UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, THE CITY OF BRISTOL PENSION FUND, and THE CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated, Plaintiffs, v. INSULET CORPORATION, DUANE DESISTO, PATRICK J. SULLIVAN, ALLISON DORVAL, and BRIAN ROBERTS Defendants.	Civ. A. No. 15-12345-MLW CLASS ACTION ECF CASE

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 Arkansas Teacher Retirement System ("ATRS"), the City of Bristol Pension Fund ("City of Bristol"), and the City of Omaha Police and Fire Retirement System ("Omaha Police & Fire") (collectively, "Lead Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum in support of final approval of the proposed settlement of this action (the "Settlement"), for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation"), and certification of the Settlement Class.[1]

PRELIMINARY STATEMENT

Lead Plaintiffs have agreed, subject to Court approval, to settle and release all claims asserted in this action in exchange for a cash payment of $19.5 million. Lead Plaintiffs and Lead Counsel respectfully submit that the proposed Settlement represents an excellent result for the Settlement Class and easily satisfies the standards for final approval.

As detailed in the concurrently-filed Joint Declaration of James Harrod and William Fredericks ("Joint Declaration"),[2] the settlement represents a recovery of at least 8.6% to 18.4% of estimated maximum damages. This is a decidedly superior result for a securities class action, particularly when considered against the very real risks that the Settlement Class might well recover significantly less – or nothing – if the action were litigated through summary judgment, trial, and likely appeals. As discussed in more detail below and in the Joint Declaration, Lead

[1] Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Stipulation of Settlement dated February 8, 2018 (ECF No. 110) (the "Stipulation").

[2] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the action (¶¶ 15-42); the nature of the claims asserted (¶¶ 8-14); the negotiations leading to the Settlement (¶¶ 43-54); the risks and uncertainties of continued litigation (¶¶ 58-69); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶ 70-76). All citations to "¶__" refer to the Joint Declaration.

Plaintiffs believe that their claims have substantial merit, but also recognize that they involved challenging issues of proof on both liability and damages. Indeed, Defendants vigorously contested Lead Plaintiffs' claims on falsity, materiality, loss causation, and damages grounds. For instance, Defendants argued that they adequately disclosed the manufacturing and quality issues that had impacted Insulet's production, that any product defects were in any event immaterial, and that the Company accurately reported its OmniPod sales in conformity with GAAP at all times. ¶¶ 59-62. Defendants also argued that the alleged "corrective disclosures" from the first half of 2016 that caused Insulet's share price to decline were unrelated to the alleged fraud, and/or resulted in price changes that were not statistically significant, thereby defeating loss causation. ¶¶ 63-65.

The proposed Settlement, if approved, will enable the Settlement Class to recover a very significant sum while avoiding the risks of continued litigation. Lead Plaintiffs, who are institutional investors of the type favored under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), have actively monitored and participated in this litigation from the outset and through the drawn-out settlement negotiations, and they recommend that the Settlement be approved. *See* Joint Decl. Exs. 3-5. Likewise, Lead Counsel, which have extensive experience in prosecuting securities class actions, strongly believe that the proposed Settlement is fair, reasonable and adequate, and in the best interests of the Settlement Class. ¶¶ 2, 55-57.

Moreover, when the parties agreed to settle, Lead Counsel had a well-developed understanding of the strengths and weaknesses of the claims and defenses in the action. Before the Settlement was reached, Lead Plaintiffs had engaged in over two years of active litigation which included: (i) conducting a thorough investigation of the claims in the action by reviewing SEC filings, news reports, securities analysts' reports, and other publicly available information – and by identifying, locating and interviewing numerous former Insulet employees; (ii) drafting the

90-page consolidated complaint; (iii) successfully opposing Defendants' motion to dismiss; (iv) vigorously pursuing and discovery, which included serving comprehensive document requests on Defendants and 32 document subpoenas on Insulet's distributors and other third parties, obtaining more than 162,000 pages of documents, conducting a diligent review and analysis of those materials, and defending or participating in seven depositions; (v) preparing a class certification motion and conducting discovery related to class certification; (vi) retaining and consulting with their expert, Prof. Steven Feinstein, on matters relating to the preparation of his expert report on market efficiency, as well as on various loss causation and class damages issues; (vii) exchanging detailed mediation statements, engaging in an all-day mediation session, and continuing to exchange supplemental mediation position papers over a further four months of negotiations; (viii) negotiating and documenting the terms of the Settlement; and (x) successfully obtaining preliminary approval of the Settlement. ¶¶ 15-54. As noted below, where a settlement is the product of arms'-length negotiations among informed and experienced counsel, such considerations also strongly support approval.

Lead Plaintiffs also move for approval of the proposed Plan of Allocation. The Plan was developed in conjunction with Lead Plaintiffs' expert, and is designed to fairly and equitably distribute the Settlement's proceeds to Settlement Class Members based on the losses they suffered on their transactions in Insulet common stock in accord with the liability and damages theories alleged in the Complaint. ¶¶ 70-76. The proposed Plan of Allocation should therefore also be approved.

The reaction of the Settlement Class to date also supports approval of both the Settlement and Plan of Allocation. Pursuant to the Court's Preliminary Approval Order (ECF No. 124), as of May 31, 2018, more than 25,700 copies of the Notice have been mailed to potential Settlement

Class Members and nominees, and the Summary Notice was published in *Investor's Business Daily* and transmitted through *PR Newswire*. *See* Declaration of Michelle Kopperud Regarding (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Joint Decl. Ex. 1 ("Kopperud Decl."), at ¶¶ 7, 8. Information regarding the Settlement and relevant documents were also made available online at www.InsuletSecuritiesLitigation.com. *Id*. ¶ 10. While the deadline for submissions of objections to the Settlement or Plan of Allocation has not yet passed, to date no objections have been received. *See* ¶¶ 7, 106.

Finally, the Court should also certify the Settlement Class under Rule 23 for Settlement purposes.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010); *City P'Ship Co. v. Atlantic Acquisition Ltd. P'Ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). Courts "enjoy great discretion to 'balance [a settlement's] benefits and costs' and apply this general standard." *Voss*, 592 F.3d at 251.

Courts generally consider both "the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005). In this Circuit, evaluation of a settlement "requires a wide-ranging review of the overall reasonableness of the settlement that relies on neither a fixed checklist of factors nor any specific litmus test." *In re Tyco Int'l Ltd. MDL,* 535 F. Supp. 2d 249, 259 (D.N.H. 2007); *see also New England Carpenters*

Health Benefits Fund v. First Databank, Inc., 602 F. Supp. 2d 277, 280 (D. Mass. 2009) ("The First Circuit has not established a fixed test for evaluating the fairness of a settlement.").

Nonetheless, in assessing a settlement, many courts in this Circuit consider the following factors first set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974):

> (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 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 attendants risks of litigation.

First Databank, 602 F. Supp. 2d at 280-81 (quoting *Grinnell*, 495 F.2d at 463); *Relafen*, 231 F.R.D. at 72 (same); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93-94 (D. Mass. 2005) (same); *In re StockerYale, Inc. Sec. Litig.*, No. 1:05cv00177-SM, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007) (same).[3]

Determining whether a settlement is fair, reasonable, and adequate is entrusted to the Court's sound discretion. *See City P'Ship*, 100 F.3d at 1043-44. Courts should not "prejudge the merits of the case" or "second-guess the settlement." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. at 211. Instead, the Court's role is limited to "determin[ing] if the parties' conclusion is reasonable." *Id*. "Any settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a

[3] Other courts in this Circuit have considered similar but slightly different sets of factors. *See, e.g.*, *Tyco*, 535 F. Supp. 2d at 259-260; *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003).

trial." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 68 (D. Mass. 1997) (quoting *Greenspun v. Bogan*, 492 F. 2d 375, 381 (1st Cir. 1974)).

In evaluating the settlement, the Court should also consider the strong public policy favoring settlement, particularly in class actions. *See Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (noting the "strong public policy in favor of settlements"); *Tyco*, 535 F. Supp. 2d at 259 ("public policy generally favors settlement – particularly in class actions as massive as the case at bar").

A. The Settlement Is Entitled to An Initial Presumption of Fairness Because It Was the Product of Extensive Arms-Length Negotiations by Informed and Experienced Counsel

Where the parties have negotiated a settlement at arm's-length and have conducted sufficient discovery, the district court should presume that the settlement is reasonable. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009); *City P'Ship*, 100 F.3d at 1043; *Relafen*, 231 F.R.D. at 71-72; *Lupron*, 228 F.R.D. at 93.

Here, the Settlement was achieved after years of vigorous litigation, including extensive discovery and motion practice, and only after protracted arm's-length settlement negotiations between experienced counsel and with the assistance of a highly experienced mediator, David Geronemus, Esq., of JAMS (the "Mediator"). ¶¶ 43-48. Settlement discussions began in July 2017, when the parties, after exchanging comprehensive mediation briefs, participated in an all-day face-to-face mediation overseen by the Mediator. ¶43-45. The parties remained far apart after this July 2017 session, but continued to exchange follow-on position statements on disputed damages and liability issues while maintaining a settlement dialogue with the assistance of the Mediator. *Id*. Significantly, however, Lead Plaintiffs continued to vigorously pursue discovery from both Defendants and dozens of third parties, and both sides filed briefs and expert reports on Plaintiffs' contested class certification motion. Accordingly, by the time the agreement to settle was reached

in the late fall, Lead Counsel had, *inter alia*, had obtained a substantial volume of documents from Defendants and numerous third parties, and had the opportunity to review and analyze those materials, including in preparation for the then-upcoming depositions. In addition, both sides had seen the other's expert reports on class certification (which also touched upon disputed issues of loss causation and damages). ¶¶ 35-41. Because Lead Counsel were plainly well informed about the strengths and weakness of the case, the proposed Settlement is entitled to an initial presumption of reasonableness. *See Relafen*, 231 F.R.D. at 71-72; *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("settlement negotiations . . . conducted at arms' length over several months . . . support 'a strong initial presumption' of the Settlement's substantive fairness"); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (involvement by mediator "helps to ensure that the [negotiations] were free of collusion and undue pressure.").

Lead Counsel have extensive securities class action experience, and they strongly believe that the $19.5 million Settlement is in the best interests of the Class. *See* ¶¶ 2, 68. The judgment of experienced and informed class counsel also supports final approval here. *See Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("trial court is entitled to rely upon the judgment of experienced counsel"); *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Bussie*, 50 F. Supp. 2d at 77 (same).

B. Consideration of the Relevant *Grinnell* Factors Strongly Supports Approval

Consideration of the relevant *Grinnell* factors, as applied by numerous courts in this Circuit, strongly supports approval of the Settlement as fair, reasonable, and adequate.

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

The complexity of this case, and the substantial expense and delay that would result if Lead Plaintiffs sought to achieve a litigated verdict, weigh strongly in favor of approval of the Settlement. *See StockerYale*, 2007 WL 4589772, at *3 (this factor "captures the probable costs, in both time and money, of continued litigation"); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *11 (E.D. La. Mar. 2, 2009) (where continued litigation through discovery, class certification, trial and appeals "would consume substantial judicial and attorney time and resources," this factor "weighs in favor of settlement").

Continuing to litigate this action would have required substantial time and expense, with no guarantee of success. Although document discovery from Defendants was substantially advanced, continuing litigation would have entailed numerous additional depositions, completion of third-party discovery, and taking further expert discovery on issues of loss causation and damages – followed by motions for summary judgment and a trial involving a sophisticated medical device where Defendants would have likely continued to contest every element of liability (including falsity, materiality, scienter and loss causation) as well as damages. ¶¶58-67.

For example, for Lead Plaintiffs to prevail on their claims at trial, they would have had to present to a jury substantial factual evidence about, among other things, Insulet's manufacturing and quality control practices and persuasive expert testimony regarding loss causation and damages. Lead Counsel was prepared to do so, but achieving a litigated verdict in this action would clearly have been a complex, costly and time-consuming task. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation and trial, the passage of time would introduce yet more risks"); *Tyco*, 535 F. Supp. 2d at 260-61 (noting that proving loss

causation and damages would have been "complex and difficult" and involved "a confusing 'battle of the experts'").

Moreover, even if Lead Plaintiffs were to succeed at trial, it is virtually certain that Defendants would file post-trial motions and appeals, further delaying the receipt of any recovery by the class – assuming, of course, that Lead Plaintiffs ultimately prevailed on appeal. *See Relafen*, 231 F.R.D. at 72 ("in light of the high stakes involved, an appeal is certain to follow regardless of the outcome at trial") (citation omitted). In contrast, the proposed Settlement provides an immediate and decidedly superior recovery of $19.5 million for members of the Settlement Class, while avoiding the risks, delays, and expense of continued litigation. Accordingly, this factor strongly supports approval of the Settlement.

2. The Reaction of the Settlement Class

The reaction of the Settlement Class to date also supports final approval. Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator began its mailing of copies of the Notice and Claim Form (the "Notice Packet") on May 3, 2018, and as of May 31, 2018 had mailed a total of 25,774 Notice Packets to potential Settlement Class Members and their nominees. *See* Kopperud Decl. ¶¶ 3-7 (Joint Decl. Ex. 1).[4] The Court-approved Notice set out the essential terms of the Settlement and informed potential Settlement Class Members of, among other things, their rights to "opt out" or to object to any aspect of the Settlement, as well as how to submit a Claim Form. Copies of the Notice Packet and additional information and court filings were also posted online. *See id*. ¶ 10.

[4] In addition, the Summary Notice (which advised Settlement Class Members how to obtain copies of the more detailed Notice) was published in *Investor's Business Daily* and transmitted over *PR Newswire* on May 14, 2018. *See id*. ¶ 8.

Although the July 3, 2018 deadline set by the Court for Settlement Class Members to object to the Settlement (or to opt out) has not yet passed, to date ***no*** objections to the Settlement or the Plan of Allocation have been received. ¶ 106. Should any objections subsequently be received, Lead Plaintiffs will address them in their reply papers (which are due on July 19, 2018).

Significantly, however, it should be noted that each of the three Lead Plaintiffs have each submitted declarations in support of the Settlement. *See* Joint Decl. Ex. 3 (ATRS, Declaration of Rod Graves); Joint Decl. Ex. 4 (City of Bristol, Declaration of Diane Waldron); Joint Decl. Ex. 5 (Omaha Police & Fire, Declaration of James Sklenar). As sophisticated institutional investors who supervised Lead Counsel's work throughout the action, including during the extended settlement negotiations, their views are entitled to considerable weight. *See, e.g., City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) ("the recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement"); *In re Veeco Instruments Inc. Sec Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (settlement reached "with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness'") (citation omitted).

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

Courts also examine "'the degree of case development that class counsel [has] accomplished prior to settlement.'" *StockerYale*, 2007 WL 4589772, at *3 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)).

Here, not only did Lead Counsel conduct an extensive pre-filing investigation of the relevant law and facts (which included identifying, locating and interviewing numerous former Insulet employees), but their work also included: fully briefing (and prevailing on) their opposition

to Defendants' motion to dismiss; obtaining and reviewing a substantial volume of documents from Defendants and numerous third parties; participating in and/or defending seven depositions (and preparing to take several others); preparing comprehensive class certification papers (and working with their expert on his supporting expert report); analyzing the rebuttal expert report of Defendants' expert, Prof. Paul Gompers of Harvard Business School; and participating in a protracted mediation process with Defendants during which both sides submitted opening, reply and multiple supplementary mediation briefs and supporting exhibits addressing both liability and damages. ¶¶ 15-42. In sum, all parties had ample understanding of the strengths and weaknesses of their claims and defenses before reaching the Settlement. Accordingly, the "stage of the proceedings" factor also weighs strongly in favor of approval. *See, e.g.*, *StockerYale,* 2007 WL 4589772, at *3 (approving settlement where "counsel had the benefit of information obtained through document discovery and its extensive own investigation"); *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474 (D.P.R. 2011) (even if – unlike here – no formal discovery was taken, counsel's investigation and informal discovery provided "sufficient information to make a well informed decision").

4. The Substantial Risks of Establishing Liability and Damages

As further detailed in the Joint Declaration at ¶¶ 59-65, this case also clearly involved very significant litigations risks as to proof of both liability and damages.

For example, Defendants advanced credible arguments that they made no materially false or misleading statements or omissions during the Settlement Class Period. More particularly, Defendants contended that they adequately disclosed to investors the risk that the Eros OmniPod (as a new product) might experience customary manufacturing issues, that they timely disclosed manufacturing quality issues when they occurred, and that in any event the problems were not material and Insulet had at all times complied with its internal quality assurance policies and

procedures. ¶ 60. Defendants also argued that Eros sales did in fact grow throughout the relevant period, that there was no evidence that their financial statements violated any provisions of GAAP, that their representations regarding "growing demand" for the Eros were accurate, and that they had no obligation to separately "break out" the performance of their higher-margin U.S. markets from their lower-margin overseas markets. *Id*. With respect to their reporting of "new patient starts," Defendants also cited evidence suggesting that they had adequately informed financial analysts that their reporting of this metric included both U.S. and non-U.S. new patient starts, and therefore could not have been misleading. *Id*.

On the issue of scienter, Defendants also contended that Lead Plaintiffs would be unable to show that Insulet's senior management ever over-rode the Company's quality assurance policies, or that Defendants ever concealed any Eros product defects that they understood to be material – and that Defendants' positive statements about the Eros product were borne out by its overall growth in sales throughout the Settlement Class Period. ¶ 61. Moreover, Defendants DeSisto and Liamos argued that their insider stock sales did not support scienter because those sales were made pursuant to Rule 10b5-1 plans, and were not suspicious in timing or amount. *Id*.

Moreover, even if Lead Plaintiffs were able to establish falsity, materiality and scienter, they still faced additional risks in proving loss causation and damages. To prove damages, Lead Plaintiffs bear the burden of establishing "loss causation," *i.e.,* that Insulet's alleged misstatements and omissions caused their alleged losses. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005). "In other words," Plaintiffs have the burden of proving that "the stock market must have reacted to the subsequent disclosure of the misconduct and not to a tangle of other factors." *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 86 (1st Cir. 2014) (internal citations and quotations omitted).

Lead Plaintiffs alleged that "corrective disclosures" occurred on January 7, January 14, February 26, March 30 and April 30, 2015, arguing that new, material information was revealed to the public on these dates concerning systemic problems with the Eros and/or the resulting adverse impact that these problems had on "new patient starts," end-user demand and reported revenue (which in turn caused significant declines in Insulet's stock price). ¶ 13. Defendants, however, vigorously argued that Lead Plaintiffs could not establish loss causation as to any of these dates because the disclosures at issue did not directly relate to, or "correct," any alleged misrepresentations – and that instead the price declines on those dates were due to other factors. ¶¶ 63-65. Defendants also contend that the stock price reactions following certain disclosures were not statistically significant, such that no damages can be associated with them. ¶ 64. And even if Lead Plaintiffs could have otherwise proven their claims, Defendants argued that any arguably "concealed truths" were adequately disclosed on the first alleged disclosure date (January 7, 2015) or by some point in January 2015 – which would have severely limited any recoverable damages. ¶ 66.

Lead Plaintiffs believe that they had good responses to all of Defendants' arguments. However, prevailing on every aspect of their claims was plainly a risky proposition. For example, prevailing on just the issue of loss causation at trial would have involved a highly complex and uncertain battle of the experts. *See, e.g., Tyco*, 535 F. Supp. 2d at 260-61 ("even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *18 (S.D.N.Y. Nov. 8, 2010) (noting that any jury verdict with respect to damages would "depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27

(S.D.N.Y. 2001) ("Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (in securities cases, calculation of damages is a "'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and [a share]'s 'true value' absent the alleged fraud") (internal citation omitted).

Accordingly, the "litigation risk" factor also strongly supports approval of the Settlement. *See, e.g.*, *StockerYale*, 2007 WL 4589772, at *3 (citing existence of significant risks of proving liability and loss causation that "could result in no liability and zero recovery for the class"); *OCA*, 2009 WL 512081, at *13 (substantial risks of proving loss causation and *scienter* favored approval of settlement); *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *18 (N.D. Tex. Nov. 8, 2005) ("plaintiffs' uncertain prospects of success through continued litigation," including challenges of proving that Defendants' statements were false when made and of establishing their scienter, favored approval).

5. Defendants' Ability to Withstand a Greater Judgment

Lead Plaintiffs believe that Insulet could have withstood a judgment greater than $19.5 million. However, "a defendant is not required to empty its coffers before a settlement can be found adequate," *In re Sturm, Ruger & Co. Sec. Litig.*, No. 3:09cv1293 (VLB), 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012); *see also In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (same). Accordingly, this factor, standing alone, is neutral – and certainly does not support rejecting a settlement where, as here, the other factors all plainly support approval. *See, e.g., D'Amato*, 236 F.3d at 86; *Relafen*, 231 F.R.D. at 73; *Lupron*, 228 F.R.D. at 97.

6. Risk of Maintaining Class Certification Through Trial

Lead Plaintiffs were highly confident that a class would be certified in this action. However, as noted in Part I.B.4 above, Defendants proffered meaningful arguments for cutting off the class period (and for severely limiting damages for the remaining members of a "narrowed" class) at some point in January 2015. This factor therefore also weighs in favor of settlement. *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.,* No. 03 Civ. 0085, 2005 WL 3008808, at *8 (D.N.J. Nov. 9, 2005) ("the risks faced by Plaintiffs with regard to class certification weigh in favor of approving the Settlement").

7. The Range of Possible Recovery In Light of Litigation Risks

Under this aspect of the *Grinnell* analysis, the issue is not whether the Settlement represents the best possible recovery, but rather how the Settlement compares to the strengths and weaknesses of the case. "[T]he evaluating court must . . . guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Lupron*, 228 F.R.D. at 98 (quoting *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 806 (3d Cir. 1995)). The court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. The determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997); *see also Relafen*, 231 F.R.D. at 73 ("[a] high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes"). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Relafen*, 231 F.R.D. at 73.

Lead Plaintiffs submit that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of this litigation, as discussed above. Indeed, when weighed against the risks of continued litigation, including the risks that there would be no recovery at all, the proposed $19.5 million all-cash Settlement is an excellent result. Indeed, Lead Plaintiffs' damages experts calculated that maximum amount recoverable for the Settlement Class at trial (assuming complete success on liability) ranged from roughly $151 to $226 million. Defendants deny that they cause any damages to the class, but have calculated that, at most, the damages that could be proved would $106 million based on Defendants' analysis of their loss causation defenses. ¶¶ 56-57.

According, the Settlement represents a recovery of approximately 8.6% to 18.4% of the Settlement Class's *maximum* recoverable damages, which is a very favorable recovery in light of the substantial litigation risks and in comparison to percentage recoveries and absolute amounts recovered in other securities class actions. ¶ 56. For example, the $19.5 million recovery here is ***3.25 to 3.9 times higher*** than the median recovery of $5 or $6 million for all securities class actions in 2017 based published reports. ¶ 55. Moreover, while Lead Plaintiffs do not necessarily agree with all of the underlying assumptions in these reports, the percentage recovery under the Settlement of between 8.6% and 18.4% of estimated investor's damages or losses compares very favorably to the median percentage recoveries reported, being approximately ***three to five times larger*** than recoveries in cases with comparable maximum damages. Moreover, as discussed above, if a jury or the Court had credited even some of Defendants' arguments with respect to liability or loss causation, the Settlement Class might have recovered little or nothing. ¶ 65. Given these risks, the Settlement provides an excellent result for the Settlement Class.

8. Summary

In sum, the relevant *Grinnell* factors ***strongly*** support a finding that the Settlement is fair, reasonable, and adequate.

II. THE PLAN OF ALLOCATION SHOULD BE APPROVED

A plan of allocation, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See Tyco*, 535 F. Supp. 2d at 262; *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 109 (D. Mass. 2010); *see also City of Providence*, 2014 WL 1883494, at *10 (plan of allocation "need only have a reasonable, rational basis"); *IMAX*, 283 F.R.D. at 192 (same).

A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable, but the plan "need not necessarily treat all class members equally." *Schwartz*, 2005 WL 3148350, at *23. Instead, a reasonable plan of allocation "may consider the relative strength and values of different categories of claims." *IMAX*, 283 F.R.D. at 192; *see also In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 35 (D.N.H. 2006) (approving plan that took into consideration "the strengths and weaknesses of the claims of the various types of class members"); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 669 (E.D. Va. 2001) (approving plan that "sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims"). In determining whether a plan is fair and reasonable, courts also give great weight to the views of experienced counsel. *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) (in evaluating fairness of a plan of allocation "courts give weight to the opinion of qualified counsel"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel").

Here, the proposed Plan of Allocation was developed by Lead Counsel in consultation with their damages expert, and is based on Lead Plaintiffs' expert's calculation of the estimated amount

of artificial inflation in the price of Insulet common stock attributable to Defendants' allegedly false and misleading statements and material omissions over the course of the Settlement Class Period. More specifically, in making these calculations, Lead Plaintiffs' expert (a) considered the price declines in Insulet common stock that occurred on the trading day immediately after each of the previously discussed "corrective disclosures" of January 7, January 14, February 26, March 30 and April 30, 2015; and (b) adjusted the observed price declines to take into account price changes that were attributable to market or industry factors (rather than Insulet-specific news). Given the relative strength of certain arguments by Defendants that challenged Lead Plaintiffs' ability to establish loss causation with respect to price declines that occurred on February 27, March 31 and May 1, 2015, the amount of estimated inflation associated with those dates was discounted by 50% in the Plan of Allocation to reflect the higher degree of risk associated with proving loss causation for Settlement Class Members who sold or held shares on or after those dates. ¶¶ 64, 72.

Lead Counsel therefore submit that the Plan of Allocation fairly and rationally allocates the proceeds of the Net Settlement Fund among Settlement Class Members based on the relative strengths of their claims as alleged in the Complaint. ¶¶ 71-72. Moreover, although its provisions were fully set forth at pages 11-15 of the Notice, to date no objections to the Plan have been received. ¶ 106. Accordingly, the Plan of Allocation should also be approved.

III. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice given to the Settlement Class was "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" in conformity with Fed. R. Civ. P. 23(c)(2)(B). *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also complied with the requirement that it be directed "in a reasonable manner to all class members who would be bound" by the settlement,

Fed. R. Civ. P. 23(e)(1), and that it "fairly apprise the prospective [class] members of the terms of the proposed settlement and of the options that are open to them." *Duhaime*, 177 F.R.D. at 61 (quoting *Greenspun*, 492 F.2d at 382). The Notice also included all of the information required by the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the action and the claims asserted; (ii) the definition of the Settlement Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Settlement Class Members' right to opt-out of the Settlement Class or object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Settlement Class Members.

As noted above, the Claims Administrator disseminated the Court-approved Notice in accord with the notice program set forth in the Court's Preliminary Approval Order, and as of May 31, 2018 had mailed over 25,700 Notice Packets by first-class mail to potential members of the Settlement Class or their nominees. *See* Kopperud Decl. ¶¶ 3-7. In addition, Lead Plaintiffs caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the internet on the *PR Newswire* on May 14, 2018 (which provided class members with both a toll-free number and a dedicated settlement website address from which they could obtain also copies of the Notice Packet). *Id*. ¶ 8. This combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, and notice via an appropriate print publication and over the internet, constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also, e.g.*, *Advanced Battery Techs.,* 298 F.R.D. at 182-83; *Schwartz*, 2005 WL 3148350, at *10-*11; *Cabletron*, 239 F.R.D. at 35-36.

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

For the reasons set forth in Lead Plaintiffs' motion for class certification (ECF Nos. 85, 86) and motion for preliminary approval (ECF No. 109 at 18-23), the Court should also finally certify the Settlement Class for purposes of this Settlement.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court (1) approve the proposed Settlement as fair, reasonable, and adequate; (2) approve the Plan of Allocation as fair and reasonable; and (3) certify the Settlement Class for purposes of this Settlement.

DATED: June 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

By: */s/ James A. Harrod*
James A. Harrod