UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

IN RE WILMINGTON TRUST SECURITIES LITIGATION	Master File No. 10-cv-00990-ER
	(Securities Class Action)
	Hon. Eduardo Robreno
This document relates to: ALL ACTIONS	ELECTRONICALLY FILED

BRIEF IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS AND PLAN OF ALLOCATION

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

Hannah Ross (*pro hac vice*)
Katherine M. Sinderson (*pro hac vice*)
Lauren McMillen Ormsbee (*pro hac vice*)
1251 Avenue of the Americas
New York, NY 10020
Phone: (212) 554-1400
Fax: (212) 554-1444

Counsel for Lead Plaintiffs and Co-Lead Counsel for the Class

CHIMICLES & TIKELLIS LLP

Robert J. Kriner, Jr. (Bar No. 2546)
Vera G. Belger (Bar No. 5676)
222 Delaware Avenue, 11th Floor
P.O. Box 1035
Wilmington, DE 19899
Phone: (302) 656-2500
Fax: (302) 656-9053

Liaison Counsel for the Class

SAXENA WHITE P.A.

Maya S. Saxena (*pro hac vice*)
Joseph E. White, III (*pro hac vice*)
Brandon T. Grzandziel (*pro hac vice*)
150 E. Palmetto Park Road, Suite 600
Boca Raton, FL 33432
Phone: (561) 394-3399
Fax: (561) 394-3382

-and-

Steven B. Singer (*pro hac vice*)
10 Bank Street, 8th Floor
White Plains, NY 10606
T: (914) 437-8551
F: (888) 631-3611

Counsel for Lead Plaintiffs and Co-Lead Counsel for the Class

Dated: September 17, 2018

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS 4

III. THE SETTLEMENT IS PRESUMPTIVELY FAIR BECAUSE IT IS THE PRODUCT OF ARM'S-LENGTH NEGOTIATIONS AND IS SUPPORTED BY LEAD PLAINTIFFS AND COUNSEL 5

IV. ANALYSIS OF THE *GIRSH* FACTORS CONFIRMS THAT THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED 8

A. Complexity, Expense, and Likely Duration of This Litigation 8

B. The Class's Reaction to the Settlements 9

C. The Stage of the Proceedings and Amount of Discovery Completed 10

D. The Risks of Establishing Liability Weigh in Favor of Final Approval 11

E. The Risks of Establishing Loss Causation and Damages 13

F. Risks of Maintaining Class Action Status Through Trial 16

G. Defendants' Ability to Withstand a Greater Judgment 17

H. The Settlements Are Reasonable in Light of All the Risks of Litigation 17

V. THE *PRUDENTIAL* CONSIDERATIONS ALSO SUPPORT THE SETTLEMENTS 18

VI. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION 19

VII. CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page(s)**

Alves v. Main,
2012 WL 6043272 (D.N.J. Dec. 4, 2012) 7

Alves v. Main,
559 F. App'x 151 (3d Cir. 2014) 7

In re AOL Time Warner, Inc. Sec. & ERISA Litig.,
2006 WL 903236 (S.D.N.Y. Apr. 6, 2006) 10

In re AT&T Corp. Sec. Litig.,
455 F.3d 160 (3d Cir. 2006) 5

Boyd v. Coventry Health Care Inc.,
2014 WL 359567 (D. Md. Jan. 31, 2014) 19

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981) 5

In re Cendant Corp. Sec. Litig.,
109 F. Supp. 2d 235 (D.N.J. 2000) 7

In re Cendant Corp. Sec. Litig.,
264 F.3d 201 (3d Cir. 2001) 7, 10, 17

In re Chambers Dev. Sec. Litig.,
912 F. Supp. 822 (W.D. Pa. 1995) 18

In re Datatec Sys., Inc. Sec. Litig.,
2007 WL 4225828 (D.N.J. Nov. 28, 2007) 8

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2005) 14

Ehrheart v. Verizon Wireless,
609 F.3d 590 (3d Cir. 2010) 4

Fishoff v. Coty Inc.,
2010 WL 305358 (S.D.N.Y. Jan. 25, 2010) 12

Fishoff v. Coty Inc.,
634 F.3d 647 (2d Cir. 2011) 12

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 4, 11

Girsh v. Jepson,
521 F.2d 153 (3d Cir. 1975).. *passim*

Glove v. DeLuca,
2006 WL 2850448 (W.D. Pa. Sept. 29, 2006)..14

Harris v. AmTrust Fin. Servs., Inc.,
135 F. Supp. 3d 155 (S.D.N.Y. 2015)..11

Harris v. AmTrust Fin. Servs., Inc.,
649 F. App'x 7 (2d Cir. 2016) 11

Lake v. First Nationwide Bank,
900 F. Supp. 726 (E.D. Pa. 1995) 7

Lazy Oil, Co. v. Witco Corp.,
166 F.3d 581 (3d Cir. 1999)..16

Lazy Oil, Co. v. Witco Corp.,
95 F. Supp. 2d 290 (W.D. Pa. 1997)..16

In re Merck & Co., Inc. Vytorin Erisa Litig.,
2010 WL 547613 (D.N.J. Feb. 9, 2010) 19

In re Nat'l Football League Players Concussion Injury Litig.,
821 F.3d 410 (3d Cir. 2016)...4, 5, 9

Nichols v. Smithkline Beecham Corp.,
2005 WL 950616 (E.D. Pa. Apr. 22, 2005) 17

In re Par Pharm. Sec. Litig.,
2013 WL 3930091 (D.N.J. July 29, 2013)..8, 9, 17

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,
148 F.3d 283 (3d Cir. 1998)...5, 17, 18

Sullivan v. DB Investments, Inc.,
667 F.3d 273 (3d Cir. 2011)..16

Sutton v. Med. Serv. Ass'n of Pennsylvania,
1994 WL 246166 (E.D. Pa. June 8, 1994) 4

In re Telik, Inc. Sec. Litig.,
576 F. Supp. 2d 570 (S.D.N.Y. 2008)...11

In re ViroPharma Inc. Sec. Litig.,
2016 WL 312108 (E.D. Pa. Jan. 25, 2016) 6, 8, 16

In re Warfarin Sodium Antitrust Litig.,
391 F.3d 516 (3d Cir. 2004)....4, 6, 17

Weiss v. Mercedes-Benz of North Am.,
899 F. Supp. 1297 (D.N.J. 1995) 11

Statutes and Rules

15 U.S.C. §§ 78bb(a) 13

Fed. R. Civ. P. 23(e)(2)....4

Court-appointed Class Representatives, the Merced County Employees' Retirement Association, the Coral Springs Police Pension Fund, the St. Petersburg Firefighters' Retirement System, the Pompano Beach General Employees Retirement System, and the Automotive Industries Pension Trust Fund (collectively, "Lead Plaintiffs"), respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlements of this Action for a total of $210 million in cash (the "Settlements") and for approval of the proposed plan of allocation of the proceeds of the Settlements (the "Plan of Allocation").[1]

I. INTRODUCTION

After nearly eight years of vigorous litigation, Lead Plaintiffs have agreed to settle all claims asserted in the Action against Defendants in exchange for a total of $210 million, comprised of a $200 million recovery from Wilmington Trust,[2] and a $10 million recovery from auditor KPMG. Not only do the Settlements provide a significant and certain recovery for the Class in an extraordinarily complex case, but this combined Settlement amount represents the second largest securities class action recovery ever obtained in Delaware and is among the top

[1] All capitalized terms that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement with Wilmington Trust Defendants and Underwriter Defendants, dated May 15, 2018 (D.I. 821-1) (the "Wilmington Trust/Underwriter Stipulation"); the Stipulation and Agreement of Settlement with KPMG, dated May 25, 2018 (D.I. 821-2) (the "KPMG Stipulation," and together with the Wilmington Trust/Underwriter Stipulation, the "Stipulations"); or in the Joint Declaration of Hannah Ross and Joseph E. White, III in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlements and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. All citations to "¶" in this memorandum refer to paragraphs in the Joint Declaration and citations to "Ex." in this memorandum refer to exhibits to the Joint Declaration.

[2] The Settlement funded by Wilmington Trust settles claims against the following Defendants: Wilmington Trust; defendants Ted T. Cecala, David R. Gibson, Robert V.A. Harra Jr., William B. North, Kevyn N. Rakowski, Carolyn S. Burger, R. Keith Elliott, Donald E. Foley, Gailen Krug, Stacey J. Mobley, Michele M. Rollins, Oliver R. Sockwell, Robert W. Tunnell, Jr., Susan D. Whiting, Rex L. Mears, and Louis Freeh (collectively, the "Individual Defendants," and, together with Wilmington Trust, the "Wilmington Trust Defendants"); and J.P. Morgan Securities LLC and Keefe, Bruyette & Woods, Inc. (the "Underwriter Defendants").

ten such recoveries in the Third Circuit. Moreover, the Settlements represent a meaningful percentage of the Class's likely recoverable damages. The $210 million recovery accounts for nearly 40% of the Class's maximum likely recoverable damages based on Lead Plaintiffs' expert damages assessment, offset by amounts already recovered by the Government.[3] This percentage is over sixteen times greater than the median 5% recovery in the Third Circuit.

While Lead Plaintiffs believe that the claims asserted against Defendants are meritorious, they recognize the risk and uncertainty of continued litigation. For example, while Lead Plaintiffs believe that the convictions in the Criminal Action are helpful, they are not dispositive because this Action is far broader in scope than the Criminal Action, containing a host of detailed allegations concerning the Bank's allowance for loan and lease losses ("ALLL"), GAAP accounting, GAAS, inflated loan risk ratings, outdated appraisals, illicit use of the ten percent rule and other supplemental financing, and severely deficient loan underwriting standards and risk management practices that were not charged in the Criminal Action. This Action also covers a time period beginning nearly two years before the charged conduct in the Criminal Action, during which the majority of damages allegedly suffered by the Class occurred. This Action also asserts claims against KPMG, whose auditors testified for the Government in its criminal case against the criminal defendants. Moreover, Lead Plaintiffs secured the settlement against the Wilmington Trust and Underwriter Defendants during the pendency of the Criminal Action trial, when a very real risk existed that the jury could have returned verdicts of not guilty for the criminal defendants.

---

[3] Consistent with the Court's opinion granting preliminary approval to the Settlements (D.I. No. 824 at 8, n.7), Lead Plaintiffs are submitting two expert reports regarding how they calculated the maximum amount of probable damages. *See* Ex. A (Declaration of S.P. Kothari); Ex. B (Declaration of Chad Coffman Regarding Lead Plaintiffs' Calculation of Damages).

As detailed in the accompanying Joint Declaration,[4] at the time the agreement to settle was reached, Lead Plaintiffs and Lead Counsel were well-informed of the strengths and weaknesses of their case and Defendants' defenses. Over the course of nearly eight years of intensive litigation, Lead Counsel, *inter alia*: (i) conducted an extensive investigation into the Class's claims and drafted four detailed amended complaints (¶¶17-36); (ii) successfully opposed Defendants' four motions to dismiss (over 678 pages of briefing) (*Id.*); (iii) successfully moved the Court to lift the discovery stay imposed between October 2014 and December 2016 (¶¶85-90); (iv) successfully moved for class certification (¶¶37-53); (v) engaged in comprehensive fact discovery, including obtaining, reviewing, and analyzing nearly 13 million pages of highly complex documents (¶¶54-84, 107-14), taking or defending over 39 depositions across the country (¶¶91-106), and engaging in significant discovery motion practice, including successfully compelling Wilmington Trust to produce documents subject to the regulatory and bank examination privileges in the face of the Federal Reserve's and other bank regulators' strong opposition (¶¶66-72); (vi) worked with nearly one dozen experts and consultants in market efficiency, damages, loss causation, accounting, underwriting and asset review, appraisals, and due diligence, many of whom had drafted expert reports that would have been exchanged if the case had not settled (¶¶115-153); and (vii) conducted intense, arm's-length settlement negotiations (¶¶161-163).

The Settlements have the full support of the court-appointed Lead Plaintiffs, all highly sophisticated, institutional investors of the type favored by Congress when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA") that were involved throughout the

[4] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is specifically referred to it for a detailed description of: the history of the Action (Section II); the nature and prosecution of the claims asserted (Section III-VIII); the negotiations leading to the Settlements (Section IX); the risks of continued litigation (Section XI); and the terms of the proposed Plan of Allocation for the proceeds of the Settlements (¶132).

litigation and settlement negotiations. Further, while the deadline to object to the Settlements has not yet passed, not a single objection has been received to date.

In light of the considerations discussed herein, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlements are fair, reasonable, and adequate, satisfy the standards of Rule 23, and provide a significant recovery for the Class. Accordingly, Lead Plaintiffs respectfully request that the Court grant final approval of the Settlements and deem the Plan of Allocation, set forth in the mailed Settlement Notice and described herein, to be a fair and reasonable method for distributing the Net Settlement Fund to eligible Class Members.

II. STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any class action settlement. However, there is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*GMC Truck*"). The presumption in favor of settlement is "especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" *Ehrheart*, 609 F.3d at 595 (quoting *GMC Truck*, 55 F.3d at 784).

Under Federal Rule of Civil Procedure 23(e), a class action settlement must be approved by the court upon a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) ("*NFL Players*"). The ultimate determination of whether a proposed class action settlement warrants approval is in the court's discretion. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). However, the Court should be hesitant to substitute its judgment for that of the parties who negotiated the Settlement. *See Sutton v. Med. Serv. Ass'n of*

Pennsylvania, 1994 WL 246166, at *5 (E.D. Pa. June 8, 1994). "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. . . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

In determining whether a settlement warrants final approval, courts in this Circuit are guided by the following factors:

> (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.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (citation omitted); *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006). The Third Circuit also advises courts to consider, where applicable, the additional factors set forth in *In re Prudential Insurance Company America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998) ("*Prudential*"), discussed in Section V.

As set forth herein and in the Joint Declaration, the proposed Settlements are an outstanding result for the Class, are presumptively fair, and the *Girsh* factors and applicable *Prudential* considerations weigh strongly in favor of approval of the Settlements.

III. THE SETTLEMENT IS PRESUMPTIVELY FAIR BECAUSE IT IS THE PRODUCT OF ARM'S-LENGTH NEGOTIATIONS AND IS SUPPORTED BY LEAD PLAINTIFFS AND COUNSEL

A proposed class action settlement is considered presumptively fair where, as here, the parties have engaged in arm's-length negotiations following years of litigation that has included

extensive fact and expert discovery and consultation with numerous experts. *See, e.g.*, *NFL Players*, 821 F.3d at 436; *Warfarin*, 391 F.3d at 535; *In re ViroPharma Inc. Sec. Litig.*, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016).

The record in this case clearly demonstrates that the Settlements were achieved in good faith, through robust, arm's-length negotiations between the parties through the direct involvement of highly experienced and informed counsel. The parties engaged in an unsuccessful formal mediation in June 2012, and informally discussed the settlement of the Action during the course of active discovery in 2014 through 2016. ¶¶ 26, 161. Serious settlement discussions between the parties began in late 2017, following the completion of fact discovery, and in the months leading up to extensive expert discovery and summary judgment motions. ¶¶ 161-163. Over several months, Lead Counsel and counsel for the Wilmington Trust Defendants participated in numerous arm's-length negotiations concerning the merits of the case, the risks of litigation, and the amount of recoverable damages. *See id. at* ¶162. Following these extensive negotiations, Lead Plaintiffs reached an agreement in principle to settle the Class's claims against the Wilmington Trust and Underwriter Defendants for $200,000,000 in cash (the "Wilmington Trust/Underwriter Settlement"). The final terms and conditions of the Wilmington Trust Settlement are set forth in the Wilmington Trust/Underwriter Stipulation, executed on May 15, 2018.

Separate settlement negotiations between Lead Plaintiffs and KPMG followed shortly thereafter. *Id. at* ¶163. After over one month of significant, arm's-length negotiations, on May 21, 2018, Lead Plaintiffs and KPMG reached an agreement in principle to settle for $10,000,000 in cash (the "KPMG Settlement"). Lead Plaintiffs and KPMG executed the KPMG Stipulation, which sets forth the final terms and conditions of the KPMG Settlement, on May 25, 2018.

The extensive and arm's-length nature of the parties' negotiations and the involvement of highly experienced counsel strongly supports the fairness of the Settlements. Indeed, significant weight should be attributed "to the belief of experienced counsel that settlement is in the best interest of the class." *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995) (citation omitted); *see also Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd*, 559 F. App'x 151 (3d Cir. 2014); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 255 (D.N.J. 2000) (affording "significant weight" to counsel's recommendation), *aff'd in relevant part*, 264 F.3d 201 (3d Cir. 2001). Lead Counsel, who are highly experienced in prosecuting securities class actions, believe that the Settlements are an excellent result and in the best interests of the Class. ¶6 & §XI. In reaching this conclusion, Lead Counsel considered the strengths and weaknesses of the claims based on the information obtained through their investigation, the substantial discovery, expert consultations and the arguments presented in the course of the settlement negotiations. As a result, Lead Counsel's opinion should be afforded considerable weight.

Finally, the presumption that the Settlements are fair and reasonable is also strengthened because they have been approved by Lead Plaintiffs that oversaw the prosecution and settlement of the Action. Lead Plaintiffs here are sophisticated institutional investors that took an active role in supervising this litigation, as envisioned by the PSLRA, and have endorsed the Settlements. *See* Declaration of Scott Myers, Ex. C-1, at ¶¶5-6; Declaration of George Mitchell, Ex. C-2, at ¶¶8-9; Declaration of Brett Ciskoski, Ex. C-3, at ¶¶5-6; Declaration of Kristen Santos, Ex. C-4, at ¶¶5-6; and Declaration of James Henry Beno, Ex. C-5, at ¶¶5-6.

IV. ANALYSIS OF THE *GIRSH* FACTORS CONFIRMS THAT THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED

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

A. Complexity, Expense, and Likely Duration of This Litigation

The first *Girsh* factor looks to "the complexity, expense and likely duration of the litigation." *Id.* at 157. "This factor is intended to capture 'the probable costs, in both time and money, of continued litigation.'" *ViroPharma*, 2016 WL 312108, at *9 (citation omitted).

Securities litigation is acknowledged by courts to be complex and expensive, and this case was no exception. *See, e.g.*, *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013) (recognizing that securities fraud class actions are "notably complex, lengthy, and expensive cases to litigate"); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) ("This securities fraud class action involves accounting and damages issues, the resolution of which would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on these issues would [be] lengthy and costly to the parties."). Moreover, this case involved a number of highly technical complex issues that were more complicated than the typical securities class action, including issues concerning GAAP accounting and ALLL, loan underwriting and risk ratings, GAAS, and causation and damages. ¶¶ 115-53. Lead Counsel had to devote substantial effort to retaining and consulting with academics and experts to gather the highly technical evidence needed to prevail on their claims, and that complex and expensive work would have continued if the Settlements had not been reached.

Moreover, achieving a litigated verdict in this Action for Lead Plaintiffs and the Class would have required substantial additional time and expense. While fact discovery had

concluded by the time the Settlements were reached, Lead Plaintiffs would have still had to engage in substantial expert discovery, including finalizing and serving detailed and fact-intensive expert reports from loss causation, damages, accounting, and banking industry experts, as well as preparing and serving rebuttal reports and taking depositions of the experts. Defendants were also preparing to serve on Lead Plaintiffs their expert reports on these topics, which Lead Plaintiffs would have sought to rebut, including, *inter alia*, experts in due diligence and auditing.

After the close of discovery, both Lead Plaintiffs and Defendants would have likely cross-moved for summary judgment, which would have to be briefed and argued, a pre-trial order would have to be prepared, proposed jury instructions would have to be submitted, and *Daubert* motions and motions *in limine* would have to be filed and argued. Substantial time and expense would need to be expended in preparing the case for trial, which itself would be highly costly and uncertain. Moreover, even if the jury returned a favorable verdict, any verdict would be the subject of post-trial motions and an appeal. Taking into account the likelihood of appeals, absent the Settlements, this case likely would have continued for years. Accordingly, this factor strongly supports approval of the Settlements.

B. The Class's Reaction to the Settlements

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *NFL Players*, 821 F.3d at 438. As of September 14, 2018, Epiq had mailed a total of 92,330 copies of the Notice Packet to potential Class Members and nominees. ¶208. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire* on August 6, 2018. *Id*. While the deadline set by the Court for Class Members

to object to the Settlements has not yet passed, to date, no objections to the Settlements or the Plan of Allocation have been received.[5]

C. The Stage of the Proceedings and Amount of Discovery Completed

The third *Girsh* factor requires a court to consider "the degree of case development that class counsel have accomplished prior to settlement" in order to "determine whether counsel had an adequate appreciation of the merits of the case before negotiating" the settlement. *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (citation omitted).

Here, Lead Plaintiffs and Lead Counsel had a thorough understanding of the strengths and weaknesses of the claims at the time they agreed to the Settlements. As explained above and in the Joint Declaration, this case was settled after nearly eight years of vigorous, hard-fought litigation, including extensive document production that included the review of nearly 13 million pages of documents. ¶¶4-5, 54-114. Lead Plaintiffs' substantial discovery also included taking, defending, or otherwise participating in 39 depositions of witnesses including the Individual Defendants and key individuals from Wilmington Trust, KPMG, and the Underwriter Defendants. ¶¶4, 91-106. Lead Plaintiffs then litigated the Action through class certification and the conclusion of fact discovery, and were on the verge of exchanging expert reports when the parties settled. ¶¶162-63.

Based on the stage of the litigation and the amount of information obtained, Lead Plaintiffs and Lead Counsel respectfully submit that they had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement."

[5] The deadline for submitting objections is October 12, 2018. As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than October 25, 2018 (eleven days prior to the Settlement Hearing) that will address any objections that may be received.

In re AOL Time Warner, Inc. Sec. & ERISA Litig., 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006).

D. The Risks of Establishing Liability Weigh in Favor of Final Approval

The fourth *Girsh* factor looks to "the risks of establishing liability." *Girsh*, 521 F.2d at 157. Under this factor, "[b]y evaluating the risks of establishing liability, [] the district court can examine what [the] potential rewards, or downside, of litigation might have been had class counsel elected to litigate the claims rather than settle them." *GMC Trucks*, 55 F.3d at 814. While Lead Plaintiffs believe that their claims have merit, in complex cases such as this, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. Mercedes-Benz of North Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995).

Defendants would likely argue (as they had previously) that there was no restatement of Wilmington Trust's financial statements, and would further argue that the complicated, technical, and judgment-driven nature of the accounting standards at issue prevented any finding of objective falsity and that Plaintiffs' allegations were based on after-the-fact market declines. Thus, the Parties' respective positions would turn on fundamental disagreements about highly technical and judgment-driven accounting standards, the resolution of which would have turned on dueling testimony offered by accounting experts. Commentators and courts routinely observe that these sorts of technical accounting disputes—requiring dueling testimony from experts—are particularly difficult for plaintiffs to litigate. *See, e.g.*, *Harris v. AmTrust Fin. Servs., Inc.*, 135 F. Supp. 3d 155, 162 n.9 (S.D.N.Y. 2015), *aff'd*, 649 F. App'x 7 (2d Cir. 2016) ("Financial accounting is not a science. It addresses many questions as to which the answers are uncertain and is a 'process [that] involves continuous judgments and estimates.'"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008) (in a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited"). Furthermore, in

response to the Complaint's allegations that Defendants committed fraud concerning the Bank's lending and accounting practices, Defendants would have advanced arguments that Plaintiffs could not establish the element of scienter—*i.e.*, that Defendants acted intentionally or recklessly misled Wilmington Trust investors. The scienter requirement is commonly regarded as the most difficult element to prove in a securities fraud claim. *See, e.g.*, *Fishoff v. Coty Inc.*, 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011) ("[T]he element of scienter is often the most difficult and controversial aspect of a securities fraud claim"). Even a jury finding of gross negligence by Defendants would be insufficient to support Plaintiffs' fraud-based claims under the Exchange Act. Here, Defendants had made and would continue to make compelling arguments that they had no intent to mislead investors with respect to the other allegations in this Action because Defendants believed the practices at issue were known of (and implicitly blessed by) the Bank's regulators and auditors. Proving otherwise would require Plaintiffs to persuade the jury concerning sensitive credibility determinations.

As discussed in more detail in the Joint Declaration, the prosecution of the Criminal Action created considerable risk and uncertainty in prosecuting this Action. The Wilmington Trust Settlement was agreed to shortly after the Criminal Trial commenced, and weeks prior to the delivery of the jury verdict against the Criminal Action Individual Defendants. Wilmington Trust and the Criminal Defendants had spent years and considerable resources building a credible defense that the Bank's past due practices were longstanding and known to its regulators and auditors, and therefore the Criminal Defendants had no intent to commit fraud. While a not-guilty jury verdict in the Criminal Action would not have been fatal to Plaintiffs' claims in this Action—due to, among other things, the higher standard of proof required in the Criminal Action, as well as the far broader conduct at issue in this Action—the Defendants would have

looked to gain every strategic advantage possible from such a verdict.

Moreover, the fraudulent conduct at issue in the Criminal Action involved a narrower subset of the fraudulent conduct at issue in this Action. While guilty verdicts in the Criminal Action would have greatly supported the elements of falsity and scienter in this Action, the elements of loss causation and damages required significantly more evidence and expert opinion, all of which would have been aggressively challenged by Defendants.

In addition, the prospect that the Defendants would pay a settlement or monetary judgment in connection with the Criminal Action – which eventually occurred in October 2017 when the Government settled with Wilmington Trust – created additional risk in prosecuting this Action. Any recovery in the Criminal Action would be offset against the Class's possible recovery here, because the applicable securities law precludes any recovery in excess of actual damages. *See, e.g.*, 15 U.S.C. §§ 78bb(a).

The Criminal Action also increased risks here through the extensive delays that it caused to the prosecution of this Action. As discussed earlier, in and around October 2014, the Government intervened in this Action and moved for a stay of discovery, arguing that discovery in this Action might impact its ongoing criminal investigation. Consequentially, discovery in this Action was effectively stayed from October 2014 until December 2016, a delay of over two years that threatened Plaintiffs' ability to secure the evidence necessary to prove their allegations, as recollections fade and documents are misplaced. Indeed, by the time the Parties agreed to settle this Action, nearly a decade had passed since much of the underlying conduct had occurred.

E. The Risks of Establishing Loss Causation and Damages

Even if Lead Plaintiffs had overcome all of the risks discussed above and were successful

in establishing liability, they still faced substantial risks in proving loss causation and damages. Indeed, these issues were an important factor in establishing the settlement value of this case. As an initial matter, while Lead Plaintiffs' damages expert estimated that the Settlement Class suffered approximately $590 million in recoverable damages, that amount would by offset by the amount recovered by the Government on behalf of investors, between $44 million and $60 million.

Furthermore, in order to prove damages, Plaintiffs bear the burden of establishing "loss causation," *i.e.*, that Defendants' false and misleading statements caused their alleged loss. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear the burden of proving "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover'" (quoting 15 U.S.C. § 78u-4(b)(4))). To establish loss causation, plaintiffs must demonstrate a sufficient connection between the alleged fraudulent conduct and the losses suffered. Lead Plaintiffs attempted to meet this burden through their allegations that Defendants' fraud was gradually revealed to the investing public through a series of partial corrective disclosures principally occurring during 2010.

In response, however, Defendants would have made credible arguments that Lead Plaintiffs could not establish (either in whole or in part) that their losses were attributable to the revelation of the Bank's fraud. Instead, Defendants would have argued that much if not all of the decline in Wilmington Trust's stock price were collateral consequences of the ongoing global financial crisis, a broad macroeconomic event that wreaked particular havoc on the real estate lending industry—precisely the subject of many of Lead Plaintiffs' allegations here. *See, e.g.*, *Glove v. DeLuca*, 2006 WL 2850448, at *37 n.67 (W.D. Pa. Sept. 29, 2006) ("When the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other

investors, the prospect that the plaintiff's loss was caused by the fraud decreases, and a plaintiff's claim fails when it has not adequately [pled] facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events." (internal quotations omitted)). In support of this argument, Defendants would cite the performance of comparable companies over the Class Period to show that many of Wilmington Trust's peers also reported negative financial results, and therefore claim that the Bank's declining stock price reflected industry trends, not fraud. Defendants would then argue that the corrective events that Lead Plaintiffs pointed to merely reflected the materialization of these substantial risks known to be facing the industry at the time.

Moreover, Defendants would argue—as they did in the Criminal Action—that the massive decline in the price of Wilmington Trust securities at the end of the Class Period related solely to the fire sale purchase of Wilmington Trust by M&T Bank at half the Bank's trading price, not any disclosure of alleged fraud. While this issue was not resolved in the Criminal Action, it would be a significant issue at summary judgment or during trial in this Action. A finding for Defendants on this issue could wipe out nearly one-third of the Class's recoverable damages.

These arguments posed a significant risk, because if Defendants had succeeded, Lead Plaintiffs could have established liability but nevertheless have been unable to establish that the Class was entitled to the full amount (or any) of its damages. Accordingly, to meet their burden on loss causation and overcome this argument, Lead Plaintiffs had to engage multiple experts in a variety of fields making clear the direct connection between the alleged corrective disclosures and disaggregating any confounding effects from the deteriorating economic conditions from the global financial crisis and other events. Further, because several of the alleged corrective

disclosures related to the Bank's announcement of significant increases to its loan loss reserve, Plaintiffs worked with sophisticated experts in different fields – including underwriting, accounting, and damages – to analyze Wilmington Trust's actual loan portfolio to establish that the Bank should have increased its loan loss reserves months or years earlier than Defendants actually did. Only by doing so could Lead Plaintiffs meet their burden of showing that the stock declines accompanying Wilmington Trust's announcements of those increases to its loan loss reserve were in fact caused by Defendants' fraudulent understatement of their loan loss reserve during the Class Period.

In light of the novel fact pattern here, the role of experts would have been particularly important and there is no doubt that Defendants would have also been able to present a well-qualified expert who would opine that the class had little or no damages. Courts have long recognized that uncertainty as to which side's expert's view might be credited by the jury presents a substantial litigation risk. *See ViroPharma*, 2016 WL 312108, at *13 ("The conflicting damage theories of defendants and plaintiffs would likely have resulted in an expensive battle of the experts and it is impossible to predict how a jury would have responded."); *Lazy Oil, Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997) ("[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and complicated 'battle of experts.'"), *aff'd*, 166 F.3d 581 (3d Cir. 1999). That risk was heightened here given the unusual fact circumstances and the competing damages methodologies and, thus, further supports approval of the Settlement.

F. Risks of Maintaining Class Action Status Through Trial

The Court granted Lead Plaintiffs' motion for class certification on September 3, 2015. In light of the imminence of trial and the strong arguments supporting the appropriateness of

class certification in this case, Lead Plaintiffs believe that the risk of decertification was minimal here. Nevertheless, there was always the risk that the Action, or particular claims in the Action, might not have been maintained as a class through trial. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 322 (3d Cir. 2011) (a "district court retains the authority to decertify or modify a class at any time during the litigation"). Accordingly, the risks related to class certification favor approval of the Settlements.

G. Defendants' Ability to Withstand a Greater Judgment

This *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240. The "fact that [defendants] could afford to pay more does not mean that [they are] obligated to pay any more than what the [] class members are entitled to under the theories of liability that existed at the time the settlement was reached." *Warfarin*, 391 F.3d at 538. Here, while Defendants theoretically could afford to pay more, Lead Plaintiffs respectfully submit that this factor should not be viewed as determinative by this Court.

H. The Settlements Are Reasonable in Light of All the Risks of Litigation

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

As discussed in the Joint Declaration and above, Lead Plaintiffs' damages experts have estimated that the Class suffered approximately $530 million to $546 million in recoverable

damages (after the offset for the Government Recovery being dispersed to investors—an amount that, to the best of Plaintiffs' knowledge, is between $44 million and $60 million). Accordingly, the $210 million recovery represents nearly 40% of the Class's maximum likely recoverable damages, a recovery that far exceeds the range of approved settlements. *See Nichols v. Smithkline Beecham Corp.,* 2005 WL 950616, at *20 (E.D. Pa. Apr. 22, 2005) (approving settlement between 9.3% and 13.9% of alleged damages); *see also C*ornerstone Research, Securities Class Action Settlements: 2017 Review and Analysis, at 19-20 (2018) (median recovery of damages in Third Circuit from 2008-2017 was 5% while median recovery of damages against financial institutions nationwide in 2017 was 5.2%). Importantly, this figure assumes that Lead Plaintiffs were able to establish causation for each and every alleged disclosure, along with scienter and falsity for each and every inflationary event. If Defendants successfully knocked out a disclosure or inflationary event, this damages number would be greatly reduced.

Moreover, even if there were a favorable verdict at trial, Defendants would most likely appeal. Recovery was thus highly uncertain and would likely take years, while the Settlements confer an immediate and substantial benefit. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 837 (W.D. Pa. 1995) ("It is safe to say, in a case of this complexity, the end of [the] road might be miles and years away."). For these reasons, the Settlements should be approved.

V. THE *PRUDENTIAL* CONSIDERATIONS ALSO SUPPORT THE SETTLEMENTS

In addition to the *Girsh* factors, the Third Circuit also advises courts to address considerations set forth in *Prudential*, 148 F.3d at 323, where applicable. These factors include:

> [1] the maturity of the underlying substantive issues, as measured by [among other things] . . . the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability

> and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. Here, each of the *Prudential* considerations weighs in favor of the Settlements. With respect to the first consideration, Lead Plaintiffs and Lead Counsel had a well-developed understanding of the strengths and weakness of the case based on the extensive discovery conducted. *See* Section IV.C above. With respect to the second and third considerations, Lead Counsel is not aware of other classes or other claimants asserting related securities fraud claim claims. With respect to the fourth consideration, Class Members were afforded the right to exclude themselves from the Class in connection with the Notice of Pendency disseminated in 2016, and 8 Class Members exercised that right. With respect to the fifth and sixth considerations, Lead Counsel's request for attorneys' fees is reasonable as set forth in the accompanying Fee Memorandum (and, in any event, approval of the Settlements is separate from the motion for fees and expenses), and the Plan of Allocation, which will govern the processing of claims and the allocation of settlement funds, is fair and reasonable as set forth in Part VI below.

VI. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Merck & Co., Inc. Vytorin Erisa Litig.*, 2010 WL 547613, at *6 (D.N.J. Feb. 9, 2010) (*citing In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000)). "In evaluating a plan of allocation, the opinion of qualified counsel is entitled to significant respect. The proposed allocation need not meet

standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis." *Boyd v. Coventry Health Care Inc.*, 2014 WL 359567, at *8 (D. Md. Jan. 31, 2014).

Here, the proposed Plan of Allocation (Notice ¶¶47-69), which was developed by Lead Plaintiffs' damages experts in consultation with Lead Counsel, provides a fair and reasonable method to allocate the Net Settlement Funds among Class Members who suffered losses as result of the conduct alleged in the Complaint. In developing the Plan of Allocation, Lead Plaintiffs' damages expert calculated the estimated amount of artificial inflation in the per share closing price of Wilmington Trust common stock which allegedly was proximately caused by Defendants' alleged false and misleading statements and material omissions.

Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of Wilmington common stock during the Class Period that is listed in the Claim Form and for which adequate documentation is provided. Notice ¶¶52-53. In general, Recognized Loss Amounts calculated under the Plan of Allocation will be the difference between the estimated artificial inflation on the date of purchase and the estimated artificial inflation on the date of sale, or the difference between the actual purchase price and the sale price, whichever is less. *Id.* ¶53. Thus, Claimants who purchased shares during the Class Period but did not hold those shares through at least one partial corrective disclosure will have no Recognized Loss Amount as to those transactions. *Id.* ¶¶50-53.

Further, under the Plan of Allocation, the Net Settlement Fund for the Wilmington Trust/Underwriter Settlement will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their "Class Period Recognized Claims," which is the sum of the Claimant's Recognized Loss Amounts for shares of Wilmington Trust common stock purchased

or otherwise acquired during the full Class Period (*i.e.*, January 18, 2008 through and including the close of trading on October 31, 2010). Notice ¶64. Also, in recognition of the fact that Defendant KPMG was not liable for any of the alleged misconduct prior to February 22, 2010, the Net Settlement Fund for the KPMG Settlement will be allocated on a *pro rata* basis relative to the size of their "Auditor Recognized Claims," which is the sum of the Claimant's Recognized Loss Amounts for any shares of Wilmington Trust common stock the Claimant purchased or otherwise acquired during the Auditor Class Period (*i.e.*, February 22, 2010 through and including the close of trading on October 31, 2010). *Id.* ¶65.

VII. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the Settlements and Plan of Allocation as fair, reasonable, and adequate.

Dated: September 17, 2018

Respectfully submitted,

CHIMICLES & TIKELLIS LLP

/s/ Robert J. Kriner, Jr.
Robert J. Kriner, Jr. (Bar No. 2546)
Vera G. Belger (Bar No. 5676)
222 Delaware Avenue, 11th Floor
P.O. Box 1035
Wilmington, DE 19899
Phone: (302) 656-2500
Fax: (302) 656-9053

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

Hannah Ross
Katherine M. Sinderson
Lauren McMillen Ormsbee
1251 Avenue of the Americas
New York, NY 10020
Phone: (212) 554-1400
Fax: (212) 554-1444

SAXENA WHITE P.A.

Maya S. Saxena
Joseph E. White, III
Brandon T. Grzandziel
Kathryn W. Weidner
150 E. Palmetto Park Road, Suite 600
Boca Raton, FL 33432
Telephone: (561) 394-3399
Fax: (561) 394-3382

-and –

Steven B. Singer
10 Bank Street, 8th Floor
White Plains, NY 10606
Telephone: (914) 437-8551
Fax: (888) 631-3611

Counsel for Lead Plaintiffs and Co-Lead Counsel for the Class