IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE THE BANCORP INC. SECURITIES LITIGATION	**Case No. 14-cv-0952 (SLR)**

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

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Dated: November 10, 2016

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs Arkansas Teacher Retirement System ("ATRS") and Arkansas Public Employees Retirement System ("APERS") (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 $17,500,000 and a corporate governance reform more fully described below. The Settlement is fair, reasonable and adequate, and should be approved.

The Settlement is the product of extensive arm's-length negotiations that included an in-person mediation session between the parties and significant follow-up discussions under the auspices of a highly respected and experienced mediator, Jed Melnick, Esq. of JAMS (the "Mediator"). The reaction of the Settlement Class to date has also been favorable. While the deadline to object to or request exclusion from the Settlement has not yet passed, to date, no putative Settlement Class Member has objected or requested exclusion. Moreover, the Settlement has been approved by the Lead Plaintiffs, both of which are sophisticated institutional investors that have experience acting as lead plaintiffs in other securities class actions. Further, counsel for Lead Plaintiffs, the law firms of Bernstein Litowitz Berger & Grossmann LLP and Spector

[1] All capitalized terms used herein that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated July 27, 2016 (D.I. 64-1) (the "Stipulation") or in the Joint Declaration of John Rizio-Hamilton and Robert M. Roseman in Support of: (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith.

Roseman Kodroff & Willis, P.C. (collectively, "Co-Lead Counsel"), both experienced in prosecuting securities class actions, have concluded that the Settlement is favorable given the risk, delay, and expense of continued litigation.

At the time the agreement to settle was reached, Lead Plaintiffs and Co-Lead Counsel understood the strengths and weaknesses of the Action. As more fully described in the Joint Declaration,[2] before the Settlement was agreed to, Co-Lead Counsel had, among other things: (i) conducted an extensive investigation of their claims, which included interviews with former Bancorp employees and a review of SEC filings, press releases, news reports and other public information; (ii) researched and drafted a consolidated complaint and an amended consolidated complaint; (iii) researched and drafted an opposition to Defendants' motion to dismiss the amended complaint; (iv) participated in oral argument on Defendants' motion to dismiss; (v) consulted with various forensic accounting, damages, banking industry and banking regulations experts; and (vi) engaged in the intensive mediation process overseen by the Mediator, which involved the exchange of written submissions concerning liability and damages, a full-day formal mediation session, and a discussion between the parties' respective damages experts.

Additionally, as a condition of the Settlement, Lead Plaintiffs conducted substantial due diligence discovery which included a review of thousands of pages of documents produced by Defendants and an interview with Mr. Ken Tepper, an advisor to Bancorp's Board of Directors who is knowledgeable about the facts surrounding both Bancorp's loan portfolio and its

[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, among other things: the nature of the claims asserted (¶ 10-20); the history of the Action (¶¶ 21-37); the negotiations leading to the Settlement (¶¶ 38-47); the risks and uncertainties of continued litigation (¶¶ 54-68); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶ 75-83).

compliance with the Bank Secrecy Act (the "BSA"). This discovery confirmed Co-Lead Counsel's assessment of the Settlement as fair and reasonable.

The Settlement is a favorable result in light of the substantial risks of continued litigation. While Lead Plaintiffs believe that the claims asserted against Defendants are meritorious, they recognize that the Action presented a number of risks to establishing both liability and damages. As detailed in the Joint Declaration and discussed further below, Defendants' motion to dismiss raised numerous challenges to Lead Plaintiffs' claims, including, among other things, the actionability and materiality of Defendants' statements, and whether Defendants acted with scienter. Absent the Settlement, Lead Plaintiffs faced the risk that Defendants would prevail on any one of their arguments, resulting in the dismissal of the action in whole or in part. Further, even if Lead Plaintiffs were successful in defeating the motion to dismiss, the parties faced the prospect of protracted litigation through costly fact and expert discovery, additional contested motions, a trial, post-trial motion practice, and likely ensuing appeals. The Settlement avoids these risks while providing a substantial, certain and immediate benefit to the Settlement Class in the form of a $17,500,000 cash payment and a corporate governance reform. In light of these considerations, Lead Plaintiffs and Co-Lead Counsel respectfully submit that the Settlement warrants final approval by the Court.

Additionally, the Court should approve the Plan of Allocation, which is set forth in the Notice sent to Settlement Class Members. The Plan of Allocation governs how Settlement Class Members' claims will be calculated and was developed by Lead Plaintiffs' damages expert in consultation with Co-Lead Counsel. For these reasons, the Plan of Allocation is fair, reasonable and adequate, and should likewise be approved.

II. TERMS OF THE SETTLEMENT

As set forth in greater detail in the Joint Declaration, on July 27, 2016, following an extensive mediation process, the parties executed the Stipulation pursuant to which Lead Plaintiffs have agreed to settle and release all claims asserted against Defendants in the Action in return for a cash payment of $17,500,000 for the benefit of the Settlement Class. Defendants have further agreed to amend the charter of Bancorp's Audit Committee to provide that in the event of a future restatement of Bancorp's financial statements, the Bank's Audit Committee will now specifically consider whether to claw back any executive compensation paid on the basis of the restated numbers. At present, no such provision exists.

III. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

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

Federal Rule of Civil Procedure 23(e) provides that a class action shall not be dismissed or compromised without the approval of the court. *See also In re: General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 785 (3d Cir. 1995). The ultimate determination whether a proposed class action settlement warrants approval is in the court's discretion. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968). 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. *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985). "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); *see also Walsh v. Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 642-43 (D.N.J.), *aff'd*, 726 F.2d 956 (3d Cir. 1983).

In determining the adequacy of a proposed settlement, a court should ascertain whether the settlement is within a range that responsible and experienced attorneys could accept, considering all relevant risks. *See Fickinger v. C.I. Planning Corp*., 646 F. Supp. 622, 630 (E.D. Pa. 1986). That analysis recognizes the "uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion."' *Fisher Bros., Inc. v. Mueller Brass Co*., 630 F. Supp. 493, 499 (E.D. Pa. 1985) (citation omitted). A court must therefore consider whether the proposed settlement is "'fair, reasonable, and adequate."' *In re Cendant Corp. Litig*., 264 F.3d 201, 231 (3d Cir. 2001) (citation omitted).

A proposed class action settlement is considered presumptively fair where, as here, the parties, through capable counsel, have engaged in arm's-length negotiations. *See, e.g., Gen. Motors Corp. Pick-Up Trucks*, 55 F.3d at 785; *Schuler v. Meds. Co.*, No. 14-1149 (CCC), 2016 U.S. Dist. LEXIS 82344, at *16 (D.N.J. June 24, 2016); *In re ViroPharma Inc. Sec. Litig.*, Civ. No. 12-2714, 2016 U.S. Dist. LEXIS 8626 at *23-24 (E.D. Pa. January 25, 2016). Indeed, it is appropriate to give "substantial weight to the recommendations of experienced attorneys" who have engaged in arm's-length negotiations. *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the

Settlement's fairness."); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 509 (W.D. Pa. 2003) (lead counsel's "assessment of the settlement as fair and reasonable is entitled to considerable weight."); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 255 (D.N.J. 2000) (affording "significant weight" to counsel's recommendation).

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) (the "*Girsh* factors"):

> (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 address the following considerations set forth in *Prudential*, 148 F.3d 283,317 (3d Cir. 1998) (the "Prudential considerations"):

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; 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; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. at 323; *see also ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *26-*27.

As set forth herein and in the Joint Declaration, the Settlement is a highly favorable result, is presumptively fair, and satisfies the *Girsh* factors and applicable *Prudential* considerations.

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

Here, the proposed Settlement is the product of arm's-length negotiations between highly experienced and capable counsel after significant investigation and consultations with banking, accounting, and damages experts. Importantly, the negations occurred under the auspices of the Mediator, Jed Melnick. The initial day-long mediation session was unsuccessful, and the parties only reached an agreement-in-principal after a mediator's proposal was provided and evaluated by all parties. "'[T]he 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 U.S. Dist.LEXIS 8626, at *24 (citation omitted).

Further, as noted above, 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) ("courts in this Circuit traditionally 'attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class'") (citations omitted). Co-Lead Counsel, experienced in prosecuting securities class actions, believe that the Settlement is a favorable result and in the best interest of the Settlement Class. In reaching this conclusion, Co-Lead Counsel considered the strengths and weaknesses of the claims based on the information obtained from confidential witnesses and through their investigation in the Action. Co-Lead Counsel have also considered Defendants' arguments made in the briefing on the motion to dismiss and during the mediation process concerning liability and damages, and have taken into account the risk that the Court or a jury may rule in favor of Defendants on some or all of the claims, thereby precluding

any recovery whatsoever for the Settlement Class. As a result, Co-Lead Counsel's opinion should be afforded considerable weight.[3]

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

As noted above, 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 the Third Circuit's opinion in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The proposed Settlement satisfies each of these factors.

A. Complexity, Expense, And Likely Duration Of This Litigation Warrant 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 U.S. Dist. LEXIS 8626, at *27 (citation omitted). Securities litigation is acknowledged by courts throughout this Circuit and others to be complex and expensive, and this case was no exception. *In re Genta Sec. Litig.*, No. 04-2123(JAG), 2008 WL 2229843, at *3 (D.N.J. May 28, 2008) ("This [securities fraud] action involves complex legal and factual issues, and pursuing them would be costly and expensive."); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525(GEB), 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) (same).

[3] In addition, the Settlement has the support of the Lead Plaintiffs. *See* Declaration of Gail Stone, Executive Director of APERS (attached as Ex. 2 to the Joint Decl.) and Declaration of George Hopkins, Executive Director of ATRS (attached as Ex. 3 to the Joint Decl.). Lead Plaintiffs each have prior experience leading securities class actions and understand how to evaluate a settlement's fairness and reasonableness in light of the risks of continued litigation.

Achieving a litigated verdict in this Action for Lead Plaintiffs and the Settlement Class would have required substantial additional time and expense. Lead Plaintiffs, assuming that they survived Defendants' motion to dismiss, would have had to engage in costly and extensive discovery, including depositions and written discovery requests. Both sides would have had to retain experts as to the merits, loss causation, and damages, and would have conducted extensive expert discovery and depositions. Also, both parties would have to brief the numerous, highly sophisticated issues that bear on class certification—including market efficiency, adequacy, typicality, commonality, and predominance of common questions of fact and law—and furnish opening, rebuttal, and reply expert reports, and conduct class certification depositions.

After the close of discovery, Defendants likely would move 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 after trial, it is likely that any verdict would be the subject of numerous post-trial motions and a complex multi-year appellate process. Taking into account the likelihood of appeals, absent the Settlement, this case likely would have continued for years.

B. The Settlement Class' Reaction to the Settlement Favors Approval

"'The second *Girsh* factor 'attempts to gauge whether members of the class support the settlement.'" *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016). A lack of significant objections by class members weighs in favor of judicial approval. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003) ("unanimous approval of

the proposed settlement by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement").

Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice dated August 17, 2016 (D.I. 67) (the "Preliminary Approval Order"), the Court-appointed Claims Administrator, Garden City Group, LLC ("GCG"), began mailing copies of Notice Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and their nominees on September 15, 2016. *See* Declaration of Jose C. Fraga (Ex. 1 to the Joint Decl.) ("Fraga Decl."), at ¶¶ 2-4. As of November 8, 2016, GCG had mailed a total of 17,910 copies of the Notice Packet to potential Settlement Class Members and nominees. *See id*. ¶ 9. In addition, the Summary Notice was published in the national edition of *The Wall Street Journal* and transmitted over the *PR Newswire* on September 27, 2016. *See id*. ¶ 10. 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. Accordingly, the reaction of the Settlement Class to date supports final approval.[4]

[4] The deadline for submitting objections and requesting exclusion from the Settlement Class is November 25, 2016. As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than December 8, 2016 addressing any requests for exclusion and objections that may be received.

C. The Stage Of The Proceedings Weights In Favor Of Approval

The third *Girsh* factor requires a court "to consider the degree to which the litigation has developed prior to settlement." *Rent-Way*, 305 F. Supp. 2d at 502. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating. *Cendant*, 264 F.3d at 235 (*citing Gen. Motors Corp. Pick-Up Truck,* 55 F.3d at 813).

Here, Co-Lead Counsel had a thorough understanding of the strengths and weaknesses of the claims at the time they agreed to the Mediator's proposal. Prior to filing the Amended Consolidated Complaint, Co-Lead Counsel extensively investigated the merits of the case, including interviewing numerous confidential witnesses, consulting with banking, accounting and damage experts, analyzing Bancorp's SEC filings, and reviewing news articles concerning Bancorp and the banking industry. Lead Plaintiffs and Co-Lead Counsel also explored the defenses asserted through briefing and oral argument of the motion to dismiss, Defendants' mediation statement, and consultations between the parties' damages experts in connection with the mediation, during which they exchanged detailed analyses of damages and loss causation.

Lead Plaintiffs and Co-Lead Counsel also had the benefit of substantial due diligence discovery—a condition of the Settlement. Co-Lead Counsel obtained and analyzed thousands of pages of internal Bancorp documents, and conducted an extensive interview with Mr. Ken Tepper, an advisor to Bancorp's Board of Directors who is knowledgeable about the facts concerning Bancorp's loan portfolio and its BSA compliance.

As a result of all these efforts, Lead Plaintiffs and Co-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); *see also In re Processed Egg Products Antitrust Litig.*, 284 F.R.D. 278, 297 (E.D. Pa. 2012) (approving a settlement where no formal discovery was taken, finding that lead counsel conducted informal discovery by independently investigating facts prior to filing complaint, and where co-lead counsel "are extremely experienced in class action litigation."); *In re Johnson & Johnson Deriv. Litig.*, 900 F. Supp.2d 467, 483 (D.N.J. 2012) ("Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties.").

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." *Gen. Motors Corp. Pick-Up Truck*, 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 N Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995).

As the Court is aware, this lawsuit alleges that during the Class Period, Defendants made false and misleading statements regarding two components of Bancorp's business: (i) the value of the Bank's commercial loan portfolio (the "Loan Portfolio Claim"), and (ii) the Bank's compliance with the BSA with respect to its prepaid debit card division (the "BSA Claim"). Lead Plaintiffs faced a high degree of risk with respect to both of these claims.

As to the BSA claim, Defendants argued, with some legal support, that there were no actionable misrepresentations or omissions. For instance, Defendants asserted that the Bank's

statements in its Forms 10-K that it had evaluated rules relating to the BSA and had "established internal processes accordingly" are not actionable because a reasonable investor would not understand these statements to mean that the Bank was in compliance with the BSA. Defendants also pointed out that the cautionary language in the Bank's Forms 10-K further undermined the allegation that they misled investors.

Defendants have also argued that certain of their statements regarding the Bank's BSA compliance were immaterial as a matter of law because they were vague statements of puffery upon which no investor would have reasonably relied. These statements include a statement by Defendant Jeremy Kuiper on Bancorp's website that the Bank maintains a "rigor of rock-solid compliance" and a statement by Defendant Betsy Cohen on a conference call that the Bank was building a "best-in-class compliance system."

Defendants also contended that Lead Plaintiffs failed to plead scienter with respect to their BSA Claim, which is commonly regarded to be the most difficult element to prove in a securities fraud claim. *See, e.g., In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 U.S. Dist. LEXIS 8626 at *35 (E.D. Pa. Jan. 25, 2016) (noting that "proving scienter is an 'uncertain and difficult necessity for plaintiffs'"). According to Defendants, liability cannot arise solely because the Bank entered into the Consent Order with the FDIC unless it can be shown that the Bank knew of and concealed its BSA violations—which, they argued, the Amended Consolidated Complaint did not do.

Defendants also contended that Lead Plaintiffs failed to adequately allege scienter because they did not establish any motive for Defendants to engage in fraud, either with respect to the BSA Claim or the Loan Portfolio Claim. For example, Defendants argued that there was no evidence of insider trading, and in fact, certain of the Individual Defendants actually *increased* their

ownership stake in Bancorp stock during the Settlement Class Period. Defendants argued that the fact that the Individual Defendants had no motive to commit fraud constitutes strong evidence that the Bank and Individual Defendants were acting in good faith.

With respect to the Loan Portfolio Claim, Defendants also had another argument with respect to scienter: that the Restatement was not the result of any intentional or reckless behavior designed to mislead investors, but rather was the product of a misjudgment as to how the Bank's credit portfolio would perform during and after the Great Recession. This argument created a real risk that Defendants' misstatements regarding the Bancorp's credit portfolio could be deemed no more than good faith mistakes, as opposed to fraud.

Further, Defendants argued that their statements concerning the adequacy of the Bank's commercial loan loss reserves were non-actionable statements of opinion, and there was no evidence demonstrating an intent to falsify the Bank's loss reserves. Indeed, Defendants contended that throughout the Class Period, they disclosed that the Bank's commercial loan portfolio was experiencing credit issues. Given these arguments, even if Lead Plaintiffs were successful in overcoming the motion to dismiss with respect to the Loan Portfolio Claim, there was a significant risk that a jury could determine that Defendants' statements concerning the sufficiency of the loan loss reserves were inactionable opinions at trial.

In short, Lead Plaintiffs faced numerous obstacles in proving liability if the litigation continued. The Settlement eliminates these and many other risks of continued litigation.

E. The Risks In Establishing Loss Causation And Damages Weigh In Favor Of Final Approval

Even if Lead Plaintiffs were successful in establishing liability, which was far from given, they faced substantial risks in proving loss causation and damages. The determination of damages is a complicated and uncertain process involving the analyses of many subjective factors. Lead

Plaintiffs must also prove loss causation under Section 10(b)—that is, they must show that the alleged false statements or omissions caused investors' losses. *ViroPharma,* 2016 U.S. Dist. LEXIS 8626, at *36. The Supreme Court's decision in *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), and the subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than it was in the past. *See, e.g.*, *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) ("Proving loss causation would be complex and difficult.")

Damages and loss causation in this case were sure to be hotly contested. If loss causation for all the corrective disclosures were fully established—which was by no means assured—Lead Plaintiffs had arguments that damages were approximately $140 million. However, Defendants would have argued that damages were zero or, at most, a fraction of Lead Plaintiffs' "best case" estimate. For example, Defendants would have contended that many of the corrective disclosures consisted of earnings announcements where a variety of information, including "confounding" information unrelated to the fraud, was disclosed to the market and impacted the stock price—such as legitimate slowdowns in the Bank's business. Defendants would have argued that Lead Plaintiffs bear the burden of proof in "disaggregating" the impact of this confounding, non-fraud information from the impact of the allegedly corrective information. If these arguments were accepted, damages for both claims may well have been drastically reduced to no more than approximately $84 million.

Defendants also would have argued that more than half of the total damages in this case are attributable to the BSA Claim, which they contended were extremely weak given the nature of the statements concerning BSA compliance, and were therefore exposed to a greater risk of dismissal. If the BSA Claim were dismissed, Defendants would likely assert that maximum damages for the Settlement Class were no more than approximately $30 million.

Moreover, to determine damages and loss causation, the parties would have to rely on expert testimony. The experts would be subject to *Daubert* challenges. Even if Lead Plaintiffs' expert survived a *Daubert* motion, at trial, these crucial elements of proof would be reduced to a "battle of experts." "[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and complicated 'battle of experts.'" *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997), *aff'd Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999). *See also ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *37. Indeed, the reaction of a jury to such competing expert testimony is highly unpredictable. *See Rent-Way*, 305 F. Supp. 2d at 506 (W.D. Pa. 2003) (competing expert opinions add uncertainty as to how much money, if any, the class might recover at trial). Co-Lead Counsel recognize the possibility that a jury could be swayed by experts for the Defendants, and find that there were no damages or only a fraction of the amount of damages Lead Plaintiffs contended.

F. Risks Of Maintaining Class Action Status Through Trial Weigh In Favor Of Approval

While Co-Lead Counsel believe that the requirements for Rule 23 are satisfied in this case, Defendants' counsel would oppose class certification if this case proceeded. Moreover, even if the Class was certified other than for settlement purposes, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential*, 148 F.3d at 321.

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." *In re: Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 538 (3d Cir. 2004). Here, while Defendants arguably could afford to pay more, this factor is not determinative, and the Court should consider all the *Girsh* factors together.

H. The Settlement Is Reasonable In Light Of All The Attendant 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." *In re Par Pharm. Sec. Litig.*, No. 06-3226 (ES), 2013 WL 3930091, at *7 (D.N.J. July 29, 2013) (citing *GMC Trucks*, 55 F.3d at 806).

As noted above, assuming that full liability and loss causation for the alleged corrective disclosures was proven, and based on various assumptions and modeling, Lead Plaintiffs could have contended that damages were approximately $140 million. However, there is a vast difference between the maximum possible recovery and the likely recovery considering the attendant risks of litigation. As discussed throughout this Memorandum, Lead Plaintiffs faced considerable risks in proving both liability and damages.

Indeed, even if liability had been established, Defendants would have argued that there were no damages or, in the alternative, that damages were low. Specifically, Defendants would have contended that damages were no more than approximately $84 million for both claims. They would have further argued that more than half the damages were attributable to the weaker BSA Claim, and if this claim were dismissed at any stage of the litigation, maximum recoverable

damages were only approximately $30 million. Thus, there is a real possibility that Lead Plaintiffs would have received nothing or a much smaller amount if the case were to proceed. Even if there were a favorable verdict at trial, Defendants may well 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."); *Prudential*, 148 F.3d at 318 (settlement was favored where "the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court"). For all of these reasons, the Settlement should be approved as fair, reasonable, and adequate.

VI. THE *PRUDENTIAL* CONSIDERATIONS SUPPORT THE SETTLEMENT

As in *ViroPharma*, each of the *Prudential* considerations weighs in favor of the Settlement:

> (1) following extensive briefing on substantive issues, expedited discovery, and an arm's-length mediation process, Lead Plaintiff, and Lead Counsel, appropriately understood the merits of the case such that they could knowingly enter into the Settlement; (2) given that there were no objections by the Settlement Class and that no persons opted out of the Settlement Class, there are no claims by other classes or subclasses related to the underlying facts of the case; (3) there are no known other claimants beyond those represented by the Settlement Class; (4) Settlement Class members were accorded the right to opt out of the Settlement, and none chose to do so; (5) as discussed in greater detail *infra*, the demand for attorneys' fees is reasonable; and (6) the Plan of Allocation is fair and reasonable.

ViroPharma, 2016 U.S. Dist. LEXIS 8626, at *42. Each of these factors is discussed herein and supports judicial approval of the Settlement as fair, reasonable, and adequate.

VII. 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. 08-285

(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. DKC 09-2661, 2014 WL 359567 (D. Md. Jan. 31, 2014); *see also In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525(GEB), 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007) (approving plan as "rational and consistent with Lead Plaintiffs' theory of the case"); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) (deeming plan of allocation "even handed" where "claimants are to be reimbursed on a *pro rata* basis for their recognized losses based largely on when they bought and sold their shares of General Instrument stock").

Here, the proposed Plan of Allocation, which was developed by Lead Plaintiffs' damages expert in consultation with Co-Lead Counsel, provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who submit valid Claim Forms. In developing the Plan of Allocation, Lead Plaintiffs' damages expert calculated the estimated amount of artificial inflation in the per share closing prices of Bancorp common stock which allegedly was proximately caused by Defendants' alleged false and misleading statements and omissions. In calculating this estimated alleged artificial inflation, Lead Plaintiffs' damages expert considered price changes in Bancorp common stock in reaction to the alleged corrective disclosures, adjusting for price changes that were attributable to market or industry forces.

Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of Bancorp common stock during the Settlement Class Period that is listed in the Claim Form and for which adequate documentation is provided. Notice ¶ 56. Under the

Plan, the sum of a claimant's Recognized Loss Amounts 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 relative size of their Recognized Claims. *Id*. at ¶¶ 60-61.

In general, the Recognized Loss Amount calculated under the Plan of Allocation will be the difference between the estimated artificial inflation on the date of purchase and the estimated artificial inflation on the date of sale. *Id.* ¶ 57. Also, under the Plan of Allocation, those shareholders who bought and then sold shares "before the relevant truth begins to leak out" have no recognized losses because "the misrepresentation will not have led to any loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Thus, claimants who purchased and sold all their Bancorp shares before the first corrective disclosure (which occurred after the close of trading on April 23, 2014), or who purchased and sold all their Bancorp shares between two of the subsequent corrective disclosures (which occurred after the close of trading on June 10, 2014, July 23, 2014, and June 26, 2015), will have no Recognized Loss Amount as to those transactions. Notice ¶ 55.

Co-Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as result of the conduct alleged in the Action. Moreover, as noted above, as of November 8, 2016, more than 17,900 copies of the Notice, which contains the Plan of Allocation, and advises Settlement Class Members of their right to object to the proposed Plan of Allocation, have been sent to potential Settlement Class Members and their nominees. *See* Fraga Decl. ¶ 9. To date, no objections to the proposed Plan of Allocation have been received.

VIII. 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.

Dated: November 10, 2016

Respectfully submitted,

/s/ Joel Friedlander

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