IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

ROBERT HURWITZ , on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. ERIC MULLINS, CHARLES W. ADCOCK, JONATHAN C. FARBER, TOWNES G. PRESSLER, JR., JOHN A. BAILEY, JONATHAN P. CARROLL, SCOTT W. SMITH, RICHARD A. ROBERT, W. RICHARD ANDERSON, BRUCE W. MCCULLOUGH, and LOREN SINGLETARY, Defendants.	Case No.: 1:15-cv-00711-MAK CLASS ACTION

OPENING BRIEF IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("FRCP"), Class Representative Robert Hurwitz ("Class Representative") respectfully submits this opening brief in support of his uncontested motion for final approval of the settlement of this class action ("Settlement") for $8,000,000 in cash and approval of the Plan of Allocation.[1] The terms of the Settlement are set forth in the Stipulation and all addendums thereto, which were previously submitted to the Court. D.I. 174, 182, 188. On July 27, 2018, the Court granted preliminary approval of the Settlement. D.I. 191-192. Pursuant to the Preliminary Approval Order and as of the date of this filing, 15,889 Notices of Proposed Settlement of Class Action and Settlement Hearing ("Settlement Notice") were mailed to potential Class Members and nominees, a Summary Notice of Settlement was published in *Investor's Business Daily* and transmitted over *PR Newswire*, and relevant documents were posted to the websites dedicated to the Settlement.[2] Class Representative now seeks final approval of the Settlement and the Plan of Allocation.

The Settlement is the culmination of extensive multi-year litigation and arm's-length negotiations between the parties with the substantial assistance of Robert A. Meyer, Esq. ("Meyer") of JAMS, a highly respected and experienced mediator. Prior to reaching a settlement, Class Counsel had: (a) conducted an extensive investigation into the definitive joint

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[1] All capitalized terms that are not defined herein shall have the same meanings as set forth in the Stipulation of Settlement [D.I. 174], the Addendum to the Stipulation of Settlement [D.I. 182] ("Addendum"), and the Second Addendum to the Stipulation of Settlement [D.I. 188] ("Second Addendum") (collectively, the "Stipulation"). Filed herewith is the Declaration of Stephen J. Oddo in Support of Class Representative's Motion for (1) Final Approval of Class Action Settlement and Plan of Allocation; and (2) an Award of Attorneys' Fees and Expenses and Class Representative's Service Award ("Oddo Declaration" or "Oddo Decl.").

[2] *See* Affidavit of Brian Stone Regarding: (A) Mailing of the Settlement Notice and Proof of Claim; (B) Publication of Summary Notice; and (C) Update to Website, ¶9 [D.I. 194] ("Stone Aff"). In addition, all relevant documents were posted on Lead Class Counsel's website. Oddo Decl., ¶70.

registration statement/proxy statement (the "Proxy") issued in connection with the acquisition of LRR Energy, L.P. ("LRE") by Vanguard Natural Resources, LLC ("Vanguard") in 2015 (the "Acquisition"), which formed the factual basis of the claims asserted here under sections 11 and 15 of Securities Act of 1933 ("Securities Act") and sections 14(a) and 20(a) of the Securities and Exchange Act of 1934 ("Exchange Act"); (b) successfully opposed Defendants' comprehensive motion to dismiss [D.I. 37-38]; (c) successfully opposed Defendants' motions for summary judgment on Class Representative's individual claims [D.I. 119]; (d) successfully certified the Class over Defendants' opposition [D.I. 120]; (e) engaged in significant discovery, including the review of tens of thousands of pages of documents produced by Defendants and various third-parties and taking the depositions of ten witnesses who played central roles in the Acquisition, including several current and former officers and/or directors of LRE and Vanguard; (f) retained three leading industry and financial experts to evaluate evidence and assist with the computation of damages and who exchanged merits expert reports; and (g) engaged in extensive arm's-length settlement negotiations, including a full-day mediation with Mr. Meyer. Oddo Decl., ¶8.

The Settlement is an outstanding recovery for the Class, considering the relative strengths of Class Representative's claims in relation to the risks of continued litigation. Defendants mounted strong defenses to the claims and, in choosing to settle the Action, Class Representative acknowledges the very real risk that continued litigation would jeopardize the greater good of securing an immediate monetary recovery for the Class. Indeed, in the absence of settlement, Class Representative and the Class would have been forced to tackle highly-complex issues of liability, such as whether they had adequately shown a material omission or misstatement, as well as overcome a likely battle of experts in order to establish loss causation and damages. Moreover, Class Representative's counsel are highly experienced in prosecuting securities litigation, and have concluded that the Settlement is a very favorable recovery in light of: the

risk, delay, and expense of continuing this Action through the completion of expert discovery; Defendants' anticipated renewed motion(s) for summary judgment, trial, and probable post-trial motions and appeal(s); a complete analysis of the evidence adduced to date; past experience in litigating complex actions similar to the present action; and the serious disputes between the parties concerning the merits of the federal securities law claims asserted and recoverable damages.

Finally, the response of the Class to the Settlement is a strong indicator of the fairness of the Settlement. Here, there have been no objections to date to the terms of the Settlement, indicating that Class Members believe the Settlement is a good result.

For all the reasons discussed herein and in the Oddo Declaration, it is respectfully submitted that the Settlement is eminently fair, reasonable, and adequate to the Class and should be finally approved by the Court. The Court should also approve the Plan of Allocation, which was set forth in the Settlement Notice disseminated to Class Members, and preliminarily approved by the Court. D.I. 191-192. The Plan of Allocation governs how the Settlement Amount will be allocated and distributed to Class Members, and is consistent with an assessment of, among other things, the damages that Class Representative and Class Counsel believe were recoverable in this Action. Accordingly, the Plan of Allocation is fair, reasonable, and adequate, and should be approved.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[3]

A. Commencement of the Action

On June 20, 2015, Vanguard and LRE announced the Acquisition. Under the terms of

[3] The Court is respectfully referred to the accompanying Oddo Declaration for a full recitation of the factual background and procedural history of the litigation, including the claims asserted, the investigation and discovery undertaken, the settlement negotiations, and the substantial risks of continued litigation, as well as the factors bearing on the reasonableness of the Settlement, the Plan of Allocation, and the request for an award of attorneys' fees and expenses.

the deal, LRE's former public unitholders received 0.55 Vanguard common units for each LRE common unit they previously owned.

On August 18, 2015, Class Representative filed a class action complaint on behalf of the public unitholders of LRE against the LRE Defendants, Vanguard, and Lighthouse Merger Sub, LLC, asserting violations of sections 14(a) and 20(a) of the Exchange Act and U.S. Securities and Exchange Commission ("SEC") Rule 14a-9 promulgated thereunder, in connection with the Acquisition.

On June 22, 2016, Class Representative filed the Amended Class Action Complaint (the "Amended Complaint"), adding LRE and the individual VNR Defendants as defendants, and alleging violations of sections 14(a) and 20(a) of the Exchange Act and sections 11 and 15 of the Securities Act. D.I. 15. The Amended Complaint alleged that the Proxy disseminated by Defendants in connection with the Acquisition failed to disclose material information to LRE's public unitholders concerning Vanguard's then-existing financial condition.

On August 22, 2016, Defendants filed their motion to dismiss the Amended Complaint. D.I. 29-30. On September 9, 2016, Hurwitz filed an opposition, and Defendants filed a reply on September 19, 2016. D.I. 31-32. On March 13, 2017, Judge Sue L. Robinson denied Defendants' motion to dismiss. D.I. 37-38.

On November 3, 2017, Defendants filed their motions for summary judgment of Class Representative's individual claims which, after full briefing and oral argument, was denied. D.I. 119. Also on November 3, 2017, Class Representative filed his motion for class certification [D.I. 78], which was granted on January 2, 2018 [D.I. 120], over Defendants' opposition.

B. Settlement Negotiations and Preliminary Approval

After months of fact discovery and the exchange of merits expert reports, the parties began to explore the possibility of settlement and ultimately agreed to participate in a mediation

session with Mr. Meyer. The parties prepared detailed mediation statements and engaged in a full-day in-person mediation session with Mr. Meyer in New York City on May 17, 2018. These efforts culminated in the Settlement.

On June 27, 2018, the Stipulation of Settlement and Class Representative's Unopposed Motion for Preliminary Approval of Settlement was filed with the Court. D.I. 174-176. On July 18, 2018, the Court held a hearing on Class Representative's motion for preliminary approval of the Settlement. D.I. 193, 183. After the preliminary approval hearing, Class Representative filed an unopposed supplement to his amended unopposed motion for preliminary approval of the Settlement. D.I. 189. On July 27, 2018, the Court granted preliminary approval of the Settlement ("Preliminary Approval Order"). D.I. 191-192.

Pursuant to the Preliminary Approval Order, to date 15,889 Settlement Notices have been mailed to potential Class Members and nominees, a Summary Notice of Settlement was published in *Investor's Business Daily* and transmitted over *PR Newswire*, and relevant documents were posted to the website dedicated to the Settlement. D.I. 194; Stone Aff., ¶¶8-9; Oddo Decl., ¶¶46, 68.

III. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

It is well settled that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998) ("*Prudential*"). The Third Circuit Court of Appeals has reiterated the long standing principle that there is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010). "This presumption is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal

litigation.'" *Id*. at 595.

FRCP 23(e) provides that a class action shall not be dismissed or compromised without the approval of the court. *See also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*GMC Trucks*"). The ultimate determination whether a proposed class action settlement warrants approval is in the court's discretion. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968). In assessing a settlement, a court must consider whether the proposed settlement is "'fair, reasonable, and adequate.'" *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001).[4] In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Third Circuit advised district courts to consider the following factors in deciding whether to approve a proposed settlement of a class action under Rule 23(e):

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

Id. at 157; *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006); *GMC Trucks*, 55 F.3d at 782; *Eichenholtz v. Brennan*, 52 F.3d 478, 488 (3d Cir. 1995); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990). In addition, the Third Circuit also advises courts to address the considerations articulated in *Prudential*, 148 F.3d at 323, which are outlined and discussed *infra* Section V. District courts "'must make findings as to each of the *Girsh* factors, and the *Prudential* factors where appropriate' in an 'independent analysis of the settlement terms.'" *In re ViroPharma Sec. Litig.*, 2016 WL 312108, at *9 (E.D. Pa. Jan. 25,

[4] Here, as throughout, all emphasis is deemed as added and citations and footnotes are deemed omitted.

2016) (quoting *In re Pet Foods Prods. Liab. Litig.*, 629 F.3d 333, 350-51 (3d Cir. 2010)).

As set forth herein and in the Oddo Declaration, the Settlement is a highly favorable result, is presumptively fair, and clearly satisfies the *Girsh* factors and applicable *Prudential* considerations. Substantial doubt exists as to whether any greater recovery could have been obtained against Defendants in the absence of the Settlement, especially in light of the difficulty of establishing liability, as well as proving loss causation and damages. Accordingly, the Settlement is superior to another very real possibility—little or no recovery at all.

IV. AN ANALYSIS OF THE *GIRSH* FACTORS CONFIRMS THAT THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE FINALLY APPROVED

A. The Complexity, Expense, and Likely Duration of This Litigation Warrant Final Approval of the Settlement

"This factor is intended to capture 'the probable costs, in both time and money, of continued litigation.'" *Viropharma*, 2016 WL 312108, at *9. "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." *Dartell v. Tibet Pharm., Inc.*, 2017 WL 2815073, at *4 (D.N.J. June 29, 2017). There is no doubt that this Action—like all securities class actions—is highly complex.[5]

The result of this Action at summary judgment and/or trial might well have turned on close questions of law, evidence, and fact. As discussed herein and in the Oddo Declaration, Defendants have repeatedly demonstrated a commitment to defend this Action vigorously through trial and beyond, and the Class faced substantial risks to obtaining a more favorable

[5] Indeed, courts have repeatedly recognized that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000); *also In re Harnischfeger Indus., Inc.*, 212 F.R.D. 400, 409 (E.D. Wis. 2002) ("Shareholder class actions are difficult and unpredictable, and skepticism about optimistic forecasts of recovery is warranted."); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 529 (E.D. Pa. 1990) ("[S]tockholder litigation is notably difficult and notoriously uncertain").

judgment if the case were to continue. If not for the Settlement, the parties would have continued with costly expert discovery and renewed summary judgment motion(s), all of which would have presented the risk of adverse rulings. In particular, Class Representative would have been forced to address highly complex factual and legal defenses raised by Defendants regarding falsity, materiality, and negative loss causation. These issues would involve nuanced theories, conflicting documentary evidence, statistical models, and the testimony of competing experts. Further, the Class would likely have been forced to litigate the issue of whether or not some or all of their claims were extinguished in connection with the confirmation of Vanguard's Bankruptcy Plan. *See* Oddo Decl., ¶51.

While Class Representative's counsel have already expended substantial amounts of time and money in securing the Settlement, further significant time and expenses would be incurred to complete expert discovery, pre-trial proceedings, and conduct a trial. *See W. Palm Beach Police Pension Fund v. DFC Global Corp.*, 2017 WL 4167440, at *4 (E.D. Pa. Sept. 20, 2017) ("*DFC Global*") ("Although the parties had already performed a great deal of work, there remained a great deal to do."). Moreover, even if the jury returned a favorable verdict after trial, there is no question that any verdict would be the subject of numerous post-trial motions and a complex multi-year appellate process. Taking into account the likelihood of appeals—absent Settlement—this Action likely would have continued for years despite the best efforts of the Court and the parties to speed the process. Thus, "[i]t is safe to say, in a case of this complexity, the end of that road might be miles and years away." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 837 (W.D. Pa. 1995).

As a result, the Settlement secures a substantial and certain recovery for the Class undiminished by further expenses and without the delays, risks, and uncertainties of continued litigation. *DFC Global*, 2017 WL 4167440, at *4 ("Securities litigation is notoriously

complicated and it is certainly not conducted on the cheap. Because there is an excellent chance that this litigation would be costly, complicated, and proceed for years into the future, the Court finds that this factor weighs heavily in favor of approving the settlement."); *Viropharma*, 2016 WL 312108, at *10 (granting approval and recognizing that fees and expenses would "grow many millions greater" if "the case were to continue, through motions for ... summary judgment, trial, and appeals"). This factor therefore weighs in favor of approval.

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

"The second *Girsh* factor 'attempts to gauge whether members of the class support the settlement.'" *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016). "The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." *Cendant*, 264 F.3d at 235. Here, 15,889 Settlement Notices were mailed to potential Class Members and nominees, a Summary Notice of Settlement was published in *Investor's Business Daily* and transmitted over the *PR Newswire*, and relevant documents were posted to the website dedicated to the Settlement. *See* Stone Aff., ¶¶4-10; Oddo Decl., ¶¶46, 68. To date, not a single objection has been filed.[6] This factor therefore weighs in favor of approval.

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

The third *Girsh* factor requires a court "to consider the degree to which the litigation has developed prior to settlement." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 502 (W.D. Pa. 2003). "Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *DFC Global*, 2017 WL 4167440, at *4 (citing *GMC*

[6] The objection deadline is November 9, 2018. Should any timely objections be filed, Class Representative's counsel will address them in their reply memorandum, to be filed no later than December 7, 2018.

Trucks, 55 F.3d at 813); *Dartell*, 2017 WL 2815073, at *5 (same).

Here, the record demonstrates that Class Representative and Lead Class Counsel were thoroughly aware of the merits of the federal securities law claims asserted prior to entering into the Settlement. This Action has been vigorously litigated since its inception in August 2015, and the mediation took place only *after* Lead Class Counsel had completed all fact discovery it intended to take and following the initiation of expert discovery. Oddo Decl., ¶8. Indeed, the Settlement was only negotiated after Lead Class Counsel had, *inter alia*: (a) conducted an extensive investigation into the Proxy issued in connection with the Acquisition; (b) successfully opposed Defendants' comprehensive motion to dismiss [D.I. 37-38]; (c) successfully opposed Defendants' motions for summary judgment on Class Representative's individual claims [D.I. 119]; (d) successfully certified the Class over Defendants' opposition [D.I. 120]; (e) propounded written discovery and received and analyzed tens of thousands of pages of documents produced by Defendants and various third-parties; (f) deposed ten witnesses, including several current and former officers and/or directors of LRE and Vanguard; (g) retained three industry and financial experts to evaluate evidence and assist with the computation of damages; and (j) exchanged merits expert reports with Defendants. Oddo Decl., ¶8.

In addition, the parties also participated in a full-day formal mediation session in New York with Mr. Meyer, where the strengths and weaknesses of the Class' claims were fully vetted. *Id.*, ¶¶39-40. Prior to the mediation, Class Representative and Defendants prepared detailed mediation statements further highlighting the factual and legal issues in dispute. These statements were submitted to Mr. Meyer and shared amongst the parties. *Id.*

Accordingly, there is no question that at the time the Settlement was reached, Class Representative and Lead Class Counsel were in an excellent position to evaluate the merits of the claims asserted and the various defenses raised by Defendants, as well as the substantial risks of

continued litigation. *Schwartz v. Urban Outfitters, Inc.*, 2016 WL 7626720, at *1 (E.D. Pa. Oct. 31, 2016) ("*Urban Outfitters*") (finding this "factor supports settlement" where plaintiff "successfully opposed Defendant's motions to dismiss and motion for partial judgment on the pleadings.... Class Counsel reviewed over 99,000 pages of documents and retained experts [and] … [t]he parties participated in mediation, where they further evaluated the issues); *see also Viropharma*, 2016 WL 312108, at *11 (finding "this factor weigh[ed] in favor of approving the Settlement" where" Lead Plaintiff, and Lead Counsel, … fully briefed the main issues in the case and conducted merits-based expedited discovery."). Having sufficient information to properly evaluate the case, the Action was settled on terms highly favorable to the Class. This factor weighs in favor of the Settlement.

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

"Class action securities litigation cases are notoriously difficult cases to prove." *Viropharma*, 2016 WL 312108, at *11. Here, approval is warranted because the Settlement is an excellent result given the numerous obstacles to proving Defendants' liability and establishing loss causation and damages. *See, e.g.*, *Girsh*, 521 F.2d at 157; *see also Viropharma*, 2016 WL 312108, at *11 ("By 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.") (citing *GMC Trucks*, 55 F.3d at 814).

1. The Risks of Establishing Liability

While Class Representative believes the federal securities law claims asserted are supported by the evidence adduced to date, Class Representative faced formidable obstacles to proving Defendants' liability, including the possibility of dismissal following Defendants' anticipated renewed motions for summary judgment on the Class claims and/or trial.

Here, the Amended Complaint alleged that the Proxy issued by Defendants in connection with the Acquisition omitted and/or failed to disclose material information concerning Vanguard's then-existing financial situation and its related effect on Vanguard's ability to make unitholder distributions to former LRE unitholders following the close of the Acquisition. Oddo Decl., ¶¶13-21. Throughout this Action, however, Defendants have vehemently denied any and all liability for the claims asserted in the Amended Complaint. *Id.* Indeed, Defendants have maintained and continue to maintain that Class Representative and the Class cannot prevail because, among other reasons: (i) the Proxy did not omit any material information because the allegedly omitted information identified in the Amended Complaint was disclosed and readily available; (ii) even if any information was undisclosed in the Proxy, such information was immaterial; and (iii) no actionable statements in the Proxy were rendered false and/or misleading by the allegedly omitted information. Thus, proving liability at summary judgment and trial would be a difficult and complex proposition. Oddo Decl., ¶¶17, 50.

Further, the Class faced significant risk from Defendants' contention that Class Members' continued pursuit of their claims in this Action would violate the injunctive and release provisions of Vanguard's confirmed Bankruptcy Plan. Specifically, Defendants maintain that, under the Bankruptcy Plan and the order of the Bankruptcy Court confirming the Bankruptcy Plan, each holder of Vanguard equity interests who did not "opt out" of the Bankruptcy Plan expressly released each of the Defendants from all claims and causes of action that arose prior to the effective date of the Bankruptcy Plan. Defendants maintain that Class Representative and the overwhelming majority of the other Class Members did not "opt out" of the Bankruptcy Plan. Because the claims at issue in this Action all arose prior to the effective date of the Bankruptcy Plan, Defendants maintain that all such Class Members released all of their claims in this Action. While Class Representative vehemently disputes the validity of such releases, the risk that they

would be enforced by either the Bankruptcy Court or this Court must be taken into account when assessing the fairness of the Settlement. Oddo Decl., ¶¶51-54.

2. The Risks of Establishing Loss Causation and Damages

Additionally, even if liability were established, Class Representative and the Class would still face considerable risk establishing loss causation and damages. *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) ("[T]he legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages."); *DFC Global*, 2017 WL 4167440, at *6 (concluding that this factor "weigh[s] heavily in favor of approving the settlement" where "[e]stablishing damages would also be no picnic").

Throughout this Action, Defendants have consistently maintained that any losses suffered by Class Representative and the Class were the result of factors outside of the control of Defendants and not the conduct alleged in the Amended Complaint. In the absence of the Settlement, Defendants would have continued to assert that the Class was barred from any recovery because, among other reasons, market forces—including an unprecedented downturn in oil and gas prices—and not the disclosures alleged in the Amended Complaint caused the price of Vanguard's common units to decline following the close of the Acquisition. Oddo Decl., ¶52.

Moreover, as evidenced by the detailed reports submitted by the experts retained by Class Representative and Defendants, the loss causation and damages elements of the federal securities laws claims asserted in this Action would be subject to complex and conflicting expert testimony. Indeed, Defendants' damages expert concluded that none of the decline in Vanguard common units was attributable to the alleged omissions and that the market had been aware of the allegedly omitted information well prior to the alleged corrective disclosure. Thus, at trial, the crucial elements of loss causation and damages would be reduced to a "battle of experts"

before the jury. *See In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 492 (E.D. Pa. 2003) ("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."). The reaction of a jury to such expert testimony is highly unpredictable, and Class Representative and Lead Class Counsel recognize the possibility that a jury could be swayed by convincing expert(s) retained by Defendants, causing them to find that the Class suffered no damages (or only a fraction of the amount contended) or that their losses were attributable to factors other than the alleged misleading statements and omissions.

In short, the Class faced numerous obstacles in proving Defendants were liable, as well as establishing loss causation and damages. Given Defendants' vigorously asserted defenses, there was no certainty that Class Representative would survive renewed motions for summary judgment and prevail at trial with respect to these issues. That the Settlement eliminates these and other risks of continued litigation weighs in favor approval. *See Urban Outfitters*, 2016 WL 7626720, at *1 (finding that lead plaintiff faced "many substantial risks in proving the alleged false statements or omissions caused damages" supports settlement); *Viropharma*, 2016 WL 312108, at *12 (granting final approval after recognizing that "proving loss causation and damages would be equally difficult" as establishing liability under federal securities laws).

E. The Risks of Maintaining the Class Action Through Trial Weigh in Favor of Approval

Although the Court granted Class Representative's motion for class certification, FRCP 23(c)(1) provides that a class certification order may be altered or amended any time before a decision on the merits. Thus, in any class action suit, even if a class is initially certified, there is always a risk that a class will be modified or decertified prior to a decision on the merits. Further, in the absence of Settlement (and as discussed *supra* Section IV.D.2), Defendants would

have likely attempted to enforce the various release provisions contained in Vanguard's Bankruptcy Plan. Given that Class Representative and an overwhelming majority of the Class purportedly failed to "opt out" of the Bankruptcy Plan's releases, Defendants may have been able to successfully enforce those provisions and significantly alter the size and composition of the Class. Oddo Decl., ¶¶51, 54. Settlement at this juncture eliminates these risks.

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

This factor evaluates whether Defendants "could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. However, the fact that Defendants could have paid more money does not render the Settlement unreasonable. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) ("[T]he fact that [the defendant] could afford to pay more does not mean that it is obligated to pay any more than what the ...class members are entitled to under the theories of liability that existed at the time the settlement was reached.").

Here, following the confirmation of Vanguard's Bankruptcy Plan, both Vanguard and LRE were dismissed from this Action with prejudice. Oddo Decl., ¶¶26, 33, 55. Thus, at the time of Settlement, there were no "large corporate defendant[s]" remaining in this Action that were "able to withstand a more substantial judgment" obtained on behalf of Class Reprehensive and the Class. *See ViroPharma*, 2016 WL 312108, at *13 (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 323 (3d Cir. 2011)).

Moreover, $7.35 million, or nearly 92% of the Settlement proceeds, is being paid out of Defendants' Director and Officers' ("D&O") insurance coverage. At the time the Settlement was reached, however, there was a real and growing risk that continued litigation would diminish—not enhance—the prospects of recovery for the Class by significantly depleting Defendants'

limited D&O insurance coverage. Oddo Decl., ¶56. In agreeing to the Settlement, Class Representative weighed the benefit of certain recovery against the real risk that continued litigation would deplete (or exhaust) Defendants' available insurance and reduce the recovery for the Class, regardless of the outcome on the merits. *Id.*; *see also Tibet Pharm.*, 2017 WL 2815073, at *6 (D.N.J. June 29, 2017) ("Importantly, the settlement proceeds here come from a wasting insurance policy ... [i]f the parties did not settle and instead continued with discovery and motions for summary judgment, the insurance funds available for any potential settlement would be quickly diminished and perhaps exhausted…."); *see also Chatelain v. Prudential-Bache Sec., Inc*., 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("certainty of payment through settlement points in favor of approval of the proposed settlement" where defendants lacked significant assets or insurance).

Finally, it is worth noting that non-party Vanguard Natural Resources, Inc. is contributing the remaining $650,000 of the Settlement Amount, even though Vanguard declared Chapter 11 Bankruptcy during the pendency of this Action and was dismissed as a defendant with prejudice. Oddo Decl., ¶56. Particularly given the sources of the settlement funds, there was strong reason for Class Representative to conclude that he had recovered a significant portion of the funds obtainable in this Action. This factor supports the Settlement.

G. The Settlement Is Reasonable in Light of All the Attendant Risks of Litigation

The final two *Girsh* factors are typically considered in tandem, and 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." *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *7 (D.N.J. July 29, 2013) (citing *GMC Trucks*, 55 F.3d at 806). As explained herein and in the Oddo Declaration, the Settlement provides for a cash payment of $8,000,000, plus any accrued interest, for the direct benefit of the Class.

Here, as set forth above and in the Oddo Declaration, Class Representative faced considerable risks in proving his claims. And even if he established liability, he faced the risk of a finding that the Class did not suffer any compensable damages. If Class Representative had ultimately prevailed at trial, there was still no guarantee of a recovery—for an appeal would surely follow. To put the Settlement in context, $8,000,000 represents an approximately 9.6% increase in the value of the consideration received by the Class in connection with the close of the Acquisition.[7] In addition, a recent study by Cornerstone Research, titled *Securities Class Action Settlements—2017 Review and Analysis*, found that between 2008 and 2017 the median settlement for class actions asserting claims under certain provisions of the Securities Act was just $4.5 million. Oddo Decl., ¶59 & Ex. 2.

The experts retained by Class Representative estimated that the Class sustained maximum classwide damages of approximately $70.6 million for the Securities Act violations and maximum classwide damages of approximately $48.2 million for the Exchange Act violations. Oddo Decl., ¶60. The Settlement of $8,000,000 therefore reflects roughly 11.3% to 16.5% of the total possible recovery of $70.6 million to $48.2 million estimated by the experts retained on behalf of Class Representative and the Class. The Settlement therefore represents a significantly higher recovery than the average percentage of recovery in cases asserting the same

[7] On October 5, 2015, in connection with the close of the Acquisition, approximately 10,468,300 Vanguard common units were distributed to the Class. Based on Vanguard's closing price that day of $7.98 per unit, the Vanguard units that the Class received were valued at approximately $83.5 million.

or similar causes of action under federal securities laws. Indeed, according to the National Economic Research Associates, Inc. 2017 annual review, the median ratio of investor losses to settlement value was just 2.6% for securities class action cases involving alleged violations of Rule 10b-5, section 11 of the Securities Act, and/or Section 12 of the Securities Act. Oddo Decl., ¶60 & Ex. 3, Fig. 29; *see, e.g.*, *Urban Outfitters*, 2016 WL 7626720, at *1(approving settlement yielding "6% to 8% of the estimated maximum damages range"); *In re Greenwish Pharm. Sec. Litig.*, 1995 WL 251293, at *5 (W.D. Pa. Apr. 26, 1995) (approving $4.375 million settlement that obtained 4.4% of estimated maximum damages); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) (approving $13.75 million settlement yielding 6% of potential damages, which was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (finding that a recovery representing 6.25% of damages was "at the higher end of the range of reasonableness of recovery in class actions securities litigations").

V. THE *PRUDENTIAL* CONSIDERATIONS SUPPORT THE SETTLEMENT

In addition to the traditional *Girsh* factors, the Third Circuit also advises courts to address the 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 Settlement. With respect to the first consideration, Class Representative and Lead Class Counsel had a well-developed understanding of the strengths and weakness of the case based on extensive discovery conducted. *See supra* Section IV.C. With respect to the second and third considerations, Lead Class Counsel is not aware of any related claims asserted by other classes or other claimants. With respect to the fourth *Prudential* consideration, Class Members were provided the opportunity to opt out of the Class, as well as the opportunity to object to the terms of the Settlement and/or the fees and expenses requested by Class Counsel. Oddo Decl., ¶¶32, 47, 64.

With respect to the fifth and sixth considerations, Class Counsel's request for attorneys' fees is reasonable as set forth in the accompanying Fee Motion[8] (and, in any event, approval of the Settlement is separate from and not dependent on any outcome of 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 *infra*, Section VI.

VI. 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." *Ikon*, 194 F.R.D. at 184; *Corel*, 293 F. Supp. 2d at 493 ("[T]he plan of allocation must be fair, reasonable and adequate"). "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Gen. Ins. Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001). Trial courts

[8] Submitted herewith is the Opening Brief in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Expenses and Class Representative's Service Award ("Fee Motion").

are vested with broad discretion in approving a plan of allocation. *See Sullivan*, 667 F.3d at 328.

Here, the Plan of Allocation, which is fully described in the Settlement Notice, establishes the method by which the Class will be able to participate in the recovery obtained as result of the Settlement. The Plan of Allocation treats all potential claimants in a fair and equitable manner and is consistent with Class Representative's theory of damages. As described in the Settlement Notice and Oddo Declaration, the Plan of Allocation provides for two forms of consideration, including: (i) an Initial Settlement Payment of $5.00 to all Class Members releasing claims (even if they do not submit a Proof of Claim); and (ii) a second payment to all Class Members who submit a timely and valid Proof of Claim, which will consist of each Class Members' *pro rata* share of the Net Settlement Amount based on the number of LRE common units held as of August 28, 2015 that were exchanged for Vanguard common units on or about October 5, 2015 in connection with the close of the Acquisition. Oddo Decl., ¶¶74-76. As a result, the Plan of Allocation will result in a fair distribution of the available proceeds among the Class. To date, no Class Members have objected to the proposed Plan of Allocation.

VII. CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2018, I electronically filed the *Opening Brief in Support of Class Representative's Motion for Final Approval of Class Action Settlement and Plan of Allocation* with the Clerk of Court using CM/ECF which will send notification of such filing to those registered as CM/ECF participants.

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