IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAN ANTONIO FIRE AND POLICE PENSION FUND, FIRE AND POLICE HEALTH CARE FUND, SAN ANTONIO, PROXIMA CAPITAL MASTER FUND LTD., and THE ARBITRAGE FUND, Plaintiffs, v. DOLE FOOD COMPANY, INC., DAVID H. MURDOCK and C. MICHAEL CARTER, Defendants.	Civil Action No. 1:15-cv-1140-LPS

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Lead Plaintiffs Proxima Capital Master Fund Ltd., San Antonio Fire and Police Pension Fund, Fire and Police Retiree Health Care Fund, San Antonio, and The Arbitrage Fund (collectively, "Lead Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement of this Action (the "Settlement") and for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

I. INTRODUCTION

The proposed Settlement resolves this litigation in its entirety in exchange for a cash payment of $74 million. Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement is fair, reasonable, and adequate – and, indeed, is an excellent result for the Settlement Class – in light of the amount of the Settlement in comparison to the maximum recovery that could be reasonably be expected to be obtained through trial, the substantial challenges that Lead Plaintiffs would have faced in proving liability and establishing loss causation and damages, and the costs and delays of continued litigation.

The Settlement is the product of extensive arm's-length negotiations between the parties, which included mediation under the auspices of a highly respected and experienced mediator, former United States District Court Judge Layn R. Phillips. The Settlement has been approved by Lead Plaintiffs, which are sophisticated institutional investors; and Lead Counsel, which are highly

[1] All capitalized terms that are not otherwise defined herein shall have the meanings ascribed to them in the Amended Stipulation and Agreement of Settlement dated March 29, 2017 (D.I. 88-1) (the "Stipulation") or in the Joint Declaration of Katherine M. Sinderson and Vincent R. Cappucci in Support of: (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. All citations to "¶ __" in this memorandum refer to paragraphs in the Joint Declaration.

experienced in prosecuting securities class actions. Both Lead Plaintiffs and Lead Counsel have concluded that the Settlement is a very positive outcome for the Settlement Class given the risks, delay, and expense of continued litigation.

At the time the Settlement was reached, Lead Plaintiffs and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the Action. As more fully described in the Joint Declaration,[2] before the parties agreed to the Settlement, Lead Counsel had, among other things: (i) successfully objected to the scope of the release in the settlement of a related Delaware Chancery Court Action to ensure that the claims asserted in this Action would not be released; (ii) conducted an extensive investigation into Defendants' alleged misstatements, including reviewing evidence and filings from the Chancery Court Action, Dole's SEC filings and investor conference calls, analyst reports, and other publicly available information; (iii) drafted a detailed amended complaint; (iv) engaged in substantial fact discovery, which included reviewing the production of over 770,000 pages of documents by Defendants and non-parties; (v) substantially prepared Lead Plaintiffs' motion for class certification; (vi) consulted extensively with experts concerning loss causation, damages and market efficiency; and (vii) engaged in arm's-length settlement negotiations and mediation, including preparing detailed mediation statements. ¶¶ 6, 18-58.

The Settlement is also a very favorable result in light of the substantial risks of continued litigation. Lead Plaintiffs alleged that Defendants made a series of materially false and misleading

[2] For the sake of brevity, the Court is respectfully referred to the Joint Declaration for a detailed description of, among other things: the history of the Action and a description of the services Lead Counsel provided for the benefit of the Settlement Class (¶¶ 18-58); the nature of the claims asserted (¶¶ 36-38); the negotiations leading to the Settlement (¶¶ 51-55); the risks and uncertainties of continued litigation (¶¶ 59-83); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶ 90-98).

statements and omissions about Dole's operations and financial condition during the Class Period in order to artificially depress the price of Dole's common stock so that Defendant Murdock could acquire the outstanding publicly held shares of Dole's common stock at a price below its fair value. As further detailed in the Joint Declaration and below, in order to survive a motion for summary judgment and prevail at trial on these claims, Lead Plaintiffs would have had to overcome a number of significant challenges relating to both liability and damages.

With respect to liability, Lead Plaintiffs faced the risk that the Court might find that their claims were barred by the statute of limitations because allegations made in certain related court cases in June 2013 arguably put plaintiffs on notice of their claims more than two years before this Action was filed. Lead Plaintiffs also faced the significant risk that the Chancery Court's Memorandum Opinion, which provided the basis for many of Lead Plaintiffs' allegations, would not be given any preclusive effect here because of the difference in the claims and burden of proof between the actions. Lead Plaintiffs would also have faced challenges in proving that Defendants' alleged misstatements were actionable. Defendants would have contended that many of the alleged misstatements were protected forward-looking statements and that the statements were not actually false, and could have pointed to some evidence to support their arguments.

Even if Lead Plaintiffs did successfully establish liability, they would still have faced substantial risks in proving loss causation and damages. Many of the risks related to the unusual nature of the action, which alleged that class members were harmed because they sold shares after Defendants had intentionally *deflated* the Company's stock price, rather than the usual situation where plaintiffs allege that the stock price was artificially inflated. There were significant and unique challenges of establishing loss causation and measuring damages in that context. Moreover, the price of Dole stock rose substantially after Murdock made his offer to purchase the

outstanding shares of Dole common stock in June 2013, providing Defendants with substantial arguments that there could be no damages established after that time period. Defendants also had credible arguments concerning loss causation and price impact because, they argued, certain information provided in the alleged misstatements was previously known to investors and because many of the alleged misstatements were made at the same time as other non-fraud-related statements that could have affected the price of Dole's stock price.

Moreover, the range of possible damages that could be established in the Action varied widely depending on the assumptions and methodology adopted. After careful review, Lead Plaintiffs' damages experts concluded that the total damages that Lead Plaintiffs would be reasonably likely to be able to prove at trial would be approximately $211.8 million. However, if Defendants' loss causation and damages arguments were accepted, damages could have been much lower or eliminated entirely. In light of all of these risks, Lead Plaintiffs and Lead Counsel believe that the $74 million proposed Settlement, representing more than a third of likely recoverable damages, is fair, reasonable and adequate and warrants final approval by the Court.

Additionally, Lead Plaintiffs request that the Court approve the Plan of Allocation, which was developed by Lead Plaintiffs' damages experts in consultation with Lead Counsel. Lead Plaintiffs submit that the Plan of Allocation should be approved because it provides a reasonable method for allocating the proceeds of the Settlement among Settlement Class Members based on damages they suffered that were related to the misconduct alleged in the Action.

II. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

There is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*GMC Trucks*") ("[t]he law

favors settlement"). The presumption in favor of settlement is "especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" *Ehrheart*, 609 F.3d at 595 (quoting *GMC Trucks*, 55 F.3d at 784). Under Federal Rule of Civil Procedure 23(e), a class action settlement must be approved by the court upon a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) ("*NFL Players*").

The ultimate determination whether a proposed class action settlement warrants approval is in the court's discretion. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). While this Court has discretion in determining whether to approve the Settlement, it should be hesitant to substitute its judgment for that of the parties who negotiated the Settlement. *See Sutton v. Med. Serv. Ass'n of Pennsylvania,* No. 92-4787, 1994 WL 246166, at *5 (E.D. Pa. June 8, 1994). "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. . . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

The Court should also assess the reasonableness of the settlement pursuant to the factors set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975):

> (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 (citation omitted); *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006). The Third Circuit also advises courts to consider, where applicable, the additional factors

set forth in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998) ("*Prudential*"), which are discussed in Section V below.

As set forth herein and in the Joint Declaration, the Settlement is a highly favorable result for the Settlement Class, is presumptively fair, and the *Girsh* factors and applicable *Prudential* considerations weigh strongly in favor of approval of the Settlement.

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

Here, the proposed Settlement is the product of extensive arm's-length negotiations between highly experienced and capable counsel after significant discovery and consultations with damages experts. The settlement negotiations were assisted by the mediation efforts of Judge Layn Phillips, an experienced mediator of securities class actions, which included the exchange of opening and reply mediation statements discussing liability, class-certification issues, and damages, and in-person, full-day mediation session on January 9, 2017, at which the parties reached their agreement in principle to settle. ¶¶ 51-52.

A proposed class action settlement is considered presumptively fair where, as here, the parties have engaged in arm's-length negotiations through experienced counsel after sufficient discovery. *See, e.g.*, *NFL Players*, 821 F.3d at 436; *Warfarin*, 391 F.3d at 535; *In re ViroPharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016). Moreover, the "'participation of an independent mediator in settlement negotiations virtually insures [*sic*] that the negotiations were conducted at arm's length and without collusion between the parties.'" *ViroPharma*, 2016 WL 312108, at *8 (citation omitted).

The presumption that the Settlement is fair and reasonable is also strengthened because it has been approved by Lead Plaintiffs that oversaw the prosecution and settlement of the action. Lead Plaintiffs here are sophisticated institutional investors that took an active role in supervising

this litigation, as envisioned by the PSLRA, and have endorsed the Settlement. *See* Declaration of Youlia Rowland, Joint Decl. Ex. 2A, at ¶¶ 3-6; Declaration of Erik T. Dahler, Joint Decl. Ex. 2B, at ¶¶ 3-6; Declaration of James Bounds, Joint Decl. Exhibit 2C, at ¶¶ 3-6; and Declaration of Roger Foltynowicz, Joint Decl. Exhibit 2D, at ¶¶ 3-6.

Further, significant weight should be attributed "to the belief of experienced counsel that settlement is in the best interest of the class." *Lake v. First Nationwide Bank,* 900 F. Supp. 726, 732 (E.D. Pa. 1995) (citation omitted); *see also Alves v. Main*, No. 01-789 (DMC), 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd,* 559 F. App'x 151 (3d Cir. 2014); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 255 (D.N.J. 2000) (affording "significant weight" to counsel's recommendation), *aff'd in relevant part,* 264 F.3d 201 (3d Cir. 2001). Lead Counsel, who are experienced in prosecuting securities class actions, believe that the Settlement is an excellent result and in the best interest of the Settlement Class. ¶¶ 5, 83. In reaching this conclusion, Lead Counsel considered the strengths and weaknesses of the claims based on the information obtained through their investigation in the Action, the substantial document discovery, the full trial record in the related action in the Chancery Court, and the arguments presented in the course of the mediation efforts. As a result, Lead Counsel's opinion should be afforded considerable weight.

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

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

A. Complexity, Expense, and Likely Duration of This Litigation Support Approval of the Settlement

The first *Girsh* factor looks to "the complexity, expense and likely duration of the litigation." *Id.* at 157. "This factor is intended to capture 'the probable costs, in both time and

money, of continued litigation.'" *ViroPharma*, 2016 WL 312108, at *9 (citation omitted).

Securities litigation is acknowledged by courts to be complex and expensive, and this case was no exception. *See, e.g., In re Par Pharm. Sec. Litig*., No. 06-3226 (ES), 2013 WL 3930091, at *4 (D.N.J. July 29, 2013) (recognizing that securities fraud class actions are "notably complex, lengthy, and expensive cases to litigate"); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525(GEB), 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) ("This securities fraud class action involves accounting and damages issues, the resolution of which would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on these issues would [be] lengthy and costly to the parties."). Moreover, this case involved a number of issues that were more complex than the typical securities class action, including issues arising out of the fact that Lead Plaintiffs' claims were based on sales of stock whose price had allegedly been deflated. To prosecute these claims, Lead Counsel were required to devote substantial effort to working with damages experts to develop appropriate methodology for calculating damages, and that complex and expensive work would have continued if the Settlement had not been reached.

Moreover, achieving a litigated verdict in this Action for Lead Plaintiffs and the Settlement Class would have required substantial additional time and expense. Lead Plaintiffs' motion for class certification and Defendants' opposition would have, consistent with the Supreme Court's recent decisions in *Comcast* and *Hallibuton*, raised issues of price impact and damages requiring preparation of expert reports and expert testimony. Lead Plaintiffs would have had to complete fact discovery, including taking depositions of the Individual Defendants, key Dole personnel and the others involved in the Take-Private Transaction. The Parties would then have had to engage in substantial expert discovery, including preparing opening and rebuttal reports and taking depositions of the experts. Lead Plaintiffs had consulted with or intended to obtain expert reports

from loss causation, damages, valuation and industry experts. Defendants were expected to put forth expert testimony on similar topics which Lead Plaintiffs would have sought to rebut.

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

B. The Settlement Class's Reaction to the Settlement

"'The second *Girsh* factor 'attempts to gauge whether members of the class support the settlement.'" *NFL Players,* 821 F.3d at 438. A lack of significant objections by class members weighs in favor of judicial approval. *See In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003). Pursuant to the Court's Amended Order Preliminarily Approving Settlement and Providing for Notice dated March 30, 2017 (D.I. 89), the Court-appointed Claims Administrator, JND Class Action Administration LLC ("JND"), began mailing copies of the Notice Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and their nominees on April 11, 2017. *See* Declaration of Robert Cormio, Joint Decl. Ex. 1 to the Joint Decl., at ¶¶ 3-5. As of June 12, 2017, JND had mailed a total of 26,914 copies of the Notice Packet to potential Settlement Class Members and nominees. *See id*. ¶ 7. In addition, the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire* on April 21, 2017. *See id*. ¶ 8. The Notice set out the essential terms of the Settlement and

informed potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Settlement Class Members to exclude themselves or object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation and no requests for exclusion have been received.[3]

C. The Stage of the Proceedings and Amount of Discovery Completed Support Approval of the Settlement

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

Here, Lead Plaintiffs and Lead Counsel had a thorough understanding of the strengths and weaknesses of the claims at the time they agreed to the Settlement. Prior to filing the Complaint, on behalf of Lead Plaintiffs, Lead Counsel extensively investigated the merits of the case, including reviewing evidence and court filings from the Chancery Court Action, Dole's regulatory SEC filings and conference-call transcripts, analyst reports, and other publicly available material. ¶ 34. Lead Plaintiffs obtained substantial additional information through fact discovery, which included reviewing of hundreds of thousands of pages of documents produced by Defendants and non-parties. ¶ 44. Lead Counsel also consulted extensively with experts in loss causation and damages through the Action and obtained information about the strengths of the claims and the defenses asserted by Defendants through Defendants' mediation statements, the in-person

[3] The deadline for submitting objections and requesting exclusion from the Settlement Class is June 27, 2017. As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than seven days before the Settlement Hearing (by July 11, 2017) that will address any requests for exclusion or objections that may be received.

mediation session and other settlement negotiations. ¶¶ 35, 48-50, 51-52.

As a result of all these efforts, Lead Plaintiff and Lead Counsel had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006).

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

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

As discussed in more detail in the Joint Declaration, Defendants had a number of defenses that posed significant risks to Lead Plaintiffs' ability to establish liability for their claims in this Action. Specifically, Defendants had substantial arguments that: (i) Lead Plaintiffs' claims were barred by the statute of limitations; (ii) the Chancery Court's Memorandum Opinion could not be used to support Lead Plaintiffs' claims here; (iii) Defendants' alleged misstatements were protected forward-looking statements under the PSLRA safe harbor; and (iv) Defendants' alleged misstatements were not actually false and were not made with scienter. ¶¶ 60-68.

First, Defendants contended that plaintiffs were or should have been on notice of their potential securities fraud claims by June 2013 when shareholder complaints alleging Defendants' misconduct in connection with Murdock's take-private proposal were filed and, thus, this Action,

filed more than two years later, was untimely. ¶ 62. Although Lead Plaintiffs disagree and believe that the statute of limitations did not begin to run until the Chancery Court's Memorandum Opinion was filed in August 2015, nevertheless there was a significant risk that the Court might find Lead Plaintiffs' claims were time-barred. *Id*.

Second, Defendants had significant arguments that the Memorandum Opinion, which provided the basis for many of the allegations in the Complaint, should be given no preclusive effect in this Action because the claims asserted in the Chancery Court Action involved different elements than Lead Plaintiffs' securities fraud claims and a different burden of proof. ¶ 63. If that occurred, Lead Plaintiffs would have to prove their case based on contested evidence that, as discussed below, could have supported a verdict in Defendants' favor at trial. *Id*.

Third, Defendants would contend that their allegedly false statements were either protected as forward-looking statements or opinions, or were not false at the time they were made. ¶¶ 64-68. For example, Defendants had strong arguments that their allegedly false statements regarding Dole's expected earnings and projected cost savings from the ITOCHU Transaction were forward-looking statements that were accompanied by meaningful cautionary language and therefore were not actionable under the PSLRA "safe harbor" provision. ¶ 64. If safe-harbor protections applied, Lead Plaintiffs might not have been able to establish liability on some of the most significant alleged misstatements. *Id*. Defendants also had significant arguments that their statements were not false when made, and these arguments were supported by some evidence, including certain documents produced in discovery. ¶¶ 65-68. For example:

- Defendants argued that their statements concerning Dole's earnings projections were, in fact, supported by contemporary internal analyses performed by Dole management during the Class Period. ¶¶ 65, 66.

- Defendants argued that Lead Plaintiffs' allegation that they falsely represented that Dole would realize only $20 million in cost savings from the ITOCHU Transaction in

2013 (compared to $50 million previously estimated), was accurate and simply a reiteration of earlier statements including a statement from Dole's CEO in November 2012 estimating the cost savings at $20 to $25 million. ¶ 66.

- Defendants argued that they made no misrepresentation when they represented that the value of the land in Hawaii that Dole planned to sell was approximately $175 to $200 million, because prior representations that the land was worth $500 million had included additional land holdings and some analysts had noted that the $175-$200 million valuation was in line with their previous assumptions. ¶¶ 67.

Lead Plaintiffs would also have had to establish Defendants' scienter in making each of these alleged misstatements. In short, despite the Chancery Court's Memorandum Opinion, Lead Plaintiffs would have faced real challenges in establishing Defendants' liability on the claims.

E. The Risks of Establishing Loss Causation and Damages Weigh in Favor of Final Approval

Even if Lead Plaintiffs has overcome all of the risks discussed above and were successful in establishing liability, they still faced substantial risks in proving loss causation and damages. Indeed, these issues were an important factor in establishing the settlement value of this case.

Establishing loss causation and damages was particularly risky here because of the unusual facts of the case – Lead Plaintiffs alleged that Defendants made false statements to intentionally *deflate* Dole's stock price, and the truth about Defendants' fraud did not become public until after the class period when the Company had already been taken private. ¶¶ 71-72. In the typical securities class action, the stock price is allegedly *inflated* by fraud, and there is a disclosure event in which the stock price drops and the inflation is removed. This stock price decline offers an easily measurable way of calculating the amount of inflation that had been in the stock and thus the damages to the class. Here, not only did Plaintiffs allege that the stock price was deflated, but there was no disclosure event that removed the deflation from the stock. ¶ 77. There was very limited legal authority or well-accepted expert methodologies for determining loss causation and

damages for a class of sellers of artificially deflated stock where there is no alleged corrective disclosure.

In addition, the fact that the price of Dole stock rose substantially in the middle of the Class Period after Murdock made his take-private offer on June 10, 2013, also created substantial challenges. ¶¶ 72-74. Defendants would have argued that this increase in the stock price eliminated any artificial deflation that might have existed in the stock price, thereby eliminating any possible claims by sellers after June 10, 2013. Defendants would also have argued that, even if artificial deflation did not dissipate at that time, class members would not be able to establish any damages for sales after June 10, 2013 because they would have sold their shares at higher prices than they purchased them and that their damages must be limited to their out-of-pocket losses. *Id*.

Lead Plaintiffs argued that Murdock's take-private offer caused Dole's stock price to rise but did not correct the false, negative information that had deflated the stock price between January 2 and June 10, 2013, and that a proper damages model for this Action must include a hypothetical take-private offer at a higher price that would have been made if the earlier alleged false statements (and alleged false statements in connection with Murdock's offer) had not been made. ¶ 75. Determining the amount of such a hypothetical offer would have required Lead Plaintiffs to establish the premium that Murdock (or another bidder) would have offered above the fair, non-deflated pre-offer stock price. *Id*. Potential damages varied significantly based on the assumptions used in determining such a hypothetical offer price.

In response, Defendants would have argued that Lead Plaintiffs could not prove that Murdock would have ever offered any more than the $13.50 per share he actually did ultimately offer. In fact, Defendants could point to evidence that Murdock's liquidity was constrained at the

time of his take-private offer, and that he had told Dole's Special Committee that he would not improve on his offer. ¶ 76. If Murdock could not have or would not have offered more, and no other bidders materialized, there would arguably be no higher "fair value" from which to subtract the price at which Class Members sold their Dole shares between June 11, 2013 and the end of the Class Period in order to determine damages. *Id*. If this view prevailed there would be no basis to award damages to shareholders who sold their shares after June 10, 2013 and aggregate class-wide damages would be substantially lower. *Id*.

Defendants also had credible arguments regarding loss causation with respect to many of the alleged false statements. For example, Defendants argued that there was no price impact from the alleged misstatements because the information provided on the dates of the alleged misstatements was previously known to investors. ¶ 78. Moreover, on many of the dates with alleged false statements, Dole released other information about its business that had an adverse effect on its stock price. *Id*. Indeed, market commentary on some of these dates attributed the change in Dole's stock price to news other than the alleged misstatements. *Id*. Thus, even if Lead Plaintiffs proved that Defendants statements' were knowingly false, Lead Plaintiffs might have had difficulty establishing the misstatements' impact on the price of Dole stock.

Finally, in order to establish damages and loss causation, the parties would have had to rely on expert testimony. In light of the novel fact pattern here and lack of a clearly established methodology for determining damages, the role of experts would have been particularly important and there is no doubt that Defendants would have also been able to present a well-qualified expert who would opine that the class had little or no damages. Courts have long recognized that uncertainty as to which side's expert's view might be credited by the jury presents a substantial litigation risk. *See ViroPharma*, 2016 WL 312108, at *13 ("The conflicting damage theories of

defendants and plaintiffs would likely have resulted in an expensive battle of the experts and it is impossible to predict how a jury would have responded."); *Lazy Oil Co. v. Witco Corp.,* 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997) ("[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and complicated 'battle of experts.'"), *aff'd,* 166 F.3d 581 (3d Cir. 1999). That risk was heightened here given the unusual fact circumstances and the competing damages methodologies and, thus, further supports approval of the Settlement.

F. Risks of Maintaining Class Action Status Through Trial Weigh in Favor of Approval

At the time the Settlement was reached, Lead Plaintiffs had substantially prepared their motion for class certification but it had not yet been filed and the Court had not certified the class. While Lead Plaintiffs believe this Action is appropriate for class treatment, Defendants would have strongly opposed the motion for class certification. Defendants would have argued that the lack of evidence of price impact from the alleged misstatements was a barrier to class certification because it would rebut the fraud-on-the-market theory of reliance. ¶ 79. Defendants would also have argued that the inclusion in the class of investors who purchased after the announcement of the Take-Private Transaction or who suffered no out-of-pocket loss, would render the class unsuitable for certification. *Id*. Accordingly, this factor supports approval of the Settlement.

G. The Settlement is Reasonable in Light of Defendants' Ability to Withstand a Greater Judgment

This *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240. The "fact that [defendants] could afford to pay more does not mean that [they are] obligated to pay any more than what the [] class members are entitled to under the theories of liability that existed at the time

the settlement was reached." *Warfarin*, 391 F.3d at 538. Here, while Defendants theoretically could afford to pay more, Lead Plaintiffs respectfully submit that this factor should not be viewed as determinative by this Court.

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

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

As discussed above and in the Joint Declaration, this case presented particularly complex questions with respect to determining the amount of damages that could be recovered, and the range of possible damages varies widely depending on the assumptions and methodology adopted. However, after carefully evaluating all of the issues and considering Defendants' arguments concerning damages and loss causation, Lead Plaintiffs' damages experts, in consultation with Lead Counsel, concluded that the total damages that Lead Plaintiffs would be reasonably likely to be able to prove at trial would be approximately $211.8 million. Notably, however, if Defendants' loss-causation and damages arguments were accepted in full or even in part, damages would be significantly lower than that amount, or even eliminated entirely.

Accordingly, in light of all the other litigation risks discussed above, the $74 million Settlement (representing more than a third of the damages that might reasonably be expected to be proved at trial) represents a very favorable resolution of the Action for Settlement Class Members.

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

V. THE *PRUDENTIAL* CONSIDERATIONS ALSO SUPPORT THE SETTLEMENT

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

> [1] the maturity of the underlying substantive issues, as measured by [among other things] . . . the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. Here, each of the *Prudential* considerations weighs in favor of the Settlement. With respect to the first consideration, Lead Plaintiffs and Lead Counsel had a well-developed understanding of the strengths and weakness of the case based on the extensive discovery conducted. *See* Section IV.C above. With respect to the second and third considerations, Lead Counsel is not aware of other classes or other claimants asserting related securities fraud claim claims. With respect to the fourth consideration, Settlement Class Members were afforded the right to opt out of the Settlement and, to date, none has chosen to do so. With respect to the fifth and sixth considerations, Lead Counsel's request for attorneys' fees is reasonable as set forth in the accompanying Fee Memorandum (and, in any event, approval of the Settlement is separate from the motion for fees and expenses), and the Plan of Allocation, which will govern the processing of claims and the

allocation of settlement funds, is fair and reasonable as set forth in Part VI below.

VI. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Merck & Co. Vytorin Erisa Litig.*, No. 08-CV-285 (DMC), 2010 WL 547613, at *6 (D.N.J. Feb. 9, 2010) (*citing In re Ikon*, 194 F.R.D. 166, 184 (E.D. Pa. 2000)). "In evaluating a plan of allocation, the opinion of qualified counsel is entitled to significant respect. The proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis." *Boyd v. Coventry Health Care Inc.*, No. DKC09-2661, 2014 WL 359567 (D. Md. Jan. 31, 2014); *see also Datatec*, 2007 WL 4225828, at *5 (approving plan as "rational and consistent with Lead Plaintiffs' theory of the case").

Here, the proposed Plan of Allocation (Notice ¶¶ 53-67) was developed by Lead Counsel through extensive consultation with Lead Plaintiffs' damages experts. It provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members. Under the Plan of Allocation, Recognized Loss Amounts for sales of Dole common stock during the Class Period are calculated based on the difference between the amount of alleged artificial deflation in the prices of Dole common stock at the time of sale and at the time of purchase. Notice ¶¶ 54, 57, 58.[4] The amount of artificial deflation in the price of Dole common stock for purposes of the Plan was determined as follows: for the period from January 2, 2013 through June 10, 2013, artificial deflation was increased at the beginning of the Class Period and on five other dates based on an

[4] For shares purchased or acquired before the beginning of the Class Period, the Recognized Loss Amount is the amount of alleged artificial deflation on the date of sale. Notice ¶ 57.

event study conducted by one of Lead Plaintiffs' damages experts that examined price changes in Dole common stock in reaction to Defendants' alleged misstatements, adjusting for changes attributable to market or industry forces. Notice ¶ 54. Additional deflation was introduced on June 11, 2013, the date of Defendant Murdock's initial offer to acquire the outstanding shares of Dole. The amount of artificial deflation introduced on this date was calculated based on an estimate of the price at which Dole common stock would have traded after such an offer if none of the alleged deflationary misstatements had been made. Notice ¶ 54. Finally, following the release of the proxy statement concerning the Take-Private Transaction on August 21, 2013, which contained further alleged misstatements, the alleged artificial deflation was increased another $1.51 to a total of $6.84 per share for the rest of the class period – an amount selected to reflect the difference between (i) the final offering price of $13.50 per share in the Take-Private Transaction and (ii) $20.34 per share, which the Chancery Court found to be a reasonable per-share value for Dole's stock based on the evidence at trial in that action. *Id*. Under the Plan, the sum of a claimant's Recognized Loss Amounts for all of his, her or its transactions is the Claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the size of their Recognized Claims. Notice ¶¶ 61-62.

Lead Counsel believe that the Plan of Allocation provides a fair and reasonable method of equitably allocating the Net Settlement Fund among Settlement Class Members. As of June 12, 2017, more than 26,000 copies of the Notice, which contains the Plan of Allocation, and advises Settlement Class Members of their right to object to it, have been sent to potential Settlement Class Members and nominees, and no objections have been received. *See* Cormio Decl. ¶ 7.

VII. CONCLUSION

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

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Respectfully submitted,

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