

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.
5 Becker Farm Road
Roseland, NJ 07068
(973) 994-1700

Liaison Counsel for Lead Plaintiff

Samuel H. Rudman
Alan I. Ellman
Avital O. Malina
ROBBINS GELLER RUDMAN
& DOWD LLP
58 South Service Road, Suite 200
Melville, NY 11747
(631) 367-7100

Lead Counsel for Lead Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARY CURRAN, Individually and on Behalf	)	No. 2:16-cv-02263-MCA-LDW
of All Others Similarly Situated,)	
	)	<u>CLASS ACTION</u>
Plaintiff,)	
	)	DECLARATION OF ALAN I. ELLMAN IN
vs.	)	SUPPORT OF: (1) LEAD PLAINTIFF'S
	)	MOTION FOR FINAL APPROVAL OF
FRESHPET, INC., et al.,	)	SETTLEMENT AND APPROVAL OF THE
	)	PLAN OF ALLOCATION; AND (2) LEAD
Defendants.	)	COUNSEL'S MOTION FOR AN AWARD
_____	)	OF ATTORNEYS' FEES AND EXPENSES
	)	AND AWARD TO LEAD PLAINTIFF
	)	PURSUANT TO 15 U.S.C. §78u-4(a)(4)

ALAN I. ELLMAN hereby declares under penalty of perjury as follows:

1. I am an attorney duly licensed to practice law in the State of New York and am admitted to practice in this Court. I am a member of the law firm of Robbins Geller Rudman & Dowd LLP (“Robbins Geller”), counsel for the Court-appointed lead plaintiff, Alaska Electrical Pension Fund (“Lead Plaintiff” or “AEPF”). I have been actively involved in the prosecution and resolution of the above-captioned action (“Action” or “Litigation”), am familiar with its proceedings, and have knowledge of the matters set forth herein based upon my active participation in the Action and the supervision of, or communications with, other individuals who helped prosecute the Action.¹

2. I respectfully submit this declaration pursuant to Rule 23 of the Federal Rules of Civil Procedure, in support of: (a) Lead Plaintiff’s motion for final approval of the all-cash settlement of \$10,100,000 (the “Settlement”); (b) Lead Plaintiff’s motion for approval of the proposed Plan of Allocation (the “Plan”); and (c) Lead Counsel’s application for an award of attorneys’ fees and expenses, including an award to Lead Plaintiff for its time representing the Settlement Class.

I. INTRODUCTION AND OVERVIEW

3. Lead Plaintiff has achieved a very good settlement for the Settlement Class. The Settlement provides for the payment of \$10,100,000 in cash for the benefit of the Settlement Class in exchange for a release of the Released Claims (as defined in the Stipulation) against the Defendants. As described herein, the Settlement is the product of Lead Plaintiff’s and Lead Counsel’s careful analysis and vigorous litigation of the claims and defenses. Specifically, and as

¹ Capitalized terms not otherwise defined herein have the same meanings as that ascribed to them in the Stipulation of Settlement (ECF No. 137-2) (the “Stipulation”).

further detailed below, Lead Counsel conducted a comprehensive investigation of the factual basis for the initial and amended complaints, drafted the operative complaint, opposed Defendants' motion to dismiss, reviewed more than 166,000 documents (consisting of approximately 800,000 pages), briefed and argued numerous discovery disputes, deposed eleven fact witnesses and defended the deposition of and/or cross-examined the deposition of six fact witnesses, fully briefed class certification, submitted and opposed expert reports, deposed one expert witness and defended three expert witness depositions, and participated in a mediation session with Defendants that was mediated by Michelle Yoshida, Esq. of Phillips ADR Enterprises (the "Mediator"). With the assistance of the Mediator, the parties reached an agreement to settle this Action on July 25, 2019.

4. As explained below and in the accompanying brief, this Settlement takes into consideration the significant risks specific to this Litigation. While Lead Plaintiff and Lead Counsel believe that Lead Plaintiff's claims have merit, there was a significant chance that one or more of Defendants' arguments in this Litigation may have ultimately proved insurmountable and the Settlement Class may have ended up with little or no recovery. If the Litigation were to proceed rather than settle at this juncture, Lead Plaintiff would be subject to the risk that class certification would be denied or that Defendants' challenges to Lead Plaintiff's allegations would prevail at summary judgment. Even if Lead Plaintiff were to overcome these hurdles, the eventual trial in this Action would last several weeks and would be very complicated for jurors, very expensive for the Settlement Class, and Lead Plaintiff would be subject to the risk of losing at trial. Even if Lead Plaintiff were to prevail at trial, a jury verdict would be subject to appeal. This protracted process would have caused the Settlement Class to incur additional expense, regardless of the outcome.

5. Lead Counsel believes that the Settlement is in the best interests of the Settlement Class, especially considering its size and the significant risks involved in the case. Rather than

proceed with this Litigation for years and risk obtaining little or nothing from Defendants, the Settlement provides the Settlement Class with a substantial cash recovery now. The Settlement Amount represents an approximate recovery of 16% of reasonable recoverable damages of approximately \$64 million (Defendants estimated reasonable recoverable damages at a significantly lower amount). This percentage far exceeds the median recovery in similar securities class actions in 2019 of 2.1%. See Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* (NERA Economic Consulting Jan. 21, 2020), at 20, Fig. 13. In sum, the Settlement provides for a substantial monetary benefit to the Settlement Class now and is a very good result in light of the substantial risks involved in continued litigation. Lead Plaintiff and Lead Counsel believe the Settlement to be fair, reasonable, and adequate, in the best interests of the Settlement Class, and should be approved by this Court.

6. Lead Counsel seeks an award of attorneys' fees of 30% of the Settlement Amount (or \$3,030,000) plus litigation expenses in the amount of \$456,411.38, with interest on such fees and expenses earned at the same rate earned by the Settlement Class on the Settlement Fund.

7. In addition, Lead Plaintiff and Lead Counsel request an award to Lead Plaintiff in the amount of \$9,360. As explained in the declaration submitted by the representative of Lead Plaintiff, Gregory Stokes ("Stokes Declaration"), Lead Plaintiff expended a substantial amount of time and effort on the Litigation. Specifically, Lead Plaintiff: (a) engaged in numerous meetings, phone conferences, and correspondence with Lead Counsel; (b) reviewed pleadings and briefs; (c) reviewed detailed correspondence concerning the status of the Litigation; (d) consulted with Lead Counsel regarding litigation strategy; (e) collected documents for production; (f) prepared for and sat for a full-day deposition; (g) participated in a full-day mediation; and (h) was kept

informed about all aspects of the mediation and settlement negotiations. Lead Plaintiff's investment of time and effort greatly contributed to the successful resolution of the Litigation.

8. Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice dated November 20, 2019 (ECF No. 141) (the "Preliminary Approval Order"), the Notice of Pendency and Proposed Settlement of Class Action (the "Notice") and the Proof of Claim and Release form ("Proof of Claim," together with the Notice, the "Claims Package") were mailed to all Settlement Class Members who could be identified with reasonable effort; the Notice was posted on the Settlement website, www.FreshpetSecuritiesSettlement.com; and the Summary Notice was published once in the national edition of *The Wall Street Journal* and once over a national newswire service.

9. The Notice advised all recipients of, among other things: (i) the definition of the Settlement Class; (ii) their right to exclude themselves from the Settlement Class; (iii) their right to object to any aspect of the Settlement, including the Plan and Lead Counsel's request for attorneys' fees and expenses; and (iv) the procedures and deadline for submitting a Proof of Claim in order to be eligible for a payment from the proceeds of the Settlement.

10. Lead Counsel has been advised by Gilardi & Co. LLC ("Gilardi"), whose retention as Claims Administrator was authorized by the Preliminary Approval Order, that as of January 27, 2020, a total of 15,690 copies of the Claims Package have been mailed to potential Settlement Class Members and their nominees. See ¶¶4-11 to the accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."). The Summary Notice was published in *The Wall Street Journal* and over *Business Wire* on November 27, 2019. *Id.*, ¶12. Additionally, the Claims Package, Stipulation,

and Preliminary Approval Order have been posted on the website established by Gilardi: www.FreshpetSecuritiesSettlement.com. *Id.*, ¶14.

11. The Court-ordered deadline for filing objections to the Settlement or requesting to “opt out” of the Settlement Class is February 12, 2020. ECF Nos. 141-142. To date, no objections to any aspect of the Settlement have been filed by Settlement Class Members.

II. THE NATURE AND HISTORY OF THE LITIGATION

A. The Commencement of the Action and Appointment of Lead Plaintiff and Lead Counsel

12. On April 21, 2016, plaintiff Gary Curran (“Curran”) filed the initial complaint (“Initial Complaint”) in this putative class action in the United States District Court for the District of New Jersey against the following Defendants: (i) Freshpet, Inc. (“Freshpet” or the “Company”); (ii) Richard Thompson, the Company’s Chief Executive Officer and a Director of Freshpet during the relevant time period; (iii) Richard Kassar, the Company’s Chief Financial Officer (“CFO”) during the relevant time period; (iv) Scott Morris, co-founder of Freshpet and the Company’s Chief Operating Officer during the relevant period; and (v) Charles A. Norris, the Chairman of the Board of Directors and managing member of Freshpet Investors LLC, a controlling shareholder of Freshpet, during the relevant time period. ECF No. 1.

13. On June 20, 2016, AEPF filed a motion to be appointed lead plaintiff. ECF No. 4. On December 16, 2016, the Court appointed AEPF as Lead Plaintiff and approved AEPF’s selection of Robbins Geller as Lead Counsel and Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C. (“Carella Byrne”) as Liaison Counsel. ECF No. 19.

B. The Amended Complaint and a Summary of the Allegations

14. Robbins Geller investigated the events underlying the Action prior to filing the Initial Complaint, and continued its comprehensive investigation after being appointed lead

counsel. This investigation included reviewing and analyzing publicly available information regarding Freshpet, including SEC filings, other regulatory filings and reports, publicly available annual reports, press releases, published interviews, news articles and other media reports, and reports of securities analysts. Lead Counsel also conducted interviews with former Freshpet employees. On March 27, 2017, Lead Plaintiff filed the Amended Complaint, which asserted claims under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (“Securities Act Claims”) and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (“Exchange Act Claims”). ECF No. 28. The Amended Complaint was filed on behalf of purchasers of Freshpet common stock between April 1, 2015 and November 11, 2015, inclusive (the “Class Period”). *See id.* The Amended Complaint alleged that, throughout the Class Period, Defendants made materially false and misleading statements regarding problems with Freshpet’s manufacturing and Freshpet’s ability to meet its forecast to install between 15,100 and 15,600 refrigerators (“Fridges”) by year-end 2015.

C. The Motion to Dismiss the Amended Complaint

15. On May 26, 2017, Defendants moved to dismiss the Amended Complaint. ECF Nos. 29-31. In support of their motion, Defendants asserted several arguments, any of which could have resulted in the dismissal of the Litigation. With respect to Lead Plaintiff’s Exchange Act Claims, Defendants argued that: (i) the alleged false and misleading statements were protected as “forward-looking” under the Private Securities Litigation Reform Act of 1995’s (“PSLRA”) safe harbor provision (ECF No. 30 at 12-18); (ii) the alleged false and misleading statements were not made with scienter (*id.* at 18-24); and (iii) the Amended Complaint did not plead loss causation because the alleged corrective disclosures were based on the Company’s announcement of a downward revision of a forecasted financial result (*id.* at 25-26). Defendants’ challenges to

scienter focused on their argument that the Amended Complaint did not plead that Defendants had “actual knowledge” that their forecasts for the full year 2015 were false and misleading. *Id.* at 20. According to Defendants, Lead Plaintiff had not supported “its assertions that these alleged ‘facts’ were known or knowable at the time Freshpet made its March 31, May 7 and August 11 projections.” *Id.* at 28. Further challenging scienter, Defendants argued that the Individual Defendants’ insider sales were not suspicious in the context of the total number of shares and vested stock options retained. *Id.* at 23.

16. With respect to Lead Plaintiff’s Securities Act Claims, Defendants argued that the alleged false and misleading statements were protected statements of opinion under *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1326 (2015). *Id.* at 28-29. Defendants also argued that the alleged false and misleading statements were not made in violation of their disclosure obligations set forth in Item 303 of SEC Regulation S-K because they were not made with actual knowledge of the alleged trend or uncertainty. *Id.* at 27.

17. On July 25, 2017, Lead Plaintiff opposed Defendants’ motion to dismiss. ECF No. 32. Lead Plaintiff set forth a detailed description of the relevant facts and asserted various arguments supporting falsity, scienter, and loss causation. Specifically, Lead Plaintiff argued that Defendants’ false and misleading statements were pled with the particularity required by the PSLRA. *Id.* at 9-11. Lead Plaintiff further highlighted numerous facts showing that Defendants had access to information contradicting their public statements. *Id.* at 19. On August 24, 2017, Defendants filed their reply brief in further support of their motion to dismiss the Amended Complaint. ECF No. 34. In Defendants’ briefing, they supplemented their arguments regarding falsity, scienter, and loss causation.

D. Defendants' Motion to Dismiss the Amended Complaint Is Denied

18. On January 12, 2018, the Court issued an Opinion denying Defendants' motion to dismiss in its entirety. ECF No. 36 (the "Opinion"). In the Opinion, the Court found that Lead Plaintiff's Securities Act Claims adequately alleged "that at the time of the Registration Statement, manufacturing and retailer problems had already affected Freshpet's ability to expand its fridge growth." *Id.* at 15. The Court also sustained Lead Plaintiff's Exchange Act Claims, finding that Lead Plaintiff alleged "scienter based on Defendants' conscious decision to omit presently known facts," *id.* at 10, and "Defendants' motive and opportunity to commit fraud." *Id.* at 11. The Court also found that a violation of Defendants' duty of disclosure under Item 303 was adequately alleged because, "by April 2015, Defendants were aware of the manufacturing and retailer issues that would impede Freshpet's ability to expand Fridge placement." *Id.* at 16. The Court also held that "the Amended Complaint sufficiently pleads loss causation with respect to the alleged omissions." *Id.* at 13-14.

E. Written Discovery

19. On February 12, 2018, Defendants filed their Answer and Affirmative Defenses to the Amended Complaint. ECF No. 40. On February 27, 2018, the parties served their Rule 26(a)(1) Initial Disclosures. After meeting and conferring regarding the terms of a proposed protective order, on March 22, 2018, the parties filed a Stipulation and [Proposed] Protective Order Restricting Disclosure of Confidential Information, which the Court entered on April 4, 2018. ECF Nos. 44-45.

20. On March 15, 2018, Defendants served their first requests for production of documents and interrogatories. On March 19, 2018, Lead Plaintiff served its first requests for production of documents and interrogatories. On April 16, 2018, Lead Plaintiff served its responses and objections to Defendants' first sets of requests for production of documents and

interrogatories. On April 18, 2018, Defendants served their responses and objections to Lead Plaintiff's requests for production of documents and interrogatories. Among other things, Defendants' interrogatories requested that Lead Plaintiff identify all persons whom Lead Counsel had contacted during the course of its investigation. Lead Plaintiff objected to this request for various reasons, including that the request called for information protected by the attorney work-product doctrine.

F. Third Party Discovery

21. Following the Court's entry of the protective order, Lead Plaintiff served the following third parties with subpoenas for the production of documents: (1) The Great Atlantic & Pacific Tea Company, Inc.; (2) Target Corporation; (3) Haggen, Inc.; (4) BJ's Wholesale Club Inc.; (5) Kroger Co.; (6) Petco Animal Supplies, Inc.; (7) PetSmart, Inc.; (8) Walmart, Inc.; (9) Albertsons Companies, Inc.; (10) Day Six Pet Nutrition; (11) MidOcean Associates; (12) Freshpet Investors LLC; (13) Kayne Anderson Capital Advisors, LP; (14) Acosta Inc.; (15) Goldman, Sachs & Co.; and (16) Credit Suisse Securities.

G. Discovery Disputes Related to Lead Plaintiff's Confidential Witnesses and Lead Counsel's Investigation

22. On May 30, 2018, the parties met and conferred about Lead Plaintiff's objections to the disclosure of the identity of the witnesses relied upon in drafting the Amended Complaint. Following that meet and confer, on June 8, 2018, Lead Plaintiff served amended responses and objections to Defendants' interrogatories that disclosed the name of one of the witnesses that Lead Counsel relied on in drafting the Amended Complaint. On June 12, 2018, Judge Wettre entered the parties' Stipulation and Protective Order Regarding Confidential Witness Number 1 ("CW1"). ECF No. 47 (the "Supplemental Protective Order"). The Supplemental Protective Order restricted disclosure of CW1's identity to Defendants' counsel only. On June 21, 2018, Lead Plaintiff sent

a letter to Defendants disclosing the name of Confidential Witness Number 1, subject to the Supplemental Protective Order.

23. On August 10, 2018, the parties held a meet and confer regarding Defendants' request for further disclosure in response to an interrogatory concerning disclosure of all individuals with whom Lead Plaintiff spoke during the investigation related to the Amended Complaint. On August 16 and 17, 2018, the parties exchanged correspondence on this issue. ECF No. 61. On September 4, 2018, the parties submitted a joint letter to the Court that outlined their respective positions regarding further disclosure of the identity of individuals that Lead Counsel spoke with in the course of its investigation. ECF No. 66. On October 3, 2018, Judge Wettre held a telephonic conference to further address this issue and requested that the parties provide supplemental briefing, which the parties did. ECF No. 66. On December 20, 2018, Judge Wettre ruled that Lead Plaintiff was only required to identify individuals with knowledge relevant to the claims but was not required to identify specific individuals with whom Lead Counsel spoke during the investigation related to the Amended Complaint. ECF No. 94. On January 18, 2018, Lead Plaintiff provided Amended Responses and Objections to these interrogatories per the Court's order. On June 20, 2019, Lead Plaintiff served on Defendants its Amended Rule 26(a)(1) Initial Disclosures which identified individuals likely to have discoverable information to support Lead Plaintiff's claims.

H. The Deposition of Plaintiff Gary Curran

24. On August 21, 2018, Defendants noticed the deposition of Gary Curran, the plaintiff that filed the Initial Complaint in the Action. On September 4, 2018, Lead Plaintiff objected to Mr. Curran's deposition because he was not the lead plaintiff in this Action nor was he a proposed class representative and Defendants had not even sought written discovery from Mr.

Curran before seeking his deposition. ECF No. 67. On September 7, 2018, Defendants responded to this letter, asserting that they wanted to depose Mr. Curran to pursue their argument that it was improper for Mr. Curran to have filed the Initial Complaint when AEPF had purchased more Freshpet shares. ECF No. 68. On October 3, 2018, the Court declined to order Mr. Curran's deposition. Instead, the Court permitted Defendants to provide Lead Plaintiff with draft interrogatories regarding Mr. Curran's role in the Litigation, and directed Lead Counsel to review those interrogatories and indicate whether Mr. Curran would consent to answer them.

I. Lead Plaintiff's Review and Analysis of Discovery Materials

25. As a result of Lead Plaintiff's document requests to Defendants and the parties' extensive meet-and-confer efforts, Lead Plaintiff obtained 165,683 documents, totaling 790,067 pages, from Defendants. Lead Plaintiff also received 1,085 documents, totaling 57,251 pages, from third parties. Lead Counsel's attorneys and staff reviewed documents and used search terms, date filters, custodian fields, and other metadata to analyze thousands of documents related to key issues in this case. These issues were also included in coding sheets used to identify documents with responsive information. Throughout the document review process, Lead Counsel reviewed the information contained in the documents, determined the documents' relevance to the allegations and analyzed how the documents supported Lead Plaintiff's claims. In connection with this effort, Lead Counsel supervised and actively managed a team of, at various times, five project attorneys in Lead Counsel's offices in Melville, New York.

J. Depositions

26. Lead Plaintiff took the following eleven fact depositions:

Deponent	Position	Date	Location
Steve Macchiaverna	Controller	December 7, 2018	Rosedale, NJ

Deponent	Position	Date	Location
Courtney Groome	Product manager/ Director of Marketing	December 17, 2018	New York, NY
Michael Hieger	Senior Vice President of Manufacturing	January 7, 2019	Rosedale, NJ
Kathryn Winstanley	Vice President of Marketing	January 15, 2019	San Francisco, CA
Charles Norris	Chairman of the Board	January 31, 2019	Los Angeles, CA
Tom Farina	Senior Vice President of Sales	February 7, 2019	Rosedale, NJ
Richard Thompson	CEO	February 12, 2019	New York, NY
Susie Wright	Vice President of Sales for Special Markets	February 18, 2019	Fayetteville, AR
Richard Kassar	CFO	February 28, 2019	New York, NY
Scott Morris	Chief Operating Officer and Co- Founder	March 5, 2019	Rosedale, NJ
Cathal Walsh	Co-Founder and Managing Director for Freshpet Europe	March 13, 2019	Dublin, Ireland

Defendants took six fact depositions, which Lead Counsel defended and/or cross-examined. The details of these depositions are set forth as follows:

Deponent	Position	Date	Location
Christopher R. Ely	Investment Advisor to Lead Plaintiff	July 16, 2018	Boston, MA
Ronald W. Gillis	Investment Advisor to Lead Plaintiff	July 16, 2018	Boston, MA
David L. Smith	Investment Advisor to Lead Plaintiff	July 17, 2018	Boston, MA
Charles Nichols II	Representative of Investment Advisor to Lead Plaintiff	July 17, 2018	Boston, MA

Deponent	Position	Date	Location
Gregory Stokes	Representative of Alaska Electrical Pension Fund	August 7, 2018	New York, NY
Confidential Witness Number 1 ²		September 17, 2018	

During the course of expert discovery, Lead Plaintiff took one expert deposition and Defendants took three expert depositions.³ The details of these depositions are set forth as follows:

Deponent	Position	Date	Location
Bjorn I. Steinholt	Lead Plaintiff's expert on market efficiency	July 25, 2018	New York, NY
Dr. Stephen Choi	Defendants' expert of market efficiency	November 29, 2018	New York, NY
Rudolph J. Leschke	Lead Plaintiff's expert on manufacturing	May 30, 2019	Irvine, CA
Bjorn I. Steinholt	Lead Plaintiff's expert on loss causation/damages	June 27, 2019	New York, NY

K. Class Certification Briefing

27. On June 29, 2018, Lead Plaintiff filed its opening motion in support of class certification. ECF No. 52. In support of its motion, Lead Plaintiff filed the Expert Report of Bjorn I. Steinholt, CFA ("Steinholt"). ECF No. 52-3. In Mr. Steinholt's report, he employed an event study, a widely accepted method to show that the market for Freshpet common stock was efficient, and analyzed the factors frequently used to measure market efficiency as set forth in

² The position of CW1 and the location of CW1's deposition are protected from disclosure by the Supplemental Protective Order. At the Court's request, Lead Counsel will provide this information *in camera*.

³ Lead Plaintiff was scheduled to take two additional expert depositions at the time the Action settled.

Cammer v. Bloom, 711 F. Supp. 1264 (D.N.J. 1989). On October 12, 2018, Defendants opposed Lead Plaintiff's motion for class certification and filed the Rebuttal Expert Report of Dr. Stephen Choi, which challenged Mr. Steinholt's conclusions regarding market efficiency. ECF No. 92. In Defendants' opposition, they argued that the market for Freshpet securities was not efficient because it failed to meet the criteria to satisfy *Cammer 5* – the factor that demonstrates “cause and effect.” Further, Defendants argued that serial correlation and purported constraints on short selling Freshpet securities during the Class Period undermined market efficiency. On December 12, 2018, Lead Plaintiff served its reply brief in support of its motion for class certification along with Mr. Steinholt's Reply Expert Report. ECF No. 93. Lead Plaintiff's reply argued that *Cammer 5* was not dispositive of market efficiency. Further, Lead Plaintiff explained Mr. Steinholt's responses to various challenges to the validity of his event study conducted in connection with *Cammer 5*, which showed the causal relationship between the stock drop and the alleged fraud. In response to Lead Plaintiff's motion, on July 25, 2018, Defendants deposed Mr. Steinholt on the conclusions set forth in his expert reports. On November 29, 2018, Lead Plaintiff deposed Dr. Stephen Choi, in connection with his expert report on market efficiency.

L. Expert Discovery

28. Pursuant to the Court's Pretrial Order, on April 22, 2019, the parties exchanged affirmative expert reports unrelated to class certification. ECF No. 94. Lead Plaintiff served the Expert Report of Bjorn I. Steinholt CFA on the issue of loss causation and damages, and served the Expert Report of Rudolph J. Leschke PE on the issues of Freshpet's manufacturing during the Class Period. On April 22, 2019, Defendants served the expert report of Dr. Stephen Choi on the issue of loss causation and damages relating to Lead Plaintiff's claims pursuant to Section 10(b) of the Exchange Act. On the same date, Defendants served the Expert Report of Henry L. Morris

on the issue of Freshpet's manufacturing during the Class Period. The parties served their responding reports on June 7, 2019. In Dr. Choi's rebuttal report, Defendants raised, for the first time, an expert opinion regarding the affirmative defense of negative causation related to Lead Plaintiff's claims pursuant to Section 11 of the Securities Act. In response, on June 26, 2019, Lead Plaintiff requested leave from the Court for Mr. Steinholt to file a rebuttal report to respond to arguments relating to negative causation raised by Dr. Choi. Lead Plaintiff also asked the Court for leave to allow Mr. Steinholt to file a rebuttal report responding to challenges raised in Dr. Choi's report regarding the validity of Mr. Steinholt's damages and loss causation analysis concerning Lead Plaintiff's claims pursuant to Section 10(b) of the Exchange Act. On July 19, 2019, Judge Wettre held a telephonic conference and ruled that Mr. Steinholt would be permitted to respond to Dr. Choi's opinions concerning the affirmative defense of negative causation pertaining to Lead Plaintiff's Section 11 claims, but could not address damages and loss causation concerning the Section 10(b) claims. Expert discovery was scheduled to close on August 5, 2019.

M. Defendants' Privilege Claims

29. On August 30, 2018, Defendants produced their first privilege log (the "Privilege Log"). After completing a review of the Privilege log and the associated documents, on February 5, 2019, Lead Plaintiff sent Defendants a letter identifying numerous documents that Lead Plaintiff believed were improperly withheld and/or redacted. On February 22, 2019, Defendants indicated that they would produce a sub-set of the withheld documents, but continued to reassert their claim of attorney-client privilege with respect to the rest of the Privilege Log. On March 1, 2019, Defendants provided to Lead Plaintiff a supplemental production that included 228 documents, 11 redacted documents, and a supplemental redaction log. Lead Plaintiff reviewed the supplemental production and concluded that it remained deficient. As a result, on March 8, 2019,

Lead Plaintiff requested the Court to compel Defendants to produce the withheld documents and provide a sufficiently specific description of the basis for withholding those documents. ECF No. 103. On April 29, 2019, the Court held a conference on the issue of the sufficiency of Defendants' Privilege Log, and directed the parties to meet and confer further and provide the Court with an oral update on the status of the dispute. ECF No. 117. On May 21, 2019, the parties met and conferred, and provided an additional update to the Court. In light of the parties' progress, the Court granted the parties additional time to confer on this issue.

30. On May 24, 2019, Lead Plaintiff wrote Defendants a letter memorializing the withdrawal of certain objections to the Privilege Log and reiterating other objections regarding the Privilege Log. In response, on June 3, 2019, Defendants agreed to produce to Lead Plaintiff additional documents. On June 10, 2019, Defendants supplemented their Privilege Log and produced 11 additional documents. On June 17, 2019, Judge Wettre held a telephonic conference during which she directed the parties to file a joint submission setting forth the parties' final position with respect to the sufficiency of the Privilege Log. The parties filed the joint submission on July 23, 2019. ECF No. 131.

Defendants served their second Privilege Log on July 22, 2019.

N. Dispute Regarding Defendants' Responses to Lead Plaintiff's Contention Interrogatories

31. On February 6, 2019, Lead Plaintiff served its Third Set of Interrogatories to Defendants (the "Contention Interrogatories"). Defendants served their Responses and Objections to the Contention Interrogatories on March 8, 2019. Upon reviewing Defendants' responses to the Contention Interrogatories, Lead Plaintiff found them to be deficient and requested a meet and confer with Defendants. On March 18, 2019, the parties met and conferred and exchanged correspondence on this issue. Following these discussions, on March 29, 2019, Defendants served

Revised Responses and Objections to the Contention Interrogatories. Upon review, Lead Plaintiff again determined that Defendants' responses were deficient. On April 2, 2019, the parties met and conferred again and did not reach a resolution. On April 10, 2019, Lead Plaintiff requested the Court to compel Defendants to appropriately respond to the Contention Interrogatories. ECF No. 111. On April 19, 2019, Defendants filed their response. ECF No. 114. On April 25, 2019, Lead Plaintiff replied in further support of its request for the Court to compel additional responses to the Contention Interrogatories. ECF No. 115. On April 29, 2019, Judge Wettre issued a ruling compelling Defendants to further respond to certain of the Contention Interrogatories. ECF No. 117. On May 20, 2019, Defendants served amended responses. After reviewing Defendants' Amended Responses and Objections to the Contention Interrogatories, Lead Plaintiff found that these responses remained deficient and were not in compliance with the Court's Order. As a result, the parties exchanged additional correspondence regarding the sufficiency of the Contention Interrogatories. On June 21, 2019, the parties submitted a letter to the Court outlining their final position with respect to the Contention Interrogatories. ECF No. 124. On July 19, 2019, the Court ruled that Defendants were not required to further supplement their responses to the Contention Interrogatories. ECF No. 130.

III. THE NEGOTIATION OF THE SETTLEMENT

A. Lead Plaintiff and Lead Counsel Had an Extensive Understanding of the Facts Before Entering into the Settlement

32. Beginning before the Initial Complaint was filed, Lead Counsel conducted an extensive investigation and analysis of the facts and legal issues in this case. This process included, among other things, a review of Freshpet's SEC filings, news reports, and other publicly available information regarding Freshpet. In addition, Lead Counsel conducted interviews of former Freshpet employees, including the confidential witnesses who provided information for the

Amended Complaint. Once discovery commenced, Lead Counsel reviewed 166,873 documents, totaling 790,067 pages, and took or defended 17 fact depositions and 4 expert depositions. Lead Counsel also retained experts to opine on issues concerning market efficiency, loss causation, damages and pet food manufacturing.

33. As detailed herein, Lead Plaintiff's and Lead Counsel's analysis of the claims and defenses also involved extensive legal research and analysis in connection with opposing Defendants' motion to dismiss, supporting Lead Plaintiff's motion for class certification, and briefing the numerous discovery disputes that were adjudicated by Judge Wettre.

34. On May 17, 2019, the parties retained the Mediator to facilitate settlement discussions. On June 14, 2019 and July 3, 2019, the parties submitted detailed mediation statements to the Mediator in advance of the July 11, 2019 mediation session. The parties did not resolve the Litigation on July 11, but continued to negotiate thereafter with the assistance of the Mediator. On July 25, 2019, with the benefit of substantial briefing as well as a developed factual record, the Mediator made, and the parties accepted, a proposal to resolve the case for \$10,100,000.

35. All of these efforts have enabled Lead Plaintiff and Lead Counsel to endorse the Settlement. Indeed, as a result of the extensive legal and factual research and analysis conducted by Lead Counsel, Lead Plaintiff and Lead Counsel had a thorough understanding of the strengths and weaknesses of the claims and the defenses at the time the agreement to settle the Action was reached.

B. The Settlement Eliminates the Risks Lead Plaintiff and the Settlement Class Faced

36. In deciding to settle the Litigation, Lead Plaintiff and Lead Counsel considered, among other things: (1) the substantial immediate cash benefit to Settlement Class Members under the terms of the Stipulation; (2) the possibility of the Settlement Class not being certified; (3) the

expense involved in preparing for and briefing summary judgment and any future appeals; (4) the possibility of the Court granting summary judgment in Defendants' favor; (5) the likelihood of a "battle of the experts" with respect to the issue of falsity, materiality, loss causation and damages; (6) the possibility of losing at trial; (7) the probability that, even if Lead Plaintiff won at trial, Defendants would file post-verdict motions and appeals resulting in additional risk to, and even more delay in obtaining, any recovery for the Settlement Class; and (8) the risk that Defendants may ultimately be unable to satisfy a judgment after trial. While Lead Counsel believes that all of the claims asserted against Defendants have merit, there were serious risks as to whether Lead Plaintiff would ultimately prevail on the merits and, even if completely successful, equally serious risks as to the amount of time it would take to collect on any judgment.

IV. THE PLAN OF ALLOCATION

37. The Net Settlement Fund will be distributed to Settlement Class Members substantially in accordance with the Plan of Allocation set forth in the Notice and approved by the Court. The Plan of Allocation provides that individuals will only be eligible to participate in the distribution of the Net Settlement Fund if they have an overall net loss on their transactions in Freshpet common stock during the Class Period.

38. For purposes of determining the amount an Authorized Claimant may recover under the Plan, Lead Counsel conferred with its damages consultant, and the proposed Plan reflects an assessment of the damages that could have reasonably been recovered by Settlement Class Members had Lead Plaintiff prevailed at trial. In the unlikely event there are sufficient funds in the Net Settlement Fund, each Authorized Claimant will receive an amount equal to the Authorized Claimant's claim. If, however, and as is more likely, the amount in the Net Settlement Fund is not sufficient to permit payment of the total claim of each Authorized Claimant, then each Authorized

Claimant shall be paid the percentage of the Net Settlement Fund that each Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants. Payment in this manner shall be deemed conclusive against all Authorized Claimants.

39. To date, there have been no objections to the Plan and Lead Counsel respectfully submits that the Plan is fair and reasonable, and that it should be approved.

V. LEAD COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

40. Absent the Settlement, there was a real possibility that the Settlement Class would be unable to obtain a meaningful recovery. Lead Counsel undertook this prosecution entirely on a contingent-fee basis and assumed significant risk in bringing these claims.

41. Lead Counsel respectfully requests that the Court award attorneys' fees of 30% of the \$10,100,000 Settlement Amount, or \$3,030,000. Lead Counsel believes such a fee is reasonable and appropriate in light of the result obtained and the resources expended by Robbins Geller, Carella Byrne and additional counsel Johnson Fistel, LLP ("Johnson Fistel") in prosecuting the case, and the inherent risk of nonpayment from representing the Settlement Class on a contingent basis. Lead Counsel further requests an award of \$456,411.38 in litigation expenses. The legal authorities supporting the requested fees and expenses are set forth in Lead Counsel's separate brief, submitted herewith.

A. Time, Labor and Fee Percentage Requested

42. Lead Counsel has devoted a significant amount of time and resources in the research, investigation, and prosecution of this Litigation.

43. Lead Counsel has substantial experience representing investors in securities class action cases, including in this District. The identification and background of Robbins Geller,

Carella Byrne, and Johnson Fistel are included as exhibits to the separate fee and expense declarations submitted by Robbins Geller (“Fee Declarations”).

44. Lead Counsel’s representation of the Settlement Class required considerable pre-filing investigation, including locating former employees of Freshpet and conducting interviews; analyzing a massive amount of public information; thoroughly researching the law pertinent to the claims and defenses asserted; drafting an amended complaint; opposing Defendants’ motion to dismiss; consulting with experts; deposing 12 fact and expert witnesses and defending 9 fact and expert depositions taken by defense counsel; analyzing and reviewing approximately 800,000 pages of documents; briefing class certification; meeting and conferring and briefing discovery disputes; drafting two lengthy mediation briefs; and preparing for and participating in a full-day mediation session.

45. Lead Counsel’s experience and advocacy were required in presenting the strengths of the case during mediation in an effort to achieve the best possible settlement and convince Defendants, their insurers, defense counsel, and the Mediator of the risks Defendants faced from not settling.

46. The fee request is based upon a percentage of the recovery after discussion with and approval by Lead Plaintiff. *See* ¶7 to Stokes Decl., submitted herewith. The fee request is similar to other requests approved by judges in this District, as set forth in Lead Counsel’s separate fee brief.

47. The fee request is also reasonable when cross-checked against the lodestar Lead Counsel incurred in prosecuting the Action. Included with Lead Counsel’s declaration is a schedule that summarizes the lodestar of the firm’s personnel who performed work on the case, as well as expenses incurred by category after having both been reviewed and reduced in the exercise

of billing judgment. In particular, the Robbins Geller declaration, and the fee and expense schedules contained within, indicate the amount of time spent on this case by each attorney and member of the professional support staff employed by Lead Counsel, and the lodestar calculation based on its current billing rates.

48. Lead Counsel has expended more than 10,600 hours in the investigation, prosecution, and resolution of the Action. Lead Counsel's lodestar is \$5,945,451.

B. The Risk, Magnitude, and Complexity of the Litigation

49. As detailed above, the Action involved complex issues of law and fact that presented considerable risk to Lead Plaintiff's case. This case involved litigating complex violations of Sections 11, 12(a)(2), 15 of the Securities Act, and Sections 10(b) and 20(a) of the Exchange Act. Thus, when Lead Counsel undertook this representation, there was no assurance that the Litigation would survive a motion to dismiss, motions for class certification or summary judgment, trial and/or any appeals. Therefore, there was no assurance Lead Counsel would recover any payment for its services.

50. Lead Counsel accepted the representation of the Settlement Class on a contingent basis in this securities class action even though any payment for Lead Counsel's services – assuming a recovery was obtained – was likely to be delayed for several years. Cases such as this present formidable challenges as there are numerous risks of adverse rulings in favor of defendants at each stage of litigation. If the case had not settled, Lead Counsel was fully prepared to litigate this case through class certification, summary judgment, trial, and appeal. Each of those stages of litigation poses considerable challenges and expense in cases of this nature.

C. Quality of the Representation

51. Lead Counsel worked diligently to obtain an exceptional result for the Settlement Class. From the outset, Lead Counsel employed considerable resources and spent considerable

time researching and investigating the facts to support a pleading that could survive a motion to dismiss and position the Litigation for class certification. Theories of damages were complex and Lead Counsel devoted much time working with its consultant to analyze Class-wide damages.

52. The recovery obtained for the Settlement Class is the direct result of the significant efforts of highly skilled attorneys who possess substantial experience in the prosecution of complex securities class actions. Lead Counsel is among the most experienced securities practitioners in the country. The Settlement represents a substantial recovery for the Settlement Class, one that is attributable to the diligence, determination, hard work, and reputation of Lead Counsel.

53. The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work. Defendants were represented by experienced lawyers from Pepper Hamilton LLP, a well-regarded defense firm. Defense counsel has a reputation for vigorous advocacy in the defense of complex cases such as this. The ability of Lead Counsel to obtain a favorable settlement in the face of such quality opposition confirms the excellence of Lead Counsel's representation.

54. When Lead Counsel undertook to represent Lead Plaintiff and the Settlement Class, it was with the expectation that it would have to devote a significant amount of time and effort in its prosecution and advance large sums of expenses on discovery and experts. The time spent by Lead Counsel on this case was at the expense of the time that it could have devoted to other matters. Lead Counsel undertook this case solely on a contingent-fee basis, assuming a substantial risk that the case would yield no recovery and leave Lead Counsel uncompensated. Unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expenses since this case began. When Lead Counsel undertook to represent Lead Plaintiff and the Settlement Class in this matter, it was with

the knowledge that Lead Counsel would spend many hours of hard work against capable defense lawyers with no assurance of ever obtaining any compensation for its efforts. The only way Lead Counsel would be compensated was to achieve a successful result.

55. As discussed above, the Settlement is a very good result for the Settlement Class in light of the risks and obstacles to recovery presented in this case, including the difficulty in certifying a class, opposing summary judgment, and prevailing at trial. Instead of facing additional years of uncertain, costly and time-consuming litigation, the Settlement will provide Settlement Class Members the certainty of a significant recovery now.

VI. THE REQUESTED EXPENSES ARE FAIR AND REASONABLE

56. Lead Counsel seeks expenses in the amount of \$456,411.38 in connection with the prosecution of the Litigation. *See* Fee Declarations, submitted herewith.

57. Lead Counsel submits that the expenses are reasonable and were necessary for the successful prosecution of this Litigation. Lead Counsel was aware that it may not recover any of these expenses unless and until this Action was successfully resolved against Defendants. Accordingly, Lead Counsel took steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of Lead Plaintiff's claims.

58. The requested expenses reflect routine and typical expenditures incurred in the course of litigation, such as the costs of travel, document processing, expert fees, mediation fees and fees to obtain transcripts and videos of the numerous depositions that were taken. Lead Counsel believes these expenses are reasonable and were necessary for the successful prosecution of the Litigation.

VII. LEAD PLAINTIFF IS ENTITLED TO AN AWARD PURSUANT TO 15 U.S.C. §78u-4(a)(4) BASED ON ITS REPRESENTATION OF THE CLASS

59. Additionally, in accordance with 15 U.S.C. §78u-4(a)(4), Lead Plaintiff seeks an award for its time spent representing the Settlement Class in the amount of \$9,360. The amount of time and effort devoted to the Litigation by Lead Plaintiff is detailed in the accompanying Stokes Declaration (at ¶8).

60. As discussed in Lead Counsel's accompanying fee brief and in Lead Plaintiff's supporting declaration, AEPF has been fully committed to pursuing the claims detailed in the Amended Complaint on behalf of the Settlement Class since it was appointed lead plaintiff. These efforts required the representative of AEPF to dedicate considerable time and resources to this Litigation that would have otherwise been devoted to his regular employment duties.

61. As more fully set forth in Lead Counsel's accompanying fee brief, the efforts expended by Lead Plaintiff during the course of this Litigation are precisely the types of activities courts have found adequate to support an award, and fully support the instant request by Lead Plaintiff for an award of \$9,360.

VIII. CONCLUSION

62. In light of the significant recovery to the Settlement Class and the substantial risks of this Litigation, as described above and in the accompanying memoranda in support of final approval of the Settlement and an award of attorneys' fees and expenses, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement and Plan should be approved as fair and reasonable. In addition, as a result of the recovery obtained in the face of substantial risks, including the contingent nature of the fees and the complexity of the case, Lead Plaintiff and Lead Counsel respectfully submit that the Court should award attorneys' fees in the amount of 30% of the Settlement Amount, plus expenses of \$456,411.38, plus the interest earned thereon at the same

rate and for the same period as that earned on the Settlement Fund until paid, plus an award of \$9,360 for Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Settlement Class.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 29th day of January, 2020, at Melville, New York.


ALAN I. ELLMAN