UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR (I) PRELIMINARY APPROVAL OF SETTLEMENT, (II) PRELIMINARY CERTIFICATION OF THE SETTLEMENT CLASS FOR PURPOSES OF SETTLEMENT, AND (III) APPROVAL OF NOTICE TO THE SETTLEMENT CLASS

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Lead Plaintiffs,[1] on behalf of themselves and the Settlement Class (defined below), have reached a proposed settlement of the above-captioned action, which is brought under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, for a total of $19.5 million in cash (the "Settlement").[2] Lead Plaintiffs now respectfully move the Court for an order, in the form attached to their accompanying Motion, (1) preliminarily approving the Settlement; (2) preliminarily certifying the Settlement Class and appointing Lead Plaintiffs as class representatives and Lead Counsel as class counsel for purposes of the Settlement; (3) approving the form and manner of providing notice of the Settlement to the Settlement Class; and (4) setting a date and time for a hearing at which the Court will consider final approval of the Settlement, approval of the proposed Plan of Allocation, and Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses.

I. PRELIMINARY STATEMENT

The parties have reached an agreement to settle this Litigation in exchange for a $19.5 million cash payment to be made for the benefit of the Settlement Class.[3] If the Settlement is approved by the Court, it will result in a substantial payment to class members, eliminate the risks to the Settlement Class of further litigation, and resolve the Litigation in its entirety. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Lead Plaintiffs now seek the Court's

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[1] By Order dated March 31, 2016, the Court appointed Arkansas Teacher Retirement System, the City of Bristol Pension Fund, and the City of Omaha Police & Fire Retirement System (collectively, "Lead Plaintiffs") to serve as Lead Plaintiffs; and Bernstein Litowitz Berger & Grossmann LLP ("BLBG") and Scott+Scott Attorneys at Law, LLP ("Scott+Scott") to serve as Lead Counsel. *See* ECF No. 36.

[2] Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Stipulation of Settlement dated February 8, 2018 (the "Stipulation"), filed herewith.

[3] The Stipulation was entered into between Lead Plaintiffs, on behalf of themselves and the Settlement Class, and Defendants Insulet Corp. ("Insulet), Duane DeSisto, Allison Dorval, Brian Roberts, and Charles Liamos (collectively, "Defendants").

preliminary approval of the Settlement so that Notice can be disseminated to members of the Settlement Class and a Settlement Hearing can be scheduled.

The substantial Settlement is the direct result of the efforts undertaken by Lead Plaintiffs and Plaintiffs' Counsel to vigorously prosecute the claims of Settlement Class Members. During 2½ years of hotly contested litigation, Lead Plaintiffs, through their counsel, have successfully opposed Defendants' motions to dismiss, obtained and reviewed more than 165,000 pages of documents, served 32 third-party document subpoenas, engaged in numerous discovery meet-and-confers with Defendants and third parties, produced more than 16,000 pages of documents, filed a motion for class certification with an accompanying expert report, and defended seven depositions. Significantly, the Settlement was reached only after substantial fact discovery, which gave Lead Plaintiffs and their counsel a thorough understanding of the strengths and weaknesses of the parties' claims and defenses. Moreover, the Settlement was also only reached after protracted arm's length negotiations, which began with in an all-day mediation attended by counsel and representatives for both sides in July 2017, but did not end until after months of additional negotiations that resulted in the signing of a Memorandum of Understanding ("MOU") on December 14, 2017 and the execution of the Stipulation on February 8, 2018.

The proposed $19.5 million Settlement is particularly noteworthy when considered against the risks that the Settlement Class might recover less (or nothing) if the case were litigated through dispositive motions, trial, and likely appeals – a process that could last many months if not years. In sum, the Complaint alleges that Defendants fraudulently misrepresented and concealed serious manufacturing and quality issues that plagued the 2013 launch of its flagship product (its "Eros" insulin infusion pump), including the negative impact that these issues had on end-user demand for the Eros, and that Defendants also misled the market about how Insulet reported "new patient

starts" (a key performance metric). Although Lead Plaintiffs and their counsel believe that these claims have substantial merit, they also recognized that they would have faced significant risks in establishing liability. For example, Defendants vigorously argued (among other things) that they were not liable because (1) the Eros manufacturing and quality issues were allegedly of a kind that are typically encountered in the launch of comparable medical devices; (2) the frequency and seriousness of Eros defects was within Insulet's quality control tolerances and did not evidence pervasive problems with the product; (3) overall demand for the Eros was not impaired by any manufacturing and quality issues, as shown by increasing overall sales during the Settlement Class Period; and (4) Defendants simply had no duty to separately break out its gross reporting of overall sales figures (which allegedly masked a decline in its higher margin U.S. sales), or to "speculate" as to the extent to which certain increases in sales to its distributors were temporary or could have masked a decline in end-user demand. Defendants also denied that they acted with any intent to defraud, pointing to, among other things, Insulet's contemporaneous disclosures to investors that it had experienced some manufacturing and quality issues, and certain evidence of steps that Insulet personnel did follow to enforce its quality assurance policies and procedures.

Even if Lead Plaintiffs were able to establish liability, they also faced significant risks in establishing damages. Under § 10(b), plaintiffs must plead and prove "loss causation" – *i.e.*, a causal nexus between the decline in price of a security and the defendants' alleged false and misleading statements. Here, Lead Plaintiffs alleged that Defendants' fraud was gradually revealed through five corrective disclosures that occurred on January 7, January 14, February 26, March 30 and April 30, 2015 and caused declines in the price of Insulet common stock the day following each disclosure. On these dates, Plaintiffs contend that Defendants disclosed material information concerning problems with the Eros, and the adverse impact these problems had on Insulet's

revenue, its "new patient starts" metric, and end-user demand for the Eros. Defendants, however, argue that Lead Plaintiffs cannot establish loss causation because the disclosures at issue did not relate to or "correct" any alleged misrepresentations, and that declines on those dates were due (in substantial part if not in whole) to other factors. They also argued that the stock price reactions following certain of these disclosures were not statistically significant, and that accordingly no damages could be associated with such events.

While Lead Plaintiffs believe that they have meritorious responses to each of Defendants' contentions, the Settlement, if approved, will allow the Settlement Class to recover a very significant sum while avoiding the risks that Defendants would prevail at class certification, summary judgment or trial, or in subsequent appeals. At the hearing to consider final approval of the Settlement, the Court will have the benefit of more extensive motion papers submitted in support of the Settlement (as well as the opportunity to assess the reaction of the Settlement Class), and it will be asked to make a determination as to whether the Settlement is fair, reasonable, and adequate. For now, however, it is respectfully submitted that the proposed Settlement readily meets the requisite preliminary legal tests of procedural and substantive fairness and adequacy to warrant issuance of notice to the Settlement Class and the scheduling of a settlement hearing, so that the Settlement Class itself can have the opportunity to weigh in on the merits of taking a $19.5 million "bird in the hand." Accordingly, Lead Plaintiffs respectfully request that the Court enter the [Proposed] Notice Order, in the form attached as Exhibit 1 to the accompanying Motion, which all Parties have agreed to. The Notice Order will, among other things: (1) preliminarily approve the Settlement on the terms set forth in the Stipulation; (2) preliminarily certify the Settlement Class and appoint Lead Plaintiffs as class representatives and Lead Counsel as class counsel, for purposes of the Settlement only; (3) approve the form and manner of giving notice to the

Settlement Class; and (4) set a date for the Settlement Hearing at which the Court will consider final approval of the Settlement, approval of the Plan of Allocation for distribution of the Net Settlement Fund and Lead Counsel's application for attorneys' fees and expenses.

II. HISTORY OF THE LITIGATION

This securities class action asserts claims on behalf of investors who purchased Insulet common stock from May 7, 2013 to April 30, 2015, inclusive (the "Settlement Class Period'). Based on an extensive investigation into the claims at issue, on June 1, 2016 Lead Plaintiffs filed and served the operative 90-page Consolidated Complaint (the "Complaint"). The Complaint alleges that Defendants repeatedly touted the successful launch of the Eros (*e.g.*, by describing the feedback from the launch as "excellent"), and boasted that customers had broadly accepted the Eros, that "new patient starts" for the Eros were growing at a rate of 20%, and that overall demand was also up. On the few occasions when Insulet did address any manufacturing and quality issues with the Eros, it assured investors that they were mere "hiccups" that had been "quickly identified and remedied."

Lead Plaintiffs, however, allege that these statements were all materially false or misleading because Defendants knew or recklessly disregarded that the Eros suffered from serious defects (including malfunctioning needle mechanisms, leaking pods, and faulty alarms), and that in turn these defects adversely affected customer acceptance and demand. The Complaint alleges that Defendants DeSisto and Liamos authorized the shipment of defective product over the objections of quality assurance personnel, showing that they were aware of these defects. The Complaint also alleges that Defendants deliberately misled investors by changing the way that Insulet reported "new patient starts" – which it had historically reported based solely on the number of new patients in the U.S. – by combining both U.S. and non-U.S. numbers. The effect of this

undisclosed change was to conceal that new patient starts in Insulet's higher-margin U.S. market were actually *declining* during 2014.

Lead Plaintiffs further allege that investors learned the truth about the nature and extent of the manufacturing and quality problems with the Eros and the resulting decline in end-user demand (and how these issues had been masked by, among other things, Insulet's deceptive reporting of "new patient starts") through various corrective disclosures in the first half of 2015. Lead Plaintiffs assert that in the wake of these disclosures, the price of Insulet shares fell sharply.

On August 1, 2016, Defendants moved to dismiss the Complaint arguing, among other things, that (1) Defendants had adequately disclosed the manufacturing and quality issues that had impacted production, and were under no duty to disclose the incidence of immaterial product defects; (2) many of the alleged misstatements were inactionable because they were forward-looking and/or were mere "puffery"; (3) Lead Plaintiffs did not adequately allege scienter because the statements in the Complaint attributed to confidential witnesses were too vague and did not sufficiently implicate Defendants' knowledge of any alleged wrongdoing; and (4) Lead Plaintiffs did not adequately allege loss causation because the alleged corrective disclosures did not reveal the falsity of any alleged misstatements and any subsequent price declines were therefore unrelated to the alleged fraud and/or not statistically significant. On September 16, 2016, Lead Plaintiffs filed their opposition papers, and Defendants filed their reply papers on October 17, 2016. Oral argument on the motion to dismiss was held on March 16, 2017. The Court thereafter issued a bench decision and subsequent order denying Defendants' motion to dismiss.

Following the Court's order denying Defendants' motion to dismiss, the Parties engaged in significant fact discovery. For example, Lead Counsel prepared and served extensive document requests on Defendants, as well as document subpoenas on 32 third parties, which yielded more

than 165,000 pages of documents that Lead Counsel subsequently reviewed and analyzed. As part of their document discovery efforts, Lead Counsel also engaged in numerous meet-and-confer discussions with both Defendants and numerous third parties regarding the scope of their proposed objections to discovery and the adequacy of their responses and ultimate document productions. Lead Counsel also prepared and served, and obtained responses to, comprehensive interrogatories on Defendants.

At the same time, the Parties also engaged in extensive discovery relating to class certification, with the three Lead Plaintiffs responding to Defendants' interrogatories, producing more than 16,000 pages of documents, and appearing for their respective depositions. On August 25, 2017, Lead Plaintiffs filed their motion for class certification with a supporting report from Lead Plaintiffs' expert on market efficiency and damages methodologies, Prof. Steven P. Feinstein, Ph.D., CFA. Defendants filed their opposition papers on November 17, 2017.

While fact discovery was underway, the Parties agreed to engage in a private mediation effort and retained David Geronemus, Esq. of JAMS, a highly experienced mediator who has resolved numerous complex securities class actions. After preparing and exchanging comprehensive mediation statements addressing both liability and damages issues, Lead Counsel and Defendants' counsel (together with client representatives) participated in a full-day, in-person mediation session before Mr. Geronemus in New York on July 20, 2017, involving presentations by counsel for both sides, and ex parte sessions with the mediator. The mediation ended, however, with the sides' settlement positions far apart. Thereafter, the parties continued to pursue discovery, but also continued their hard-fought settlement negotiations, which included exchanging multiple written statements that raised additional points and counterpoints relating to both liability and damages issues. As a result of the ensuing months of negotiations, on November 27, 2017, the

Parties reached an agreement in principle to settle the Litigation that was memorialized in a binding MOU executed on December 14, 2017. The MOU documented the material terms of the Parties' agreement to settle and release all claims asserted against Defendants in exchange for the Defendants' payment of $19,500,000 for the benefit of the Settlement Class.

III. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

As a matter of public policy, settlement is a highly favored means of resolving disputes. *See U.S. v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000); *Hotel Holiday Inn de Isla Verde v. N.L.R.B.*, 723 F.2d 169, 173 n.1 (1st Cir. 1983) (settlement agreements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits'").[4] This policy is especially applicable to complex class action litigation. *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("the law favors class action settlements"); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007) ("public policy generally favors settlement – particularly in [large] class actions"); *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 107 (D. Mass. 2010) ("[public] policy encourages settlements").

Under Rule 23(e) of the Federal Rules of Civil Procedure, judicial review of a proposed class action settlement consists of a two-step process: preliminary approval and a subsequent settlement fairness hearing. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 57 (D. Mass. 2005) ("First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.") (quoting MANUAL FOR COMPLEX LITIGATION, FOURTH ("MCL") § 13.14 at 171). Given this two-step process, the Court is not required to undertake an in-depth consideration of the relevant factors

[4] Unless otherwise noted, all internal quotation marks and citations are omitted.

for final approval at this time. Instead, the Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." MCL § 21.632.

For purposes of preliminary approval, the Court must determine whether the proposed settlement "appears to meet" the fair, reasonable, and adequate standard that will be used at final approval, and thus falls "within the range of possible approval." *Scott v. First Am. Title Ins. Co.*, 2008 WL 4820498, at *3 (D.N.H. Nov. 5, 2008); *see also In re Lupron Marketing & Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004); *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 140 (D.P.R. 2010). Lead Plaintiffs request that the Court take the first step in the settlement approval process by preliminarily approving the Settlement. As shown below, the proposed Settlement clearly satisfies the standard for preliminary approval.

A. The Settlement Is the Result of Arm's-Length Negotiations by Well-Informed and Experienced Counsel

"Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair." *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987) (Wolf, J.); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009) ("If the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable.").

Here, the Settlement was achieved only after protracted arm's-length negotiations. Moreover, given that the Parties had litigated the action for two-and-a-half years, engaged in extensive document discovery, and exchanged detailed written statements about the claims and defenses at issue, the Parties and their counsel were well-informed about the strengths and

weaknesses of the claims and defenses. Further, the judgment of the Parties' counsel – who are highly experienced in securities class action litigation – that the Settlement is a fair and reasonable resolution of the Litigation should be given considerable weight. *See, e.g., Gulbankian v. MW Mfrs., Inc.*, Civil Action No. 10-10392-RWZ, 2014 WL 7384075, at *3 (D. Mass. Dec. 29, 2014) ("Class Counsel here are attorneys with extensive experience in consumer and building product class action litigation, and they insist that this Agreement is fair, reasonable and adequate. I give significant weight to this representation."); *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."). *See also* Firm Resumes of Lead Counsel, Exhibits B and C to the Declaration of James A. Harrod In Support of Lead Plaintiffs' Motion for Class Certification (ECF No. 86).[5]

B. The Stage of the Proceedings Supports Preliminary Approval

As will be further detailed prior to the Settlement Hearing, Lead Plaintiffs' decision to enter into the Settlement was based on a thorough understanding of the strengths and weaknesses of their claims after more than two years of intense litigation effort, which included: (1) conducting a thorough investigation into the Settlement Class's claims and interviewing numerous former employees of Insulet; (2) drafting a detailed consolidated complaint; (3) successfully opposing the Defendants' motion to dismiss; (4) fully briefing class certification; and (5) conducting significant

[5] The presumption that the Settlement is fair is further strengthened by the fact that it was negotiated under the auspices of an experienced mediator. *See Roberts v. TJX Companies, Inc.*, No. 13-CV-13142-ADB, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) ("the participation of an experienced mediator[] also supports the Court's finding that the Settlement is fair, reasonable, and adequate"); *In re Viropharma Inc. Sec. Litig.,* No. CV 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) (the "participation of an independent mediator in settlement negotiations virtually insures [*sic*] that the negotiations were conducted at arm's length and without collusion between the parties").

document discovery. Indeed, the Parties reached their agreement in principle to settle just days before the December 1, 2017 deadline for substantial completion of Defendants' document production. In addition, Lead Plaintiffs had filed their motion for class certification on August 25, 2017, the Parties had completed class certification discovery of Lead Plaintiffs, and Defendants had filed their opposition to class certification on November 17, 2017.

Accordingly, Lead Plaintiffs' extensive litigation efforts gave them a strong basis to assess the strengths and weaknesses of their case. *See Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 347 (D. Mass. 2015) (approving settlement reached before fact depositions had commenced but after defendants had produced more than 40,000 documents); *In re StockerYale, Inc. Sec. Litig.*, Master File No. 1:05-cv-00177-SM, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007) (approving settlement reached after "[c]lass counsel had the benefit of information obtained through document discovery and its extensive own investigation").

C. The Substantial Benefits for the Settlement Class, Weighed Against Litigation Risks, Strongly Support Preliminary Approval

The $19.5 million cash recovery achieved by the proposed Settlement provides a very substantial benefit to the Settlement Class. This is particularly true when compared to the risk that no recovery or only a much lesser recovery might have been obtained after summary judgment, trial and likely appeals, which could have taken additional months or years.

The claims alleged on behalf of the Settlement Class involve many complex legal and factual issues. If the Litigation were to proceed through dispositive motions and trial, Lead Plaintiffs would have to overcome numerous defenses asserted by Defendants as to both liability and damages. Among other things, the Parties vigorously disagreed on whether Defendants made any false or misleading statements and omissions regarding the Eros launch, manufacturing and quality issues, and the underlying demand for the Eros. Defendants have asserted that they

adequately informed investors about Insulet's problems with the Eros launch, disclosing that certain manufacturing and quality issues had caused lower production and an inability to meet customer demand. Defendants have also contended that the Eros product defects and failures identified in the Complaint were not significant and that Defendants were under no duty to publicly disclose them, and that at all times particularly given that Insulet's quality assurance policies and procedures were appropriately high and fully complied with. As for Insulet's reporting of "new patient starts," Defendants assert that they adequately informed financial analysts that this metric included both U.S. and non-U.S. numbers, that "overall" demand and sales actually increased during the Settlement Class Period, and that they had no duty to separately disclose aspects of sales or demand that were declining.

Lead Plaintiffs also faced additional risks in proving loss causation and damages. The Parties disagree whether corrective disclosures occurred on January 7, January 14, February 26, March 30 and April 30, 2015. Lead Plaintiffs contend that on these dates new, material information concerning systemic problems with the Eros, and the adverse impact these problems had on Insulet's revenue, "new patient growth starts" metric, and Eros demand was revealed to the public. Defendants counter that Lead Plaintiffs cannot link the negative disclosures on those dates to Defendants' alleged misrepresentations, because the resulting price declines were either not statistically significant or were otherwise due to non-fraud-related factors such that Lead Plaintiffs would be unable to prove loss causation and damages. Resolution of such matters would have likely come down to a complex, expensive and unpredictable "battle of experts."

In sum, the Parties disagree on numerous complex issues of law and fact, and the Settlement enables the Settlement Class to recover a substantial "bird in the hand" while avoiding the risks of defeat on these issues at summary judgment, trial, or in subsequent appeals.

IV. THE SETTLEMENT CLASS SHOULD BE PRELIMINARILY CERTIFIED FOR SETTLEMENT PURPOSES

The Court should also preliminarily certify the Settlement Class for purposes of the Settlement under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The proposed Settlement Class, which has been stipulated to by the Parties, consists of:

> All Persons who purchased Insulet common stock during the Settlement Class Period and were damaged thereby. Excluded from the Settlement Class are: (i) Defendants and any parent, subsidiary or affiliate of Insulet; (ii) the officers and directors of Insulet and its affiliates, currently and during the Settlement Class Period; (iii) Immediate Family Members of any Individual Defendant; (iv) any entity in which any Defendant has or had during the Settlement Class Period a controlling interest; and (v) the legal representatives, heirs, successors or assigns of any such excluded person or entity. Also excluded from the Settlement Class is each Person who submits a request for exclusion from the Settlement Class that is accepted by the Court.

Stipulation ¶ 1.39.

It is appropriate to certify a class action for settlement purposes. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 307 (D. Mass. 1987) (Wolf, J.). Indeed, "the certification of a settlement class can provide significant benefits to class members while enabling defendants to achieve an expedited and final resolution of multiple suits." *In re Lupron*, 345 F. Supp. 2d at 137. While a settlement class, like other certified classes, must satisfy the elements of Rules 23(a) and (b), the manageability concerns of Rule 23(b)(3) are not at issue in certification of a settlement class. *See Amchem Prods.*, 521 U.S. at 593; *In re Relafen Antitrust Litig.*, 231 F.R.D. at 68.

A. The Settlement Class Satisfies the Requirements of Rule 23(a)

Certification is appropriate under Rule 23(a) if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

1. The Settlement Class Members Are Too Numerous to Be Joined

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be "impracticable." Fed. R. Civ. P. 23(a). "[C]ourts may draw reasonable inferences from the facts presented to find the requisite numerosity" and routinely find the numerosity requirement satisfied based on the number of shares that were outstanding and the average trading volume during the class period. *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 258 (D. Mass. 2005).

The Settlement Class easily satisfies numerosity. During the Settlement Class Period, there were roughly 54 million publicly traded Insulet shares, and an average of approximately 568,000 Insulet common shares traded daily. *See* ECF No. 85 at 10. Accordingly, numerosity is readily satisfied here. *See, e.g., Kirby v. Cullinet Software, Inc.*, 116 F.R.D. 303, 306 (D. Mass. 1987); *In re Sonus Networks, Inc. Sec. Litig.*, 247 F.R.D. 244, 248 (D. Mass. 2007).

2. There Are Common Questions of Law and Fact

Rule 23(a)(2) requires the existence of at least one question of law or fact common to the class. *See In re Boston Scientific Corp. Sec. Litig.*, 604 F. Supp. 2d 275, 281 (D. Mass. 2009) ("It is relatively easy for a plaintiff to show commonality because '[a] single common legal or factual issue can suffice' to satisfy the requirement"). The Rule 23(a)(2) commonality test has been described as a "low bar" and thus easily satisfied. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008).

The Litigation raises numerous common issues of law and fact. Lead Plaintiffs' claims concern common alleged material misstatements and omissions about Insulet's launch of the Eros, manufacturing and quality issues, and underlying demand for the Eros. *See also* ECF No. 85 at 11.

Thus, for Lead Plaintiffs' § 10(b) claim, common questions of law and fact include "whether defendants made material misleading statements or omissions, whether defendants acted with the requisite scienter, and whether the proposed class is entitled to a presumption of reliance under the fraud-on-the-market theory." *In re Boston Scientific*, 604 F. Supp. 2d at 281. In addition, Lead Plaintiffs' "control person" claims under § 20(a) rest on common legal and factual questions of whether there has been an underlying violation of § 10(b) and whether Defendants DeSisto, Dorval, Roberts, and Liamos exercised "control" over Insulet.

3. Lead Plaintiffs' Claims Are Typical of the Settlement Class

Rule 23(a)(3) requires that the claims of the class representatives be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). "The plaintiff can meet this requirement by showing that its injuries arise from the same events or course of conduct as do the injuries of the class, and that its claims are based on the same legal theory as those of the class." *In re Boston Scientific*, 604 F. Supp. 2d at 282. "Typical" does not mean "identical." *See Swack*, 230 F.R.D. at 260. Instead, typicality is primarily a "question of whether the putative class can fairly and adequately pursue the interests of the absent class members without being sidetracked by her own particular concerns." *Id.* at 264; *see also Glass Dimensions, Inc. v. State Street Bank & Trust Co.*, 285 F.R.D. 169, 178 (D. Mass. 2012) ("Typicality is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class.").

The claims of Lead Plaintiffs and absent Settlement Class Members are based on the same alleged misleading misrepresentations and omissions and thus arise from the same course of events. Lead Plaintiffs' claims and the claims of absent Settlement Class Members are based on the same legal theories and would be proven by the same evidence. *See* ECF No. 85 at 12.

4. Lead Plaintiffs Will Fairly and Adequately Protect the Interests of the Settlement Class

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To satisfy the Rule 23(a)(4) adequacy prerequisite, "[t]he moving party must show first that the interests of the representative party will not conflict with the interests of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *In re Boston Scientific*, 604 F. Supp. 2d at 282 (internal citation omitted).

There is no antagonism or conflict of interest between Lead Plaintiffs and the proposed Settlement Class. Lead Plaintiffs and the other members of the Settlement Class share the common objective of maximizing their recovery from Defendants. *See In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. at 133 ("Plaintiffs, like other members of the proposed class, have the same incentives to maximize recovery for the wrongs allegedly perpetrated on them by Defendants."). Lead Plaintiffs have vigorously pursued the claims in this Litigation, and Lead Counsel have extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States. Therefore, Rule 23(a)(4) is satisfied.

B. The Settlement Class Satisfies the Requirements of Rule 23(b)(3)

Rule 23(b)(3) authorizes class certification if the Court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Common Legal And Factual Questions Predominate

As the Supreme Court has noted, predominance is a test "readily met" in cases alleging violations of the securities laws. *Amchem*, 521 U.S. at 625; *In re Evergreen Ultra Short*

Opportunities Fund Sec. Litig., 275 F.R.D. 382, 393 (D. Mass. 2011) (same); *see also In re Boston Scientific*, 604 F. Supp. 2d at 283 ("Most [§ 10(b)] elements are generally amenable to common proof."). Indeed, as shown by the above analysis of Lead Plaintiffs' claims under Rule 23(a)(2)'s commonality standard (*supra* at Section IV(A)(2)), there is an overwhelming number of questions of law and fact common to the claims asserted.

The elements of falsity, materiality, scienter, and loss causation are subject to classwide proof and not required to be established at the class certification stage. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013) (materiality of misrepresentations and omissions "is a question common to all members of the class"); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) (it is error to require securities plaintiff "to show loss causation as a condition of obtaining class certification"); *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 52 (S.D.N.Y. 2012) (stating that all elements of a § 10(b) claim, "other than reliance in cases that are not premised on fraud-on-the-market, are subject to class wide proof in securities litigation"). *See also* ECF No. 85 at 15-20 (discussing the fraud-on-the-market presumption of reliance).

2. A Class Action Is Superior to Other Methods of Adjudication

This consolidated class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the claims of the large number of purchasers or acquirers of Insulet publicly traded common stock during the Settlement Class Period. *See* Fed. R. Civ. P. 23(b)(3). Indeed, courts have concluded that the class action device in securities cases is usually the superior method by which to redress injuries to a large number of individual plaintiffs in light of the large and geographically dispersed nature of shareholder classes, the inefficiency of multiple lawsuits and the size of individual recoveries in comparison to the costs of litigations. *See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (securities fraud cases are "particularly well-suited for class treatment"); *In re Evergreen*, 275 F.R.D. at 393 ("[O]ther judges

of this Court have stressed that class actions are particularly appropriate for securities litigation because it may be the only practicable means of enforcing investor's rights."); *Swack*, 230 F.R.D. at 257-58 (recognizing preference for class certification in securities fraud cases); *John Hancock Life Ins. Co. v. Goldman, Sachs & Co.*, No. 01-10729, 2004 WL 438790, at *2 (D. Mass. Mar. 9, 2004) ("There is little question that suits on behalf of shareholders alleging violations of federal securities laws are prime candidates for class action treatment and that Rule 23 of the Federal Rules of Civil Procedure has been liberally construed to effectuate that end.").

V. NOTICE TO THE SETTLEMENT CLASS SHOULD BE APPROVED

As outlined in the proposed Notice Order, Lead Counsel will notify Settlement Class Members of the pendency of the Litigation and the proposed Settlement by causing the Notice and Claim Form to be mailed to all Settlement Class Members who can be identified with reasonable effort. The Notice will advise Settlement Class Members of (i) the pendency of the Litigation as a class action; (ii) the essential terms of the Settlement; (iii) the proposed Plan of Allocation; and (iv) information regarding Lead Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses. The Notice will also provide specifics on the date, time, and place of the Settlement Hearing and set forth the procedures, as well as deadlines, for opting out of the Settlement Class, for objecting to the Settlement, the proposed Plan of Allocation, and/or the motion for attorneys' fees and reimbursement of Litigation Expenses, and for submitting a Claim Form. The proposed Notice Order also requires Lead Counsel to cause the Summary Notice to be published once in *Investor's Business Daily* and to be transmitted once over the *PR Newswire*. Lead Counsel will also cause a copy of the Notice and Claim Form to be available on the settlement website established by the Claims Administrator.

This form and manner of providing notice to the Settlement Class satisfy the requirements of due process, Rule 23, and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15

U.S.C. § 78u-4(a)(7). The Notice and Summary Notice "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them.'" *Hill v. State St. Corp.*, Civil Action No. 09-12146-GAO, 2015 WL 127728, at *15 (D. Mass. Jan. 8, 2015); *see also Duhaime v. John Hancock Mut. Life Ins. Co.*, No. 96-10706, 1997 WL 888989, at *5 (D. Mass. June 13, 1997) (O'Toole, D.J.) (finding that proposed notice program "constitutes due, adequate, and sufficient notice to all persons entitled to be provided with notice"); *In re Chipcom Corp. Sec. Litig.*, No. 95-11114, 1996 WL 1057531, at *1 (D. Mass. Apr. 29, 1996) (finding that notice program provided "due and adequate notice . . . to all Persons entitled to notice" and "satisfied the requirements of Rule 23 . . . and the requirement of due process").

VI. PROPOSED SCHEDULE

In connection with preliminary approval of the Settlement, the Court must set a final approval hearing date, dates for mailing and publication of the Notice and Summary Notice, and deadlines for submitting claims or for objecting to the Settlement.[6] The Parties respectfully propose the following schedule for the Court's consideration, as agreed to by the Parties and set forth in the proposed Notice Order, which is based on the date the Notice Order is entered and the date for which the Settlement Hearing is scheduled:

Event	**Time for Compliance**
Deadline for mailing the Notice and Claim Form to the Settlement Class ("Notice Date")	20 business days after entry of the Notice Order (Notice Order ¶ 8(b))
Deadline for publishing Summary Notice	10 business days after the Notice Date (Notice Order ¶ 8(d))
Filing of papers in support of final approval of the Settlement, the Plan of Allocation, and Lead Counsel's fee and expense request	35 calendar days before the Settlement Hearing (Notice Order ¶ 27)

[6] The blanks for certain deadlines currently contained in the agreed-upon form of Notice will be filled in once the Court sets those dates and prior to mailing to Settlement Class Members.

Receipt deadline for objections and requests for exclusion from the Settlement Class	21 calendar days before the Settlement Hearing (Notice Order ¶¶ 14, 17, 18)
Filing of reply papers in support of final approval of the Settlement, the Plan of Allocation, and Lead Counsel's fee and expense request	7 calendar days before the Settlement Hearing (Notice Order ¶ 27)
Settlement Fairness Hearing	At the Court's convenience, at least one hundred ten (110) calendar days following the entry of the proposed Notice Order (Notice Order ¶ 5)
Deadline for submitting Claim Forms	120 calendar days after the Notice Date (Notice Order ¶ 11)

If the Court agrees with the proposed schedule, Lead Plaintiffs request that the Court schedule the Settlement Hearing for a date 110 calendar days after entry of the Notice Order, or at the Court's earliest convenience thereafter. For example, if the Court enters the Notice Order by February 16, 2018, Lead Plaintiffs request that the Court schedule the Settlement Hearing for June 6, 2018, or at the earliest date thereafter that is convenient for the Court.

VII. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement; preliminarily certify the Settlement Class and appointment of Lead Plaintiffs as class representatives and Lead Counsel as class counsel, for purposes of the Settlement; approve the form and manner of providing notice of the Settlement to the Settlement Class; and enter the accompanying proposed Notice Order.

DATED: February 9, 2018

Respectfully submitted,

By: */s/James A. Harrod*

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
James A. Harrod (admitted *pro hac vice*)
Rebecca E. Boon (admitted *pro hac vice*)
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
jim.harrod@blbglaw.com
rebecca.boon@blbglaw.com

By: */s/William C. Fredericks*

SCOTT+SCOTT ATTORNEYS AT LAW, LLP
William C. Fredericks (admitted *pro hac vice*)
Sean T. Masson (admitted *pro hac vice*)
The Helmsley Building
230 Park Ave., 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
wfredericks@scott-scott.com
smasson@scott-scott.com

Lead Counsel for Lead Plaintiffs and Proposed Class Counsel for the Settlement Class

BERMAN TABACCO
Steven J. Buttacavoli (BBO #651440)
One Liberty Square
Boston, MA 02109
Tel: (617) 542-8300
Fax: (617) 542-1194
sbuttacavoli@bermantabacco.com

Local Counsel for Lead Plaintiffs

GLANCY PRONGAY & MURRAY LLP
Robert V. Prongay
Joshua L. Crowell (admitted *pro hac vice*)
Alexa Mullarky (admitted *pro hac vice*)
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 201-9150
Facsimile: (310) 201-9160
jcrowell@glancylaw.com
amullarky@glancylaw.com

Additional Counsel for Lead Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

/s/James A. Harrod
James A. Harrod