IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	:	Master File No. 98-CV-1664 (WHW)
CENDANT CORPORATION SECURITIES LITIGATION	:	This document relates to: all actions except the Prides Action (No. 98-2819)

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MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR ENTRY OF HEARING ORDER AND ORDER MODIFYING THIRD DISTRIBUTION ORDER

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Lead Plaintiffs, the New York State Common Retirement Fund, the California Public Employees' Retirement System and the New York City Pension Funds, by and through their counsel Bernstein Litowitz Berger & Grossmann LLP ("Co-Lead Counsel"), and on behalf of the Class, respectfully submit this Memorandum of Law in support of their motion for entry of a proposed Order pursuant to Rule 23(e) of the Federal Rules of Civil Procedure:

A. preliminarily approving the proposed settlement (the "Settlement") between Lead Plaintiffs and the Claims Administrator, Heffler Radetich & Saitta, L.L.P. ("Heffler");

B. approving the proposed form and manner of providing notice of the Settlement to Class Members;

C. modifying the Court's Order Approving Lead Plaintiffs' Motion to Conduct a Third Distribution of the Net Settlement Fund, for Payment of Lead Counsel's Fees for Services Provided Between October 1, 2003 and January 31, 2009, and for Unreimbursed Litigation Expenses (ECF No. 1811) (the "Third Distribution Order"); and

D. scheduling a Settlement Hearing to determine if the Settlement is fair, reasonable and adequate and should be approved (the "Hearing Order"). [1]

PRELIMINARY STATEMENT

Lead Plaintiffs have reached a Settlement with Heffler that provides for the payment of $1,100,000 by Heffler for the benefit of the Class and the release of any claims against Heffler in connection with its approval and payment of the Fraudulent Claims from the Cendant Class Settlement Fund (the "Settlement Fund" or "Fund") or any other claims arising out of Heffler's

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[1] The proposed Hearing Order is attached as Exhibit A to Lead Plaintiffs' Motion.

role in processing the claims in this Action. The complete terms of the Settlement are set forth in the Stipulation and Agreement of Settlement (the "Stipulation").[2]

As is explained in more detail below, in November 2008, Lead Plaintiffs learned 1) that ten fraudulent claims had been submitted to Heffler pursuant to a criminal scheme and 2) that payments were made with respect to six of those ten claims. Thereafter, an investigation was undertaken to determine whether there was any basis for asserting claims against Heffler based on the payment of the Fraudulent Claims. After this investigation, and in consideration of both the difficulties of successfully asserting a claim against Heffler and the costs and delay of further litigation, Lead Plaintiffs and Co-Lead Counsel determined that it was appropriate to explore the possibility of settlement. Lengthy intense arm's-length negotiations culminated in the achievement of the Settlement. Lead Plaintiffs and Co-Lead Counsel believe that the Settlement is fair and reasonable and in the best interest of the Class.

Lead Plaintiffs now request that the Court preliminarily approve the Settlement, schedule a Settlement Hearing, and approve the notice of the Settlement, which will be mailed together with the Fourth Distribution check to the Class Members who are receiving a check pursuant to the terms of the Third Distribution Order.[3] In the Fourth Distribution, Lead Plaintiffs will distribute approximately $14.5 million in additional funds to Class Members (including

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[2] A copy of the Stipulation is being filed simultaneously with the Court. Unless otherwise defined, all capitalized words or phrases used herein have the meaning set forth in the Stipulation.

The Stipulation also provides that the $1,100,000 settlement amount may be increased, up to a maximum of $1,350,000, if a claim asserted against Heffler concerning the approval and payment of fraudulent claims in the BankAmerica Action, which were submitted to Heffler as part of the same criminally fraudulent scheme, settles before trial for more than $300,000. *See* Stipulation ¶3.

[3] Under the terms of the Third Distribution Order, only those Claimants who have cashed their Third Distribution checks and who would receive at least $10 in a Fourth Distribution are eligible to participate in the Fourth Distribution.

$1,430,808 recovered by the government as restitution in the criminal proceedings instituted in relation to the Fraudulent Claims), within twenty-one (21) days of the Court's entry of the Hearing Order. If the Settlement with Heffler is approved, the additional recovery will be included in a fifth distribution to Class Members.

In light of the Settlement, in order to effectuate the distribution of the balance of the Settlement Fund to Class Members, Lead Plaintiffs also request that the Court modify the Third Distribution Order. This modification will provide for the distribution of funds (in one or more subsequent distributions) that remain in the Settlement Fund after the Fourth Distribution due to uncashed distribution checks, funds newly deposited pursuant to the Settlement with Heffler (if approved), additional restitution funds or other reasons. Currently, the Third Distribution Order provides only for a third and fourth distribution of the Net Settlement Fund after which any balance remaining would be donated to charity.

Finally, Lead Plaintiffs also request that, following dissemination of the Notice and the Settlement Hearing and after due consideration of any comments on or objections to the Settlement that may be received, the Court enter the proposed Judgment Approving Settlement Between Lead Plaintiffs and Heffler Radetich & Saitta, L.L.P.[4]

BACKGROUND

On August 15, 2000, this Court approved settlements of the Action with Cendant Corporation ("Cendant"), Ernst & Young LLP ("E&Y") and other Defendants that collectively provided an initial cash recovery to the Class of $3,186,500,000 – at that time, the largest recovery ever in a securities class action. As part of the settlement consideration, Lead Plaintiffs

[4] Lead Plaintiffs believe that support for final approval of the Settlement is demonstrated in this memorandum. Should the Court, however, receive any comments on or objections to the Settlement from Class Members, Lead Plaintiffs will address them in a supplemental submission.

also obtained the right to a 50% interest in any net recovery that Cendant or certain other defendants obtained in resolution of claims they had or were litigating against E&Y. Lead Plaintiffs' initial recovery was subsequently augmented by $131,750,000 obtained from the resolution of Cendant's claims against E&Y. Heffler, which had been appointed Claims Administrator for the Action, to date, has conducted three distributions from the Settlement Fund.[5]

On September 11, 2008, an Indictment and an Information were filed under seal by the U.S. Attorney for the Eastern District of the Pennsylvania (collectively, the "Indictment"). The Indictment charged six individuals – one of whom, Christian Penta ("Penta"), had been a Heffler employee – with participating in a scheme to submit fraudulent claims in three large class action settlements, including this Action. The charges were based on a criminal investigation conducted by the Internal Revenue Service Criminal Investigation Division and the Federal Bureau of Investigation, which determined that ten fraudulent claims had been filed in this Action and that payments totaling $28,691,193.84 were made from the Settlement Fund with respect to the six Fraudulent Claims.

The Indictment alleged, among other things, that the fraudulent scheme was sophisticated and designed to defraud not only each of the three class action settlements but also the firms administering those settlements. The Indictment noted that the perpetrators took elaborate steps to pursue the fraudulent claims and to produce the necessary records to support them. For example, they:

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[5] Heffler conducted an initial distribution of $2.9 billion to Class Members beginning in March 2003, a second distribution of over $365 million beginning in March 2004, and a third distribution of approximately $165 million beginning in October 2010 (which included the additional funds that the Class obtained in connection with settlement of Cendant's claims against E&Y). Heffler is now prepared to conduct a fourth distribution.

- created fake corporations, using false names for executive personnel, with addresses in the United States and in foreign countries;
- opened bank accounts and established virtual offices for the fake corporations in the United States and in foreign countries, with functioning mailing addresses and telephone numbers;
- used professional office services to retrieve the mail and take telephone messages; and
- created brokerage account statements and other financial documents to make it appear that the fake companies owned the securities necessary to share in the class action settlement funds.

Lead Plaintiffs did not learn of the Indictment or the payments on the Fraudulent Claims until after the Indictment was unsealed in November 2008. Thereafter, Lead Plaintiffs investigated the circumstances of the fraud to determine whether there was any basis for bringing an action against Heffler or any other persons to recover on behalf of the Class the payments made on the Fraudulent Claims. In connection with this investigation, Co-Lead Counsel and/or Lead Plaintiffs, among other things: (i) reviewed the Indictment; (ii) spoke with the Assistant U.S. Attorney handling the criminal prosecution; (iii) obtained and reviewed all the documents relating to Cendant that were provided by Heffler to the U.S. Attorney's office in connection with the government's investigation into the fraudulent scheme, and reviewed additional documents requested directly from Heffler; (iv) reviewed both the transcript of the hearing in which Penta pled guilty and the Government's Change of Plea Memorandum and Guilty Plea Agreement with Penta; (v) interviewed, in the presence of Heffler's counsel, the Heffler partner in charge of the Cendant settlement administration; (vi) obtained follow-up representations from Heffler through its counsel, and (vii) obtained responses to written questions put to Penta by his attorney. Additionally, Co-Lead Counsel and Lead Plaintiffs considered the practices of and industry standards (or lack thereof) applicable to claims administrators at the time of the Cendant

settlement administration; reviewed Heffler's claims administration procedures as well as those of other claims administrators; assessed Heffler's insurance coverage and financial condition; and evaluated the possibility of a recovery from the perpetrators of the fraud, Heffler or others.

The conclusion of both the investigation by the U.S. Attorney's office and the one undertaken by Lead Plaintiffs was that, contrary to the initial belief that Penta was an integral part of the scheme, he apparently had a very limited role (which did not involve the review or approval of claims submitted) in the Cendant claims administration. Moreover, only one of the ten fraudulent claims was submitted while Penta was working on the Cendant administration and four fraudulent claims were submitted after he left Heffler's employment.

Based on the results of the investigation, Lead Plaintiffs determined that there was no basis for alleging that Heffler participated in the fraudulent scheme uncovered by the government and that Heffler could not be held responsible for the conduct of Penta, its former employee. Co-Lead Counsel researched the possibility of bringing claims against Heffler under a theory of *respondeat superior* or another theory of vicarious liability, but concluded that in any relevant jurisdiction, Heffler would not be liable for the crimes or frauds committed by its employee unless the employee's actions were undertaken for the benefit of the employer. There was no suggestion here that the fraud in which Penta participated was in anyway undertaken for the benefit of Heffler. Moreover, while Lead Plaintiffs did believe that a claim could be stated for negligence on the part of Heffler for failing to have in place adequate policies and procedures to detect fraud, and then not applying them with sufficient rigor to determine that the claims at issue were fraudulent, Lead Plaintiffs recognized the significant obstacles and risks that they would face if they were to commence an action against Heffler. Based on their investigation, the sophisticated nature of the fraud perpetrated, and the steps taken by the perpetrators to evade

detection, Lead Plaintiffs concluded that the certain recovery of $1.1 million from Heffler through a settlement was a superior outcome to the litigation risks, costs and delays attendant to pursuing a negligence claim against Heffler based on its approval or payment of the Fraudulent Claims.

Moreover, Heffler's insurance carrier disclaimed coverage on any claims that Lead Plaintiffs might assert. Thus, even if Lead Plaintiffs were to prevail in an action against Heffler, recovery on any judgment could be subject to litigation against the insurance carrier. Lead Plaintiffs weighed both the cost and risk to the Class of protracted litigation against Heffler and, possibly, its insurance carrier and the risk of a possible lengthy postponement of final distribution of the Settlement Fund before entering into the Settlement with Heffler.

Finally, the U.S. Attorney's office has pursued the assets of the individuals convicted of participating in the fraudulent scheme. The restitution funds recovered by the government are being apportioned between two of the three actions impacted by the scheme, in proportion to the classes' respective losses in those actions related to the fraudulent scheme.[6] As of July 31, 2012, restitution funds in the amount of $1,724,072.94 have been recovered from the individuals and deposited in escrow. Of this amount, $1,430,808.13 was allocated to this Action and will be included in the Fourth Distribution. After communications with the Assistant U.S. Attorney, Co-Lead Counsel and Lead Plaintiffs have concluded that the likelihood of any additional meaningful recovery from the individual perpetrators of the fraud beyond the restitution funds

[6] The losses in the BankAmerica Action caused by the same fraudulent scheme were $5,879,073.36. Class counsel in the third action affected by the fraud (the NASDAQ Action) has decided, with that court's approval, to forego any claims it may have on the recovery of the restitution funds. Accordingly, the Cendant Class will receive approximately 83% of any restitution amount recovered.

that have been or may be obtained by the government is minimal and, accordingly, that pursuing legal action against these individuals on behalf of the Class is not warranted.

Therefore, instead of uncertain and potentially prolonged litigation, the Settlement with Heffler will provide an additional $1.1 million for those members of the Class entitled to receive additional settlement distributions. Lead Plaintiffs and Co-Lead Counsel respectfully submit that the proposed Settlement is fair, reasonable and adequate to the Class and merits the Court's approval. Lead Plaintiffs also request that the Court approve the proposed form and method of providing notice of the Settlement and schedule a final Settlement Hearing.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED

A. The Standard for Approval of a Class Action Settlement

Under Rule 23(e), any compromise or settlement of a class action must be approved by the Court. To approve a proposed settlement, the Court must find that it is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 258 (3d Cir. 2009); *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 316 (3d Cir. 1998); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007).

A number of principles and factors guide the Court's review of a settlement. First, approval of a proposed class action settlement is a matter within "the sound discretion of the district court." *Prudential,* 148 F.3d at 299; *see also Ins. Brokerage Antitrust Litig.*, 579 F.3d at 256 (same); *Lazy Oil Co. v. Witco Corp.,* 166 F.3d 581, 587 (3d Cir. 1999) ("We will reverse a [class action] settlement approval only when the district court has committed a 'clear abuse of discretion.'"). Second, there is a strong judicial policy favoring resolution of disputed claims

through settlement, particularly "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged".).

In evaluating a proposed settlement, the Court must consider whether it is within a "range of reasonableness" that informed lead plaintiffs, advised by experienced attorneys, could accept in light of the relevant risks of the litigation. *See General Motors*, 55 F.3d at 806; *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 414 (E.D. Pa. 2010). The court must avoid substituting its image of an "ideal settlement" for the views of the "compromising parties," and must keep in mind the fact that a settlement is, after all, "a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Prudential Ins. Co. of Am. Sales Practice Litig.,* 962 F. Supp. 450, 534 (D.N.J. 1997), *aff'd,* 148 F.3d 283 (3d Cir. 1998) (citations omitted); *see also Prudential*, 148 F.3d at 316-17; *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *4 (D.N.J. Nov. 9, 2005).

B. Application of the *Girsh* Factors Supports Approval of the Settlement

In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Third Circuit set out the following non-exclusive factors for district courts to consider in determining whether a proposed class action is "fair, reasonable and adequate":

> (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 of the attendant risks of litigation . . . .

521 F.2d at 157 (citations omitted); *accord Ins. Brokerage Antitrust Litig.*, 579 F.3d at 258; *Warfarin*, 391 F.3d at 534-35; *In re Cendant Corp. Litig.*, 264 F.3d 201, 231-32 (3d Cir. 2001). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair. Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under *Girsh*." *In re Suprema Spec., Inc. Sec. Litig.*, No. 02-168 (WHW), 2008 WL 906254, at *4 (D.N.J. Mar. 31, 2008) (internal quotation and citations omitted). As demonstrated below, the applicable *Girsh* factors, considered as a whole, strongly support approval of the Settlement.[7]

1. The complexity, expense and likely duration of the litigation support approval of the Settlement

This factor weighs strongly in favor of the Settlement because the "probable costs, in both time and money" of bringing an action against Heffler and pursuing the Class's potential claims through litigation would be substantial. *General Motors*, 55 F.3d at 812; *see also La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, No. 03-CV-4372 (DMC), 2009 WL 4730185, at *4 (D.N.J. Dec. 4, 2009); *In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, No. 05-232, 2008 WL 4974782, at *6 (E.D. Pa. Nov. 21, 2008).

[7] Because the Class has not yet been provided with notice of the Settlement, "the reaction of the class to the settlement" cannot yet be assessed. Lead Plaintiffs' proposed program for providing notice to the Class, including the provision of an opportunity to object to the Settlement, is discussed below in Part II. Lead Plaintiffs will file a supplemental submission in response to any objections to the Settlement that may be received.

Here, Lead Plaintiffs have not yet filed a complaint against Heffler. Any potential litigation would require significant additional expenditures by the Class and would take a substantial amount of time to proceed through the legal system. Although the potential litigation against Heffler might not have been unduly complex (in comparison to the underlying securities fraud case), the expected costs and delays of resolving the dispute through litigation strongly support approval of the Settlement – particularly in light of Co-Lead Counsel's belief that any potential benefit to the Class of litigation was likely to be limited. In contrast to the expense and duration of litigation, a settlement at this time will provide an immediate $1.1 million benefit for the Class and will allow the case to be brought to a final resolution.

2. The stage of the proceedings and the investigation completed support approval of the Settlement

Under this *Girsh* factor, the Court should consider the stage of the proceedings and the amount of discovery completed in order to determine whether "counsel had an adequate appreciation of the merits of the case" at the time the settlement was negotiated. *Cendant*, 264 F.3d at 235 (quoting *General Motors*; 55 F.3d at 813).

Here, as described above, Co-Lead Counsel and Lead Plaintiffs conducted an extensive investigation into the factual circumstances surrounding the fraud and Heffler's approval of the Fraudulent Claims for payment. As a result of this investigation and legal analysis, Lead Plaintiffs had a strong understanding of the strengths and weaknesses of the potential claims against Heffler at the time the Settlement was achieved, despite the fact that no formal complaint against Heffler was ever filed and, thus, no formal discovery was conducted; this supports approval of the Settlement. *See Prudential*, 148 F.3d at 319 (this factor supported settlement where informal discovery had provided the information plaintiffs needed to appreciate the potential merits of the case); *see also Cendant*, 264 F.3d at 235-36 (even where settlement was

reached at an early stage of the litigation, this factor supported settlement if the parties had an "adequate appreciation of the merits of the case").

3. The risks of establishing liability support approval of the Settlement

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of recovery, against the risks of establishing liability and damages through litigation. *See Cendant*, 264 F.3d at 237; *Prudential*, 148 F.3d at 319; *Smith v. Dominion Bridge Corp.*, No. 96-7580, 2007 WL 1101272, at *5 (E.D. Pa. Apr. 11, 2007).

As set forth in greater detail above, Co-Lead Counsel and Lead Plaintiffs investigated possible claims that might be asserted against Heffler for its role in approving (and failing to detect) the Fraudulent Claims. After these investigations, Lead Plaintiffs concluded that, for a variety of reasons (set forth above, *see* pp. 6-7), it would not be able to hold Heffler responsible on a theory of vicarious liability and there would be obstacles to the ultimate success of a claim of negligence against Heffler for its role in approving payment of the Fraudulent Claims.

In sum, Lead Plaintiffs concluded that given the certainty of the $1.1 million settlement amount, the risks of successfully prosecuting a claim against Heffler for its role in approving and paying the Fraudulent Claims did not justify pursuing legal action. This fact strongly supports the reasonableness of the $1.1 million Settlement.[8]

4. The ability of the settling defendant to withstand a greater judgment

Lead Plaintiffs also considered the fact that Heffler's insurance carrier had disclaimed coverage on any claims that Lead Plaintiffs might assert. Thus, even if Lead Plaintiffs were to

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[8] If Lead Plaintiffs were able to establish Heffler's liability, establishing that the Class was damaged and the amount of those damages would be relatively simple. However, in light of the weight of the other *Girsh* factors (including the substantial barriers to establishing liability), this factor is relatively unimportant to the analysis.

prevail in an action against Heffler, there might be problems of recoverability on any judgment, including the necessity of litigation against Heffler's insurance carrier.

Moreover, even if the recoverability of a judgment substantially greater than the amount of the Settlement were not in question, that factor is of lesser importance here in light of the difficulties to establishing Heffler's liability and other factors weighing in favor of the Settlement. *See Warfarin*, 391 F.3d at 538 (where other factors support settlement, a defendant's ability to pay an amount greater than the settlement can be considered neutral or "irrelevant"); *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No. 06-3202, 2009 WL 2137224, at *10 (E.D. Pa. July 16, 2009) ("this factor's importance is lessened by the obstacles the class would face in establishing liability and damages"); *Remeron*, 2005 WL 3008808, at *9 ("many settlements have been approved where a settling defendant has had the ability to pay greater amounts").

5. The reasonableness of the Settlement in light of the best possible recovery and the attendant risks of litigation support approval of the Settlement

The reasonableness of the Settlement should be considered in light of the best possible recovery and the risks the parties would face if the case went to trial. *See Prudential*, 148 F.3d at 322; *General Motors*, 55 F.3d at 806. As set forth above, the conclusion of Lead Plaintiffs' factual and legal investigation was that the Class's likelihood of success on any claims against Heffler was remote. Accordingly, although the $1.1 million settlement payment represents only a fraction of the $28.7 million in Fraudulent Claims that were paid, the value of the Settlement must be considered in light of the difficulties of establishing Heffler's liability and the costs and delays of further litigation.

Courts in this Circuit recognize that an assessment of the recovery achieved through settlement must be juxtaposed against the likelihood of success in the litigation. *See Prudential*, 148 F.3d at 322-23; *Sealed Air Corp.*, 2009 WL 4730185, at *7; *Dominion Bridge*, 2007 WL 1101272, at *6 (the "fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather, the percentage should be considered in light of the strengths of the claims").[9] Courts have often found settlements in the range of the percentage recovery here to be fair, reasonable and adequate. *See, e.g., Sealed Air Corp.*, 2009 WL 4730185, at *7 (observing that "average settlement amounts in securities fraud class actions . . . have ranged from 3% to 7% of the class members' estimated losses"); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approving settlement that obtained 5.2% of the best possible recovery); *Lazy Oil Co*, 95 F. Supp. 2d at 319 (approving settlement representing 5.35% of the estimated damages for the class period); *In re Greenwich Pharm. Sec. Litig*, No. 92-3071, 1995 WL 251293, at *4-5 (E.D. Pa. Apr. 26, 1995) (approving settlement that obtained 4.4% of estimated maximum damages).

C. Based on the *Girsh* Factors and the Totality of the Circumstances, the Settlement is Fair, Reasonable and Adequate

The *Girsh* factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement. *See Prudential*, 148 F.3d at 323; *Am. Bus. Fin. Servs.*, 2008 WL 4974782, at *5. In determining whether a given settlement is reasonable, the opinion of experienced counsel is also entitled to considerable weight. *See id.*, at *9 ("A court should give significant weight to the opinion of experienced counsel that the settlement is in the best interests

[9] *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.")

of the class"); *Dominion Bridge*, 2007 WL 1101272, at *6; *Ikon*, 194 F.R.D. at 179; *Lachance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997) (courts should "give credence to the estimation of the probability of success proffered by class counsel"). After investigating the strengths and weaknesses of Lead Plaintiffs' case against Heffler and the costs of continued litigation, Lead Plaintiffs and Co-Lead Counsel believe that the Settlement is the best outcome for the Class.

In sum, the Settlement, which provides for at least $1.1 million in additional consideration for the Class, is "fair, reasonable and adequate," is within the "range of reasonableness," and should be approved.

If the Settlement is approved, the Settlement Amount of $1,100,000 will be added to the Settlement Fund and, after deductions for payments of unpaid fees and expenses incurred in connection with the distributions to Class Members, the balance of the Fund will be distributed to Class Members who are eligible to receive a check in the fifth (or any subsequent) distribution. With the approval of the Court, the funds will be allocated according to the same Court-approved Plan of Allocation that governs all distributions from the Net Settlement Fund. Lead Counsel will seek no attorneys' fees in connection with this Settlement.

II. NOTICE OF THE SETTLEMENT

Rule 23(e) requires that notice of a class action settlement be made "in a reasonable manner." Fed. R. Civ. P. 23(e)(1). Rule 23(e) notice is designed to apprise class members of the key terms of the settlement and of their rights in connection with the settlement, including their right to inspect the complete settlement documents and other papers filed in the litigation and to object if they wish to do so. *See Prudential*, 148 F.3d at 327; *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). The Court has substantial flexibility and discretion

to determine the method of providing this notice. Indeed, under Rule 23(e), the "district court has virtually complete discretion as to the manner of giving notice to class members." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010); *accord Weber v. Gov't Emp'rs Ins. Co.*, No. 07-1332 (JBS/JS), 2009 WL 2496811, at *3 (D.N.J. Aug. 11, 2009) (under Rule 23(e), "[t]he [district] court has complete discretion in determining what constitutes a reasonable notice scheme, both in terms of how notice is given and what it contains." (*quoting* 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL 2d § 1797.6 at 200 (3d ed. 2005))).[10]

Lead Plaintiffs propose to provide notice of the Settlement by first-class mail to all Class Members who are receiving a Fourth Distribution check, in the same mailing together with the check. Thus, the notice will be targeted at those Class Members who have a continuing interest in the proceeds of the settlements achieved in the Action, as provided by prior order of the Court. The Notice of Proposed Settlement of Possible Claims against Claims Administrator (the "Notice") to be mailed to these Class Members will include a summary of the terms of the Settlement, Lead Plaintiffs' reasons for recommending the Settlement, the date of the final Settlement Hearing, information on how to obtain more information (including a copy of the Stipulation), and an explanation of Class Members' right to object to the Settlement and the procedures for doing so. In addition, the Notice and the Stipulation will be made available to

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[10] The requirements for notice of a settlement under Rule 23(e) are considerably less stringent than those required for notice of pendency of a class action under Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances." *See Larson v. Sprint Nextel Corp.*, No. 07-5325 (JLL), 2009 WL 1228443, at *3 (D.N.J. Apr. 30, 2009) (noting that Courts have "nearly unlimited discretion" in fashioning notice plans that meet the reasonableness standards of Rule 23(e) and due process, in contrast with the "higher standards" of Rule 23(c)(2)).

Class Members on the pages of Co-Lead Counsel's and Heffler's websites pertaining to the Action. A copy of the proposed Notice is attached as Exhibit 1 to the Hearing Order.

The proposed notice plan is appropriate given the procedural posture of the case and the fact that the claims administration process in the Action is substantially complete. Providing individual notice to those Class Members who are receiving a Fourth Distribution check is appropriate under the flexible standard of Rule 23(e), as only these Class Members would be eligible to receive a portion of any cash recovery from claims asserted against Heffler (whether obtained by settlement or through litigation).

If any objections to the Settlement are received, Lead Plaintiffs will file a supplemental submission in response to such objections seven calendar days before the Settlement Hearing.

III. MODIFICATION OF THE THIRD DISTRIBUTION ORDER

Lead Plaintiffs also request that the Court modify its Third Distribution Order. Currently, the Third Distribution Order provides only for a third and fourth distribution from the Net Settlement Fund after which any balance remaining in the fund will be donated to non-sectarian, not-for-profit, 501(c)(3) organization(s) designated by Lead Plaintiffs and approved by the Court. *See* Third Distribution Order ¶5.

Lead Plaintiffs request that the Court modify the Third Distribution Order to provide that the funds that remain in the Net Settlement Fund after the Fourth Distribution due to uncashed checks, funds deposited pursuant to the terms of the Settlement with Heffler (if approved) and any additional restitution funds obtained through the criminal proceedings instituted in relation to the Fraudulent Claims or for other reasons, shall, no earlier than (i) six months after the Fourth Distribution, (ii) the date on which the Settlement if approved becomes Final, or, if applicable, (iii) the date on which the Settlement is terminated and the parties to the Stipulation are restored

to their respective positions as of November 20, 2008, whichever is latest, be re-distributed at that time only to those Claimants who by that time have cashed their Fourth Distribution checks and who would receive at least $10 from such distribution after the payment from this balance of the unpaid costs incurred in connection with such re-distribution as are approved by Lead Plaintiffs. Additional re-distributions to Claimants who have cashed each of their prior distribution checks and who would receive at least $10 from such re-distribution after payment of the costs of the re-distribution as approved by Lead Plaintiffs shall occur thereafter in six-month intervals until Lead Counsel in consultation with Lead Plaintiffs and Heffler determine that further re-distributions would not be cost-effective, at which time Lead Plaintiffs shall donate the balance in the Net Settlement Fund to non-sectarian, not-for-profit, 501(c)(3) organization(s) designated by Lead Plaintiffs and approved by the Court.

This modification will provide a mechanism for the distribution to the Class of the funds obtained in this Settlement, any additional restitution funds that may be received, or any other funds available due to uncashed checks or other reasons following the Fourth Distribution.

CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court (a) enter the proposed Hearing Order preliminarily approving the Settlement, approving the proposed form and manner of notice to Class Members, scheduling a Settlement Hearing, and modifying the Third Distribution Order; and (b) following the Settlement Hearing and after due consideration of all comments or objections that may be received, finally approve the Settlement as fair, reasonable and adequate.

Dated: New York, New York
October 5, 2012

Respectfully submitted,

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