UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RONALD MONK, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. JOHNSON & JOHNSON, WILLIAM C. WELDON, DOMINIC J. CARUSO, COLLEEN A. GOGGINS and PETER LUTHER, Defendants.	Civil Action No. 10-4841 (FLW) (DEA)

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO P.C.
5 Becker Farm Road
Roseland, New Jersey 07068

Liaison Counsel for Lead Plaintiff Sjunde AP-Fonden and the Class

Darren J. Check
Gregory M. Castaldo
Matthew L. Mustokoff
Kimberly A. Justice
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087

Lead Counsel for Lead Plaintiff Sjunde AP-Fonden and the Class

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Court-appointed Lead Plaintiff Sjunde AP-Fonden ("Lead Plaintiff" or "AP7"), by and through its counsel Kessler Topaz Meltzer & Check, LLP ("Lead Counsel"), respectfully submits this memorandum of law in support of its motion for an order: (i) finally approving the proposed settlement of the above-captioned action (the "Action"), which this Court preliminarily approved by its Order Preliminarily Approving Settlement dated August 6, 2013 (the "Preliminary Approval Order"); and (ii) approving the proposed plan for allocating the settlement proceeds to the Class (the "Plan of Allocation").[1]

As set forth herein, the proposed settlement (the "Settlement") represents an excellent result for the Class in light of the risks Lead Plaintiff faced had the Action continued to be litigated. Pursuant to the terms of the Stipulation, Lead Plaintiff, through its counsel, has obtained a total of $22,900,000 (the "Settlement Amount") for the benefit of the Class, in exchange for the dismissal of all claims brought in the Action and a full release of claims against

[1] Pursuant to the Court's Preliminary Approval Order, the Class was certified pursuant to Fed. R. Civ. P. 23, solely for purposes of effectuating the Settlement, and consists of all persons and entities who purchased Johnson & Johnson ("J&J" or the "Company") common stock from October 14, 2008, to July 21, 2010, inclusive, and who were damaged thereby. Excluded from the Class are: (i) the Defendants; (ii) the Dismissed Defendants; (iii) the officers and directors of the Company or its subsidiaries or affiliates; (iv) members of the immediate families of the Individual Defendants and Dismissed Defendants and each of their legal representatives, heirs, successors, or assigns; and (v) any entity in which any Defendant or Dismissed Defendant has or had a controlling interest. Also excluded from the Class are all persons and entities who exclude themselves from the Class by timely requesting exclusion in accordance with the requirements set forth in the Notice of Pendency of Class Action and Proposed Settlement, Motion for Attorneys' Fees and Expenses, and Final Approval Hearing (the "Notice"). Lead Plaintiff respectfully requests that the Court affirm its certification of the Class for purposes of carrying out the Settlement. *See* §V below.

Capitalized terms not defined herein shall have those meanings ascribed to them in the Stipulation and Agreement of Settlement dated July 15, 2013 (the "Stipulation"). Dkt. Entry 111-2.

the Released Parties.[2] The Settlement Fund (the Settlement Amount plus any interest earned thereon) will be used for the payment of taxes, notice and administrative costs, and for Court-awarded attorneys' fees and expenses. The cash remainder after these expenditures (the "Net Settlement Fund"), will be distributed to Class Members who are not otherwise excluded from the Class and who submit valid Proofs of Claim to the Claims Administrator in accordance with the requirements established by the Court ("Authorized Claimants"). Each Authorized Claimant shall be allocated a percentage of the Net Settlement Fund based upon the relationship that each Authorized Claimant's claim bears to the total of all Authorized Claimants' claims, as explained in the Notice. *See also* §IV below.

The Settlement was reached after more than two years of contentious litigation and is the product of well-informed, arm's-length settlement negotiations among experienced and knowledgeable counsel, facilitated by a highly experienced and respected mediator. As more fully discussed below and in the accompanying Declaration of Matthew L. Mustokoff in Support of Final Approval of Settlement, Plan of Allocation and Application for an Award of Attorneys' Fees and Expenses (the "Mustokoff Dec."), Lead Plaintiff performed a substantial investigation into the Class's claims and engaged in extensive and contested motion practice, including two motions to dismiss, a motion for partial reconsideration and two motions to compel the production of documents, as well as formal discovery, before successfully negotiating this Settlement for the Class. *See* Mustokoff Dec., ¶¶11-26. Moreover, at every stage of the Action, Defendants asserted aggressive defenses and, had the Settlement not been reached, the Class

[2] The "Released Parties" means the Defendants (*i.e.*, J&J, Dominic J. Caruso and Colleen A. Goggins) and the current and former officers, directors, partners, members, parents, subsidiaries, controlling persons, affiliates, employees, agents, attorneys, auditors, underwriters, insurers, representatives, heirs, predecessors, successors in interest, and assigns of the Defendants.

would have faced hurdles in proving its case, particularly with respect to overcoming Defendants' defenses to liability and establishing the Class's full amount of damages at trial. Thus, the risks involved in continued litigation, when measured against the benefit of the present Settlement, support approval of this Settlement.

The reaction of the Class thus far also supports the Settlement. Pursuant to the Court's Preliminary Approval Order, as of October 9, 2013, 2,082,307 copies of the Notice have been mailed to potential Class Members and nominees.[3] The Notice contains a detailed description of the nature and procedural history of the Action, as well as the material terms of the Settlement, including: (i) Lead Plaintiff's estimate of the average per share recovery; (ii) the manner in which the Net Settlement Fund (as defined above) will be allocated among participating Class Members; (iii) a description of the claims that will be released in the Settlement; (iv) the right and mechanism for Class Members to exclude themselves from the Class; and (v) the right and mechanism for Class Members to object to the Settlement, the Plan of Allocation and/or Lead Counsel's request for attorneys' fees and expenses.[4] As of the date of this memorandum, there have been no objections to any aspect of the Settlement and only 102 requests for exclusion from the Class (out of the more than 2 million Notices mailed) have been received. *See* Mulholland Dec., ¶11. Lead Plaintiff – a sophisticated institutional investor of the type favored by Congress

[3] *See* ¶9 of the Declaration of Paul Mulholland, CPA, CVA Concerning (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date (the "Mulholland Dec.") submitted on behalf of Strategic Claims Services ("SCS"), the Court-authorized claims administrator for the Settlement. The Summary Notice was also published in *Investor's Business Daily* and transmitted over *PR Newswire* on September 3, 2013. *See* Mulholland Dec., ¶7.

[4] As set forth in the Notice (*see* Exhibit B to the Mulholland Declaration), the deadline for submitting a request for exclusion from the Class or filing an objection to the Settlement, or any aspect thereof, is October 24, 2013. If any requests for exclusion or objections are received after the date of this submission, Lead Counsel will address them in its reply brief to be filed with the Court on or before November 7, 2013.

when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"), has closely monitored and participated in the Action and recommends that the Settlement be approved.[5]

In light of both Lead Counsel's and Lead Plaintiff's informed assessment of: (i) the strengths and weaknesses of the Class's claims, and the defenses thereto, based on their litigation and settlement efforts over the pendency of this Action; (ii) the absence of opposition to the Settlement to date; (iii) the considerable risks and delays associated with continued litigation and trial; and (iv) Lead Counsel's past experience in securities class action litigation, Lead Plaintiff and Lead Counsel firmly believe that the Settlement is eminently fair, reasonable, and adequate and provides a substantial result for the Class. Accordingly, Lead Plaintiff respectfully requests that the Court grant final approval of this Settlement. In addition, the Plan of Allocation is a fair and reasonable method for distributing the Net Settlement Fund to the Class and also warrants the Court's final approval.

II. FACTUAL BACKGROUND AND LITIGATION HISTORY

This Action centers around allegations that certain former and current officers of J&J, and J&J's wholly owned subsidiary McNeil-PPC, Inc. ("McNeil"), failed to disclose and/or misrepresented (i) certain quality control issues and (ii) the true financial impact of those alleged quality control issues and resulting product recalls on McNeil.[6] Mustokoff Dec., ¶9. The alleged

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[5] *See* H.R. Conf. Rep. No. 104-369, at 34 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 733 ("The Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions."). *See also* the Declaration of Richard Gröttheim, Chief Executive Officer of Sjunde AP-Fonden, in Support of (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses submitted herewith.

[6] *See* Second Amended Complaint dated September 7, 2012 (the "Complaint"). Dkt. Entry 83 (Filed Under Seal), ¶2.

misstatements and omissions surrounding J&J's alleged failure to disclose its quality control issues allegedly caused the price of J&J common stock to be artificially inflated throughout the Class Period, resulting in damages to persons and entities who purchased J&J common stock during this time. Mustokoff Dec., ¶10.[7]

For the sake of brevity and to avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Mustokoff Declaration for a detailed discussion of the procedural history of the Action. Mustokoff Dec., ¶¶11-26, 37-42.[8]

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND WARRANTS THE COURT'S FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) provides, in pertinent part, that the court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable and adequate. The Third Circuit has interpreted this rule to require courts to "independently and objectively analyze the evidence and circumstances before it in order to determine the settlement is in the best interest of those whose claims will be extinguished." *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001).[9] The district court's duty is "to protect

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[7] As alleged, when the true adverse financial impact of J&J's undisclosed quality control issues was revealed to the market in July 2010, the price of J&J's stock declined a total of $2.45 per share – from a closing price of $59.57 on July 19, 2010 to a closing price of $57.12 on July 21, 2010. Complaint, ¶¶14, 233; Mustokoff Dec., ¶10.

[8] In addition to the Mustokoff Declaration, Lead Plaintiff is also simultaneously submitting to the Court, on behalf of its counsel, the Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Fee Memorandum"). The Mustokoff Declaration and Fee Memorandum are incorporated by reference herein.

[9] Here, as throughout, unless otherwise stated, all citations and internal quotations are hereby deemed omitted.

absent class members by assuring the settlement represents adequate compensation for the release of the class claims, a duty which some have described as a 'fiduciary responsibility.'" *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3d Cir. 2004).

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court," and, due to its proximity to the parties and to the nuances of the litigation, appellate courts "accord great deference to the district court's factual findings." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998). In reviewing the settlement, the district court's role "is neither to rewrite the settlement … reached by the parties nor to try the case by resolving issues left unresolved by the settlement." *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *4 (D.N.J. Nov. 9, 2005).

When exercising its discretion, a court should always review the proposed settlement in light of the strong judicial and public policies that favor settlements. *Warfarin Sodium*, 391 F.3d at 535 ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"). The Third Circuit recently "reaffirm[ed] the 'overriding public interest in settling class action litigation.'" *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010); s*ee also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (noting "'the strong presumption in favor of voluntary settlement agreements, which we have explicitly recognized with approval'") (citing *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010)); *In re*

Sch. Asbestos Litig., 921 F.2d 1330, 1333 (3d Cir. 1990) (noting that settlement resolves disputes that would otherwise "linger" and therefore conserves judicial resources and expense).

A. The Settlement is Presumptively Fair

An initial "'presumption of fairness'" attaches to a settlement when: "'(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Warfarin*, 212 F.R.D. at 254 (quoting *Cendant*, 264 F.3d at 232 n.18); *see also Meijer, Inc. v. 3M*, 2006 WL 2382718, at *11 (E.D. Pa. Aug. 14, 2006); *Nichols v. SmithKline Beecham Corp.*, 2005 WL 950616, at *11 (E.D. Pa. Apr. 22, 2005). By focusing on the negotiating process, the Court can avoid the burden of an unduly extended inquiry into the claims asserted and result achieved. *See Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993) ("[A]bsent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel.").

The record here demonstrates that the Settlement is entitled to a presumption of fairness. *First*, counsel for the Parties engaged in protracted arms'-length negotiations, including two in-person, all-day mediation sessions, with the assistance of a highly experienced and respected mediator, the Hon. Daniel Weinstein (Ret.) of JAMS. Mustokoff Dec., ¶¶37-43. *See Milliron v. T-Mobile USA, Inc*., 2009 WL 3345762, at *5 (D.N.J. Sept. 10, 2009), *aff'd*, 423 Fed. App'x. 131 (3d Cir. 2011) ("[T]he participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties."). At all times during these negotiations, the Parties vigorously represented

their clients' interests.[10] Given the nature of these protracted negotiations which were conducted entirely at arms'-length, this factor weighs in favor of granting final approval of the Settlement.

Second, the stage of this litigation also supports final approval of the Settlement. In sum, Lead Plaintiff, through its counsel, has, *inter alia*, conducted a comprehensive investigation into the Class's claims; prepared two amended complaints; opposed two rounds of motions to dismiss; filed a motion for partial reconsideration; conducted discovery, including the review and analysis of thousands of pages of documents produced by Defendants and certain third parties and preparation for depositions of several key witness, and consulted with a leading economist and damages expert. Mustokoff Dec., ¶¶11-25.

Third, Lead Counsel is highly experienced in the field of securities litigation, supporting a presumption that the Settlement is fair. Based on its thorough review of the record and its prior experience in these types of cases, Lead Counsel believes the Settlement is fair, reasonable and adequate and warrants Court approval. *See Collier v. Montgomery Cnty. Hous. Auth.*, 192 F.R.D. 176, 186 (E.D. Pa. 2000) ("the court will give due regard to the advice of the experienced counsel in this case who recommend the settlement, who have negotiated this settlement at arms-length and in good faith"); *Austin v. Pa. Dep't of Corrections*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) ("[S]ignificant weight" should be attributed "to the belief of experienced counsel that settlement is in the best interests of the class.").

Fourth, although the deadline to submit objections to the Settlement has not yet passed, to date, there have been no objections to the Settlement. *See* §III(B)(2) below.

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[10] *See* Declaration of the Hon. Daniel Weinstein (Ret.) (the "Weinstein Dec.") submitted herewith, ¶10. ("I can readily attest that the negotiations between counsel for lead plaintiff and counsel for the defendants were conducted at arm's-length. This was a difficult and, at times, tenuous mediation. I worked diligently to reduce expectations on both sides and to keep the parties moving toward a resolution that was acceptable.").

For the foregoing reasons, the Settlement is entitled to a presumption of fairness.

B. The *Girsh* Factors Support Final Approval of the Settlement

In order to determine whether the settlement is fair, reasonable and adequate under Rule 23(e), courts in the Third Circuit look to the factors enunciated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), recently reaffirmed in *Pet Food*, 629 F.3d at 349-51 and *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 258 (3d Cir. 2009). The *Girsh* factors are:

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

521 F.2d at 157. "[T]he Court's assessment of whether the settlement is fair, adequate and reasonable is guided by the *Girsh* factors, but the Court is in no way limited to considering only those enumerated factors and is free to consider other relevant circumstances and facts involved in this settlement." *Plymouth Cnty. Contributory Ret. Sys. v. Hassan*, 2012 WL 664827, at *2 (D.N.J. Feb. 28, 2012). Further, in considering the relative strength of plaintiffs' case, the Court need not engage in a trial on the merits that the Settlement was intended to avoid. *See Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987) ("The temptation to convert a settlement hearing into a full trial on the merits must be resisted."). An evaluation of the *Girsh* factors demonstrates that the present Settlement is fair, reasonable and adequate to the Class.

1. Complexity, Expense and Likely Duration of the Litigation

The first *Girsh* factor – the complexity, expense and likely duration of the litigation, assesses "the probable costs, both in time and money, of continued litigation." *Cendant*, 264 F.3d at 233. In evaluating the settlement of securities class actions, courts have repeatedly

recognized that such litigation is complex and uncertain. *See, e.g.*, *In re Suprema Specialties, Inc. Sec. Litig.*, 2008 WL 906254, at *5 (D.N.J. Mar. 31, 2008) (finding complexity of the securities class action supports final approval); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) (approving a securities fraud class action settlement in part due to the complexity of the issues involved in a securities class action).

This Action was no exception. The Action was brought under the Securities Exchange Act of 1934 ("Exchange Act") and the claims advanced by the Class involved complex legal issues and many questions remained regarding the extent of Defendants' liability and the true measure of the Class's damages. These issues would have undoubtedly required extensive discovery, including additional document review and numerous depositions and, if taken to trial, would have resulted in an expensive "battle of the experts." *See supra* III((B)(4)(b). In the absence of the Settlement, the Action could have continued for additional years.

The Settlement enables Class Members to receive the immediate cash benefit of the Settlement while avoiding (i) the cost of continued litigation, (ii) the uncertainties regarding the outcome of the Parties' ongoing discovery efforts which had sparked contentious motion practice, and (iii) the substantial risks inherent in facing an adverse decision on Defendants' motion to dismiss in part the Second Amended Complaint which was pending when the Settlement was reached, as well as the risks associated with continued litigation – class certification, summary judgment, a complex trial, and the lengthy appellate process. Indeed, even if members of the Class were willing to assume all of the litigation risks, the passage of time would introduce still more risks in terms of appeals and possible changes in the law that would, in light of the time value of money, make future recoveries less valuable than this recovery today. *See Prudential*, 148 F.3d at 318 ("the trial of this class action would be a long,

arduous process requiring great expenditures of time and money on behalf of both parties and the court"); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 501 (W.D. Pa. 2003) ("[A] future recovery, even one in excess of the proposed Settlement, may ultimately prove less valuable to the Class than receiving the benefits of the proposed Settlement at this time."). The complexity, expense and likely duration of the litigation, therefore, weigh heavily in favor of final approval of this Settlement.

2. The Reaction of the Class to Date to the Settlement

"A favorable reception by the Class constitutes 'strong evidence' of the fairness of a proposed settlement and supports judicial approval." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Here, pursuant to the Preliminary Approval Order, the deadline for Class Members to object to the Settlement, or any aspect thereof, will expire on October 24, 2013. To date, there have been no objections, and only 102 requests for exclusion from the Class (out of the more than 2 million Notices mailed) have been received.[11]

3. Stage of the Proceedings and the Amount of Discovery Completed

The third *Girsh* factor – the stage of the proceedings and the amount of discovery completed, examines the "degree of case development that class counsel have accomplished prior to settlement and allows the court to determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Sullivan*, 667 F.3d at 321; *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010); *Cendant*, 264 F.3d at 235; *Prudential*, 148 F.3d at 319.

[11] As set forth above, should any objections or exclusions be received after the date of this submission, Lead Counsel will address them in its reply brief to be filed with the Court on or before November 7, 2013.

Here, Lead Plaintiff and its counsel possessed an adequate appreciation of the merits of the claims and defenses before settling. As more fully set forth in the accompanying Mustokoff Declaration, Lead Plaintiff, through Lead Counsel, among other things: (i) conducted an extensive factual investigation into the alleged fraud, including a thorough review of publicly available information regarding J&J such as the Company's filings with the U.S. Securities and Exchange Commission ("SEC"), press releases, conference calls and other public statements issued by Defendants, as well as securities analyst reports;[12] (ii) conducted extensive and wide ranging investigative interviews with several former employees of J&J and J&J's subsidiary McNeil, including personnel who worked at McNeil's Fort Washington, Pennsylvania plant; (iii) prepared and filed two amended complaints detailing Defendants' alleged violations of the federal securities laws; (iv) conducted extensive research of the law applicable to the Class's claims and the defenses thereto; (v) opposed two rounds of motions to dismiss; (vi) filed a motion for reconsideration of the Court's dismissal of Lead Plaintiff's claims against William C. Weldon; (vii) conducted discovery, including the review and analysis of thousands of pages of documents produced by Defendants and third parties, preparation for depositions of fact witnesses and litigating two motions to compel the production of documents; and (viii) consulted with a leading economist and damages expert on issues of loss causation and damages. Mustokoff Dec., ¶¶11-25.

[12] Lead Plaintiff, through its counsel, also reviewed testimony given by defendant Goggins, former J&J Chief executive officer William C. Weldon, and members of the FDA before the U.S. House of Representatives Committee on Oversight and Government Reform on May 27 and September 30, 2010 and documents obtained through various government and regulatory investigations, including those by the U.S. House of Representatives, the U.S. Department of Justice, the FDA and the Oregon Attorney General. Mustokoff Dec., ¶25.

Further, Lead Plaintiff, through Lead Counsel, engaged in protracted settlement negotiations with Defendants' Counsel facilitated by an experienced mediator and distinguished former judge, The Honorable Daniel H. Weinstein (Ret.) of JAMS, including two formal full-day mediation sessions, several telephonic conferences and the exchange of lengthy mediation statements and supplemental submissions, before arriving at the Settlement that is before the Court for approval. Mustokoff Dec., ¶¶37-42. The Settlement and its terms are the result of a tough, arm's-length, and fair bargaining process.

In short, Lead Counsel's investigation, discovery and motion practice enabled Lead Counsel and Lead Plaintiff to thoroughly understand and evaluate the strengths and weaknesses of the claims and the risks of continued litigation, and accordingly to enter into the Settlement on a fully informed basis. This factor strongly favors approval of the Settlement.

4. Risks of Establishing Liability and Damages

In assessing the fairness of the Settlement, the Court must balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the risks of establishing liability and damages through continued litigation. *Prudential*, 148 F.3d at 319; *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at *5 (E.D. Pa. Apr. 11, 2007). "A trial on the merits always entails considerable risks," *Schering-Plough*, 2010 WL 1257722, at *10, and "no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 343 (E.D. Pa. 2007). While Lead Plaintiff and Lead Counsel believe that the claims asserted against the Defendants have merit, they also recognize that there were considerable risks involved to continued litigation. If the Action were to proceed, Lead Plaintiff would have to overcome Defendants' extensive challenges to the claims asserted.

a. Risks to Establishing Liability

Even if Lead Plaintiff survived the pending motion to dismiss, Lead Plaintiff faced a substantial risk to establishing Defendants' liability going forward. Throughout the litigation, Defendants contended that Lead Plaintiff would be unable to prove materiality of the alleged misstatements and omissions, as the risks of future quality control problems had been publicly disclosed by J&J and were well known to the market prior to the alleged revelations of fraud at the end of the Class Period. In support of this "truth on the market" argument, Defendants pointed to J&J's disclosure of the FDA's January 8, 2010 Form 483 inspection report to McNeil detailing its adverse inspection of the McNeil plant in Las Piedras, Puerto Rico, followed by disclosure of the FDA's January 15, 2010 "warning letter" to defendants Weldon and Luther criticizing, among other things, McNeil and J&J's quality control procedures. Additionally, as asserted in their motion to dismiss in part the Second Amended Complaint, Defendants argued that, with respect to certain of defendant Caruso's alleged misstatements, the statements were not actionable, as they were either accurate when made or forward-looking and protected by the PSLRA's safe-harbor provision. Mustokoff Dec., ¶29. Defendants also asserted that Lead Plaintiff would be unable to establish the requisite scienter for Section 10(b) liability (*i.e.*, that Defendants' conduct was either intentional or reckless) because there was no evidence that defendants Caruso and Goggins were aware of some or all of the quality control issues at McNeil, including the Motrin recall, and that, contrary to Lead Plaintiff's assertions of misleading conduct, these executives acted in good faith. *Id.*, ¶30.[13]

[13] In addition, Defendants asserted that the quality control issues at best affected only a minuscule fraction of the Company's products, and that its senior executives could not possibly have known about them during the time of the challenged statements. *Id.*, ¶30, n.12.

Additionally, Defendants have vigorously challenged Lead Plaintiff's discovery efforts, and Lead Plaintiff would most likely continue to face hurdles gathering evidence and building their case against Defendants. While Lead Plaintiff is confident that there are substantially more relevant documents that would be produced after the Court ruled on Lead Plaintiff's pending motion to compel, the outcome of this motion, as well as future discovery efforts, are uncertain. *Id*., ¶31.

b. Risks Regarding Loss Causation and Establishing Damages

Should Lead Plaintiff have succeeded in overcoming each and every defense Defendants could raise to liability, considerable risk remained to proving damages. To that end, Lead Plaintiff would be required to prove that J&J's alleged false and misleading statements artificially inflated the price of its common stock or maintained artificial inflation, as well as the specific amount of the artificial inflation. Mustokoff Dec., ¶32.

In support of their contention that Lead Plaintiff would be unable to establish loss causation, *i.e.*, that the correction of the alleged misstatements and omissions caused the decline in J&J's stock price, Defendants asserted that due to various non-fraud-related disclosures by J&J and other information that affected the Company's stock price (*e.g.*, announcements of the FDA's investigation of McNeil's manufacturing practices on May 27, 2010 and the criminal investigation of McNeil by the U.S. Attorney's Office for the Eastern District of Pennsylvania on July 20, 2010), Lead Plaintiff would not be able to disaggregate the impact of these disclosures on the stock price from the alleged, fraud-related corrective disclosures. Indeed, presentation of evidence and the Parties' differing arguments on loss causation and damages would hinge upon extensive expert discovery and testimony. Although Lead Plaintiff believes it would be able to present expert testimony to meet its burden on loss causation, and to rebut any arguments that Defendants would make, Defendants would have presented their own experts with conflicting

opinions and there could be no certainty which experts' views would be credited by the jury. Mustokoff Dec., ¶¶33-34.[14]

In addition to the above, by its December 19, 2011 Opinion granting in part and denying in part Defendants' motion to dismiss the Amended Complaint, the Court effectively found that purchasers of J&J common stock on or between October 14, 2008 and April 19, 2010 did not have claims under Section 10(b) of the Exchange Act, as the first alleged false and misleading statement deemed actionable by the Court was made on April 20, 2010. Thus, going forward, there was the great likelihood that the class asserted in the Second Amended Complaint – and, accordingly, damages – would have been substantially curtailed. Mustokoff Dec., ¶35.

This uncertainty surrounding proving liability and damages lends clear support to Lead Plaintiff's argument that the Settlement is fair, reasonable and adequate. Accordingly, the risk of establishing liability and damages heavily favors approval of the Settlement.

5. The Risks of Maintaining the Class Action Through Trial

While Lead Plaintiff believes that each of the class action elements are met and that it would have been able to maintain the Action as a class action through trial, the Settlement was reached prior to Lead Plaintiff moving for class certification. Moreover, even if this Court had certified the class, no class certification decision is immune from a possible reversal on appeal or

[14] As a result, the crucial element of damages would likely be reduced at trial to a "battle of the experts." *See In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *18 (S.D.N.Y. Nov. 8, 2010) ("Undoubtedly, in this action, establishing the amount of damages at trial would have resulted in a 'battle of experts.' The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *U.S. v. 412.93 Acres of Land*, 455 F.2d 1242, 1247 (3d Cir. 1972) ("The jury … is under no obligation to accept as completely true the testimony of any expert witness. It may adopt as much of the testimony as appears sound, reject all of it, or adopt all of it."). Lead Counsel has sufficient experience to recognize that in such a battle there exists the substantial possibility that a trier of fact could be swayed by Defendants' experts, who would seek to minimize or eliminate the amount of Lead Plaintiff's losses by showing that any losses were attributable to factors other than the alleged misstatements and omissions. *Id.*, ¶34.

reconsideration at a later time, including based on issues that may develop at trial itself. *See, e.g., Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1120 (2008); *Prudential*, 148 F.3d at 321. Indeed, a class certification order may always be altered or amended any time before a decision on the merits. Fed. R. Civ. P. 23(c)(1). *See also In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, 2009 WL 2137224, at *10 (E.D. Pa. July 16, 2009); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476-77 (S.D.N.Y. 1998) (decertification can occur if management problems arise during litigation and could deprive class of any recovery). Thus, the risks of failing to obtain class certification or failing to maintain class certification through trial, favor approval of the Settlement.

6. Defendants' Ability to Withstand a Greater Judgment, and the Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation

The last three *Girsh* factors are essentially consideration of the reasonableness of the settlement in light of (i) the defendants' ability to withstand a greater judgment, (ii) the best possible recovery, and (iii) all the attendant risks of litigation. These factors, too, support approval of this Settlement.

Although Defendants could likely withstand a greater judgment, the Third Circuit has noted that this fact alone does not weigh against settlement approval. *See Warfarin Sodium*, 391 F.3d at 538 (finding no error where district court concluded that DuPont's ability to pay a higher amount was irrelevant to determine fairness of settlement). More importantly, the court must "measure[] the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *Gen. Motors*, 55 F.3d at 806. The Third Circuit has cautioned that:

> [I]n cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement … The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

Id. *See also Prudential*, 148 F.3d at 322 (the very essence of a settlement is compromise).

Here, the proposed Settlement confers an immediate and certain payment of $22.9 million in cash in contrast to the delays, costs and uncertainty of continued litigation.[15] The Settlement is even more significant given the various risks involved in the Action. Lead Plaintiff, aided by Lead Counsel, carefully considered these risks when negotiating the present Settlement, and that such a result was secured in the face of such risks evinces the significance of the Settlement. *See* Weinstein Dec., ¶11 ("I believe the settlement represents the highest settlement amount and the most favorable terms that the class could have achieved at that time."). In light of the foregoing, the final *Girsh* factors support approval of the Settlement.

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

In determining whether to approve a proposed plan of allocation, "[t]he court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all

[15] In the view of Lead Plaintiff's damages expert, this recovery represents approximately 12% of the damages number that would be defensible at trial. Mustokoff Dec., ¶54. This damages estimate, however, assumes that a jury would accept every element of the Class's damages theory as being correct and recoverable and does not take into account the many risks Lead Plaintiff faced if the Action proceeded to trial. *Id.*, ¶54, n.22. *See In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) ("[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved ... [r]ather, the percentage recovery, must represent a material percentage recovery to plaintiff in light of all the risks ..."); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Jan. 31, 2007) (finding settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class actions securities litigations").

participants in the fund." *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983). "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *see also Suprema*, 2008 WL 906254, at *7 (same). A Plan of Allocation need not be, and cannot be, perfect. *Cendant*, 264 F.3d at 231.

Here, the proposed Plan of Allocation was drafted by Dr. David Tabak, an experienced damages expert who assisted Lead Plaintiff in developing their damages model used in connection with mediation, with the careful consideration, detailed analysis, and ultimate approval of Lead Counsel. Mustokoff Dec., ¶45. The Plan reflects that the price of J&J common stock was artificially inflated during the Class Period (October 14, 2008, to July 21, 2010, inclusive) due to alleged misrepresentations and/or omissions by Defendants. The Plan takes into account the impact of disclosures made on the following three dates: May 27, 2010, July 20, 2010, and July 21, 2010 (each a "Disclosure Date").[16] Any share of J&J common stock purchased during the Class Period will accrue a "Recognized Claim" for each Disclosure Date through which it is held, with shares held through the end of the Class Period accruing a Recognized Claim for each Disclosure Date after such share was purchased. For shares held as of the close of trading on July 21, 2010, Recognized Claims are limited by the "bounceback"

[16] As set forth in the Complaint: (i) on May 27, 2010, the U.S. House of Representatives Committee on Oversight and Government Reform held a hearing during which the Committee disclosed the retrieval of certain defective Motrin products from store shelves, (ii) on July 20, 2010, the Company announced that recalls and the closure of the Fort Washington plant would adversely impact sales in 2010 by approximately $600 million, and (iii) on July 21, 2010, the Company announced that its Lancaster, Pennsylvania plant had been cited by the FDA for quality control issues. Mustokoff Dec., ¶46, n. 17. *See* Complaint, ¶¶12, 13, 68, 93, 234.

provision of the PSLRA.[17] In addition, in light of the Court's December 19, 2011 Opinion granting in part and denying in part Defendants' motion to dismiss Lead Plaintiff's Amended Complaint, Recognized Claims for J&J common stock purchased on or between October 14, 2008, and April 19, 2010 has been reduced by 90%. Mustokoff Dec., ¶46.[18]

Pursuant to the Plan of Allocation, the Court-authorized claims administrator, SCS, will calculate each Authorized Claimant's "Recognized Claim" based on the information supplied with the Class Member's Proof of Claim. Each claimant's *pro rata* share of the Net Settlement Fund shall be based upon the claimant's Recognized Claim from transactions in J&J common stock during the Class Period. *Id*., ¶47.[19] Moreover, the Plan of Allocation is similar in structure to numerous plans of allocation which have been utilized, and approved by courts, in other securities class action cases.

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[17] Pursuant to Section 21(D)(e)(1) of the PSLRA, "in any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. § 78u-4(e)(1). Consistent with the requirements of the PSLRA, Recognized Claims are reduced to an appropriate extent by taking into account the closing prices of J&J common stock during the 90-day "bounceback" period. The mean (average) closing price for J&J common stock during the 90-day period (beginning on July 22, 2010, and ending on November 26, 2010) was $61.27.

[18] The Court's December 19, 2011 Opinion found that purchases of J&J common stock on or between October 14, 2008 and April 19, 2010 were not actionable under the federal securities laws, as the first actionable alleged misleading statement occurred on April 20, 2010. *Id*., ¶46, n.19.

[19] If the total Recognized Claims for all Authorized Claimants exceeds the Net Settlement Fund, each Authorized Claimant's share of the Net Settlement Fund will be determined based upon the percentage that his, her or its Recognized Claim bears to the total Recognized Claims for all Authorized Claimants. *Id*.

In sum, Lead Counsel believes that this method of allocation has a reasonable and rational basis and is fair and equitable and therefore, warrants the Court's approval.

V. THE COURT SHOULD AFFIRM ITS CERTIFICATION OF THE CLASS

In presenting the proposed Settlement to the Court for preliminary approval, Lead Plaintiff requested that the Court certify the Class for settlement purposes so that notice of the proposed Settlement, the final approval hearing and the rights of Class Members to request exclusion, object or submit Proofs of Claim could be issued. In its Preliminary Approval Order, the Court certified the Class for settlement purposes. Nothing has changed to alter the propriety of the Court's certification and, for all the reasons stated in Lead Plaintiff's previously filed Memorandum of Law in Support of Motion for Preliminary Approval of Proposed Settlement (Dkt. Entry 111-1), incorporated herein by reference, Lead Plaintiff respectfully requests that the Court reiterate its certification of the Class for purposes of carrying out the Settlement.

VI. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

In accordance with the Court's Preliminary Approval Order, on or before August 26, 2013, the Court-authorized Claims Administrator, SCS, caused the approved Notice and Proof of Claim to be mailed, by first-class mail, to potential Class Members and nominees. *See* Mulholland Dec., ¶4. In addition, on September 3, 2013 the approved Summary Notice was published in *Investor's Business Daily* and transmitted over *PRNewswire*. *Id*., ¶7. The notice program, which combines an individual, mailed notice to all potential Class Members who could be reasonably identified, as well as to brokers and nominees, and a summary notice published in a national business publication and on the internet, meets the requirements of Rule 23 of the Federal Rules of Civil Procedure, which calls for "the best notice practicable under the circumstances including individual notice to all members who can be identified through

reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Prudential*, 148 F.3d at 326-27.

As these cases require, the Class has been given notice of the proposed Settlement and Plan of Allocation, and the rights of Class Members in connection therewith, as well as the method and dates by which they may object to the Settlement and proposed Plan of Allocation, request exclusion from the Class, and submit Proofs of Claim in order to be eligible to participate in the Settlement. Additionally, the Class has been advised of the date of the final fairness hearing at which they will have an opportunity to be heard with respect to any objection raised.

VII. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully submits that the Settlement and Plan of Allocation are fair, reasonable and adequate, and respectfully requests the Court to grant final approval of the Settlement and Plan of Allocation. Additionally, as determined in connection with the Court's preliminary approval of the Settlement, all of the requirements for certification have been met, and Lead Plaintiff respectfully requests the Court to affirm its certification of the Class for purposes of carrying out the Settlement in is order granting final approval.

Dated: October 10, 2013

CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO P.C.

Liaison Counsel for Lead Plaintiff Sjunde AP-Fonden and the Class

By: /s/James E. Cecchi
JAMES E. CECCHI

Darren J. Check
Gregory M. Castaldo
Matthew L. Mustokoff
Kimberly A. Justice
KESSLER TOPAZ MELTZER & CHECK LLP
280 King of Prussia Road
Radnor, PA 19087

Lead Counsel for Lead Plaintiff Sjunde AP-Fonden and the Class