CARELLA, BYRNE, CECCHI, OLSTEIN,
BRODY & AGNELLO, P.C.
JAMES E. CECCHI
DONALD A. ECKLUND
5 Becker Farm Road
Roseland, NJ 07068
Telephone: 973/994-1700
973/994-1744 (fax)
jcecchi@carellabyrne.com
decklund@carellabyrne.com

Liaison Counsel for Lead Plaintiff

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

ANDREW J. KORNECKI, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. AIRBUS SE, et al., Defendants.	No. 2:20-cv-10084-KM-JBC CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Operating Engineers Construction Industry and Miscellaneous Pension Fund ("Lead Plaintiff") respectfully submits this memorandum of law in support of its motion for final approval of the proposed settlement for $5,000,000 in cash between Lead Plaintiff, on behalf of the Class, and Defendant Airbus SE ("Airbus" or the "Company"), and Defendants Guillaume M.J.D. Faury, Tom Enders, Dominik Asam, and Harald Wilhelm ("Individual Defendants" and, together with Airbus, "Defendants"), and approval of the Plan of Allocation.

I. INTRODUCTION

The parties have reached an agreement to resolve this securities class action for $5,000,000 for the benefit of the Class. The terms of the Settlement are set forth in the Amended Stipulation and Agreement of Settlement, dated June 7, 2022 (the "Stipulation"), which was previously submitted to the Court. ECF 67-1.[1] The Settlement is the result of extensive, arm's-length negotiations between counsel, highly experienced in securities class actions with a firm understanding of the strengths and weaknesses of the case. With the benefit of substantial investigation, and based on a thorough evaluation of the merits of Lead Plaintiff's claims, including the risk to recovery and likelihood of ultimate success, the Settlement constitutes a

[1] Unless otherwise stated or defined, all capitalized terms used herein shall have the meanings provided in the Stipulation. Emphasis is added and internal citations are omitted unless otherwise noted.

very good result for the Class. It satisfies all applicable requirements for preliminary approval set forth in Rule 23(e) as well as the additional *Girsh* factors which are considered by courts in the Third Circuit.

This case has been carefully investigated and litigated since its inception in August 2020. The Settlement takes into account the specific and significant risks and obstacles that Lead Plaintiff and the Class would face if litigation were to continue. Lead Counsel is highly experienced in prosecuting securities class actions and has concluded that the Settlement is a highly favorable recovery in light of the risks, uncertainties, delay, and expense of continued litigation. In particular, the Settlement avoids the delay associated with discovery, class certification, summary judgment, trial, and probable post-trial motions and appeal(s). *See* Declaration of Brian O. O'Mara in Support of: (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) Lead Counsel's Application for an Award of Attorneys' Fees and Expenses and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("O'Mara Decl."), ¶¶3-5, 19-21, submitted herewith.

In addition, the Settlement has the support of the Lead Plaintiff. *See* accompanying Declaration of M. Scott Anderson in Support of Lead Plaintiff's Motion for Final Approval of the Settlement, ¶5 ("Anderson Decl.").

For all the reasons discussed herein and in the O'Mara Declaration, it is respectfully submitted that the Settlement is eminently fair, reasonable, and adequate to the Class and should be finally approved by the Court. The Court should also approve the Plan of Allocation, which was set forth in the Notice that was sent to Class Members. The Plan of Allocation governs how Class Members' claims will be calculated, was developed with the assistance of Lead Plaintiff's damages expert, and is consistent with an assessment of, among other things, the damages that Lead Plaintiff and its counsel believe were recoverable in the Litigation. Therefore, the Plan of Allocation is fair, reasonable, and adequate, and should likewise be approved.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying O'Mara Declaration for a detailed discussion of the factual background and procedural history of the Litigation, the extensive efforts undertaken by Lead Plaintiff and its counsel during the course of the Litigation, the risks of continued litigation, and the negotiations leading to the Settlement. *See generally* O'Mara Decl.

III. THE STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

It is well settled that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *accord In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998); *see also Nyby v. Convergent Outsourcing, Inc.*, 2017 U.S. Dist. LEXIS

122056, at *7 (D.N.J. Aug. 3, 2017). Settlement spares the litigants the uncertainty, delay, and expense of a trial and appeals while simultaneously reducing the burden on judicial resources. The Third Circuit Court of Appeals reiterated the long-standing principle that there is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010). "This presumption is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" *Id*. at 595.

Federal Rule of Civil Procedure 23(e) requires judicial approval of a class action settlement. Rule 23(e)(2) provides that courts should consider the following factors when determining whether a class action settlement is "fair, reasonable and adequate" such that final approval is warranted:

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

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition, in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Third Circuit advised district courts to consider the following factors, several of which overlap with those in Rule 23(e)(2), in deciding whether to approve a proposed settlement of a class action:

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

Id. at 157.

The Settlement represents a very favorable result, is presumptively fair, and satisfies each element of Rule 23(e)(2) and the *Girsh* factors. Substantial doubt exists as to whether any greater recovery could have been obtained against Defendants in the absence of the Settlement, especially in light of the difficulty of proving that the alleged statements were materially false, and satisfying the additional requirements of scienter, loss causation, and damages. Accordingly, the Settlement is superior to another very real possibility – little or no recovery.

IV. THE PROPOSED SETTLEMENT IS PROCEDURALLY AND SUBSTANTIVELY FAIR, ADEQUATE, AND REASONABLE

A. The Settlement Satisfies the Requirements of Rule 23(e)(2)

1. Lead Plaintiff and Lead Counsel Have Adequately Represented the Class

The determination of adequacy "primarily examines two matters: the interests and incentives of the class representatives, and the experience and performance of class counsel." *In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 392 (3d Cir. 2015). Here, Lead Plaintiff's interests are directly aligned with the interests of other Class Members. Additionally, Lead Plaintiff and Lead Counsel have adequately represented the Class by thoroughly investigating and prosecuting this action, including by, among other things, conducting an extensive investigation of the relevant factual events, including Defendants' alleged false and misleading statements and omissions, and a thorough evaluation of the regulatory proceedings related to the Litigation. Lead Plaintiff and Lead Counsel also engaged economic experts and consultants to perform analyses related to loss causation, materiality, market impact, and damages. O'Mara Decl., ¶¶3, 19-20, 23, 29, 39, 43. Through each step of the Litigation, Lead Plaintiff and Lead Counsel have strenuously advocated for the best interests of the Class. Lead Plaintiff and Lead Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

2. The Proposed Settlement Was Negotiated at Arm's Length by Sophisticated and Experienced Counsel

The Settlement also satisfies Rule 23(e)(2)(B). It is the product of arm's-length negotiations between sophisticated and experienced counsel informed by a thorough factual, legal, and economic investigation, resulting in the successful resolution of the Litigation, for which there was no hint of collusion. O'Mara Decl., ¶¶3-5, 19-20. Indeed, a class action settlement is considered presumptively fair, where, as here, the parties, through capable counsel informed by an extensive investigation in connection with preparing Lead Plaintiff's claims based on an analysis of SEC filings, media and analyst reports, press releases, shareholder communications, regulatory and enforcement materials, witness interviews, and relevant case law and authorities (*see id.*), have engaged in arm's-length negotiations. Here, as counsel was pursuing and attempting to perfect service of process on Defendants through the Hague Convention, Lead Counsel and counsel for Airbus began exploring the possibility of resolving the Litigation. Over the course of the next several months, and based on a candid and realistic legal, factual, and economic assessment of the strengths and weakness of the claims, counsel continued to explore the prospects of reaching an agreement to settle the Litigation, ultimately reaching an agreement in principle to settle the matter on March 28, 2022. *Id.*, ¶¶3, 19-20.

3. The Proposed Settlement Is Adequate in Light of the Litigation Risks, Costs, and Delays of Trial and Appeal

Rule 23(e)(2)(C)(i) and the first, fourth, fifth, eighth and ninth *Girsh* factors overlap, as they address the substantive fairness of the Settlement in light of the risks posed by continuing litigation. As set forth below, these factors weigh in favor of final approval.

a. The Risks of Establishing Liability at Trial

While Lead Plaintiff believes that it had a strong case on the merits, as in every complex case of this kind, it faces formidable obstacles to proving Defendants' liability. Lead Plaintiff's case centered on allegations that during the Class Period, Defendants knowingly or recklessly issued false and misleading statements that failed to disclose that: (i) Airbus's policies and protocols were insufficient to ensure compliance with relevant anti-corruption laws and regulations; (ii) consequently, Airbus engaged in bribery and corruption to enhance its commercial aircraft, helicopter, and defense business; (iii) as a result, Airbus's earnings were derived in part from unlawful conduct and therefore unsustainable; (iv) resolution of government investigations and enforcement actions would foreseeably cost Airbus billions of dollars in settlements and legal fees and subject the Company to significant continuing government oversight; and (v) as a result of the foregoing, the Company's public statements were materially false and misleading at all relevant times. These allegedly

false and misleading statements are further alleged to have artificially inflated the price of Airbus Securities traded in the United States, and when the truth was eventually disclosed, the price of such Securities declined, resulting in substantial damages to the Class. Lead Plaintiff further contends that, upon the disclosure of the truth, the artificial inflation created by Defendants' fraudulent scheme was removed from the trading price of Airbus Securities, damaging Lead Plaintiff and Members of the Class. O'Mara Decl., ¶¶17-18.

There was no guarantee that Plaintiff would be able to overcome Defendants' likely motion(s) to dismiss and for summary judgment, and/or prove its claims at trial. Indeed, establishing scienter would be particularly challenging. A defendant's state of mind in a securities case is often the most difficult element of proof and one which is rarely supported by direct evidence such as an admission. *See In re ViroPharma Inc. Sec. Litig.*, 2016 U.S. Dist. LEXIS 8626, at *35 (E.D. Pa. Jan. 25, 2016) ("'Since stockholders normally have "little more than circumstantial and accretive evidence to establish the requisite scienter, proving scienter is an uncertain and difficult necessity for plaintiffs."'") (quoting *Smith v. Dominican Bridge Corp.*, 2007 U.S. Dist. LEXIS 26903, at *17 (E.D. Pa. Apr. 11, 2007)). And Defendants would be expected to argue on a motion to dismiss and at summary judgment and/or trial, that Lead Plaintiff could not demonstrate scienter because Defendants had no "actual knowledge" of the allegedly undisclosed facts. O'Mara Decl., ¶¶4, 19-20, 29. Clearly, the question of

scienter was not without risk and it was possible that Lead Plaintiff would not be able to adduce sufficient evidence to satisfy a jury on this issue.

In short, Lead Plaintiff faced numerous obstacles in proving liability if litigation continued. There was no certainty, given Defendants' vigorously asserted defenses, that Lead Plaintiff and the Class would prevail on liability. The Settlement eliminates these and many other risks of continued litigation. *See In re Delphi Corp. Sec.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (discussing "the risk that Defendants could prevail with respect to certain legal or factual issues, which could result in the reduction or elimination of Plaintiffs' potential recoveries").

b. The Risks of Establishing Loss Causation and Damages Weighs in Favor of Final Approval

Even if Lead Plaintiff successfully established liability, it faced substantial risks in proving loss causation and damages. The determination of damages is a complicated and uncertain process, involving the analysis of many factors. Damages for Lead Plaintiff's Exchange Act claims are measured by "the difference between the purchase price and the 'true value' of the security [*i.e.*, value absent the fraud] at the time of the purchase." *Semerenko v. Cendant Corp.*, 223 F.3d 165, 184 (3d Cir. 2000); *In re Ocean Power Techs., Inc.*, 2016 U.S. Dist. LEXIS 158222, at *61 (D.N.J. Nov. 15, 2016). Defendants likely would have argued that Lead Plaintiff could not establish loss causation with respect to some or all of the alleged corrective disclosures of the alleged fraud. In fact, Defendants likely would retain experts to

opine that certain (if not all) of the alleged losses did not correlate to damages attributable to the alleged misstatements, which could reduce or even eliminate recoverable damages. And would likely argue that various drops were attributed to market-wide events rather than Company-specific information. Although Lead Plaintiff would retain experts to opine in support of Lead Plaintiff's causation and damages theories, there is no guarantee that this "battle of the experts" would result in a favorable outcome for the Class.

To prevail on its Exchange Act claims, Lead Plaintiff must also show that the alleged false statements or omissions caused the damages or loss causation. *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *36.[2] Absent settlement, establishing loss causation could be a major risk faced by Lead Plaintiff. The Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), and the subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than in the past. *See Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *61. Several examples illustrate this point. The Eleventh Circuit in *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012), affirmed a lower court

[2] With respect to Lead Plaintiff's Section 11 claim, Defendants have the burden to establish the absence of causation. *See In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3d Cir. 2004) ("Under sections 11 and 12(a)(2), plaintiffs do not bear the burden of proving causation. It is the defendants who may assert, as an affirmative defense, that a lower share value did not result for any nondisclosure or false statement.").

ruling that granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor. The Eleventh Circuit also upheld summary judgment in favor of defendants on loss causation grounds in a case that had been litigated for eleven years. *See Phillips v. Sci.-Atlanta, Inc.*, 489 F. App'x 339 (11th Cir. 2012). In *In re Oracle Corp. Sec. Litig.*, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), the court granted summary judgment in defendants' favor holding that shareholder plaintiffs failed to present sufficient evidence to establish loss causation.

The determination of loss causation and damages almost always involves conflicting expert testimony from defendants and plaintiffs. Expert testimony could rest on many assumptions, any of which could potentially be rejected by a jury as speculative or unreliable. Lead Plaintiff would have likely faced a motion *in limine* by Defendants to preclude Lead Plaintiff's damages expert's testimony under the *Daubert* test and risked a decision that a valuation model might not be admissible in evidence. Even if Lead Plaintiff survived the *Daubert* motion, at trial the loss causation and damage assessments of Lead Plaintiff's and Defendants' experts were sure to vary substantially, and in the end, this crucial element would be reduced to a "battle of the experts," and it is impossible to predict how a jury might respond. *See ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *37. Lead Counsel recognizes the

possibility that a jury could find that there were no damages, as Defendants insisted, or only a fraction of the amount of damages Lead Plaintiff contended or find that the losses were attributable to factors other than the alleged false and misleading statements. "Thus, even if [Lead] Plaintiff prevailed on the issue of liability, significant additional risks would remain in establishing the existence of damages." *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *63.

c. The Settlement Eliminates the Additional Costs and Delay of Continued Litigation

The anticipated complexity, cost, and duration of the Litigation would be considerable. *See In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014) ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"). There is no doubt that this Litigation, like all securities class actions, is complex. *See, e.g.*, *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 U.S. Dist. LEXIS 124269, at *50-*51 (D.N.J. Dec. 9, 2008) ("Federal securities class actions by definition involve complicated issues of law and fact."). Indeed, courts have recognized that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). The resolution of this Litigation at summary judgment and/or trial might well have turned on close questions of law, evidence, and fact. There clearly were substantial risks to Lead Plaintiff obtaining a more favorable judgment if litigation were to continue.

If not for this Settlement, the case would have continued to be fiercely contested by all parties. While Lead Counsel has already expended substantial amounts of time and money to reach the point of settlement, further significant time and expenses would be incurred to complete pre-trial proceedings and conduct a trial. As the court noted in *Ikon*, which is equally applicable here:

> In the absence of a settlement, this matter will likely extend for . . . years longer with significant financial expenditures by both defendants and plaintiffs. This is partly due to the inherently complicated nature of large class actions alleging securities fraud: there are literally thousands of shareholders, and any trial on these claims would rely heavily on the development of a paper trial [sic] through numerous public and private documents.

194 F.R.D. at 179.

Moreover, even if the jury returned a favorable verdict after trial, there is no question that any verdict would be the subject of numerous post-trial motions and a complex multi-year appellate process. Accordingly, this case likely would have continued for years despite the best efforts of the Court and the parties to speed the process. Thus, "[i]t is safe to say, in a case of this complexity, the end of that road might be miles and years away." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 837 (W.D. Pa. 1995); *see also Prudential*, 148 F.3d at 318 (settlement was favored where "the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court").

In light of these many risks, costs and delays, the Rule 23(e)(2)(C)(i) factor, as well as the first, fourth, fifth, eighth and ninth *Girsh* factors, weigh in favor of final approval.

4. The Proposed Method for Distributing Relief Is Effective

With respect to Rule 23(e)(2)(C)(ii), Lead Plaintiff and Lead Counsel have taken appropriate steps to ensure that the Class is properly notified about the Settlement. Pursuant to the Notice Order (ECF 66 & 68), more than 212,500 copies of the Notice and Proof of Claim were mailed to potential Class Members and nominees, and the Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, ¶¶10-11 ("Murray Decl."), submitted herewith. Additionally, a settlement-specific website was created where key Settlement documents were posted, including the Stipulation, Notice, Proof of Claim, and Notice Order. *Id.*, ¶13. This claims process is similar to that typically used in securities class action settlements. *See Christine Asia Co., Ltd. v. Yun Ma*, 2019 U.S. Dist. LEXIS, at *53 (S.D.N.Y. Oct. 16, 2019) ("[t]his type of claims processing and method for distributing settlement proceeds is standard in securities and other class actions and is effective"). This factor therefore supports final approval.

5. Lead Counsel's Request for Attorneys' Fees Is Reasonable

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Consistent with the Notice, and as discussed in Lead Counsel's fee memorandum, Lead Counsel seeks an award of attorneys' fees in the amount of 30% of the Settlement Amount, and expenses in the amount of $67,215.79, in addition to interest on both amounts.

This request is in line with, and in some cases below, fee awards in this District and the Third Circuit. *See, e.g.*, *Schwartz v. Urban Outfitters, Inc.*, 2016 U.S. Dist. LEXIS 181235, at *6 (E.D. Pa. Oct. 31, 2016) (awarding 30% of $8.5 million fund); *Bodnar v. Bank of Am., N.A.*, 2016 WL 4582084, at *5 (E.D. Pa. Aug. 4, 2016) (awarding 33% of $27.5 million fund); *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *66-*67 (awarding 30% of $8 million fund); *Esslinger v. HSBC Bank Nev., N.A.*, 2012 U.S. Dist. LEXIS 165773, at *43 (E.D. Pa. Nov. 20, 2012) ("a fee award of 30% of the [$23.5 million] settlement here is reasonable and in keeping with similar precedent"); *W. Pa. Elec. Emps.' Pension Fund v. Alter*, 2014 WL 12618202, at *1 (E.D. Pa. Aug. 4, 2014) (awarding 30% of $13.25 million settlement); *In re PAR Pharm. Sec. Litig.*, 2013 U.S. Dist. LEXIS 106150, at *30 (D.N.J. July 29, 2013) (awarding 30% of an $8.1 million settlement noting that "Lead Counsel's fee request is comparable to fees typically awarded in analogous cases"); *In re Veritas Software*

Corp. Sec. Litig., 396 F. App'x 815 (3d Cir. 2010) (Third Circuit affirmed the 30% award of a $21.5 million settlement).[3]

Because Lead Counsel's fee request is reasonable, and because Lead Plaintiff has ensured that the Class is fully apprised of the terms of the proposed award of attorneys' fees, this factor supports final approval of the Settlement.

6. The Parties Have No Other Agreements Besides Opt-Outs

Rule 23(e)(2)(C)(iv) requires the consideration of any agreement required to be disclosed under Rule 23(e)(3). The parties have entered into a standard supplemental agreement providing that, in the event Class Members with a certain aggregate amount of valid claims opt out of the Settlement, Airbus shall have the option to terminate the Settlement. Because this agreement has no bearing on the fairness of the Settlement, this factor weighs in favor of final approval. *See Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *54 (stating that opt-out agreements are "standard in

[3] The Stipulation provides that any attorneys' fees and expenses awarded by the Court shall be paid to Lead Counsel when the Court executes the order awarding such fees and expenses. *See* Stipulation, ¶7.2; *see also Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016) (finding such provisions do "not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys get paid"); *In re Genworth Fin. Sec. Litig.*, 2016 U.S. Dist. LEXIS 132269, at *28 (E.D. Va. Sept. 26, 2016) (ordering that "attorneys' fees and Litigation Expenses awarded above may be paid to Lead Counsel immediately upon entry of this Order").

securities class action settlements and ha[ve] no negative impact on the fairness of the Settlement").

7. The Settlement Ensures Class Members Are Treated Equitably

Rule 23(e)(2)(D), the final factor, considers whether Class Members are treated equitably. As discussed further below in Section VII, Lead Counsel developed the Plan of Allocation in consultation with its damages expert to treat Class Members equitably relative to each other by: (i) taking into account the timing of their purchases, acquisitions, and sales of Airbus Securities; and (ii) providing that each Authorized Claimant shall receive his, her, or its *pro rata* share of the Net Settlement Fund based on their recognized losses. Lead Plaintiff will be subject to the same formula for distribution of the Net Settlement Fund as every other Class Member. This factor therefore merits granting final approval of the Settlement.

Based on the foregoing, Lead Plaintiff and Lead Counsel respectfully submit that each of the Rule 23(e)(2) factors support granting final approval of the Settlement.

B. An Analysis of the Remaining *Girsh* Factors Further Confirms that the Settlement Is Fair, Reasonable, and Adequate and Should Be Finally Approved

1. The Reaction of the Class Supports Approval of the Settlement

"'The second *Girsh* factor "attempts to gauge whether members of the class support the settlement."'" *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016). "The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). Here, over 212,500 copies of the Notice and Proof of Claim were mailed to potential Class Members and nominees, a Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*, and relevant documents were posted to the website dedicated to the Settlement. *See* Murray Decl., ¶¶10-11, 13. To date, not a single objection has been filed.[4] This factor therefore weighs in favor of approval.

2. The Stage of the Proceedings Weighs in Favor of Final Approval

The third *Girsh* factor requires a court "to consider the degree to which the litigation has developed prior to settlement." *In re Rent-Way Sec. Litig.*, 305 F. Supp.

[4] The objection deadline is September 9, 2022. Should any timely objections be filed, Lead Counsel will address them in its reply brief, to be filed no later than September 23, 2022.

2d 491, 502 (W.D. Pa. 2003). "The goal here is to determine 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Id.* (quoting *Cendant*, 264 F.3d at 235); *see also ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *30 (same).

Both the knowledge of Lead Plaintiff and its counsel and the proceedings themselves reached a stage where an intelligent evaluation of the strengths and weaknesses of the Class' claims and the propriety of the Settlement could be made. As discussed above and in the O'Mara Declaration, by the time the Settlement was reached, Lead Counsel had the benefit of their extensive investigation, including interviews of witnesses and a thorough economic analysis. *See generally* O'Mara Declaration.

Lead Plaintiff and its counsel were therefore in a position to evaluate the strengths and weaknesses of the claims asserted and Defendants' anticipated defenses, as well as the substantial risks of continued litigation and the propriety of settlement. Having sufficient information to properly evaluate the case, the Litigation was settled on terms favorable to the Class.

3. The Settlement Is Reasonable in Light of the Ability of Defendants to Withstand a Greater Judgment

This factor evaluates whether Defendants "could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. The fact that Defendants could have paid more money does not render the Settlement

unreasonable, however. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) ("[T]he fact that [the defendant] could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."). "This factor is not alone dispositive. '[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement.'" *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *38 (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 323 (3d Cir. 2011)).

For all the foregoing reasons, it is respectfully submitted that the proposed Settlement satisfies the factors articulated by the Third Circuit and should be approved as fair, reasonable, and adequate.

V. FINAL CERTIFICATION OF THE CLASS IS APPROPRIATE

In presenting its motion for preliminary approval, Lead Plaintiff requested that the Court preliminarily 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 Notice Order, this Court preliminarily certified the Class. *See* ECF 66 & 68. Nothing has changed to alter the propriety of the Court's certification, and no potential Class Member has objected to class certification. Accordingly, and for all the reasons stated

in support of Lead Plaintiff's preliminary approval motion, *see* ECF 65-1 at 17-20, incorporated herein by reference, Lead Plaintiff now requests that the Court: (i) finally certify the Class for purposes of carrying out the Settlement; (ii) appoint Lead Plaintiff as class representative; and (iii) appoint Lead Counsel as class counsel.

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

The Notice to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). "'The Rule 23(e) notice is designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.'" *Dartell v. Tibet Pharms., Inc.*, 2017 U.S. Dist. LEXIS 100872, at *7 (D.N.J. June 29, 2017).

Both the substance of the Notice and the method of its dissemination to potential Class Members satisfied these standards. The Court-approved Notice includes all the information required by Fed. R. Civ. P. 23(c)(2)(B) and the PSLRA, 15 U.S.C. §78u-4(a)(7), including: (i) an explanation of the nature of the Litigation and the claims asserted; (ii) the definition of the Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the

attorneys' fees and expenses that will be sought; (vii) a description of Class Members' right to opt out of the Class or to object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.

As noted above, in accordance with the Court's Notice Order, Gilardi & Co. LLC ("Gilardi"), the Court-appointed Claims Administrator, commenced the mailing of the Notice and Proof of Claim to potential Class Members, brokers, and nominees on June 15, 2022. *See* Murray Decl., ¶¶5-7. As of August 25, 2022, over 212,500 copies of the Notice and Proof of Claim have been mailed. *Id.*, ¶10. Gilardi also caused the Summary Notice to be published in *The Wall Street Journal* and transmitted it over *Business Wire* on June 22, 2022. *Id.*, ¶11. Additionally, on June 15, 2022, Gilardi posted copies of the Notice, Proof of Claim, Stipulation, and Notice Order on the website maintained for the Settlement. *Id.*, ¶13. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *8. *See also Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual

situation first-class mail and publication in the press fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause.").

VII. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The Notice contains the Plan of Allocation, detailing how the Settlement proceeds are to be allocated among claiming Class Members. A trial court has broad discretion in approving a plan of allocation. *See Sullivan*, 667 F.3d at 328. The test is simply whether the proposed plan, like the settlement itself, is fair, reasonable, and adequate. *Nyby*, 2017 U.S. Dist. LEXIS 122056, at *21; *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *73; *Walsh v. Great Atl. Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The court's principal obligation is simply to ensure that the fund distribution is fair and reasonable.").

"Courts 'generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.'" *Ocean Power*, 2016 U.S. Dist. LEXIS 158222, at *73 (quoting *Sullivan*, 667 F.3d at 328). "In particular, pro rata distributions are consistently upheld, and there is no requirement that a plan of allocation 'differentiat[e] within a class based on the strength or weakness of the theories of recovery.'" *Id*. In determining whether a proposed plan is fair, courts may look primarily to the opinion of counsel. *See Moore v. GMAC Mortg.*, 2014 U.S. Dist. LEXIS 181431, at *14-*15 (E.D. Pa. Sept. 19, 2014) ("'As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable

weight.'"). Here, working with its damages expert, Lead Counsel developed the Plan of Allocation that is consistent with, among other things, Lead Plaintiff's and its counsel's assessment of damages that were recoverable in this Litigation. As a result, the Plan of Allocation will result in a fair distribution of the available proceeds among Class Members. To date, no Class Members have objected to the proposed Plan of Allocation.

VIII. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court approve the Settlement and the Plan of Allocation as fair, reasonable, and adequate.

DATED: August 26, 2022

Respectfully submitted,

CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.
JAMES E. CECCHI
DONALD A. ECKLUND

s/ James E. Cecchi
JAMES E. CECCHI

5 Becker Farm Road
Roseland, NJ 07068
Telephone: 973/994-1700
973/994-1744 (fax)
jcecchi@carellabyrne.com
decklund@carellabyrne.com

Liaison Counsel for Lead Plaintiff

ROBBINS GELLER RUDMAN
& DOWD LLP
ARTHUR C. LEAHY
THEODORE J. PINTAR
BRIAN O. O'MARA
STEVEN M. JODLOWSKI
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
artl@rgrdlaw.com
tedp@rgrdlaw.com
bomara@rgrdlaw.com
sjodlowski@rgrdlaw.com

Lead Counsel for Lead Plaintiff