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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

INDUSTRIENS PENSIONSFORSIKRING A/S, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. BECTON, DICKINSON AND COMPANY and THOMAS E. POLEN, Defendants.	Case No. 2:20-cv-02155-SRC-CLW Hon. Stanley R. Chesler, District Court Judge Hon. Cathy L. Waldor, Magistrate Judge

NOTICE OF CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

To: All Counsel by ECF

PLEASE TAKE NOTICE that on April 22, 2024, at 11:30 a.m. in Courtroom 4D of the Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, NJ 07101, or by telephone or videoconference (in the discretion of the Court), before the Honorable Cathy L. Waldor, Class Representative Industriens Pensionsforsikring A/S ("Class Representative"), by and through its undersigned counsel, will and hereby does move the Court for orders granting Class Representative's Motion for Final Approval of Settlement and Plan of Allocation under Federal Rule of Civil Procedure 23 which will: (i) grant final approval of the proposed settlement of the above-captioned securities class action ("Settlement") on the terms set forth in the Stipulation and Agreement of Settlement dated as of December 19, 2023 (ECF No. 182-2); and (ii) approve the proposed plan for allocating the net proceeds of the Settlement to the Class.

PLEASE TAKE FURTHER NOTICE that, in support of the Motion, the undersigned intend to rely on the accompanying Memorandum of Law and the accompanying Declaration of Joshua E. D'Ancona and exhibits attached thereto, and the papers and pleadings filed in this Action, the arguments of counsel, and any other matters properly before the Court.

PLEASE TAKE FURTHER NOTICE that, proposed orders granting the relief requested herein will be submitted in connection with Class Representative's reply

submission, which will be filed no later than April 15, 2024, pursuant to the Court's January 18, 2024 Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 186).

Dated: March 18, 2024

Respectfully submitted,

s/ James E. Cecchi

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CERTIFICATION OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the CM/ECF system. Those attorneys registered with the Electronic Filing System will receive notice of this filing by ECF and email. I further certify that a courtesy copy of this filing will be served upon the Court.

Dated: March 18, 2024

s/ James E. Cecchi
James E. Cecchi

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UNITED STATES DISTRICT COURT
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INDUSTRIENS PENSIONSFORSIKRING A/S, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. BECTON, DICKINSON AND COMPANY and THOMAS E. POLEN, Defendants.	Case No. 2:20-cv-02155-SRC-CLW Hon. Stanley R. Chesler, District Court Judge Hon. Cathy L. Waldor, Magistrate Judge

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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Court-appointed Lead Plaintiff and Class Representative Industriens Pensionsforsikring A/S ("Industriens" or "Class Representative") respectfully submits this Memorandum of Law in support of its Motion, pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rules"), for: (i) final approval of the proposed settlement of this securities class action on the terms set forth in the Stipulation and Agreement of Settlement dated as of December 19, 2023 (ECF No. 182-2) ("Stipulation"); and (ii) approval of the proposed plan for allocating the net proceeds of the Settlement to the Class ("Plan of Allocation" or "Plan").[1]

I. INTRODUCTION

Subject to Court approval, Class Representative has agreed to settle all claims asserted in the Action against Becton, Dickinson and Company ("BD" or the "Company") and Thomas E. Polen ("Polen" and, together with BD, "Defendants") in exchange for an $85,000,000 cash payment. As detailed in the D'Ancona

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Stipulation and in the Declaration of Joshua E. D'Ancona ("D'Ancona Declaration" or "D'Ancona Decl.") filed herewith. The D'Ancona Declaration is an integral part of this submission and, for the sake of brevity herein, Class Representative respectfully refers the Court to the D'Ancona Declaration for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks of continued litigation. Citations to "¶ _" herein refer to paragraphs in the D'Ancona Declaration and citations to "Ex. _" herein refer to exhibits to the D'Ancona Declaration. All internal citations, quotation marks, and footnotes have been omitted and emphasis has been added unless otherwise indicated.

Declaration and summarized below, the Settlement: (i) is the culmination of nearly four years of vigorous litigation efforts; (ii) is the product of protracted settlement negotiations under the guidance of an experienced class-action mediator and, ultimately, the Parties' acceptance of the mediator's recommendation to resolve the Action for the Settlement Amount; and (iii) represents a meaningful percentage of the Class's estimated maximum damages. Class Representative respectfully submits that the Settlement provides an excellent result for the Class and readily satisfies the standards for final approval under Rule 23(e)(2).

At the time of settlement, the Parties had engaged in a comprehensive discovery process through which over two million pages of documents were produced, numerous interrogatories had been served and answered, class certification briefing and related discovery had been completed, and fact depositions were underway. In addition to reviewing and analyzing the documentary evidence and conducting extensive deposition preparation, Class Representative and Class Counsel also conducted a wide-ranging investigation into the Class's claims, researched and prepared four detailed complaints, briefed three motions to dismiss (defeating the third in substantial part), and obtained certification of the Class. As a result of these efforts (and others), Class Representative and Class Counsel had a well-developed understanding of the strengths and weaknesses of the Class's claims when they agreed to resolve the Action.

While Class Representative believes the Class's claims are meritorious and supported by Class Counsel's investigative efforts and evidence developed during discovery, it also recognized that there were substantial risks to further litigation. The Court had already dismissed the Action once at the motion to dismiss stage, and, although the Court largely sustained the claims set forth in the Complaint, had the Action not resolved, Defendants would have continued to aggressively litigate their arguments and defenses through summary judgment and trial.

For example, Defendants undoubtedly would have continued to forcefully assert that the statements at issue in the Action—concerning the nature of a commercial ship hold on BD's Alaris Infusion Pump System ("Alaris"), the reasons underlying the ship hold, and BD's ability to meet its fiscal year 2020 financial guidance despite the ship hold—were not false or misleading. To this end, Defendants would argue that, when the alleged misstatements were made, the U.S. Food and Drug Administration ("FDA") had not formally taken any action requiring BD to stop shipping Alaris and that it was not until February 3, 2020—just days before BD disclosed the same—that Defendants learned a new application for regulatory clearance and remediation of numerous software issues would be required before BD could resume shipping Alaris. With respect to scienter, Defendants would continue to maintain that they believed their statements to be true and had no motive to misrepresent their regulatory situation. In support, Defendants would assert,

among other things, that BD had been able to ship Alaris in the course of software fixes in the past, and they understood and believed that the software remediation at issue during the Class Period would be no different.

Class Representative would also face hurdles establishing loss causation and damages. Defendants would likely assert that the alleged corrective disclosure on February 6, 2020 did not reveal any truth about any prior misstatements concerning the Alaris ship hold or BD's fiscal year 2020 financial guidance, but rather disclosed an event from just days earlier—the FDA definitively requiring new regulatory clearance and remediation before Alaris could be shipped. Defendants would also challenge, as they did at the class certification stage, the proposed methodology for calculating option damages and would likely argue that the Class Period should be, at the very least, shortened on the grounds that the early stages of the Class Period lacked evidence of liability.

Adverse determinations on these issues at summary judgment, trial, or in likely appeals could have reduced or potentially eliminated a recovery for the Class, let alone a recovery greater than the Settlement Amount. The Settlement avoids these risks—as well as the delay and expense of continued litigation—while providing a substantial and certain near-term benefit to the Class. Moreover, the Settlement is not "claims-made." Rather, all Settlement proceeds, after deducting Court-approved fees and costs, will be distributed to Class Members who submit valid Claims.

In January 2024, the Court preliminarily approved the Settlement, finding that it would "likely be able to finally approve the Settlement." ECF No. 186, ¶ 1. The Settlement has the full support of the Class Representative—a sophisticated investor that took an active role in supervising the litigation, and the reaction of the Class to date has been positive. While the deadline for objections has not yet passed, following an extensive notice campaign, there have been no objections to the Settlement or the Plan of Allocation.[2]

Given the foregoing considerations and the factors addressed below, Class Representative and Class Counsel respectfully submit that: (i) the Settlement meets the standards for final approval under Rule 23, and is a fair, reasonable, and adequate result for the Class; and (ii) the Plan is a fair and reasonable method for equitably allocating the Net Settlement Fund to Class Members who submit valid Claims based on losses they suffered as a result of the alleged fraud.

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e)(2) requires judicial approval of any class action settlement. Whether to grant such approval lies within the district court's discretion. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). This discretion should be guided by this Circuit's strong judicial policy favoring settlement, which

[2] Any objections received after this submission, will be addressed in Class Representative's reply papers to be filed with the Court on April 15, 2024.

"is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010); *see also McDonough v. Horizon Blue Cross Blue Shield of N.J.*, 641 F. App'x 146, 150 (3d Cir. 2015) (noting "overriding public interest in settling class action litigation").

Under Rule 23(e)(2), the Court should approve a proposed class action settlement if it finds it to be "fair, reasonable, and adequate." *See also In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016). In making this determination, Rule 23(e)(2) provides that a court consider whether:

> (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.

Consistent with this guidance, courts in this Circuit have long considered the factors enumerated in *Girsh v. Jepson* in deciding whether to approve a class action settlement:

> . . . (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 153, 157 (3d Cir. 1975) (ellipses in original); *In re Wilmington Tr. Sec. Litig*., 2018 WL 6046452, at *4 (D. Del. Nov. 19, 2018).[3] The Third Circuit also advises courts to consider, where applicable, the additional factors set forth in *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998). *See infra* § II.C.7.[4]

At the preliminary approval stage, this Court considered the Rule 23(e)(2) factors in assessing the Settlement, and found it to be fair, reasonable, and adequate, subject to further consideration at the Settlement Hearing. ECF No. 186, ¶ 1. Nothing

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[3] "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Valeant Pharms. Int'l Sec. Litig.*, 2020 WL 3166456, at *7 (D.N.J. June 15, 2020).

[4] The Advisory Committee Notes to the 2018 amendments to Rule 23 explain that the four Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Accordingly, Class Representative discusses below the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four Rule 23(e)(2) factors, but also discuss the application of the non-duplicative factors articulated by the Third Circuit in *Girsh* and *Prudential*.

has changed to alter the Court's previous findings, and the factors supporting the Court's determination to preliminarily approve the Settlement apply equally now. Accordingly, Class Representative and Class Counsel respectfully submit that the Settlement is fair, reasonable, and adequate, and warrants final approval under the Rule 23(e)(2) factors and Third Circuit law.

A. Class Representative and Class Counsel Have Adequately Represented the Class in this Action

The first Rule 23(e)(2) factor—whether Class Representative and Class Counsel "have adequately represented the class"—favors approval of the Settlement. 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).

The Court has expressed confidence in the abilities of Class Representative and Class Counsel to pursue this litigation, first by appointing each to their respective positions (ECF No. 24), and then by certifying the Class on August 3, 2023 and finding that Class Representative and Class Counsel had satisfied Rule 23(a)(4)'s adequacy requirement (ECF No. 168). The Court's confidence was well placed as Class Representative and Class Counsel have zealously pursued this litigation on behalf of the Class.

Here, Class Representative has diligently supervised and participated in the Action and through its efforts, has provided meaningful direction and assistance to Class Counsel. Class Representative's efforts included, *inter alia*, communicating regularly with Class Counsel about case developments and strategy, reviewing and commenting on court filings and other material documents, responding to Defendants' discovery requests, including by reviewing and verifying interrogatory responses and searching for and producing potentially relevant documents, preparing for and providing testimony at a deposition, and authorizing all settlement negotiations. *See* Ex. 1, ¶¶ 4-6. In addition, Class Representative has no interests antagonistic to the Class, and shares claims in common with its members. *See Utah Ret. Sys. v. Healthcare Servs. Grp., Inc.*, 2022 WL 118104, at *4 (E.D. Pa. Jan 12, 2022) ("Plaintiff's interests are coextensive with, and not antagonistic to, the interests of the class since they all raise the same claims and seek the same relief: they share the same interest in holding Defendants accountable for their alleged misconduct.").

Likewise, Class Representative retained counsel who is highly experienced in securities litigation. *See* Ex. 3-C. Class Counsel actively pursued the Class's claims and negotiated a favorable Settlement through protracted mediation. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) ("[C]ourts in this Circuit traditionally attribute significant weight to the belief of experienced counsel that

settlement is in the best interest of the class."), *aff'd*, 559 F. App'x 151 (3d Cir. 2014).

B. The Settlement Was Negotiated at Arm's Length with the Assistance of an Experienced Mediator

A presumption of fairness attaches where, as here, the Parties engaged in arm's-length negotiations following years of litigation that included extensive discovery and consultation with an expert. *See, e.g.*, *NFL*, 821 F.3d at 436; *Warfarin*, 391 F.3d at 535, 537. This presumption is further supported where a neutral mediator is involved. *See Alves*, 2012 WL 6043272, at *22 ("The 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."). Here, the Parties' settlement negotiations included three mediation sessions (two in-person and one virtual) with David Murphy, Esq. of Phillips ADR Enterprises, P.C., the preparation of detailed mediation statements, and presentations addressing the Parties' respective views on liability and damages. ¶ 110. These negotiations culminated in Mr. Murphy's recommendation to settle the Action for $85 million, which the Parties accepted on October 18, 2023. *Id*.

Moreover, the proceedings had reached a stage where Class Representative and Class Counsel could make a sound evaluation of the claims and propriety of settlement. Prior to settlement, Class Counsel had: (i) exhaustively investigated the Class's claims, including through interviews with over 200 witnesses (¶¶ 23-26); (ii)

researched and prepared four detailed complaints based on that investigation (¶¶ 27, 33, 45-46, 57); (iii) opposed multiple motions to dismiss (¶¶ 31, 37, 48); (iv) briefed and argued a motion to amend the Third Amended Complaint (¶¶ 57-60); (v) engaged in substantial fact discovery, including negotiating with Defendants in numerous meet and confers over the scope of discovery, reviewing over two million pages of highly technical information produced by Defendants and third parties, deposing two of BD's former executives, preparing to depose 20 additional witnesses, and litigating three discovery disputes (¶¶ 63-98); (vi) consulted with an expert at various litigation stages (¶¶ 106-09); (vii) successfully moved for class certification (¶¶ 99-105); and (viii) defended the depositions of Industriens and Class Representative's expert and deposed Defendants' expert in connection with class certification (¶¶ 100, 102).[5] Additionally, the Parties' settlement negotiations, including the facts and arguments set forth in their respective mediation submissions and asserted during the sessions with Mr. Murphy, further informed the Parties of each side's arguments. ¶ 110. As a result, Class Representative and Class Counsel were well informed of the strengths and risks of the case when they agreed to settle. *See* 4 Newberg and Rubenstein on Class Actions, *Newberg on Class Actions* § 13:49

[5] The D'Ancona Declaration provides additional detail on Class Counsel's litigation efforts. ¶¶ 20-113.

(6th ed. 2023) (approval warranted "[w]here a court can conclude that the parties had sufficient information to make an informed decision about settlement").

C. The Settlement Provides the Class Adequate Relief, Considering the Costs, Risks, and Delay of Litigation and Other Relevant Factors

Rule 23(e)(2)(C) overlaps considerably with many of the factors articulated in *Girsh*. All of these factors, which entail "a substantive review of the terms of the proposed settlement" and the "relief that the settlement is expected to provide to" the Class, weigh in favor of the Settlement. *See* Fed. R. Civ. P. 23(e)(2)(A) & (B) advisory committee's note to 2018 amendment.

1. The Complexity, Expense, and Likely Duration of the Litigation

Rule 23(e)(2)(C)(i) and the first *Girsh* factor look to "the complexity, expense and likely duration of the litigation." *Girsh*, 521 F.2d at 157. "This factor is intended to capture the probable costs, in both time and money, of continued litigation." *In re ViroPharma Inc. Sec. Litig.*, 2016 WL 312108, at *9 (E.D. Pa. Jan. 25, 2016). Indeed, settlement is favored where "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *Talone v. Am. Osteopathic Ass'n*, 2018 WL 6318371, at *14 (D.N.J. Dec. 3, 2018); *see also In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("Generally,

unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

Courts consistently acknowledge that securities class actions are "notably complex, lengthy, and expensive cases to litigate," *see In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013), and this case was no exception. As discussed in the D'Ancona Declaration and below, continued litigation of this Action presented numerous risks to Class Representative's ability to establish liability and damages. ¶¶ 114-31. And, continuing to prosecute the Action through the completion of fact discovery (including depositions and a pending discovery dispute), expert discovery, summary judgment motions, and trial would have required substantial additional time and expense.[6] In contrast, the Settlement avoids the risk, expense, and delay of continued litigation while providing a substantial, near-term recovery for the Class, underscoring the Settlement's fairness.

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[6] Additionally, even if Class Representative prevailed at trial, Defendants surely would have appealed the verdict. Post-trial motions and appellate proceedings would have added significantly to the expense of this Action and delayed, potentially for years, any recovery to the Class (with no assurance that Class Representative would ultimately prevail or recover more than the Settlement Amount). *See, e.g., In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (granting defendants judgment as a matter of law on the basis of loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd on other grounds sub nom.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).

2. The Risks of Continued Litigation

In assessing a settlement, a court should also consider "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." *Girsh*, 521 F.2d at 157. "These [*Girsh*] factors balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *Wilmington Tr.*, 2018 WL 6046452, at *5. Here, while Class Representative ultimately largely prevailed at the motion to dismiss stage, it still faced the possibility that the Court would rule in Defendants' favor at summary judgment, or that Defendants might prevail at trial. *See Nobles v. MBNA Corp.*, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) (noting that, although "[p]laintiff's claim has survived a motion to dismiss, [] success is not guaranteed if this matter were to proceed to jury trial.").[7] As set forth below, these risks favor approval of the Settlement.

i. Risks to Establishing Liability

As detailed in the D'Ancona Declaration and summarized herein, Class Representative faced a number of substantial risks to proving liability.

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[7] *See also, e.g.*, *In re Apollo Grp., Inc. Sec. Litig.*, 2010 WL 5927988 (9th Cir. June 23, 2010) (granting judgment to defendants and nullifying a unanimous jury verdict for plaintiff following trial).

First, Class Representative faced challenges in proving that the statements at issue were materially false or misleading.[8] Defendants would argue, as they did throughout the Action, that when the alleged misstatements were made, the FDA had not formally taken any action requiring BD to stop shipping Alaris and that when the FDA did ultimately inform BD (on February 3, 2020) that a new application for regulatory clearance was required to resume shipping, BD disclosed this information to the public three days later. ¶¶ 118-20. In support, Defendants would also assert that: (i) they had no duty to predict and disclose potential FDA action or a speculative threat to sales and BD's 2020 fiscal year guidance; (ii) they had already disclosed at the start of the Class Period that upgrades would be made to Alaris (and a voluntary ship hold imposed) and that BD's applications for regulatory clearance for changes to Alaris were publicly accessible through the FDA's online databases; and (iii) based on their understanding of BD's conversations with the FDA, they believed the ship hold would be short-lived and would conclude shortly after the start of BD's 2020 fiscal year even as they worked to remediate other Alaris defects. *Id*. Defendants would further argue that many of the alleged misstatements were

[8] *See Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) ("To state a valid securities fraud claim under Rule 10b–5, a plaintiff must first establish that defendant, in connection with the purchase or sale of a security, made a materially false or misleading statement or omitted to state a material fact necessary to make a statement not misleading.").

forward-looking and protected under the PSLRA's safe harbor (*see* 15 U.S.C. § 78u-5(c). ¶ 121; *In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 281 (3d Cir. 2010) ("Statements about future profitability and assumptions underlying management's expectations about the future fall squarely within the definition of forward-looking statement.").

Second, Class Representative faced challenges in proving Defendants' scienter, one of the most difficult elements for a plaintiff in a securities fraud case to prove. *See, e.g., ViroPharma*, 2016 WL 312108, at *12 ("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."). Had the Settlement not been reached, Defendants would continue to argue that at the time Polen made the alleged ship hold misstatements, he (and therefore BD) could not predict and had no knowledge that the FDA was going to require a new regulatory application to be filed and granted, as well as the remediation of numerous device software issues, before BD could resume shipping Alaris. ¶¶ 122-23. Defendants would also likely assert that they had no knowledge of the FDA's position that Alaris should not be shipped absent these regulatory and remediation steps until February 3, 2020, undermining claims that the alleged misstatements in November 2019 through January 2020 were made with scienter. ¶ 123. Defendants would further argue that BD understood its proposed regulatory

pathway would allow Alaris to be shipped to customers while BD worked to remediate the software issues, as had been done with prior Alaris fixes. *Id*.[9]

Finally, if Defendants were able to convince a jury either that Defendants' statements were factually true or that Defendants did not act with the requisite scienter, Class Representative's Sections 20(a) and 20A claims against Polen would have been foreclosed as well, as both of these claims require Class Representative to prove a primary violation of the Exchange Act. ¶ 124.

ii. Risks to Establishing Damages

Class Representative also faced considerable challenges in establishing loss causation and damages. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear burden of proving "that the defendant's misrepresentations caused the loss for which the plaintiff seeks to recover").

Throughout the Action, Defendants asserted that Class Representative would be unable to demonstrate that Defendants' misrepresentations or omissions directly or proximately caused the economic losses incurred. Defendants would assert, among other things, that BD's February 6, 2020 announcement regarding the

[9] Separately, Defendants would have raised aggressive affirmative defenses to Class Representative's Section 20A claims, including that Polen's alleged insider trades were made pursuant to a SEC Rule 10b5-1 trading plan. Defendants would also argue that Polen's sales were not suspicious in timing or amount, further supporting a finding that Polen did not act with scienter. *Id*.

remediation and regulatory clearance hurdles to Alaris shipments and sales, and the effect on BD's 2020 fiscal year guidance, did not reveal a hidden "truth" underlying any prior misstatement, or anything resembling fraud—but rather disclosed an event from just days earlier, i.e., the FDA's definitive statement that Alaris needed new regulatory clearance and remediation before it could be shipped. ¶¶ 125-30. Resolution of these complicated loss causation issues—and ultimately, the Class's damages—would have hinged upon extensive expert discovery and testimony. Thus, "establishing damages at trial would lead to a battle of experts . . . with no guarantee whom the jury would believe." *In re Cendant Corp. Litig*., 264 F.3d 201, 239 (3d Cir. 2001); *see also 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).

iii. Risks to Maintaining the Class Action Through Trial

The Court certified the Class on August 3, 2023. ECF No. 168, *see* ¶ 104. In light of the strong arguments supporting the appropriateness of class certification in this Action, Class Representative believes that the risk of decertification was minimal. Nevertheless, there is always a risk that the Action, or particular claims in the Action, might not have been maintained as a class through trial. *See Sullivan v.*

DB Invs., 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").

3. The Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and the Risks of Litigation

The eighth and ninth *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; *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) ("[T]he percentage recovery[] must represent a material percentage recovery to plaintiff in light of all the risks[.]"). The $85,000,000 cash Settlement easily clears this threshold.

Here, based on expert estimates employing various reasonable assumptions, the Class's maximum aggregate damages were between approximately $550 million and $850 million. ¶ 129. Using this estimated range, the Settlement represents approximately 10-15% of maximum damages—a recovery reflecting the informed assessment by Class Counsel and Class Representative of the strengths of the Class's claims and risks of litigating this complex Action through the remainder of

discovery, summary judgment, trial and appeals.[10] However, had Defendants prevailed on even one of their core arguments going forward, recoverable damages would be lowered or potentially eliminated altogether. Thus, the Settlement provides a substantial recovery given the risks of further litigation, and this supports approval.

4. 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. *Cendant*, 264 F.3d at 235. A settlement following sufficient discovery and arms-length negotiation is "presumptively valid." *Devlin v. Ferrandino & Son, Inc.*, 2016 WL 7178338, at *5 (E.D. Pa. Dec. 9, 2016) (settlement "generally recognize[d]" as "presumptively valid where . . .the parties engaged in arm's length negotiations after meaningful discovery").

From the commencement of this Action in February 2020 through its resolution in October 2023, Class Representative and Class Counsel spent substantial time and resources litigating the factual and legal issues in play. ¶¶ 20-

[10] While each securities class action reflects its own unique risks, the Settlement compares favorably to recoveries achieved in other securities cases and approved by courts in this Circuit. *See, e.g.*, *Wilmington Tr.*, 2018 WL 6046452, at *8 (noting "Third Circuit median recovery of 5% of damages in class action securities litigation").

105. As noted above, before reaching the Settlement, Class Representative through Class Counsel had engaged in substantial fact discovery—including analyzing more than two million pages of documents from Defendants and third parties; serving numerous discovery requests and subpoenas; litigating multiple discovery disputes; preparing and exchanging class certification expert reports; and participating in five depositions and preparing to take 20 more. ¶¶ 63-98. Class Counsel also opposed three motions to dismiss and successfully moved for class certification. ¶¶ 31, 37, 48, 99-105. In addition, Class Counsel prepared detailed mediation statements and presentations, and participated in tooth-and-nail settlement negotiations, including three separate mediation sessions. ¶ 110. This substantial record demonstrates that, when the Settlement was reached, Class Representative and Class Counsel had more than enough information to make an informed decision about settlement based on the "strengths and weaknesses of their case." *Dartell v. Tibet Pharms., Inc.*, 2017 WL 2815073, at *5 (D.N.J. June 29, 2017) (finding factor favored settlement where parties had "fully briefed motions to dismiss, a motion for class certification, and [had] engaged in discovery," as well as the "engage[ment of] two experts"). This factor strongly supports the Settlement.

5. Ability of Defendants to Withstand a Greater Judgment

The seventh *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. However, even 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, this factor does not render the significant amount recovered through the Settlement any less fair, reasonable, or adequate.[11]

6. The Reaction of the Class to Date

In assessing a settlement, courts in this Circuit also consider "the reaction of the class to the settlement." *Girsh*, 521 F.2d at 157. The deadline for Class Members to object to the Settlement or request exclusion from the Class is April 1, 2024. As of this filing, there have been no objections to the Settlement and not a single request for exclusion. ¶ 12, Ex. 2, ¶ 16. Class Representative will address any objections and requests for exclusion received in its reply submission.

7. The Relevant *Prudential* Factors Also Support the Settlement

In addition to Rule 23(2)(e) and the traditional *Girsh* factors, the Third Circuit also advises courts to address, where applicable, the following factors set forth in *Prudential*:

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[11] *See In re Schering-Plough Corp. Sec. Litig.*, 2009 WL 5218066, at *5 (D.N.J. Dec. 31, 2009) ("pushing for more in the face of risks and delay would not be in the interests of the class").

> [1] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, 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.

148 F.3d at 323. Each of the *Prudential* factors weighs in favor of the Settlement. With respect to the first *Prudential* factor, Class Representative and Class Counsel had a well-developed understanding of the strengths and weaknesses of the case based on their extensive investigation of the Class's claims, consultation with an expert, substantial discovery, and mediation efforts. *See supra* § II.C.4. With respect to the second and third *Prudential* factors, Class Counsel is not aware of other classes or claimants asserting related securities fraud claims.[12] With respect to the fourth *Prudential* factor, Class Members have been afforded the opportunity to opt out of the Class and, so far, none have chosen to do so. *See* Ex. 2, ¶ 16. With respect to the fifth and sixth *Prudential* factors, Class Counsel's request for attorneys' fees is

[12] A related derivative action, *In re Becton, Dickinson & Co. Shareholder Derivative Litigation*, Master File No. 2:20-cv-15474 (D.N.J.), was filed on November 2, 2020. These derivative claims are not being released by the Settlement and have been specifically carved out of the "Released Plaintiff's Claims." ¶ 20, fn. 11.

reasonable as set forth below in § II.D. and in the accompanying Fee and Expense Memorandum, and the Plan of Allocation, which will govern the allocation of the Net Settlement Fund, is fair and reasonable as set forth below in § III.

D. The Remaining Rule 23(e)(2) Factors Support Final Approval of the Settlement

In evaluating the Settlement, Rule 23(e)(2) instructs courts to also consider: (i) "the effectiveness of [the] proposed method of distributing the relief provided to the class, including the method of processing class member claims;" (ii) "the terms of any proposed award of attorney's fees, including the timing of payment;" (iii) any other agreement made in connection with the proposed settlement; and (iv) whether "class members are treated equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv) & (e)(2)(D). These factors also support final approval of the Settlement.

First, the proposed method of distribution and claims processing ensures equitable treatment of Class Members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii) & (e)(2)(D). Class Members' Claims will be processed and the Net Settlement Fund distributed pursuant to a standard method routinely approved in securities class actions. The Court-authorized Claims Administrator, JND Legal Administration ("JND"), will review and process all Claims received, provide each Claimant with an opportunity to cure any deficiency in their Claim or request judicial review of the denial of their Claim, if applicable, and will ultimately mail or wire Authorized

Claimants their *pro rata* share of the Net Settlement Fund, as calculated under the Plan of Allocation. *See infra* § III; ¶¶ 138-44. Importantly, none of the Settlement proceeds will revert to Defendants. *See* Stipulation, ¶ 12.

Second, the relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees and Litigation Expenses incurred in prosecuting this Action, including the timing of any such Court-approved payments. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). As shown in the Fee and Expense Memorandum, the requested attorneys' fees of 25% of the Settlement Fund, made in accordance with an *ex ante* retention agreement with Class Representative (*see* Ex. 1, ¶ 8), and to be paid upon the Court's approval, are reasonable in light of Class Counsel's efforts over the past four years and the $85 million case recovery, as well as the significant risks shouldered by Class Counsel.[13] Additionally, the 25% fee request is fully supported by Third Circuit case law. *See Wilmington Tr.*, 2018 WL 6046452, at *9 (finding 28% to be a "typical fee percentage" in the Third Circuit); *see also Beltran v. SOS Ltd.*, 2023 WL 319895, at *8 (D.N.J. Jan. 3, 2023) ("In common fund cases, the fees typically awarded to class counsel generally range between 19% to 45% of the Settlement Fund."), *R & R*

[13] In connection with its fee request, Class Counsel also seeks payment from the Settlement Fund of Plaintiff's Counsel's expenses in the total amount of $843,144.64 and a request for reimbursement to Class Representative in the amount of $84,856.40. ¶¶ 145, 162, 170.

adopted, 2023 WL 316294 (Jan. 19, 2023). Additionally, the proposal that any Court-awarded attorneys' fees be paid upon issuance of such a ruling is reasonable and consistent with common practice in similar cases, as the Stipulation dictates that if the Settlement were terminated or any fee award subsequently modified, Class Counsel must repay the subject amount with interest. Stipulation, ¶ 15.[14]

Lastly, as previously disclosed, the only agreement the Parties entered into in addition to the Term Sheet and the Stipulation was a confidential Supplemental Agreement regarding requests for exclusion. *See* Stipulation, ¶ 35; *see also* Fed. R. Civ. P. 23(e)(2)(C)(iv). The Supplemental Agreement provides Defendants with the right to terminate the Settlement in the event that the Class Members who timely and validly request exclusion from the Class meet certain conditions. Stipulation, ¶ 35. This type of agreement is standard in securities class actions and has no negative impact on the fairness of the Settlement. *See, e.g., Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *11 (N.D. Cal. Sept. 4. 2018) ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").

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[14] Such provisions in class action settlements, sometimes referred to as "quick-pay" provisions, "have generally been approved by other federal courts." *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020) (finding objection to "quick-pay provision" "border[ed] on frivolous" as there was "no reason to buck" the trend of other federal courts approving such provisions).

For the reasons set forth above and in the D'Ancona Declaration, the Settlement is fair, reasonable, and adequate when evaluated under any standard, or set of factors and, therefore, warrants the Court's final approval.

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

"Approval 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." *Beltran*, 2023 WL 319895, at *9. Further, an allocation formula recommended by experienced and competent class counsel "need only have a reasonable and rational basis." *Par Pharm.*, 2013 WL 3930091, at *8. Moreover, "[a] plan of allocation that reimburses class members based on the type and extent of their injuries [relative to strength and value of their claims] is generally reasonable." *In re Lucent Techs., Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004); *see also In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) (deeming plan of allocation "even handed" where "claimants are to be reimbursed on a *pro rata* basis for their recognized losses based largely on when they bought and sold their shares of [eligible] stock").

Here, the Plan (set forth in Appendix A to the Notice) was developed by Class Counsel in consultation with Class Representative's economic expert, Joseph R. Mason, Ph.D., and his team at The BVA Group, LLC. ¶ 140. The Plan is designed

to equitably distribute the Net Settlement Fund to Class Members who timely submit valid Claims demonstrating they suffered economic losses as a result of Defendants' alleged violations of the federal securities laws set forth in the Complaint, as opposed to economic losses caused by market or industry factors or that would have been likely attributed to non-fraud-related information released on the same day. *Id*.

The Plan is based upon the estimated amount of artificial inflation (or deflation) in the price of BD Securities over the course of the Class Period. *Id*. To have a loss with respect to BD common stock and call options, a Claimant must have purchased and/or acquired their stock/options during the Class Period and held such stock/options through the alleged corrective disclosure on February 6, 2020, that removed the artificial inflation from the price of BD common stock and call options. ¶ 141. Likewise, to have a loss with respect to BD put options, a Claimant must have sold (written) their options during the Class Period and such options must have remained open through the alleged corrective disclosure on February 6, 2020, that removed the artificial deflation from the price of BD options. *Id*.

Further, a Claimant's loss will depend upon several factors, including the date(s) when the Claimant purchased/acquired/sold their BD Securities during the Class Period and at what price(s), taking into account the PSLRA's statutory limitation on recoverable damages. *Id*. Authorized Claimants will recover their proportional "*pro rata*" amount of the Net Settlement Fund based on their calculated

loss. ¶ 142. *See Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 105 (D.N.J. 2018) ("[P]ro rata distributions are consistently upheld . . . .").[15] Accordingly, Class Representative's trading activity is treated in the same manner.

The Plan will result in a fair and equitable distribution of the Settlement proceeds among Class Members who suffered losses as a result of Defendants' alleged conduct. The Plan was fully disclosed in the Notice and, to date, no objections to the Plan have been received. ¶ 144. For these reasons, the Plan should be approved.

IV. NOTICE SATISFIED RULE 23, DUE PROCESS, AND THE PSLRA

Class Representative has provided the Class with adequate notice of the Settlement. The notice satisfied both: (i) Rule 23, as it was "the best notice . . . practicable under the circumstances" and directed "in a reasonable manner to all class members who would be bound by the" Settlement (Fed. R. Civ. P. 23(c)(2)(B) & (e)(1)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974)); and (ii) due process, as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d

[15] Under the Plan, the Settlement proceeds available for BD options shall be limited to a total amount equal to 3.5% of the Net Settlement Fund. ¶ 141.

Cir. 2013) ("Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class."). Collectively, the notices to the Class provide all information specifically required by Rule 23 and the PSLRA. *See* ECF No. 186 at 5; Exs. 1-3 to Ex. 2.

In accordance with the Preliminary Approval Order, JND has mailed a total of 200,814 Postcard Notices and 4,131 Notice Packets to potential Class Members and Nominees through March 14, 2024. *See* Ex. 2, ¶ 10. In addition, JND caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over *PR Newswire* on February 28, 2024, and established a dedicated website, www.BectonSecuritiesLitigation.com, to provide information about the Settlement and access to downloadable copies of the Notice and Claim Form and other Settlement-related documents. *Id*., ¶¶ 11, 14. Defendants also issued notice pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715. ¶ 135, fn. 16.

In sum, the notice campaign utilized here provides sufficient information for Class Members to make informed decisions regarding the Settlement, fairly apprises them of their rights with respect to the Settlement, represents the best notice practicable under the circumstances, and complies with the Court's Preliminary

Approval Order, Rule 23, the PSLRA, and due process. Comparable notice programs are routinely approved by Courts in this Circuit.[16]

V. CONCLUSION

For the reasons set forth herein and in the D'Ancona Declaration, Class Representative respectfully requests that the Court grant final approval of the Settlement and approve the Plan of Allocation.

Dated: March 18, 2024

Respectfully submitted,

s/ James E. Cecchi

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[16] *See, e.g.*, *Goodman v. UBS Fin. Servs. Inc.*, 2023 WL 8527165, at *2 (D.N.J. Dec. 7, 2023); *In re Innocoll Holdings Pub. Ltd. Co. Sec. Litig.*, 2022 WL 16533571, at *2-4 (E.D. Pa. Oct. 28, 2022); *Kanefsky v. Honeywell Int'l Inc.*, 2022 WL 1320827, at *2-3 (D.N.J. May 3, 2022); *In re Horsehead Holding Corp. Sec. Litig.*, 2021 WL 2309689, at *2 (D. Del. June 4, 2021).

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the CM/ECF system. Those attorneys registered with the Electronic Filing System will receive notice of this filing by ECF and email. I further certify that a courtesy copy of this filing will be served upon the Court.

Dated: March 18, 2024

s/ James E. Cecchi
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