with Mr.

Melnick *via* video conference. At the end of the mediation, the Parties reached an agreement in principle to settle the Action, subject to the negotiation of a Stipulation of Settlement and approval by the Court.

Defendants agreed to pay $5.25 million into a Settlement Fund to be distributed to Settlement Class Members who submit timely and valid claim forms after payment of certain costs of notice and administration and payment of Plaintiffs' Counsel's fees and expenses, and the awards to Plaintiffs. That money has been deposited into an escrow account and it is currently earning interest for the benefit of the Settlement Class.

The Settlement, the precise terms of which are set forth in the Stipulation, resolves the claims of the Settlement Class against all 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, as well as the expense and risks of continued litigation, that the certain recovery obtained for the benefit of the Settlement Class (approximately 25% of Plaintiffs' estimate of maximum recoverable damages) is an excellent result and is in the best interests of the Settlement Class.[3]

On June 11, 2021, the Court entered an order granting preliminary approval of the settlement (the "Order"). The Order directed that the Notice of Pendency and Proposed Settlement

[3] 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 will be those Settlement Class Members who timely and validly exclude themselves therefrom in accordance with the instructions set forth in the Notice of Pendency and Proposed Settlement of Class Action, mailed to all Settlement Class Members.

of Class Action ("Notice") and Proof of Claim form be mailed in accordance with the procedures set forth in the Stipulation and the short form publication notice to be published in *The Wall Street Journal* and over a national newswire service. Submitted herewith is the Certification of Ross D. Murray of Gilardi & Co. LLC ("Murray Cert.") attesting to such mailing and publication.

The time within which to object to the Settlement expires on August 31, 2021, and although that date has not yet passed, to our knowledge, ***no*** objections to the Settlement have been received.[4] Thus, the members of the Settlement Class appear to overwhelmingly support the Settlement and all of its terms.

While Plaintiffs believe that the claims asserted in the Action have merit, Defendants maintain that there are meritorious defenses to those claims, and Plaintiffs believe that the Settlement provided herein substantially benefits the Settlement Class when weighed against the risk of continued litigation. Specifically, Defendants argued that the material declines in M-ER pricing occurred after the October 2018 IPO; that statements concerning the Company's goodwill are opinion statements, whose falsity requires a showing that such statements had no basis in fact or that the Defendants did not believe them; and that disclosures unrelated to M-ER or the Company's goodwill write-down caused the relevant March 2019 stock drop (*i.e.*, negative causation). Mandel Cert., ¶31. If Defendants had prevailed on any of these defenses, the Settlement Class could have received nothing. Also, and not surprisingly, Defendants argued that maximum damages were far less than Plaintiffs had estimated. If they were correct, and even if Plaintiffs had prevailed on the merits, the Settlement Class may have received far less than the $5.25 million Settlement Amount.

[4] Should any timely objections be received, counsel will address them in a reply brief, to be filed no later than November 2, 2021.

The parties have also weighed the expense that would be necessary to take this case through the discovery, trial and appellate phases against the likelihood of obtaining a better result in connection with any judgment after trial, and have determined, following arm's-length negotiations, including formal mediation, that the Settlement is fair, reasonable and adequate, and, further, that the Settlement falls within the parameters of settlements in similar actions given the benefits conferred on the Settlement Class.

Plaintiffs now respectfully request that the Court grant final approval of the proposed Settlement and find that it is fair and reasonable. Likewise, the proposed Plan of Allocation is a fair and equitable method of distributing the Net Settlement Fund to Settlement Class Members, is consistent with the calculation of damages under Section 11(e) of the Securities Act, and should be approved as fair, reasonable, and adequate. Finally, the Court should confirm its preliminary certification of the Settlement Class.

III. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

In New Jersey, there is a strong public policy favoring the settlement of litigation. *Strougo v. Ocean Shore Holding Co.*, 457 N.J. Super. 138, 157 (2017); *Herrera v. Twp. of S. Orange Vill.*, 270 N.J. Super. 417, 424 (App. Div. 1993). This policy promotes the interests of both the litigants and the court by saving the expense of a trial while simultaneously reducing the burden on judicial resources. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC*, 215 N.J. 242, 253-54 (2013). "[W]hen parties negotiate a settlement they have far greater control of their destiny than when a matter is submitted to a jury. Moreover, the time and expense that precedes the taking of such a risk can be staggering. This is especially true in complex commercial litigation." *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1300-01 (D.N.J. 1995).

The test for court approval of a settlement of a class action is whether the settlement is fair and reasonable to the members of the class. *Strougo*, 457 N.J. Super. at 157; *Chattin v. Cape May*

Greene, Inc., 216 N.J. Super. 618, 627 (App. Div. 1987); *Paterson v. Paterson Gen. Hosp.*, 104 N.J. Super. 472 (App. Div.), *aff'd*, 53 N.J. 421 (1969). In all respects here, R. 4:32 mirrors Rule 23 of the Federal Rules of Civil Procedure and thus, New Jersey courts rely on the well-established federal standards for approval of class action settlements.[5] *See, e.g.*, *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 424-25 (1983); *Morris Cnty.*, 197 N.J. Super. at 369. Therefore, courts in New Jersey evaluate the fairness of a settlement by considering the factors enumerated by the Third Circuit in *Girsh v. Jepson*, 521 F. 2d 153, 157 (3d Cir. 1975); *Strougo*, 457 N.J. Super. at 159.

As explained below, application of these factors invites the Court's approval of the Settlement.

A. The Settlement Should Be Approved Because the Parties Had Sufficient Information to Evaluate the Strengths and Weaknesses of Their Respective Cases

Consideration is given to the amount of information available to the parties to ensure they had sufficient data to make an informed decision about the adequacy of the proposed settlement in light of the strengths and weaknesses of their cases. *Strougo*, 457 N.J. Super. at 160. Here, Plaintiffs' Counsel conducted an extensive investigation of their claims, briefed motions to dismiss and for reconsideration, opposed a motion to stay discovery, and a motion for leave to appeal. Plaintiffs also reviewed documents produced by Defendants in advance of the mediation.

As a federal appellate court has reiterated "'in the context of class action settlements, "formal discovery is not a necessary ticket to the bargaining table" where the parties have sufficient information to make an informed decision about settlement.'" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239

[5] R. 4:32-2(e) requires the settlement of a class action to be approved by the court. *See Morris Cnty. Fair Hous. Council v. Boonton Twp.*, 197 N.J. Super. 359, 368-70 (Law Div. 1984), *aff'd*, 209 N.J. Super. 108 (App. Div. 1986).

(9th Cir. 1998)). Nevertheless, the arm's-length settlement negotiations in this matter, as well as the extensive investigation and briefing done, were sufficient to inform each side of the strengths and weaknesses of their respective cases. Thus, the parties had enough information to make an informed decision regarding the merits of the Settlement.

Moreover, the judgment of experienced counsel entering into a settlement is entitled to great weight. Plaintiffs' Counsel are well known for their experience and success in litigating complex class actions. Defense counsel are also highly regarded in the field of complex litigation. The fact that such qualified and well-informed counsel endorse the Settlement as being fair, reasonable and adequate "is entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985). Accordingly, this factor heavily favors this Court's approval of the Settlement.

This Settlement also enjoys a presumption of fairness because it is the product of arm's-length negotiations by experienced counsel. *See M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987). As noted above, and as set forth in more detail in the Mandel Cert., the Settlement was reached after extensive, arm's-length negotiations between sophisticated counsel and parties. As a result of these negotiations, the parties were ultimately able to reach agreement on the terms of the Settlement that the parties now present to the Court for approval.

B. The Settlement Should Be Approved Because It Provides a Meaningful Benefit to the Settlement Class

As a result of Plaintiffs' Counsel's diligent efforts on behalf of the Settlement Class, valuable benefits are being provided to Settlement Class Members in the form of a $5.25 million Settlement Fund. The Settlement Fund will be distributed to Settlement Class Members according to the Plan of Allocation, which Plaintiffs' Counsel believe is a fair and equitable formula for distributing the Net Settlement Fund. *See* §V hereof, and Mandel Cert., ¶¶49-51.

C. The Settlement Should Be Approved Because It Appropriately Balances the Likelihood of Success at Trial with the Benefit of an Immediate Recovery

The Court must also "survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 319 (3d Cir. 1998).

The risks of litigation in this case were substantial, particularly in light of the following factors that would have made it more difficult for Plaintiffs to prevail.

Specifically, although Plaintiffs argued their losses in Osmotica's stock were related to the revelations of the falsity of Defendants' material misstatements and omissions in the Offering Documents (Mandel Cert., ¶34), Defendants would attempt to demonstrate that M-ER pricing fell after the IPO because new competition emerged in the market, which in turn caused Osmotica customers to adjust contract prices for M-ER and resulted in price adjustments to product already distributed to customers. *Id.*, ¶32. Defendants would also attempt to show that the Offering Documents contained no materially false or misleading statements or omissions because: the challenged statements concerned historical fact; adequate risk disclosures were made; and they had no duty to disclose the alleged national decline in M-ER pricing. *Id.* Defendants would also attempt to demonstrate that the Company's goodwill was not impaired before or at the time of the October 2018 IPO, and that any impairment occurred in the fourth quarter of 2018, after the IPO. *Id.*

Defendants would also vigorously challenge Plaintiffs' ability to prove loss causation and damages, maintaining that the March 2019 disclosures that caused the stock drop were by and large unrelated to M-ER pricing, and instead primarily concerned disappointing results from a Phase III clinical trial of another product, and other news unrelated to M-ER pricing. *Id.*

Ultimately each side would rely on expert testimony to present their loss causation and damages estimates 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 v. Medicines Co.*, No. 14-1149 (CCC), 2016 U.S. Dist. LEXIS 82344, at *21-*22 (D.N.J. June 24, 2016). *See also Strougo*, 457 N.J. Super. at 162.

Prevailing upon these contested issues of liability and damages would subject the Settlement Class to considerable risk through class certification, summary judgment, trial and the inevitable appeals. Plaintiffs also faced the risk that Osmotica could not withstand a greater judgment after further litigation, when any insurance policy proceeds would likely have been depleted by defense costs. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 240-41 (3d Cir. 2001). The $5,250,000 Settlement, which represents approximately 25% of Plaintiffs' estimated damages (and many times more than Defendants' estimates), provides an immediate recovery that eliminates the risks of Litigation through such a costly, lengthy, and uncertain battle. *See Schuler*, 2016 U.S. Dist. LEXIS 82344, at *21 (finding that the "uncertainty of success at trial and the certain, immediate benefit provided by the Settlement . . . weighs in favor of approval").[6]

D. Reaction of the Settlement Class

"[T]he reaction of the class to the proffered settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 530 (E.D. Pa. 1990). In this regard, a small number of objections is convincing evidence of a proposed settlement's fairness and adequacy. *See, e.g., In re Gen. Pub. Utils. Sec.*

[6] A 25% recovery far exceeds the median recovery in Securities Act settlements. *See* Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements, 2020 Review and Analysis*, at 8, Fig. 7 (Cornerstone Research 2021) (median settlement as a percentage of simplified statutory damages in Securities Act cases between 2011-2020 with damages less than $50 million was 15.2%).

Litig., No. 79-1420, 1983 U.S. Dist. LEXIS 11641, at *22 (D.N.J. Nov. 16, 1983) ("The lack of objection from the members of the class is one of the most important reasons leading the court to the conclusion that the settlement should be approved.").

Here, in response to the extensive notice program approved by the Court, over 7,000 Notices were mailed to members of the Settlement Class and to banks, brokerages and other nominees, and a Summary Notice was published in *Investors' Business Daily* and transmitted over *Business Wire*, thereby providing broad notice of the Settlement to Settlement Class Members. Not a single objection to any aspect of the Settlement was filed by any Settlement Class Member, thus providing compelling evidence that the Settlement, in the eyes of those who directly benefit from it, is fair, reasonable and adequate.

IV. CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT IS PROPER

The Order provisionally certified the action as a class action on behalf of all Persons who acquired Osmotica common stock pursuant and/or traceable to the Registration Statement or IPO. The Court must now determine if the provisional certification should be made permanent. Plaintiffs submit that the Court should so rule. The benefits of the proposed Settlement can be realized only through certification of the Settlement Class. The United States Supreme Court has confirmed the viability of settlement classes. *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). *See also In re Lucent Techs. Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 639-40 (D.N.J. 2004) ("Class actions created for the purpose of settlement are well recognized under Rule 23 of the Federal Rules of Civil Procedure.").

Under R. 4:32-1(a), one or more members of a class may sue on behalf of all others similarly situated if (1) the class is so ***numerous*** that joinder of all others similarly situated is impracticable, (2) there are questions of law or fact ***common*** to the class, (3) claims of the

representative parties are ***typical*** of the claims of the class, and (4) the representative parties will fairly and ***adequately*** protect the interests of the class.[7]

As explained below, the Settlement Class satisfies each of these requirements.

A. An Ascertainable Class Exists and Is So Numerous that Joinder Is Impracticable

There are thousands of potential members of the Settlement Class. *See* Murray Cert., ¶11. Thus, it goes without saying that the Settlement Class meets the numerosity requirement. *See Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (While no minimum number is required, the Third Circuit has stated that numerosity is generally met where the moving party "demonstrates that the potential number of plaintiffs exceeds 40.").[8] *See also Strougo*, 457 N.J. Super. at 155 ("While the precise number of members in this case is presently unknown, it is clear that joinder of all members would be impracticable and therefore the numerosity requirement is met.").

B. Common Questions of Law and Fact Exist and Predominate

R. 4:32-1(a)(2) requires that there be "questions of law or fact common to the class." Citing the parallel federal rule, the Appellate Division has noted that a "'single common question is sufficient.'" *Delgozzo v. Kenny*, 266 N.J. Super. 169, 185 (App. Div. 1993) (quoting *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 429 (E.D. Pa. 1984), *aff'd in part and vacated in part sub nom. In re*

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[7] As previously stated, R. 4:32 is modeled after Rule 23 of the Federal Rules of Civil Procedure. *Cadillac*, 93 N.J. at 424-25. Therefore, federal court decisions that conform to New Jersey's policy of liberally certifying class actions can be helpful in interpreting the New Jersey class action rules.

[8] In federal shareholder class actions, it has been consistently held that plaintiffs need not establish an exact number of class members, but only show that the proposed class is sufficiently numerous. *Shamberg v. Ahlstrom*, 111 F.R.D. 689, 698 (D.N.J. 1986) (approving a class of plaintiffs estimated to number in the hundreds or thousands, based upon the securities' sale in an initial public offering and subsequent trading on a national market); *Vargas v. Calabrese*, 634 F. Supp. 910, 918 (D.N.J. 1986) ("It is not necessary . . . that plaintiffs know with certainty the size of the class they seek to have certified."); *Gunter v. Ridgewood Energy Corp.*, 164 F.R.D. 391, 395 (D.N.J. 1996) (Court declined to require precision with respect to the quantity of class members, stating: "Even if the reportedly 'thousands' of members of this putative class only amounted to 'hundreds,' this prong would still be easily met.").

Sch. Asbestos Litig., 789 F.2d 966 (3d Cir. 1986)). The commonality requirement is easily satisfied here because the following questions are common to all Settlement Class Members:

(a) whether Defendants violated the Securities Act;

(b) whether the Offering Documents misrepresented and/or omitted material information in violation of the Securities Act; and

(c) whether and to what extent Settlement Class Members have sustained damages and the appropriate measure of damages under §11(e) of the Securities Act.

C. Plaintiffs' Claims Are Typical of the Claims of the Settlement Class

Typicality requires that a class representative's claims share "'essential characteristics'" with those of other class members and arise out of the same event, practice or course of conduct and same legal theory. *Goasdone v. Am. Cyanamid Corp.*, 354 N.J. Super. 519, 529 (Law Div. 2002) (citation omitted).

In this case, Plaintiffs' claims are the same as other Settlement Class Members because they each suffered the same injury flowing from allegedly false and misleading Offering Documents and therefore have the same claims against Defendants as absent Settlement Class Members.

D. Plaintiffs Will Fairly and Adequately Represent the Settlement Class

Adequacy of representation consists of two components: adequacy of the class representatives and adequacy of their counsel. *Rebish v. Great Gorge*, 224 N.J. Super. 619, 623-24 (App. Div. 1988); *Delgozzo*, 266 N.J. Super. at 188. First, no conflicts, disabling or otherwise, exist between Plaintiffs and the Settlement Class Members. Each Plaintiff stands in the same shoes as other Settlement Class Members with the same incentive to obtain a recovery against Defendants. Second, Plaintiffs' Counsel are preeminent class action attorneys and have long and successful track records in litigating major class actions. *See* resumes of Plaintiffs' Counsel

submitted herewith. Given the lack of conflict and the retention of competent counsel, Plaintiffs are adequate class representatives.

E. The Action Satisfies R. 4:32-1(b)(3)

As set forth in R. 4:32-1(b)(3), an action may be maintained as a class action if, in addition to satisfying the requirements of R. 4:32-1(a):

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

Because both predominance and superiority are satisfied here, this Action easily meets R. 4:32-1(b)(3).

First, in order to satisfy this requirement, it must be shown that the issues subject to generalized proof predominate over the issues subject to only individualized proof. As the United States Supreme Court recognized in *Amchem*, the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." 521 U.S. at 623. *See also Bredbenner v. Liberty Travel, Inc.*, No. 09-905 (MF), 2011 U.S. Dist. LEXIS 38663, at *23 (D.N.J. Apr. 8, 2011). Here, the issues of liability and causation are common to all members of the Settlement Class and clearly predominate over any individual issues. Second, resolution of the Action through a class action is far superior to litigating thousands of individual claims where the

expense for a single Settlement Class Member in pursuing a separate action would likely exceed the individual's loss in their Osmotica shares. *See id.* at *26-*27.

In light of the foregoing, all of the requirements of R. 4:32-1(a) and 4:32-1(b)(3) are satisfied, and thus, the Court should finally certify the Settlement Class for settlement purposes.

V. THE PLAN OF ALLOCATION SHOULD BE APPROVED

The Plan of Allocation establishes the method by which the Net Settlement Fund will be distributed to Settlement Class Members submitting acceptable Proof of Claim forms. The Plan of Allocation was set forth in the Notice mailed to Settlement Class Members, and is described in paragraphs 49-51 of the Mandel Cert. The Plan of Allocation calculates recognized claims based on the statutory framework of §11(e) of the Securities Act and will distribute the Settlement proceeds on a *pro rata* basis to those Settlement Class Members who submit valid claim forms. Assessment of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Cendant*, 264 F.3d at 231. An allocation formula need only have a reasonable basis, particularly if recommended by experienced class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001).

The objective of a plan of allocation is to provide an equitable basis upon which to distribute the settlement fund among eligible class members. Here, the Plan of Allocation will result in a fair distribution of the available proceeds among those Settlement Class Members who submit valid claims, and therefore should be approved.

VI. CONCLUSION

In the judgment of Plaintiffs' Counsel, the Settlement before the Court is an excellent resolution of the issues in dispute. Therefore, it is respectfully requested that the Court approve

the Settlement as fair and reasonable; finally certify the Settlement Class and approve the Plan of Allocation; and enter the proposed Judgment agreed upon by the parties.

DATED: August 17, 2021

Respectfully submitted,

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