IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LORD ABBETT AFFILIATED FUND, INC., *et al.*, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. NAVIENT CORPORATION, *et al.*, Defendants.	Case No. 1:16-cv-112-MN

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

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Court-appointed Class Representatives Lord Abbett Affiliated Fund, Inc., Lord Abbett Equity Trust–Lord Abbett Calibrated Mid Cap Value Fund, Lord Abbett Bond-Debenture Fund, Inc., and Lord Abbett Investment Trust–Lord Abbett High Yield Fund (collectively, "Plaintiffs" or the "Lord Abbett Funds"), on behalf of themselves and the Classes certified by the Court, respectfully move this Court, pursuant to Federal Rule of Civil Procedure ("Rule") 23, for: (i) final approval of the proposed settlement of the above-captioned action ("Action") on the terms set forth in the Stipulation and Agreement of Settlement dated November 16, 2021 (D.I. 339-1) ("Stipulation"); and (ii) approval of the proposed plan for allocating the net proceeds of the Settlement to the Classes ("Plan of Allocation" or "Plan").[1]

I. PRELIMINARY STATEMENT

Plaintiffs are pleased to present for the Court's approval their agreement to settle this securities class action in exchange for a cash payment of $35 million for the benefit of the Classes. Plaintiffs respectfully submit that the proposed Settlement—which, if approved, would rank as the fifth largest securities class action settlement in District of Delaware history—is an excellent result given the serious risks they faced in proving the securities claims at issue and the significant delays of continued litigation. It is the culmination of over five years of vigorous litigation by Plaintiffs and Plaintiffs' Counsel, including through motions to dismiss, class certification, fact and expert discovery, full briefing on summary judgment and expert motions, and trial preparation. The

[1] Unless defined below, all capitalized terms have the meanings set forth in the Stipulation or the accompanying Declaration of Jeremy P. Robinson ("Robinson Decl."), which is an integral part of this submission. For the sake of brevity, Plaintiffs respectfully refer the Court to the Robinson Decl. for a detailed summary of, *inter alia*: the claims asserted, the procedural history, the arm's length negotiations, the serious risks of continued litigation, compliance with the Court-approved notice plan, and the Plan of Allocation. Citations to "¶ __" refer to paragraphs in the Robinson Decl., and citations to "Ex. __" refer to its exhibits. Unless noted, all internal cites and punctuation are omitted, and emphasis is added.

proposed Settlement is also the product of extensive arm's length negotiations by experienced and well-informed counsel, including through a mediation process supervised by former U.S. District Court Judge Layn R. Phillips, one of the preeminent securities litigation mediators in the nation. As detailed in the accompanying Robinson Declaration and summarized herein, the proposed Settlement provides a substantial, certain, and immediate recovery for Class Members and avoids the significant risks of continued litigation, including the risk of a diminished recovery or no recovery at all—after years of additional litigation, appeals and delay.

The proposed Settlement is the direct result of Plaintiffs' and Counsels' substantial litigation efforts. Indeed, Plaintiffs and Plaintiffs' Counsel zealously represented Class Members' interests and gained a thorough understanding of the strengths and weaknesses of the case. By the time the Parties reached the proposed Settlement, Plaintiffs and Plaintiffs' Counsel had conducted an extensive investigation, including interviews of multiple former Navient employees, which culminated in the filing of two detailed amended complaints. They litigated Defendants' motions to dismiss, which first resulted in the dismissal of all claims and the entire action. Subsequently, Plaintiffs were successful in resurrecting certain claims, while the Court dismissed others with prejudice. Plaintiffs and Lead Counsel thereafter completed extensive fact discovery, which included contested discovery motions, the analysis of 6 million pages of documents, and the depositions of 18 fact witnesses, including Navient's top executives. They also litigated a contested class certification motion, which involved 3 depositions and resulted in the Court certifying the Classes. Further, Plaintiffs and Lead Counsel completed extensive expert discovery, which between the Parties involved the submission and analysis of 22 expert reports authored by 11 experts, as well as 12 expert depositions (for a cumulative total of 33 depositions). They also fully briefed Defendants' summary judgment motion and the Parties' respective *Daubert*

motions, which involved the submission of over 300 pages of briefing and 20,000 pages of exhibits. As a result, Plaintiffs and Lead Counsel had a well-developed understanding of the merits and risks of the claims when the Settlement was reached.

The proposed Settlement is also the product of extensive arm's-length negotiations between the Parties, including a formal mediation session before Judge Phillips during which he made two mediator's proposals before the Parties could achieve a resolution. Ex. 2 ¶¶9. The first proposal brought the Parties within a narrowed negotiating range, and the second proposed a settlement in full for $35 million, which Judge Phillips independently viewed as "reasonable and fair for the Class and all parties involved," particularly given the "burdens and risks associated with taking a case of this size and complexity to trial." *Id.* ¶12. The Parties ultimately accepted the $35 million settlement proposal.

Plaintiffs and Lead Counsel believe that the Settlement is in the best interests of the Classes given the serious risks involved in continued litigation. As discussed below and in the Robinson Declaration, the Action presented many significant risks to establishing both liability and damages through continued, prolonged litigation that could have resulted in no recovery at all. The Settlement avoids these risks and provides a substantial and certain benefit rather than the mere possibility of a recovery after additional years of litigation, including the inevitable appeals.

Further, the Settlement has the full support of Plaintiffs, which are sophisticated institutional investors that took an active role in supervising the litigation and participated directly in the arm's length settlement negotiations. Also, while the deadline to object to the Settlement has not yet passed, to date no Class Members have objected to the Settlement.[2]

[2] The Court-ordered deadline for submission of objections is February 24, 2022. Should any objections be received, Plaintiffs will address them in their reply papers.

As discussed herein, Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and should be approved. Additionally, Plaintiffs request that the Court approve the Plan of Allocation, which is set forth in the Settlement Notice mailed to potential Class Members. The Plan of Allocation, which Lead Counsel developed in consultation with Plaintiffs' damages expert, provides a reasonable method for allocating the Net Settlement Fund among Class Members who submit valid claims based on damages they suffered on their transactions in Navient Securities during the relevant time periods. The Motion should be approved.

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e)(2) requires judicial approval of any class action settlement. Strong judicial policy favors settlement—particularly "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010). Under Rule 23(e)(2), the Court should approve a proposed class action settlement if it finds it to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) ("*NFL Players*"). In making this determination, Rule 23(e)(2) provides that a court should consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment;
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Consistent with Rule 23(e)(2), courts in the Third Circuit consider the following nine factors enumerated in *Girsh v. Jepson* in deciding whether to approve a proposed settlement:

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

521 F.2d 153, 157 (3d Cir. 1975). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Valeant Pharms. Int'l, Inc. Sec. Litig*., 2020 WL 3166456, at *7 (D.N.J. June 15, 2020). Third Circuit courts also consider, as appropriate, the factors set forth in *In re Prudential Insurance Company America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998). As set forth below, all relevant factors favor approval.

A. Plaintiffs and Lead Counsel Have Adequately Represented the Classes

Plaintiffs and highly-qualified Plaintiffs' Counsel "have adequately represented the class," which weighs in favor of settlement. Fed. R. Civ. P. 23(e)(2)(A). *See Vinh Du v. Blackford*, 2018 WL 6604484, at *4 (D. Del. Dec. 18, 2018) ("The Third Circuit applies a two-prong test to assess the adequacy of the proposed class representatives. First, the court must inquire into the qualifications of counsel to represent the class and, second, it must assess whether there are conflicts of interest between named parties and the class they seek to represent.").

First, Plaintiffs' Counsel are highly experienced in securities litigation. *See* Exs. 4A-3 & 4C-3. They actively pursued the claims on behalf of the Classes for over five years, resulting in a favorable Settlement through mediation. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) ("courts in this Circuit traditionally attribute significant weight to the belief of

experienced counsel that settlement is in the best interest of the class"), *aff'd*, 559 F. App'x 151 (3d Cir. 2014). As detailed in the Robinson Declaration, Plaintiffs' Counsel: (i) conducted an extensive investigation into investors' claims, including interviews of former Navient employees (¶¶4, 38-39); (ii) researched and drafted two detailed amended complaints (¶¶4, 40-41, 47); (iii) opposed, through extensive briefing, two rounds of motions to dismiss filed by Defendants—overcoming the initial dismissal of the entire action (¶¶4, 18, 44); (iv) completed extensive fact discovery, which included contested discovery motions, the analysis of 6 million pages of documents, the depositions of 18 fact witnesses, including Navient's top executives, and the service of and response to extensive written discovery. (¶¶2, 5-8, 55-57, 65-81, 86-89); (v) litigated a contested class certification motion, which involved 3 depositions and resulted in the Court certifying the Classes (¶¶4, 90-101); (vi) completed extensive expert discovery, which involved the submission and/or analysis of 22 expert reports from a total of 11 experts, as well as 12 expert depositions (¶¶4, 9, 82-85); (vii) fully briefed Defendants' summary judgment motion and the Parties' respective *Daubert* motions (including a separate motion to strike expert testimony), which involved the submission of over 300 pages of briefing and 20,000 pages of exhibits (¶¶105-115); and (viii) began preparing for trial (¶116).

Second, Plaintiffs' claims, which are based on a common course of alleged wrongdoing by Defendants, are typical of other Class Members. By seeking to prove their securities claims, Plaintiffs likewise sought to prove the same claims of Class Members—and no conflicts existed between the interests of Class Members and Plaintiffs. As such, "Plaintiff's interests are coextensive with, and not antagonistic to, the interests of the class since they all raise the same claims and seek the same relief." *Utah Retirement Sys. v. Healthcare Svs. Grp., Inc.*, -- F. Supp. 3d --, 2022 WL 118104, at *4 (E.D. Pa. Jan. 12, 2022).

B. The Settlement Resulted From Extensive Arm's Length Negotiations Supervised By An Experienced Mediator

As detailed herein and in the Robinson Declaration, Plaintiffs and Lead Counsel negotiated the Settlement "at arm's length," F.R.C.P. 23(e)(2)(B), following the completion of extensive fact and expert discovery and dispositive motion briefing, which provided them with a full opportunity to understand and evaluate the case. *See generally In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). Approval of a settlement is warranted "[w]here a court can conclude that the parties had sufficient information to make an informed decision about settlement." *4 Newberg On Class Actions* § 13:49 (5th Ed. 2021).

Courts recognize that the participation of an experienced, respected mediator in the settlement process weighs heavily in favor of a proposed settlement's procedural fairness. *See Alves*, 2012 WL 6043272, at *22. Here, the Parties participated in a formal mediation with Judge Phillips, one of the nation's foremost securities mediators. *See, e.g.*, *In re MGM Mirage Sec. Litig.*, 708 F. App'x 894, 897 (9th Cir. 2017) (unpublished) (calling Judge Phillips a "nationally recognized mediator" and affirming settlement approval in part due to his representations); *see* Ex. 2, ¶¶2, Robinson Decl. ¶¶15-16, 117-24. Prior to the mediation, the Parties exchanged and submitted their summary judgment briefing and separate detailed submissions addressing damages. *Id.* ¶12. And, at the mediation, the Parties robustly argued their respective positions and exchanged multiple rounds of settlement demands and offers. *Id.* ¶¶15-16. During the mediation, Judge Phillips made a mediator's recommendation to bring the Parties within a narrowed negotiating range that he independently thought was reasonable, which the Parties accepted. *Id.* Then, after additional negotiations, Judge Phillips issued a mediator's recommendation that the Parties settle the Action for $35 million in cash, which was within the agreed range that he independently viewed as fair and reasonable. *Id.* The Parties accepted this proposal on October 1,

2021. *Id.* In sum, the negotiations between the Parties were arm's length, hard-fought and reflected an in-depth understanding of the strengths and weaknesses of the case. *Id*.

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

Rule 23(e)(2)(C) overlaps considerably with many of the factors articulated by the Third Circuit in *Girsh*, which evaluate the fairness of the "relief that the settlement is expected to provide to" the Classes. Fed. R. Civ. P. 23(e)(2), adv. cmt. notes to 2018 amendments, subdivision (e)(2), ¶¶ (C) and (D). These factors support approval here.

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

Courts consistently recognize that the expense, complexity, and possible duration of the litigation are key factors in evaluating the reasonableness of a settlement. *Girsh*, 521 F.2d at 157. Settlement is favored where, as here, continuing to litigate through trial would require "extensive pretrial motions addressing complex factual and legal questions" and then "a complicated, lengthy trial." *Talone v. Am. Osteopathic Ass'n*, 2018 WL 6318371, at *14 (D.N.J. Dec. 3, 2018). In that regard, courts regularly acknowledge that securities class actions are "notably complex, lengthy, and expensive cases to litigate[,]" *In re PAR Pharm. Sec. Litig.*, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013) (citing examples). This case was no exception. As discussed in the Robinson Declaration and below, continued litigation of this Action presented numerous risks. ¶¶133-66. Further, continuing to prosecute the Action through a ruling on Defendants' summary judgment motion, the Parties' respective *Daubert* motions, trial, and the inevitable post-trial appeals would have imposed both risk and substantial additional costs on the Classes and delay the Classes' ability to recover. *See In re Ocean Power Techs., Inc., Sec. Litig.*, 2016 WL 6778218, at *12 (D.N.J. Nov. 15, 2016) ("Settlement is favored under this factor if litigation is expected to be

complex, expensive and time consuming."). In contrast, the Settlement avoids the risk, expense, and delay of continued litigation while providing a substantial, near-term recovery for the Classes.

2. The Risks of Continued Litigation

In assessing a settlement, a court should also consider the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." *Girsh*, 521 F.2d at 157. "These [*Girsh*] factors balance the likelihood of success and the potential damages award if the case were taken to trial against the benefits of immediate settlement." *In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *5 (D. Del. Nov. 19, 2018). As discussed below, absent the proposed Settlement, Plaintiffs faced significant risks in continued litigation. *See W. Palm Beach Police Pension Fund v. DFC Glob. Corp*., 2017 WL 4167440, at *5-6 (E.D. Pa. Sept. 20, 2017) (approving settlement where "[e]stablishing liability would be difficult for the Class [and] [e]stablishing damages would also be no picnic;" finding that "these factors weigh heavily in favor of approving the settlement").

3. Risks to Establishing Liability and Damages

While Plaintiffs and Lead Counsel believe that the claims asserted against Defendants in the Action are meritorious, they recognize that this Action presented several substantial risks to establishing both liability and damages. Those risks included:

- First, Plaintiffs faced significant risk as to whether the Spin Shares issued in connection with Navient's 2014 spin-off from Sallie Mae were properly included in the Action, which would have dramatically impacted possible damages. ¶¶144-47.

- Second, Plaintiffs faced significant risks in proving that Defendants made misrepresentations. Defendants insisted that they made no misstatements at all. For example, they defended Navient's accounting for loan losses through expert evidence and by pointing to the review of the accounting by Navient's auditor, KPMG, as well as the lack of any restatement. Defendants also argued that expert analysis of the quantitative evidence established that Navient did not engage in forbearance steering and that it did not use forbearance in a way that contradicted its public statements. Further, the Parties' competing expert evidence set up an unpredictable "'battle of the experts' . . . with no

guarantee whom the jury would believe." *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001). ¶¶148-56.

- Third, Plaintiffs faced challenges to proving that Defendants acted with scienter—a notoriously difficult element to prove. *See Fishoff v. Coty Inc.*, 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011). *See* ¶¶157-60. For example, Defendants argued that Navient's executives were unaware of any need to increase Navient's loan loss provisions and that Navient increased its provisions as soon as the Company learned that loans were performing poorly in compliance with GAAP. ¶158-59. Likewise, as to Plaintiffs' forbearance claims, Defendants argued that they lacked scienter because they helped borrowers avoid default, Navient's executives were unaware of any misuse, and Defendants had no incentive to misuse forbearance because the relevant loans were guaranteed and Navient earned more by avoiding forbearance. ¶160.

- Finally, Plaintiffs faced formidable challenges with respect to proving loss causation and damages. *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (stating that disentangling the market's reaction to various pieces of news is a "complicated concept, both factually and legally"). Defendants asserted in their summary judgment motion and would have argued at trial that Plaintiffs could not establish loss causation as to several of the alleged corrective disclosures. ¶¶161-63. For example, Defendants disputed that the alleged corrective disclosure on July 22, 2015, caused any statistically significant decline in the price of Navient common stock. ¶162. Defendants also argued that another alleged corrective disclosure—a Consumer Financial Protection Bureau report released on September 29, 2015—did not specifically address Navient and did not reveal any new fraud related information. ¶163.

While Plaintiffs believe that they had compelling responses, Defendants' arguments presented significant risks at summary judgment and trial, which weighs in favor of approval.

4. Risks to Maintaining the Class Action Through Trial

Defendants' motion for summary judgment was pending when the Settlement was reached, as were the Parties' respective *Daubert* motions. In these motions, Defendants advanced multiple arguments (summarized *supra*) that, if successful, would have resulted in substantially less recovery for Class Members—or, indeed, no recovery at all. *See supra* § II.C.1-3, ¶¶27-30. The Settlement removes all of these significant risks and uncertainty through a substantial and certain payment of $35 million in cash without the attendant trial delays and the inevitable appeals. *See* Fed. R. Civ. P. 23(c)(1)(C). Thus, this factor also supports approval of the proposed Settlement.

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

The eighth and ninth *Girsh* factors—the reasonableness of the settlement in light of the best possible recovery and the risks of litigation—also weigh in favor of approving the Settlement. "In making [an] assessment [of these factors], 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; *In re AT&T Corp., Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. . . . [r]ather, the percentage recovery, must represent a material percentage recovery to plaintiff in light of all the risks") (first alteration in original). The $35 million Settlement—which, if approved, would rank as the fifth largest securities class action settlement in the history of the District of Delaware—meets this threshold.

As set forth at length in the Robinson Declaration, the $35 million Settlement represents over 9.58% of the maximum reasonably likely damages calculated by Plaintiffs' damages expert. ¶168. If Plaintiffs overcame all the significant risks to liability and damages and prevailed on every single disputed issue in the Action (including as to the Spin Shares), then Plaintiffs' expert estimated that the maximum possible damages were $687 million. ¶169. Even under this aggressive and extreme scenario, the Settlement is more than 5% of the maximum recoverable damages—again, assuming complete success in proving liability at trial and on any appeal. *Id.*

As for Defendants, their damages expert opined that there were no damages in this case at all. Further, assuming liability but excluding the Spin Shares (as Defendants argued would be required), Defendants' expert asserted that aggregate maximum recoverable damages were at most $39.54 million (based on Plaintiffs' expert's calculations using Defendants' expert's figures and

conclusions). ¶170. Under this scenario, the Settlement represents over ***88.5%*** of the maximum possible damages award. *Id*.

By these measures, the $35 million Settlement represents an excellent result given the risks. The Settlement is approximately 5% to 9.58% of the maximum damages that could be recovered for the Classes under Plaintiffs' approach, which is a level of recovery that significantly exceeds the recovery percentage of settlements approved by courts within the Third Circuit. *See, e.g.*, *Cendant*, 264 F.3d at 241 (noting "a range of recoveries . . . for securities class action settlements," including as low as 1.6%). Moreover, under Defendants' approach (based on Plaintiffs' experts' calculations), the Settlement represents over 88.5% of the maximum possible damages. Further, as explained above, Plaintiffs' success in proving maximum damages was subject to significant risks. If Defendants' substantial arguments were accepted, the maximum damages would have been substantially lowered or eliminated entirely. Thus, this factor favors approval.

6. Stage of the Proceedings and Amount of Discovery Completed

As described in detail *supra* and in the Robinson Declaration, the Settlement occurred after extensive fact and expert discovery, after full briefing on summary judgment and *Daubert* motions, after Lead Counsel had begun preparing for trial, and following an arm's-length negotiation process with an experienced mediator. A settlement following sufficient discovery and genuine arm's-length negotiations is "presumptively valid." *Devlin v. Ferrandino & Son, Inc.*, 2016 WL 7178338, at *5 (E.D. Pa. Dec. 9, 2016). The record demonstrates that, when the Settlement was reached, Plaintiffs and Lead Counsel had a complete picture of the "strengths and weaknesses of their case." *Dartell v. Tibet Pharms., Inc.*, 2017 WL 2815073, at *5 (D.N.J. June 29, 2017) (finding, in a securities class action, the third *Girsh* factor weighed in favor of settlement where the parties had "fully briefed motions to dismiss, a motion for class certification, and [had] engaged in discovery," as well as the "engage[ment of] two experts"). This factor supports approval.

7. The Ability of Defendants to Withstand a Greater Judgment

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240. But even the "fact that [defendants] could afford to pay more does not mean that [they are] obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached." *Warfarin Sodium*, 391 F.3d at 538; *see also In re Schering-Plough Corp. Sec. Litig.*, 2009 WL 5218066, at *5 (D.N.J. Dec. 31, 2009) ("pushing for more in the face of risks and delay would not be in the interests of the class"). Here, even if Defendants could conceivably afford to pay more, that factor does not outweigh the numerous factors strongly favoring Settlement, including the serious risks to continued litigation and the certain and immediate recovery of a substantial recovery for Class Members.

8. The Reaction of the Classes to Date

In assessing a settlement, courts in the Third Circuit also consider "the reaction of the class to the settlement." *Girsh*, 521 F.2d at 157; *NFL Players*, 821 F.3d at 438. The deadline for Class Members to object to the Settlement is February 24, 2022. ¶173, 178. As of the date of this filing, the Settlement has received no objections. ¶178. Plaintiffs will address objections to the Settlement, if any, in their reply.

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

Courts in this Circuit also consider various *Prudential* factors, as appropriate to the specifics of the litigation. As relevant here, these factors support approval of the proposed Settlement. *See* 148 F.3d at 323 (including the maturity of the substantive issues; the existence of other possible claims by Class Members; the comparison of the results achieved to those of other Class Members or potential Class Members; the ability of Class Members to opt out of settlement; the reasonableness of attorneys' fees; and the reasonableness of the claims processing procedure).

To start, the substantive issues had matured at the time of the Settlement given the comprehensive record in the Action, which had proceeded to pending summary judgment and *Daubert* motions that the Parties briefed on a fully developed discovery record. Plaintiffs and Lead Counsel thus had a clear understanding of the strengths and weaknesses of the case based on their extensive litigation of the Classes' claims (as set forth in detail in the Robinson Declaration and herein), which supports approval of the proposed Settlement. *See supra* § II.C; ¶¶55-116.

Next, there are no settlements that have been "achieved—or [are] likely to be achieved" by any individuals or other potential Class Members that are comparable to the "results achieved by the" proposed Settlement for the benefit of Class Members in this case. *Prudential*, 148 F.3d at 323. For example, there have been no other securities claims brought by separate classes or subclasses of claimants within the Class Periods certified by the Court in this Action. *Id.* Nor do any settlements that Navient entered in other actions involve the same Class Members or claims as in this Action. *Id.* While Navient settled a separate securities class action proceeding in the District of New Jersey, *In re Navient Corporation Securities Litigation*, Master File No. 17-8373 (RBK/AMD), that settlement involved a different class of Navient investors who alleged claims over a later class period—which started over a year after the relevant period here ended. ¶¶125-26. Further, the recent settlement between Navient and forty state attorneys general (the "State AG Settlement") resolving a broad array of consumer law claims was not for the benefit of any Navient investors—such as the Class Members in this Action. ¶¶127-30. Rather, the State AG Settlement covered separate consumer law violations with distinct elements (not securities law claims), brought by the States on behalf of consumers (not investors) for a much broader array of alleged misconduct that occurred over a significantly longer period than at issue here. Further, the State AG Settlement also resulted in remedies—for example, the cancelation of student loans—that are

indisputably unavailable in a securities class action. There are thus no relevant comparator settlements that might weigh against the result of the Settlement here. At most, the closest relevant case is the District of New Jersey action settlement for $7.5 million, which highlights the benefit of the proposed $35 million Settlement achieved here.

Finally, other relevant *Prudential* factors, including the ability of Class Members to opt out of the Settlement, the reasonableness of attorneys' fees, and the reasonableness of the procedure for processing individual claims, *id.* at 323, also favor the Settlement. Class Members were afforded the opportunity to opt out of the Classes in connection with the Class Notice mailed in May 2021, and ten (10) opt-outs were received—all from individuals (not institutional investors). ¶104. Lead Counsel's request for attorneys' fees is also reasonable, as set forth below in § II.D and in the accompanying Fee Memorandum. And the Plan of Allocation, which was developed with Plaintiffs damages expert and which will govern the allocation of the Net Settlement Fund, is fair and reasonable. *See* § III, *infra*; ¶¶179-86.

D. The Remaining Rule 23(e)(2) Factors Support Approval Of The Settlement

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

First, the proposed method of distribution and claims processing ensures equitable treatment of Class Members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii) & (e)(2)(D). Class Members' claims will be processed, and the Net Settlement Fund will be distributed, pursuant to a standard method routinely approved in securities class actions. The Court-authorized Claims Administrator,

JND Legal Administration ("JND"), will review and process all Claims received, provide Claimants with an opportunity to cure any deficiency or request judicial review of the denial of their Claims, if applicable, and will ultimately mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund, as calculated under the Plan. *See infra* § III; ¶174, 184. Importantly, one hundred percent of the Net Settlement Fund will be distributed pursuant to the Plan of Allocation, ¶185; none of the Settlement proceeds will revert to Defendants. *See* Stipulation ¶12.

Second, as further discussed in the accompanying Fee Memorandum, the requested attorneys' fees of 20% of the Settlement Fund, to be paid only upon the Court's approval, are reasonable in light of the efforts devoted by Plaintiffs' Counsel over the past five years, the recovery obtained for the Classes, and the significant risks that Plaintiffs' Counsel shouldered at every step.[3] The request for attorneys' fees is also consistent with attorneys' fee percentages awarded to counsel in other complex class actions in this Circuit. *See Wilmington Tr.*, 2018 WL 6046452, at *9 (finding 28% to be a "typical fee percentage" in the Third Circuit). Of note, the approval of attorneys' fee awards is separate from the approval of the Settlement, and neither Plaintiffs nor Plaintiffs' Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. Stipulation, ¶15.[4]

Third, as previously disclosed, the only agreement the Parties entered into other than the Stipulation (which subsumes and supersedes the Parties' initial Term Sheet) was a confidential Supplemental Agreement, which set forth the conditions under which the Navient Defendants

[3] In connection with its fee request, Lead Counsel also seek payment from the Settlement Fund of Plaintiffs' Counsel's Litigation Expenses in the total amount of $2,878,030.51. ¶ 212.

[4] Pursuant to the Stipulation, Court-awarded attorneys' fees will be paid upon issuance of such an award. Stipulation ¶ 15.

would have been able to terminate the Settlement if the Class Members who requested exclusion reached a certain confidential threshold. *See* Stipulation, ¶35; *see also* Fed. R. Civ. P. 23(e)(2)(C)(iv). Here, the Supplemental Agreement is moot because the Court already ruled that there would not be another opportunity to request exclusion in connection with the Settlement Notice. ¶101-03.

For the reasons herein and in the Robinson Declaration, the proposed Settlement is fair, reasonable, and adequate under any relevant standard or factor and, thus, should be approved.

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

Approval of a "plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *PAR Pharm.*, 2013 WL 3930091, at *3. To meet this standard, a plan of allocation recommended by experienced and competent class counsel "need only have a reasonable and rational basis." *Id.* at *8. Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See Ikon Office Sols. Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). Here, the Plan (set forth in Appendix A to the Settlement Notice) was developed by Lead Counsel in consultation with Plaintiffs' damages consultant, Dr. Michael Hartzmark, an expert financial economist, and his team. ¶181. Under the Plan, Recognized Loss Amounts for purchases and acquisitions of Navient Senior Notes, which have Securities Act claims only, are calculated based on the statutory formula for damages under Section 11 of the Securities Act. ¶182. The Plan of Allocation increases the Recognized Loss Amounts for these Securities Act claims by 15% to account for the fact that these are negligence-based claims and, unlike the other fraud-based claims in the Action, Plaintiffs did not have to prove scienter or loss causation to establish liability. *Id.*

For purchases and acquisitions of Navient common stock and call options, and sales of Navient put options, which have Exchange Act claims only, the Recognized Loss Amounts are calculated principally based on the difference between the amount of estimated alleged artificial inflation (or deflation for put options) in the security at the time of purchase/acquisition and at the time of sale, or the difference between the actual purchase/acquisition price and sales price of the security, whichever is less. ¶183. This is the typical method for calculating damages under the Exchange Act. *Id*. With respect to the Spin Shares, the Plan of Allocation applies a 50% discount to account for the unique and increased risk associated with the acquisition of these shares. As noted above, Defendants insisted that these shares could not, as a matter of fact and law, give rise to cognizable or compensable Exchange Act claims. *Id*. As such, Lead Counsel determined—fully informed on the law and unique facts at issue, as well as based on its substantial experience in the securities laws generally—that the 50% discount was reasonable and appropriate to achieve a fair and equitable allocation of the Settlement proceeds given the unique risks faced on the Spin Share claims, including the continuing risks at summary judgment, at trial, and on appeal. *Id*.

Discounts of this kind are routine in securities class actions like this one. In fact, "[c]ourts frequently endorse distributing settlement proceeds according to the relative strengths and weaknesses of the various claims." *In re Portal Software Inc. Sec. Litig*., 2007 WL 1991529, at *6 (N.D. Cal. June 30, 2007) (preliminarily approving plan that discounted dismissed claims by awarding them only 5% of settlement fund); *see also Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 589 (N.D. Ill. 2011) ("when real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, it is appropriate to weigh distribution of the settlement in favor of plaintiffs whose claims comprise the set that was more likely to succeed") (quoting *In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 133 (S.D.N.Y. 1997)).

Authorized Claimants will recover their proportional "pro rata" amount of the Net Settlement Fund based on their calculated loss as a percentage of all Authorized Claimants' calculated losses. ¶184. *See Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 105 (D.N.J. Feb. 6, 2018) ("pro rata distributions are consistently upheld . . . ."). The Plan was fully disclosed in the Settlement Notice and, to date, no objections to the Plan have been received. ¶178. Accordingly, Plaintiffs and Lead Counsel believe the Plan is fair, reasonable, and adequate and should be approved. Fed. R. Civ. P. 23(e)(2)(C)(ii) & (e)(2)(D).

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

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

In accordance with the Court's Preliminary Approval Order, on December 14, 2021, JND began mailing copies of the Settlement Notice Packet to potential Class Members and nominees. *See* Ex. 3 ¶¶2-4; ¶175. Through February 9, 2022, JND has mailed a total of 102,900 Settlement Notice Packets. Ex. 3 ¶4; ¶175. In addition, JND caused the Summary Settlement Notice to be published in *The Wall Street Journal* and transmitted over *PR Newswire* on December 29, 2021. Ex. 3 ¶5; ¶176. JND also updated the case website to include copies of the Settlement Notice and Claim Form and to include information concerning the Settlement. Ex. 3¶7; ¶177.[5]

[5] The Settlement Notice and Claim Form are also available at www.blbglaw.com.

Collectively, the Settlement Notice apprised Class Members of, *inter alia*: (i) the amount of the Settlement; (ii) the reasons why the Parties proposed the Settlement; (iii) the estimated average recovery per affected Navient share, option, and note; (iv) the maximum amount of attorneys' fees and expenses sought; (v) the identity and contact information for a representative of Lead Counsel available to answer questions concerning the Settlement; (vi) the right of Class Members to object to the Settlement; (vii) the binding effect of a judgment on Class Members; (vii) the dates and deadlines for certain Settlement-related events; and (ix) information on how to submit a Claim Form in order to be eligible to receive a distribution from the Net Settlement Fund. *See* Fed. R. Civ. P. 23(c)(2)(B); 15 U.S.C. § 78u-4(a)(7). The content disseminated through this notice campaign "contain[ed] sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights." *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013).

In sum, this combination of sending individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmission over a newswire, and publication on internet websites, was "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Comparable notice programs are routinely approved by Courts in this Circuit. *See, e.g.*, *Valeant*, 2020 WL 3166456, at *6; *Ocean Power*, 2016 WL 6778218, at *10; *In re ViroPharma Inc. Sec. Litig.*, 2016 WL 312108, at *5-6 (E.D. Pa. Jan. 25, 2016).

V. CONCLUSION

For the reasons set forth herein and in the Robinson Decl., Plaintiffs respectfully request that the Court grant final approval of the Settlement and the Plan of Allocation.

Dated: February 10, 2022

Respectfully submitted,

/s/ *Christopher M. Foulds*

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on February 10, 2022, I caused the Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorney's Fees and Litigation Expenses to be served upon the following counsel by CM/ECF and e-mail:

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