UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KEVIN L. DOUGHERTY, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. ESPERION THERAPEUTICS, INC., et al. Defendants	Civ. No. 2:16-cv-10089-AJT-RSW CLASS ACTION

JOINT DECLARATION OF RAMZI ABADOU AND RYAN LLORENS IN SUPPORT OF: (A) CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION; AND (B) CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES AND AWARDS TO CLASS REPRESENTATIVES PURSUANT TO 15 U.S.C. § 78u-4(a)(4)

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RAMZI ABADOU and RYAN LLORENS declare as follows:

1. Ramzi Abadou is a partner at Kahn Swick & Foti, LLP ("KSF"), counsel for Lead Plaintiff and Class Representative Ronald E. Wallace ("Wallace").[1]

2. Ryan Llorens is a partner at Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), counsel for Lead Plaintiff and Class Representative Walter J. Minett ("Minett") (collectively, Wallace and Minett are referred to interchangeably herein as "Lead Plaintiffs" or "Class Representatives", and KSF and RGRD are referred to interchangeably as "Lead Counsel" or "Class Counsel").

3. We actively participated in all material aspects of the prosecution and settlement of this action (the "Litigation"), are familiar with the proceedings, and have personal knowledge of the matters set forth herein based on our active supervision and participation in the Litigation.

4. The Settlement provides a recovery of Eighteen-Million Two-Hundred-Fifty Thousand Dollars ($18,250,000) in cash to resolve the claims made in this Action asserted by Lead Plaintiffs Wallace and Minett, both individually and on behalf of the Class, against Defendants Esperion Therapeutics, Inc. ("Esperion" or

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[1] Capitalized terms not otherwise defined herein have the same meaning as those ascribed to them in the Stipulation of Settlement (ECF No. the "Stipulation"). *See* the Court's May 6, 2021 Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order"), ECF No. 212, PageID.14818 ("[U]nless otherwise defined, all terms used herein have the same meanings as set forth in the Stipulation").

the "Company") and Tim Mayleben ("Mayleben"), and is memorialized in the Stipulation filed on April 26, 2021. *See* n.1, *supra*; *see also* ECF No. 211.[2]

5. Pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"), we submit this declaration in support of Class Representatives' motion for: (a) final approval of the Settlement and the proposed Plan of Allocation; and (b) approval of the application of an award of attorneys' fees and expenses to Class Counsel, including an award to Class Representatives for their time representing the Class pursuant to 15 U.S.C. § 78u-4(a)(4).

6. Class Counsels' motion for attorney's fees seeks 32.5% of the Settlement Amount, in the amount of five million nine hundred thirty-one thousand two hundred and fifty dollars ($5,931,250). *See* § VII.A, *infra*. Class Counsel further seek $833,716.99 for their reasonable costs and expenses related to their representation of the Class during the prosecution of this Action. *See* § VII.B, *infra*.

7. Pursuant 15 U.S.C. § 78u-4(a)(4), Class Representatives Wallace and Minett also seek an award of $7,500.00 each to reimburse them for their reasonable costs and expenses (including lost wages) directly relating to their representation of the class. *See* § VII.C, *infra*.

8. As of this writing, we are aware of only one objection to the Settlement.

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[2] Mayleben and Esperion are collectively referred to herein as "Defendants." Collectively, Wallace, Minett, Esperion, and Mayleben are sometimes referred to herein as "the Parties."

It does not challenge the procedural or fairness of the Settlement, but rather addresses the requirements for submitting claims.

I. PRELIMINARY STATEMENT

9. Over the course of five years of thorough investigation, hard-fought litigation, and a vigorously negotiated settlement with the assistance of two experienced mediators—Ms. Michelle Yoshida of Phillips ADR, and later the Hon. Judge Gerald E. Rosen (Ret.)—Lead Plaintiffs and Class Counsel obtained a substantial and valuable Settlement on behalf of members of the certified Class, consisting of all persons or entities who purchased the common stock of Esperion during the period from August 18, 2015 and September 28, 2015, inclusive ("Class Period"; *see* ECF No. 211, PageID.14700). This Court previously entered an order granting preliminary approval of the Settlement. ECF No. 212.

10. This case has been vigorously litigated from the outset, and the Settlement was achieved only after Lead Counsel, *inter alia*: (i) conducted a thorough pre-discovery investigation, reviewing and analyzing numerous relevant publicly available documents (including the Company's SEC filings, conference call transcripts, media reports, and analyst reports), ultimately drafting and filing a detailed amended complaint which eventually survived Defendants' initially successful attempt to have the matter dismissed (*see* § III.B., *infra*); (ii) demonstrated the Lead Plaintiffs' ability to serve as competent managers of this

litigation, later also prevailing on their motion to certify this matter as a class action with Wallace and Minett as Class Representatives (*see* § III.A and § III.I, respectively, both *infra*); (iii) aggressively pursued discovery from Defendants and non-parties alike, culminating in the production and review of over more than 220,000 pages of documents (*see* § III.E.1, *infra*); (iv) took or defended the depositions of 26 fact and expert witnesses, including but not limited to both Lead Plaintiffs, Defendant Mayleben, representatives of the Company pursuant to FED. R. CIV. P. 30(b)(6), and a representative of the United States Food and Drug Administration ("FDA") (*see* § III.F, *infra*); (v) sought partial summary judgment on specific elements of the Class Representatives' claims, while opposing Defendants' motion for summary judgment (*see* § III.J, *infra*); and (vi) engaged in mediation with two qualified and independent mediators, ultimately reaching the Settlement presented here for the Court's approval (*see* § III.D and § III.K, *infra*).

11. As a result of these extensive efforts, Lead Plaintiffs and Lead Counsel obtained a full understanding of the strength and weaknesses of the claims asserted in the Amended Complaint. Though Class Representatives and Class Counsel believe they would ultimately prevail against Defendants, there remained risks that needed to be carefully evaluated when determining the best course of action, and how to best serve the interests of the Class (*i.e.* whether to settle, on what terms,

against which Defendants, or to continue litigating through already-briefed motions for summary judgment, trial, and likely appeal).

12. As summarized below, the allegations made by Class Representatives in their complaint are supported by legal authority and considerable evidence obtained *via* discovery; nevertheless, victory against Defendants was not guaranteed. Certain uncertainties remained with respect to Lead Plaintiffs' ability to overcome the factual and legal defenses marshaled by experienced Defense Counsel.

13. For the reasons detailed below, final approval of the Settlement is warranted, the Plan of Allocation should be approved, and the application by Class Representatives and Class Counsel for an award of attorneys' fees and their expenses should be granted, and Class Representatives' request for personal reimbursement of reasonable costs and expenses should be approved.

14. As detailed herein, the Settlement was reached only after lengthy arm's-length negotiations by experienced and capable counsel for Lead Plaintiffs and Defendants. As part of the negotiations, the Parties engaged in one in-person mediation with Ms. Yoshida of Phillips ADR, and two mediations conducted with Judge Rosen (Ret.) of JAMS. Prior to the first mediation session with Ms. Yoshida in May 2019, the Parties submitted and exchanged briefs with supporting exhibits analyzing the strengths and weaknesses of their respective claims and defenses. In advance of the first mediation with Judge Rosen, the parties submitted a Joint

Mediation Statement. Following this mediation session, the Parties continued their settlement communications facilitated through Judge Rosen.

15. Ultimately, Judge Rosen issued a mediator's proposal of $18.25 million for a global resolution of all claims. On March 10, 2021, the Parties agreed to the proposal, and executed the Terms of Settlement on March 12, 2021.

16. The proposed Settlement is the product of hard-fought litigation and takes into consideration the risks specific to the case. Lead Plaintiffs have expressed their belief that the Settlement is an excellent result for the Class.[3] Class Counsel agrees, based on consideration of, *inter alia*: (i) publicly available information regarding the Company's size and financial resources; (ii) briefing on Defendants' motion to dismiss; (iii) appellate briefing and the Sixth Circuit's ruling on the same; (iv) briefing on Lead Plaintiffs' motion for class certification and summary judgment; (v) briefing on Lead Plaintiffs' motion challenging certain confidential designations; (vi) review and analysis of approximately 222,000 pages produced in this matter; (vii) deposition testimony of 16 fact witnesses and 6 experts; (viii) expert opinions on, *inter alia*, loss causation and damages; (ix) various briefing on numerous discovery-related motions and the Court's associated rulings; and (x) discussions with mediator Judge Rosen during the mediation process.

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[3] *See* accompanying Declaration of Ronald E. Wallace ("Wallace Decl.") and Declaration of Walter J. Minett ("Minett Decl.") (collectively "Lead Plaintiffs' Declarations").

17. Class Counsel obtained considerable evidence supporting Plaintiffs' claims. Had the case proceeded to trial, Class Counsel believe that a jury would render a judgment in favor of Plaintiffs. Nevertheless, the Parties' motion practice, Class Counsel's detailed legal research and investigation, and the mediation process informed Lead Counsel that the case also had many risks to be carefully considered going forward.

18. Defendants' Motion for Summary Judgment made it clear that there were unsettled factual and legal issues to be addressed by the Court and later by a jury at trial. Any of these factual or legal issues could have been decided against Lead Plaintiffs and the Class, resulting in no recovery at all, or a smaller recovery than obtained for the Class in the Settlement. Class Counsel also considered the risks inherent in recovery even if Lead Plaintiffs did win at trial; specifically, Lead Plaintiffs would have to hope that the verdict would survive a likely multi-year appeal process.

19. Moreover, the ongoing COVID-19 pandemic has substantially disrupted the courts, both at the district and appellate level, aggravating the ordinary delays associated with trial and appeal.

20. Lead Plaintiffs and Lead Counsel carefully considered all of these factors in deciding to settle on the terms set forth in the Stipulation. Balancing all of the circumstances and risks both sides faced if the Litigation were to continue, Lead

Plaintiffs and Lead Counsel concluded that settlement on the terms agreed upon is fair and reasonable and is in the best interests of the Class. The Settlement confers a substantial, immediate benefit to the Class and eliminates the significant risks that continued litigation poses at summary judgment, trial, and in any post-trial litigation.

21. It is respectfully submitted that: (i) the Settlement should be approved as fair, reasonable, and adequate; (ii) Class Counsel should be awarded attorneys' fees of 32.5% of the $18.25 million Settlement, litigation expenses of $833,716.99, plus interest on both amounts at the same rate and for the same period as earned by the Settlement Fund; (iii) Class Representatives should be awarded $15,000.00 in the aggregate (at $7,500.00 each), in connection with their representation of the Class, as provided by 15 U.S.C. § 78u-4(a)(4); and (iv) the Plan of Allocation should be approved as fair, reasonable, and adequate, as it was developed by an economic expert and tracks the theory of damages asserted.

22. As described below, Lead Counsel vigorously prosecuted this Litigation on a wholly contingent basis and advanced or incurred all litigation expenses for several years. By doing so, Lead Counsel shouldered the entire risk of an unfavorable result. Lead Counsel neither received any compensation for their efforts, nor been paid their substantial expenses. Thus far, the Litigation has resulted in the investment of over 18,230 hours of attorney, other professional, and paraprofessional time.

23. The fee application for 32.5% of the $18.25 million Settlement Amount is fair and reasonable both to the Class and to Lead Counsel and has been approved by Lead Plaintiffs, thus meriting this Court's approval. The fee is within the range of fees frequently awarded in these types of actions (including class action settlements approved by this Court) and is justified, given the substantial benefits conferred on the Class, the risks undertaken, the quality of representation, and the nature and extent of legal services performed.

24. The requested fee amounts to $5,931,250, plus interest earned thereon. In considering the reasonableness of the requested fee, the Court should consider a range of factors, including the amount of money expended in defense of the allegations at issue, the complexity of the issues, and the more than 18,230 hours expended by Plaintiffs' Counsel in litigating the case.

25. Plaintiffs' Counsel should also be awarded their litigation expenses of $833,716.99 which were reasonably and necessarily incurred in prosecuting this Litigation (KSF, RGRD, The Miller Law Firm, P.C., and Holzer & Holzer, LLC have each submitted separate declarations detailing the expenses incurred by their respective firms in the Litigation). This amount includes costs incurred for: (i) retaining qualified experts, including the preparation of reports and the taking and defending of depositions; (ii) stenographic and videographer services; (iii) travel and lodging for Lead Counsel to attend Court hearings, depositions, and mediations; (iv)

online factual and legal research; (v) creating and managing a database of approximately 222,000 pages of documents produced by Defendants and third-parties; (vi) fees associated with the service of third-party subpoenas; (vii) photocopying, imaging, and printing costs; and (viii) the mediations conducted by Ms. Yoshida and Judge Rosen. As detailed herein, these expenses were reasonably and necessarily incurred to plead Lead Plaintiffs' claims, respond to Defendants' Motion to Dismiss and appeal the judgment, conduct appropriate discovery and evaluate the evidence obtained, research legal issues arising throughout the Litigation, seek class certification, fully brief motions for summary judgment, assess the case's strengths and weaknesses, and obtain the successful Settlement on the terms proposed.

26. Finally, as detailed herein, the Plan of Allocation was developed by an economic expert and tracks the theory of damages asserted and therefore should be approved as fair, reasonable, and adequate.

27. Because the proposed Settlement, Plan of Allocation, and request for attorneys' fees and expenses are reasonable, fair, and have the full approval of Class Representatives, Class Counsel respectfully request that the Court grant final approval of the Settlement, approve the Plan of Allocation, and award Class Counsel the requested attorneys' fees and litigation costs and expenses, including reimbursement of Class Representatives' time pursuant to 15. U.S.C. § 78u-4(a)(4).

II. SUMMARY OF LEAD PLAINTIFFS' ALLEGATIONS

28. This is a securities fraud class action on behalf of all purchasers of Esperion common stock between August 18, 2015 and September 28, 2015, inclusive (the "Class Period"), against Esperion and its Chief Executive Officer ("CEO") (collectively, "Defendants") for violating §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") and SEC Rule 10b-5 promulgated thereunder.

29. During the Class Period, Esperion was a clinical stage pharmaceutical company, developing cholesterol lowering drugs. Its lead product candidate, called ETC-1002, was intended to lower LDL cholesterol levels in patients who were either statin-intolerant or already taking the maximum tolerable dose of statins and required further relief.[4] Mayleben was the Company's CEO, President, and a member of its Board of Directors.

30. The Class Representatives allege that, by the beginning of August 2015, Esperion had completed ETC-1002's Phase 2b clinical trials and was meeting with the FDA to discuss moving forward with the Phase 3 segment of the approval process. Up to that point, Esperion had not contemplated a lengthy and expensive cardiovascular outcomes trial ("CVOT") prior to ETC-1002 being approved.

[4] A statin is a class of lipid lowering medication, commonly used to treat high LDL cholesterol levels. ETC-1002 was subsequently approved for use by the FDA and is marketed under the name "Nexletol."

Defendants understood that "[a]ny such study would be costly and time consuming and, regardless of the outcome, would adversely affect [Esperion's] development timeline and financial condition."

31. Class Representatives further allege that, on August 17, 2015, acknowledging the importance of its meeting with the FDA, Esperion relayed to investors material events from its "End of Phase 2" meeting ("EOP2 Meeting") with the FDA. However, it is alleged that the Defendants misrepresented to investors the substance of that meeting, stating *inter alia* that the Company would not be required to complete a CVOT to gain approval of ETC-1002.

32. Plaintiffs have further alleged that after the market closed on September 28, 2015, Esperion revised its earlier statements, now stating that the FDA had actually "encouraged the Company to initiate a cardiovascular outcomes trial promptly." Defendants for the first time acknowledged that it may be necessary to have a completed CVOT prior to approval. Investors immediately recognized the material difference in the two different characterizations of the same meeting.

33. Plaintiffs have further alleged that, when the market closed on September 28, 2015, Esperion stock closed at $35.09 per share. The next day, Esperion's stock opened at $26.00 per share. By the time the market digested the truth on September 29, 2015, Esperion share prices plummeted almost 50% from the previous close, and ended the day at $18.33 per share on unusually high volume.

34. Defendants have denied these allegations, any wrongdoing, and admit no liability for investors' losses.

III. HISTORY OF THE CASE

A. Appointment of Lead Plaintiffs

35. On January 12, 2016, Kevin L. Dougherty filed the original complaint in the Eastern District of Michigan seeking recovery on behalf of "all persons who purchased Esperion common stock" between August 18, 2015 and September 28, 2015, (inclusive). ECF No. 1. Pursuant to the PSLRA, on March 14, 2016, Wallace and Minett timely and jointly moved to be appointed lead plaintiff and their counsel, KSF and RGRD (respectively), to be appointed lead counsel. ECF No. 18.

36. On April 5, 2016, the Court appointed Wallace and Minett as Lead Plaintiffs and approved their selection of KSF and RGRD as co-Lead Counsel to represent the putative class. ECF No. 25. Lead Plaintiffs actively participated in all significant aspects of the case throughout the entirety of the Litigation and Lead Counsel regularly communicated with Lead Plaintiffs regarding the status of the case. Lead Plaintiffs also preserved, collected, searched for, and produced information during the Litigation and in response to Defendants' discovery requests. Lead Plaintiffs were deposed and attended the hearing on class certification. Lead Plaintiffs were kept apprised of all settlement negotiations with Defendants and ultimately approved the Settlement. *See* Declarations of Ronald Wallace and Walter

Minett, submitted herewith.

B. Preparing and Defending the Amended Complaint

1. District Court Proceedings

37. On May 20, 2016, Lead Plaintiffs filed the Amended Complaint for Violation of the Federal Securities Laws (ECF No. 29; "Amended Complaint"), asserting claims under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder against all Defendants and claims under § 20(a) of the Exchange Act against the Individual Defendant, on behalf of a class of all persons who purchased Esperion common stock between August 18, 2015 and September 28, 2015 (inclusive), and who were damaged by Defendants' alleged violations of the federal securities laws.

38. In connection with their investigation, Lead Counsel analyzed voluminous materials, including: (a) Esperion's SEC filings; (b) transcripts of Esperion's public presentations and earnings conference calls; (c) analyst reports regarding Esperion and its industry and market; (d) media and news reports; and (e) analysis of the price movement of Esperion stock.

39. The Amended Complaint alleges that Defendants misled investors concerning the substance of an August 11, 2015 EOP2 Meeting between Company representatives and the FDA concerning the ongoing and future development of ETC-1002. More specifically, the Amended Complaint alleges that Defendants: (a)

misrepresented the FDA's position regarding the necessity of a completed Cardiovascular Outcomes Trial ("CVOT") before ETC-1002 would be approved by the FDA; and (b) that there was a clear regulatory path for approving ETC-1002. *See, generally,* ECF No. 29.

40. On July 5, 2016, Defendants moved to dismiss the Amended Complaint. ECF No. 30. Defendants first argued that Lead Plaintiffs failed to satisfy the heightened pleading standards of the PSLRA. *See, generally, id.*, PageID.590-92. Defendants further argued that Plaintiffs did not allege facts giving rise to an inference of scienter—a necessary element of a securities fraud claim. *Id.*, PageID.592-601. Specifically, Defendants also contended that the allegations in the Amended Complaint were non-actionable because: (i) the Complaint failed to allege sufficient facts establishing that the August 17, 2015 statements were objectively false at the time they were made; and (ii) the statements were forward-looking in nature and thus protected by the PSLRA's safe harbor provisions. *Id*., PageID.601-04. In a footnote, Defendants argued that loss causation was not established in the Amended Complaint's allegations. *Id*., PageID.592, n.4.

41. On August 19, 2016, after Lead Counsel expended significant time conducting legal research and considering the issues presented, Lead Plaintiffs opposed Defendants' Motion to Dismiss, arguing *inter alia*, that Defendants' statements were materially false or misleading, as evidenced by the disparity

between the Company's August 17 and September 28, 2015 statements, and that the statements were not forward looking in nature because they referred to events which had already taken place during the EOP2 Meeting. ECF No. 32, PageID.712-17. Lead Plaintiffs also countered Defendants' scienter arguments, including but not limited to an argument rebutting Defendants' suggestion that there was no motive for the alleged fraud. *Id*., PageID.717-26. The opposition likewise answered Defendants' footnote regarding loss causation. *Id*., PageID.726-27. On September 13, 2016, Defendants filed a reply. ECF No. 35.

42. Oral argument took place before the Court on November 21, 2016. On December 27, 2016, the Court granted Defendants' Motion to Dismiss and entered a final Judgment. ECF Nos. 38 and 39. On January 24, 2017, Lead Plaintiffs filed a Motion to Alter or Amend the December 27, 2016 Judgment and for Leave to File the Proposed Second Amended Complaint ("Motion to Alter or Amend"). ECF No. 40. On February 15, 2017, the Court ordered Defendants to Respond to Lead Plaintiffs' Motion to Alter or Amend. ECF No. 41. Defendants did so on March 1, 2017. ECF No. 42.

43. On May 22, 2017, the Court issued an Order denying Lead Plaintiffs' Motion to Alter or Amend and denying leave for Lead Plaintiffs to file the Proposed Second Amended Complaint. ECF No. 43.

44. On June 19, 2017, Lead Plaintiffs notified Defendants and the Court

that they appealed the December 27, 2016 final Judgment and the later May 22, 2017 Opinion and Order denying Lead Plaintiffs' Motion to Alter or Amend, as well as all prior orders that had merged into the Judgment. ECF No. 44.

2. Appellate Court Proceedings

45. Lead Plaintiffs filed their opening appellate brief on September 14, 2017 (Dkt. No. 20) arguing, *inter alia*, that the Court: (i) never explained why Defendants' inconsistent statements regarding the CVOT did not support an inference of scienter; (ii) did not address any of the analysts' reports which condemned the inconsistent statements; (iii) mistakenly rejected an inference of recklessness; and (iv) erroneously found that no evidence demonstrated Defendants' knowledge and that Defendants' statements were forward-looking.

46. Class Representatives further argued that the Court erred in: (i) refusing to consider and accept as true additional facts alleged in their proposed Second Amended Complaint and in denying their Rule 59(e) motion for reconsideration; and (ii) creating a rule that Plaintiff-Appellants were required to bring newly discovered evidence to the Court's attention within a handful of days during a holiday.

47. Defendants-Appellees filed their corrected brief on November 16, 2017 (Dkt. No. 27) wherein they argued that the Court's rulings on scienter and safe harbor should be affirmed because, *inter alia*: (i) the Amended Complaint did not allege a single particularized fact that Mayleben knew that any statement was

materially false or misleading when made and the more compelling inference was that the Company's statements accurately reflected his knowledge at the time; and (ii) Esperion's statements were protected under the safe-harbor doctrine of the PSLRA as forward-looking statements. Defendants-Appellees further argued that the Court acted within its discretion in denying Plaintiff-Appellants' Rule 59(e) motion for reconsideration because it did not identify any new evidence.

48. On December 7, 2017, Plaintiff-Appellants submitted their reply brief (Dkt. No. 30) asserting, *inter alia*, that Defendants-Appellees: (i) mischaracterized Plaintiff-Appellants' claims; (ii) failed to provide a plausible explanation of Mayleben's contradictory statements or one that was more compelling than Plaintiffs-Appellants'; and (iii) did not offer a coherent argument explaining how Defendants-Appellees' past- and present-tense statements were forward-looking.

49. On December 22, 2017, counsel for Plaintiff-Appellants filed an additional citation referencing a relevant case decided by the Sixth Circuit on December 13, 2017, a week after it submitted its reply. (Dkt. No. 34).

50. On March 15, 2018, Steven F. Hubachek (RGRD) argued on behalf of Plaintiff-Appellants to a three-judge panel consisting of the Honorable Circuit Judges Eugene E. Siler, Jr., Alice M. Batchelder, and Bernice B. Donald. Deborah S. Birnbach argued on behalf of Defendants-Appellees. Plaintiff-Appellants argued, *inter alia*, that Defendants-Appellees' September 28, 2015 statements directly

contradicted their August 17, 2015 statements and, under controlling precedent a company's top executives are presumed to be aware of the most important facts concerning that company, which here was the FDA's approval of its medication. Plaintiff-Appellants further argued that the Court failed to undertake a detailed analysis of the purported forward-looking statements.

51. Defendants-Appellees argued, *inter alia*, that: (i) Plaintiffs-Appellants did not allege particularized facts establishing Mayleben's state of mind or benefits derived by Defendants-Appellees from making the statements; and (ii) the Company's forward-looking statement was merely an update concerning what the Company believed it was hearing from the FDA.

52. On September 27, 2018, the Sixth Circuit Court of Appeals reversed the Judgment entered on December 27, 2016, and remanded the case to the District Court for further proceedings consistent with the Sixth Circuit's decision. *Dougherty v. Esperion Therapeutics, Inc.*, 905 F.3d 971 (6th Cir. 2018). *See also* ECF No. 46; Dkt. No. 37-2.

53. Defendants-Appellees petitioned for rehearing or rehearing *en banc* on October 11, 2018 (Dkt. No. 38). Plaintiffs-Appellants responded and opposed this request on November 6, 2018. (Dkt. No. 40).

54. The original panel reviewed the petition for rehearing and concluded that the issues raised in the petition were "fully considered" during the original

submission. The petition was then circulated to the full court and "no judge . . . requested a vote on the suggestion for rehearing en banc" and the petition was therefore denied. *Dougherty v. Esperion Therapeutics, Inc.*, 2018 U.S. App. LEXIS 34036 (6th Cir. 2018); *see also* Dkt. No. 41-1.

3. Remand to the District Court

55. The Sixth Circuit issued its Mandate on December 11, 2018. *See* ECF No. 47. On February 5, 2019, counsel for all Parties appeared before the Court to address, *inter alia*, a proposed scheduling order and related deadlines. Thereafter, the Court formally re-opened the case on February 6, 2019, signing the Scheduling Order eight days later. *See* ECF Nos. 52 and 56, respectively.

C. Defendants Answer the Amended Complaint, And the Parties Enter a Protective Order to Protect Confidential Information

56. Defendants filed their Answer to the Amended Complaint on December 26, 2018. *See* ECF No. 48 ("Answer"). Following a review of the Answer, counsel for Lead Plaintiffs wrote to counsel for Defendants on January 14, 2019, contending that the Answer and its affirmative defenses contained several deficiencies. Defendants responded to the letter on January 24, 2019, disputing their Answer was deficient in any respect but proposed amendments to its paragraph 9, and potential revisions to the asserted affirmative defenses to address Plaintiffs' concerns.

57. The Parties met and conferred telephonically on January 24, 2019, with Defendants requesting that Plaintiffs identify the Answer's deficiencies with FED. R.

CIV. P. 8 with greater specificity. On January 30, 2019, Lead Plaintiffs responded with a three-page letter, which among other things contended that Defendants' Twenty-Seventh (application of statutes of limitation or repose), Twenty-Eighth (laches), Thirty-Seventh (estoppel, and other equitable doctrines), and Forty-Third (absence of indispensable parties) Affirmative Defenses were noncompliant with the Federal Rules and applicable case law, further providing reasons for same. Plaintiffs further contended that other Affirmative Defenses would simply negate elements of the Amended Complaint's allegations.

58. Following additional meet and confer negotiations, Defendants filed their Amended Answer March 28, 2019, with the consent of the Court. *See* ECF Nos. 61 and 62.

59. Additionally, the Parties negotiated and provided to the Court a Stipulation and [Proposed] Order Governing the Treatment of Confidential Information, which the Court executed on February 4, 2019. ECF No. 50 ("Protective Order"). The Protective Order provided a mechanism for the Parties to designate, use and file certain information as confidential, as well as a procedure for the challenge of such designations. *Id*., PageID.1130-1132, 1134-1135, 1140.

D. First Attempts at Mediation

60. As discovery got underway, the Parties decided to attempt settlement of the case, and retained Ms. Yoshida of Phillips ADR, a mediator with extensive

experience in settling complex litigation, including securities class actions.

61. We prepared and submitted to Ms. Yoshida a 25-page mediation statement. Although discovery was far from complete, Lead Plaintiffs' submission was supported by 20 exhibits including, *inter alia*, materials produced by the FDA in response to Lead Plaintiffs' subpoena duces tecum. *See* § III.E.1.b, *infra*.

62. Defendants also prepared and submitted a 25-page mediation statement, supported by 29 exhibits and three affidavits by fact witnesses. In advance of the in-person mediation session, Lead Plaintiffs carefully reviewed the Defendants' submission, its supporting material, and analyzed the merits of the arguments advanced therein. Responses were exchanged on April 18, 2019.

63. On May 2, 2019, the Parties engaged in a full day mediation before Ms. Yoshida. This session did not result in a resolution of the Action, but at the urging of Ms. Yoshida, the Parties agreed to and did continue discussions by phone and email, further conferring with the mediator on an as-needed basis following material developments in the litigation.

E. Fact Discovery

64. On February 26, 2019, the Parties exchanged their written Initial Disclosures, as required by FED. R. CIV. P. 26.

1. Lead Plaintiffs' Written Discovery

a) Written Discovery to Defendants

65. Lead Plaintiffs immediately pursued a robust written discovery program against Defendants, serving their first requests on January 25, 2019. During discovery, Lead Plaintiffs served upon Defendants: (i) four sets of requests for production of documents; (ii) three sets of interrogatories; and (iii) two sets of requests for admissions.

66. The Parties' objections, responses, and answers to one another's discovery requests prompted numerous meet-and-confer sessions to address and negotiate the scope and manner of each Party's responses, objections and, where applicable, document productions. Through extensive efforts over the course of several months, the Parties successfully came to agreement on many issues, including search terms and relevant custodians for Defendants' document production. The Parties' comprehensive negotiations around the scope of document discovery resulted in several compromises that alleviated the need to raise disputes with the Court.

67. To control costs and maximize efficiency of the document review process, the documents were placed in an electronic database, Relativity, created and maintained by RGRD, which allowed Lead Counsel to search for and code documents through Boolean-type searches as well as by characteristics such as

author and/or recipient, type of document, date, and Bates number. The database also enabled Lead Counsel to cull and organize witness-specific documents in folders for streamlined review.

68. Junior attorneys performed the initial document review, to limit costs where practicable. All aspects of the attorney document review were carefully supervised to eliminate inefficiencies and to ensure a high-quality work-product. Lead Counsel held weekly internal conferences to discuss important documents, discovery preparation efforts, and case strategy.

69. Throughout discovery, Lead Counsel's attorneys and paraprofessionals not only analyzed and organized the information for use in depositions and in anticipation of trial, but also identified gaps in the productions for follow-up purposes. Additionally, detailed review of Defendants' privilege log resulted a later challenge to Defendants' claims of privilege. *See* § III.H.4, *infra*.

70. Ultimately, Defendants produced more than 152,460 pages in response to Lead Plaintiffs' discovery requests.

b) Subpoenas Duces Tecum

71. Lead Plaintiffs' investigation led to the identification of dozens of non-parties likely to have relevant and discoverable information. Lead Plaintiffs subpoenaed over 40 third parties, who produced 13,851 documents totaling more

than 67,485 pages. The following chart outlines the subpoenas Lead Plaintiffs issued during discovery:

Date Issued:	Entity Subpoenaed:	Description:
3/13/2019	UBS Securities LLC ("UBS")	Investment bank with analysts covering Esperion
3/13/2019	Chardan Capital Markets, LLC	Investment bank with analysts covering Esperion
3/13/2019	Credit Suisse (USA), LLC	Investment bank with analysts covering Esperion
3/13/2019	JMP Securities LLC	Investment bank with analysts covering Esperion
3/13/2019	J.P. Morgan Securities LLC	Investment bank with analysts covering Esperion
3/21/2019	United States Food and Drug Administration	Federal agency with information surrounding End of Phase 2 Meeting and development of ETC-1002
4/5/2019	The Weisscom Group, LTD. ("W2O")	Defendants' external publicist/media consultant retained during events in question
5/15/2019	Red House Communications, Inc.	Defendants' external publicist/media consultant retained during events in question
6/6/2019	Pacira Biosciences, Inc.	Venture capital firm
6/6/2019	Bonnie Goldmann and Goldmann Consulting, LLC	Venture capital firm
6/6/2019	Jan Lessem	Former Esperion employee
6/7/2019	Clermont Partners, LLC	Venture capital firm
6/11/2019	Aisling Capital Management L.P.	Venture capital firm
6/11/2019	Alta Partners L.P.	Venture capital firm
6/11/2019	Domain Associates, LLC	Venture capital firm

Date Issued:	Entity Subpoenaed:	Description:
6/11/2019	Longitude Capital	Venture capital firm
6/11/2019	Scott Braunstein, M.D.	Current (or former) member of Esperions' Board of Directors
6/11/2019	Patrick Enright	Current (or former) member of Esperions' Board of Directors
6/11/2019	Dov A. Goldstein, M.D.	Current (or former) member of Esperions' Board of Directors
6/11/2019	Antonio M. Gotto, Jr.	Current (or former) member of Esperions' Board of Directors
6/11/2019	Daniel Janney	Current (or former) member of Esperions' Board of Directors
6/11/2019	Mark E. McGovern, M.D	Current (or former) member of Esperions' Board of Directors
6/11/2019	Gilbert S. Omenn	Current (or former) member of Esperions' Board of Directors
6/11/2019	Nicole Vitullo	Current (or former) member of Esperions' Board of Directors
8/16/2019	Goodwin Procter	Defendant Esperion's regulatory counsel
8/19/2019	Barclay's Capital, Inc.	Investment bank with analysts covering Esperion
8/19/2019	Citibank, N.A.	Investment bank with analysts covering Esperion
8/19/2019	Needham & Company, LLC	Investment bank with analysts covering Esperion
8/19/2019	RBC Capital Markets, LLC	Investment bank with analysts covering Esperion
8/19/2019	Stifel Nicolaus & Company Incorporated	Investment bank with analysts covering Esperion
8/22/2019	FINRA Regulation, Inc.	Self-regulatory financial organization

Date Issued:	Entity Subpoenaed:	Description:
12/5/2019	Verizon Wireless Services, LLC	Wireless telephone services provider used by fact witnesses
12/5/2019	AT&T Mobility, LLC	Wireless telephone services provider used by fact witnesses
12/5/2019	Sprint Corporation	Wireless telephone services provider used by fact witnesses
12/5/2019	Keith Lenden	Former Esperion employee
1/29/2020	Myrtle Potter & Company	Life sciences consulting firm
2/10/2020	Pentwater Capital Management, LP	Private investment firm; investor in Esperion
5/22/2020	G. Alexander Fleming and Kinexum LLC	Defendants' retained expert

2. Defendants' Discovery to Lead Plaintiffs

72. Defendants served their First Set of Interrogatories to Lead Plaintiffs and First Requests for Production on May 17, 2019.

73. Lead Plaintiff Minett responded and objected on June 14, 2019 and produced documents that same day. Minett later supplemented this production on July 3, 2019.

74. Lead Plaintiff Wallace responded and objected to this discovery on June 17, 2019 and produced documents the same day. Wallace later supplemented this production on July 3, 2019 and July 5, 2019.

75. Defendants served their Second Set of Requests for the Production of Documents to Lead Plaintiffs directed solely to Lead Plaintiff Wallace on July 19,

2019. Wallace responded and objected on August 19, 2019. Contemporaneously, Wallace also served his Supplemental Responses and Objections to Defendants' First Interrogatories, producing an additional 30 pages of documents.

76. Defendants served their Second Set of Interrogatories to Lead Plaintiffs and their First Set of Requests for Admission to Lead Plaintiffs on February 28, 2020.

77. Lead Plaintiffs Minett responded and objected to Defendants' Second Set of Interrogatories on March 30, 2020 and jointly responded to Defendants' Requests for Admission on March 30, 2020.

F. Fact and Expert Witness Depositions

78. Between July 10, 2019 and March 6, 2020, Lead Plaintiffs prepared for, took, or defended in-person deposition testimony from the following witnesses:

Witness	Description	Date	Location
Ronald Wallace	Lead Plaintiff (defending)	Jul. 10, 2019	San Francisco, CA
Chad Coffman	Lead Plaintiffs' Market Efficiency Expert (defending)	Jul. 26, 2019	Chicago, IL
Walter Minett	Lead Plaintiff (defending)	Jul. 31, 2019	Jacksonville, FL
Dr. Paul Gompers	Defendants' Retained Economics Expert (market efficiency)	Sept. 16, 2019	Boston, MA
Dr. James Smith	Deputy Division Director, FDA	Oct. 25, 2019	Silver Spring, MD
Dr. Mary McGowan	Chief Medical Officer for Esperion	Jan. 9, 2020	Manchester, NH
April Seiler	Senior Director of Project Management, Esperion Therapeutics,	Jan. 14, 2020	Ann Arbor, MI

Witness	Description	Date	Location
	Inc.		
Denise Powell	Esperion's External Corporate Communications Consultant (at Red House Consulting, LLC)	Jan. 30, 2020	San Francisco, CA
Dr. Gbola Amusa	Analyst covering Esperion for Chardan Capital Markets	Feb. 18, 2020	New York, NY
Dr. Narenda Lalwani	Executive VP of Research & Development, Chief Operating Officer for Esperion	Feb. 26, 2020	Ann Arbor, MI
Patrick Enright	Member of Esperion Board of Directors	Feb. 28, 2020	Redwood City, CA
Dr. Scott Braunstein	Member of Esperion Board of Directors	Mar. 3, 2020	Philadelphia, PA
Marianne Andreach	VP of Product Planning for Esperion	Mar. 6, 2020	Morristown, NJ

79. Additionally, Lead Plaintiffs prepared for the deposition of Defendants' attorney Deborah Birnbach. On February 5, 2020, the Lead Plaintiffs served a deposition and document subpoena, and requested contemporaneous production of certain documents. Defendants and the witness objected to the subpoena, asserting claims of attorney-client privilege, and later filed a joint motion to quash. *See* ECF Nos. 124 (sealing motion), 125 (filed under seal).[5] *See also* § III.H.5, *infra*.

80. The COVID-19 pandemic triggered nationwide travel restrictions that

[5] An earlier-filed iteration of this motion, filed at ECF No. 120 was stricken for being mislabeled as a sealed exhibit rather than a sealed motion. *See* ECF No. 123. Defendants were given leave to re-file under the proper label. *Id*., PageID.5967. In its order, the Court further noted it had been "indulgent" of the Parties' preference for sealing documents but cautioned that future filings—particularly those addressing the merits of the claims—should more narrowly tailor their redactions due to increased public interest in dispositive motions. *Id*., PageID.5967-68.

precluded further in-person deposition testimony. Following several meet-and-confer sessions, during which the Parties discussed the practical realities of ongoing litigation during the pandemic and ways to mitigate the pandemic's dilatory effect on this Action, the Parties negotiated and executed a four-page "Protocol for Remote Depositions" on May 5, 2020.

81. In accordance with the negotiated Protocol for Remote Depositions, the following fact and expert witness depositions were conducted *via* videoconference, with the assistance and technological support of the court reporter service Aptus:

Witness	Description	Date	Location
Nancy Fitzsimmons	Esperion's External Corporate Communications Consultant (at W2O Group)	May 7, 2020	Videoconference
Dr. Vamil Divan	Analyst covering Esperion for Credit Suisse	May 28, 2020	Videoconference
Rick Bartram	In his capacity as 30(b)(6) Representative of Esperion for selected topics	June 16, 2020	Videoconference
Rick Bartram	In his individual capacity, VP of Finance for Esperion	June 17, 2020	Videoconference
Ashley Hall	In her individual capacity as Senior VP of Global Regulatory Affairs for Esperion, and as 30(b)(6) Representative of Esperion for selected topics	June 23, 2020	Videoconference
Mindy Lowe	Investor Relations and Communications Manager for Esperion	July 1, 2020	Videoconference
Dr. Phil Lavin	Lead Plaintiffs' Regulatory Expert (defending)	July 16, 2020	Videoconference
Tim Mayleben	Defendant, CEO of Esperion	July 22, 2020	Videoconference
Chad Coffman	Lead Plaintiffs' Damages Expert	July 31, 2020	Videoconference

Witness	Description	Date	Location
	(defending)		
Carl Seiden	Defendants' Regulatory Expert	Aug. 6, 2020	Videoconference
Dr. Paul Gompers	Defendants' Damages Expert	Aug. 11, 2020	Videoconference
Harvey Pitt	Plaintiffs' Retained Regulatory Expert (Securities), Former Chairman of the SEC (defending)	Aug. 13, 2020	Videoconference
Dr. Zan Fleming	Defendants' Retained Regulatory Expert (FDA)	Aug. 20, 2020	Videoconference

82. In addition to the above, the Lead Plaintiffs intended to obtain further deposition from Defendant Tim Mayleben at the time that the settlement was reached. *See, e.g.,* § III.H.6, *infra*.

G. Expert Discovery

83. Lead Plaintiffs and Defendants each retained and relied upon expert witnesses at various stages of this litigation. Each of these experts was deposed, as set forth above. *See* § III.F, *supra*.

1. Lead Plaintiffs' Experts

84. At Class Certification, Lead Plaintiffs retained Chad Coffman, an economist, to opine on market efficiency and to establish that the Class was entitled to invoke the "fraud on the market presumption" at the Class Certification stage. In connection with the above, Mr. Coffman performed an event study and prepared a 98-page written report (including exhibits), which Lead Plaintiffs used to support their motion to certify the Class. *See* ECF No. 65-13. Mr. Coffman also prepared a rebuttal report to address arguments raised in opposition by Defendants. *See* ECF

No. 97-2; *see also* ECF No. 98 at Ex. A.

85. Responding to Defendants' subpoena, Mr. Coffman further produced documents relied upon in the preparation of his reports.

86. Additionally, in connection with their motion for summary judgment and in anticipation of trial, Lead Plaintiffs further retained Mr. Coffman to opine on loss causation and the extent of available damages. *See* ECF No. 175, PageID.8842-8921 (Coffman Ex. 1).

87. Lead Plaintiffs also retained Harvey Pitt, former Chairman of the SEC, to opine on the long-standing practices of investors, market participants, public companies, and regulators. Mr. Pitt opined, *inter alia*, that Esperion's failure to timely correct or update its August Press Release, despite notice from the FDA that the Company's August Press Release contained inaccurate information, was inconsistent with marketplace expectations of the disclosure obligations assumed and fulfilled by public companies. In support of his opinions, Mr. Pitt provided a 55-page written report (including exhibits), which Lead Plaintiffs used to support their motion for partial summary judgment and oppose Defendants' motion for summary judgment. *See* ECF No. 173 at Pitt Ex. 1; *see also* ECF No. 187.

88. Finally, Lead Plaintiffs retained Philip T. Lavin, Ph.D., a biostatistician, FDA panel member, and pharmaceutical consultant, to opine on interactions between the FDA and Esperion preceding the August 11, 2015 EOP2 Meeting and

Defendants' August 17, 2015 public statements. Dr. Lavin opined, *inter alia*, that the August 17, 2015 press release did not inform readers that a pre-approval CVOT in the HeFH and ASCVD patient populations remained a possibility and instead, conveyed that a pre-approval CVOT would not be required for approval in those patient populations. In connection with the above, Dr. Lavin provided a 69-page written report (including exhibits) in anticipation of trial.

89. Lead Plaintiffs produced the documents Mr. Pitt and Dr. Lavin relied upon to prepare their respective reports on August 30, 2019.

2. Defendants' Experts

90. At Class Certification, Defendants retained Paul A. Gompers, Ph.D., an economist, to respond to Mr. Coffman's expert report and materials produced therewith. Dr. Gompers specifically evaluated market efficiency and damages. In connection with the above, Dr. Gompers did not perform an event study but rather relied on Mr. Coffman's. Nevertheless, Dr. Gompers prepared a 66-page written report (including exhibits), which Defendants relied upon in their efforts to rebut the "fraud on the market presumption" at Class Certification. *See* ECF Nos. 86-3 (redacted version) and 87-2 (filed under seal).

91. Additionally, in connection with their motion for summary judgment and in anticipation of trial, Defendants further retained Dr. Gompers to opine on loss causation and the extent of available damages. *See* ECF No. 188-10.

92. Defendants also retained Dr. G. Alexander Fleming, a board-certified endocrinologist and former Medical Officer at the FDA, to opine on whether Esperion reasonably could have believed, as of August 17, 2015, that it had a clear regulatory path forward for FDA approval of ETC-1002 as an adjunct to maximally tolerated statin therapy in HeFH and ASCVD patients before the completion of a CVOT. In connection with the above, Dr. Fleming prepared a 40-page written report (including exhibits), which Defendants used to support their motion for summary judgment. *See* ECF No. 179-6.

93. Dr. Fleming prepared a 19-page rebuttal report, used by Defendants to oppose Plaintiffs' partial motion for summary judgment. *See* ECF No. 188-12.

94. Defendants also retained Carl Seiden, a former pharmaceutical industry securities analyst, to review and respond to the reports of Mr. Coffman, Mr. Pitt, and Dr. Lavin. In doing so, Mr. Seiden opined on how reasonable investors in biopharmaceutical companies with clinical stage drugs would have understood the August 17, 2015 disclosures and whether those disclosures had an impact on sell side-securities analysts' views of ETC-1002 and Esperion. In connection with the above, Mr. Seiden provided a 61-page written report (including exhibits), which Defendants used to support their opposition to Plaintiffs' partial motion for summary judgment. *See* ECF No. 188-12.

95. Defendants produced the documents Dr. Gompers relied upon to

prepare his initial report on August 30, 2019, totaling 72 documents (2,019 pages) of material.

H. Discovery-Related Motions

96. Several discovery disputes arose between the Parties from time to time, but despite their efforts they were not always able to resolve them. Motion practice, as set forth below, followed.

1. Lead Plaintiffs Challenge Certain Confidentiality Designations by Defendants

97. Pursuant to the applicable provisions of the Protective Order, on May 15, 2019, Lead Plaintiffs sent Defendants written objections to the "Confidential" designation of information contained in four email chains between the Company and the FDA, as well as ten non-party analyst reports.

98. On June 12, 2019, Lead Plaintiffs filed their Motion to Challenge Defendants' Designation of Confidential Material, arguing that: (i) Defendants could not show good cause for affording the challenged documents "confidential" treatment; (ii) the emails contained no "confidential" information contemplated by Rule 26, the Protective Order, or other applicable law; and (iii) the analyst reports do not warrant confidential treatment. ECF No. 68 (motion to seal); ECF No. 69 (filed under seal). The matter was referred to Judge Magistrate Judge Whalen, who set a hearing date for July 25, 2019. ECF Nos. 70, 71, and 72. Defendants opposed the motion on June 26, 2019, and Lead Plaintiffs replied on July 3, 2019. *See* ECF

Nos. 74 and 75, respectively.

99. Prior to oral argument, the Parties met and conferred by telephone, thereafter submitting a Statement of Resolved and Unresolved Issues. ECF No. 77.

100. The Parties appeared before Magistrate Judge Whalen for oral argument on July 25, 2019, who granted the motion. ECF No. 79 (order); ECF No. 83 (transcript). Defendants objected and sought review of that decision by this Court. ECF Nos. 84 (sealing motion) and 85 (filed under seal). Lead Plaintiffs opposed Defendants' objections, filing their response on August 27, 2019. ECF Nos. 88 (sealing motion) and 89 (filed under seal). Defendants, in turn, replied on September 3, 2019. ECF Nos. 92 (sealing motion) and 93 (filed under seal).

101. On August 24, 2020, the Court overruled Defendants' objections, and ordered that the email chains at issue be unsealed. *Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 158429, at *3 (E.D. Mich. 2020); *see also* ECF No. 165.

2. Defendants' Motion to Strike Wallace's Deposition Errata

102. Following Ronald Wallace's deposition, he timely submitted errata on August 19, 2019, accompanied by four additional brokerage statements. Defendants objected to the errata, contending, *inter alia*, that Mr. Wallace's errata impermissibly made substantive changes to his testimony and that his deposition should be re-opened. Lead Plaintiffs disputed Defendants' characterization of the errata and the

scope of permissible changes allowed in the Sixth Circuit.

103. On October 21, 2019, Defendants filed a motion to: (i) strike the errata; (ii) re-open Mr. Wallace's deposition; and (iii) stay further depositions of Esperion employees, pending additional questioning to Mr. Wallace. Lead Plaintiffs prepared and filed an opposition to Defendants' motion to strike. ECF Nos. 101 (motion to seal) and 102 (filed under seal). Defendants filed their reply on November 11, 2019. ECF Nos. 103 (sealing motion) and 104 (filed under seal). This motion, however, was ultimately mooted. *See* n.11, *infra*.

3. Lead Plaintiffs' Motion to Compel UBS to Respond to Subpoena Duces Tecum

104. On January 10, 2020, Lead Plaintiffs filed a Motion to Compel Non Party UBS Securities LLC ["UBS"] to Produce Documents Responsive To Lead Plaintiffs' Subpoena. ECF No. 107. The motion sought analyst communications spanning a four-month period from UBS's lead stock analyst who published reports about Esperion. *Id*., PageID.5070. On January 15, 2020, the Court referred the motion to Magistrate Judge Whalen, who in turn scheduled March 19, 2020 to hear argument on the motion. ECF Nos. 108 and 109.[6]

105. UBS opposed on January 31, 2020, contending the discovery sought was disproportionate to the needs of the case, and unduly burdensome. ECF No. 114,

[6] Lead Plaintiffs and UBS thereafter negotiated and stipulated to a modified briefing schedule, which Judge Whalen approved. ECF No. 112.

PageID.5173-79. UBS further sought sanctions against Lead Plaintiffs. *Id*. at PageID.5181-82. Lead Plaintiffs replied on February 10, 2020. ECF No. 118.

106. After briefing on the motion was completed, Lead Plaintiffs and UBS conducted an in-person meet and confer on February 25, 2020 to comply with their obligations under Civil L.R. 37.1. During that conference, Lead Plaintiffs and UBS found a satisfactory solution, and subsequently submitted their stipulation and proposed order to Magistrate Judge Whalen, who signed an order executing the stipulation. ECF No. 140.

4. Lead Plaintiffs' Motion to Compel Documents Withheld on Claims of Attorney-Client Privilege

107. On October 18, 2019, Defendants produced to Lead Plaintiffs a privilege log pursuant to FED. R. CIV. P. 26(b)(5). The Parties met and conferred several times, resulting in two additional revisions to the log being produced on November 15 and 27, 2019.

108. Lead Plaintiffs wrote to Defendants on December 18, 2019, contending, *inter alia*, that the privilege log contained numerous deficient entries, and that Defendants had withheld documents in whole or in part which were not entitled to claims of privilege. Defendants responded on January 7, 2020, disputing Lead Plaintiffs' contention and offering authorities supporting Defendants' contentions that the privilege log and withheld documents were proper in all respects. The Parties

continued to meet and confer, leading to the production of additional documents to Lead Plaintiffs.

109. On February 5, 2020, Lead Plaintiffs filed a motion to compel the production of documents which Defendants withheld on claims of privilege. ECF Nos. 116, 117. Defendants opposed on February 25, 2020. ECF No. 126 (filed under seal). Lead Plaintiffs replied on February 26, 2020. ECF Nos. 127 (sealing motion) and 128 (filed under seal). On March 30, 2020, the Court referred this motion to compel (and another pending discovery motion) to Magistrate Judge Whalen for argument. ECF No. 139.

110. On May 26, 2020, Lead Plaintiffs filed a Notice of Recent Factual Developments in Further Support of Motion to Compel Production of Documents Withheld on Claims of Privilege, advising the Court of recent deposition testimony, and production of additional documents supporting their argument. ECF Nos. 148 (sealing motion) and 149 (filed under seal).

111. Defendants attempted strike the notice on May 27, 2020, contending that Plaintiffs' notice was, in fact, a "disguised sur-reply" which was prohibited without leave of Court. ECF No. 150. Lead Plaintiffs opposed. ECF No. 153. The motion to strike was also referred to Magistrate Judge Whalen. ECF No. 155.[7]

[7] Magistrate Judge Whalen later formally denied the motion to strike on January 12, 2021, finding that the Notice was not a de facto sur-reply (notwithstanding some "explanatory narrative"), and that Defendants, who had a "full and fair opportunity

112. Lead Plaintiffs continued to monitor jurisprudence for recent developments supporting the motion to compel, and on June 29, 2020, they filed a Notice of Recent Supplement Authority to alert the Court of the opinion reached in *Chabot v. Walgreens Boots All., Inc.*, 2020 U.S. Dist. LEXIS 107547 (M.D. Pa. 2020), which addressed claims of attorney client privilege of draft press releases circulated between client and counsel prior to publication.

113. On September 15, 2020, Magistrate Judge Whalen set the motion to compel (and other pending discovery motions) for hearing to take place *via* videoconference on October 8, 2020. *See* ECF Nos. 172 and 182. In accordance with his *Special Requirements for Discovery Motions*, Magistrate Judge Whalen ordered the Parties to meet and confer regarding the outstanding discovery motions and advise the Court of any resolutions. The Parties did so.

114. On October 6, 2020, the Parties submitted a Statement of Resolved and Unresolved Issues, outlining the matters remaining outstanding concerning the motion to compel filed at ECF No. 117. *See* ECF No. 183.[8]

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to present all of their facts and arguments" were not prejudiced by its filing. ECF No. 207, PageID.14552-53.

[8] The Statement also informed the Court that the Parties were able to resolve the outstanding issues concerning the outstanding Defendants' motion to quash (ECF No. 124), Lead Plaintiffs' motion to re-open depositions and continue testimony (ECF No. 169), as well as Defendants' motion to strike Mr. Wallace's deposition errata (ECF No. 100), though the lattermost motion was not scheduled

115. On October 8, 2020, the Parties argued the motion to compel *via* videoconference. *See* Transcript of Remote Motion Hearing at ECF No. 184. Magistrate Judge Whalen permitted supplemental briefing, which the Parties submitted. *See* ECF Nos. 185 and 186.

116. On November 30, 2020, Magistrate Judge Whalen found that subject matter waiver had been triggered, and ordered Defendants to produce "all drafts of both the August and September press releases, in addition to the drafts that Esperion voluntarily disclosed to the FDA and the SEC [including] counsel's notes, editorial comments, memoranda, and emails related to the drafting of and revisions to the various drafts." *Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 222811, at *12-13 (E.D. Mich. 2020); ECF No. 197. Judge Whalen stayed the order on Defendants' request, pending objections. ECF Nos. 201, 202, and 203.

117. The Parties fully briefed Defendants' objections. *See* ECF Nos. 204 (objections), 205 (response), and 206 (reply). These objections were still pending when the Parties reached this Settlement agreement.

5. Defendants' Motion to Quash Deposition Subpoena to Deborah Birnbach

118. Based on materials provided in discovery, Lead Plaintiffs believed they had good cause to take the deposition of Defendants' trial counsel Deborah

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for argument before Magistrate Judge Whalen at that time. *See* ECF No. 183, PageID.12787 n.1.

Birnbach, and on February 5, 2020, Lead Plaintiffs served her with a deposition subpoena for March 23, 2020. The subpoena further commanded the attorney to further produce documents upon her appearance.

119. Defendants (and the witness) jointly moved to quash the deposition. ECF Nos. 119 (sealing motion) and 120 (filed under seal).[9]

120. Lead Plaintiffs opposed the motion to quash. ECF No. 129 (sealing motion); ECF No. 130 (filed under seal). Therein, Lead Plaintiffs argued that: (i) the *Shelton* test did not apply, given the attorney's apparent firsthand knowledge of the underlying facts which formed the basis of the litigation; and (ii) even if the *Shelton* test did apply, Lead Plaintiffs had satisfied all its elements and were therefore entitled to depose the attorney. *Id*.

121. Defendants prepared and filed their reply brief on February 27, 2020, seeking leave of Court to file it under seal. ECF Nos. 131 (sealing motion), 132 (sealed reply brief). Lead Plaintiffs opposed Defendants' motion to file under seal and filed an opposition with the Court on March 11, 2020. ECF No. 133. On March 18, 2020, Defendants filed a reply to address the arguments Lead Plaintiffs raised

[9] These documents were later stricken and re-filed with leave of Court on February 25, 2020. *See* ECF No. 123 (order striking filings), ECF No. 124 (redacted motion to quash and supporting documents), ECF No. 125 (sealed motion and supporting documents).

against continued sealing. *See* ECF No. 138. Two days later, the Court granted Defendants' sealing motion. *See* Text-Only Order dated March 20, 2020.

122. On March 12, 2020, Lead Plaintiffs filed a motion for leave to file a sur-reply in further opposition to Defendants' motion to quash. *See* ECF Nos. 134 (sealing motion), 135 (filed under seal). Lead Plaintiffs contended that a sur-reply was justified to address new arguments raised for the first time by Defendants in their reply brief.[10] Before argument, however, the Parties resolved this dispute. *See* ECF No. 183.[11] Magistrate Judge Whalen formally granted the Defendants' motion to quash, issuing reasons for doing so. ECF No. 198; *see also Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 223221 (E.D. Mich. 2020).

6. Lead Plaintiffs' Motion to Continue Depositions and Compel Deposition Testimony

123. As the last depositions were taken, some open items remained, arising either from supplemental productions of documents or objections made during certain depositions. Lead Plaintiffs and Defendants conferred several times to

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[10] In a Text-Only Order dated March 20, 2020, the Court also granted Lead Plaintiffs leave to file their sur-reply brief. Lead Plaintiffs did so on April 14, 2020. *See* ECF Nos. 146 (redacted version) and 147 (filed under seal).

[11] The Parties further informed the Court they had further resolved the Defendants' motion to quash (ECF No. 124), Lead Plaintiffs' motion to re-open depositions and continue testimony (ECF No. 169), and Defendants' motion to strike Mr. Wallace's deposition errata (ECF No. 100), though the lattermost motion was not scheduled for argument before Judge Whalen at that time. *See* ECF No. 183, PageID.12787 n.1.

negotiate the circumstances—if any—under which one or more of the depositions could be re-opened to resume examination on limited topics.

124. On August 26, 2020, Lead Plaintiffs moved to resume examination of: (i) Ashley Hall, a fact witness and one of Esperion's designated 30(b)(6) corporate representatives; (ii) Marianne Andreach, a fact witness; and (iii) Defendant Tim Mayleben. *See* ECF Nos. 168 (sealing motion) and 169 (filed under seal). The motion was referred by the Court to Magistrate Judge Whalen. ECF No. 170.

125. Defendants opposed the motion on September 9, 2020, arguing that Lead Plaintiffs had not met their burden of a particularized showing of necessity to establish good cause to re-open any of the depositions for Hall, Andreach, or Mayleben. ECF No. 171. Lead Plaintiffs prepared and filed a reply, arguing the merits of resuming the three above-mentioned depositions. ECF No. 180.

126. Ultimately, the Parties agreed that Lead Plaintiffs would not pursue further deposition testimony from Hall or Andreach, while Defendant Mayleben would appear for an additional two hours' deposition time. Defendants further agreed to acknowledge the authenticity of documents ultimately produced pursuant to the earlier order compelling production of privileged materials (*see* § III.H.4, *supra*.), should it be upheld. *See* ECF No. 199, PageID.14420-21.[12]

[12] At the time that the Settlement was reached, Defendant Mayleben's additional two hours' deposition time remained open.

I. Motion for Class Certification

1. Initial Briefing and Argument Before Magistrate Judge Whalen

127. Lead Plaintiffs moved to certify the class on June 6, 2019. After outlining the standards for class certification, Lead Plaintiffs asserted that: (i) the class is numerous; (ii) questions of law and fact are common to the class; (iii) Lead Plaintiffs' claims are typical of the class; and (iv) Lead Plaintiffs are adequate, thus satisfying the requirements of FED. R. CIV. P. 23(a). Addressing the requirements of Rule 23(b)(3), they also argued that (i) common questions of law and fact predominated; and (ii) that a class action is the superior method for resolving this dispute. Finally, Lead Plaintiffs demonstrated that class counsel met the statutory requirements of Rule 23(g). *See*, *generally*, ECF Nos. 65 and 66.

128. On June 26, 2019, Defendants filed their Brief in Opposition to Plaintiffs' Motion for Class Certification. Defendants contended that: (i) Plaintiffs did not satisfy Rule 23(b)(3) because the class-wide presumption of reliance did not apply; (ii) Plaintiffs failed to articulate a damages methodology satisfying *Comcast* and Rule 23(b)(3); and (iii) Plaintiffs were not adequate class representatives or typical class members. *See*, *generally*, ECF Nos. 86 and 87.

129. Lead Plaintiffs filed their Reply in Support of Motion for Class Certification on October 7, 2019 and argued that: (i) Defendants failed to rebut Plaintiffs' overwhelming evidence of market efficiency; (ii) Defendants made no

attempt to rebut the presumption of reliance; (iii) Plaintiffs' damages methodology was consistent with their theory of liability; (iv) Wallace and Minett were adequate; and (v) Wallace was typical. *See*, *generally*, ECF Nos. 97 and 98. As with all other documents filed after the entry of the Protective Order, Lead Plaintiffs prepared a sealing motion to file confidential aspects of the briefing under seal.

130. On November 20, 2019, Lead Plaintiffs filed a Notice of Supplemental Authority in Further Support of Class Certification to bring to the Court's attention a decision in *Roofer's Pension Fund v. Papa*, 2019 U.S. Dist. LEXIS 197491, (D.N.J. 2019) which addressed certain adequacy and typicality concerns raised by Defendants against Mr. Wallace. ECF No. 106.

131. The matter was referred to Magistrate Judge Whalen, who held a class certification hearing on November 26, 2019. *See* ECF Nos. 94 (referral order), 96 (notice of hearing). Lead Plaintiffs and Counsel for Lead Plaintiffs appeared and participated in the hearing before Magistrate Judge Whalen. At oral argument, Mr. Abadou focused his attention on: (i) price impact; (ii) the relative importance of the *Cammer* and *Krogman* factors when determining market efficiency; and (iii) Mr. Wallace's adequacy. In turn, Defendants' counsel argued: (i) that there was no presumption of reliance and therefore no rebuttable presumption; (ii) that Plaintiffs failed to prove market efficiency due to deficiencies in the methodology and conclusions; and (iii) Mr. Wallace's atypicality and inadequacy.

132. On February 3, 2020, Lead Plaintiffs submitted supplemental authority, advising the Court of *Weiner v. Tivity Health, Inc.*, 334 F.R.D. 123 (M.D. Tenn. 2020), which addressed certain arguments made by Defendants in relation to market efficiency at the time of the alleged fraud. ECF No. 115.

133. On April 9, 2020, Lead Plaintiffs submitted additional supplemental authority, advising the Court of *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020), a recent decision addressing Defendants' price impact arguments. ECF No. 142.

134. Magistrate Judge Whalen entered his Opinion and Order Granting Class Certification on May 31, 2020.; *see* ECF No. 152; *see also Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 94757 (E.D. Mich. 2020). The Parties jointly moved the Court to amend the Opinion and Order Granting Class Certification to address certain technicalities and to re-title the document as a "Report and Recommendation" on June 10, 2020. *See* ECF No. 154. On June 19, 2020, Magistrate Judge Whalen granted the joint motion to amend. *See* ECF No. 157; *see also Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 108072 (E.D. Mich. 2020).

2. Subsequent Objections and Arguments Are Made to Judge Tarnow, Who Granted Class Certification

135. On July 6, 2020, Defendants objected to Magistrate Judge Whalen's Report and Recommendations Granting Class Certification ("R&R"). ECF No. 159.

Defendants outlined five objections to the R&R: (i) the fraud-on-the-market presumption of reliance did not apply because Plaintiffs failed to prove that the market for Esperion stock was efficient during the Class Period; (ii) Defendants had rebutted the presumption of reliance under *Halliburton II*; (iii) Lead Plaintiffs had not articulated a damages methodology satisfying Rule 23(b)(3); (iv) Plaintiffs had failed to establish their adequacy under Rule 23(a)(4); and (v) Wallace's trading activity rendered him atypical under Rule 23(a)(3). *Id*.

136. Lead Plaintiffs responded to Defendants' objections on July 20, 2020, arguing that: (i) the R&R correctly found that Plaintiffs established market efficiency; (ii) Defendants had not rebutted the presumption of reliance; (iii) Plaintiffs' damages methodology was consistent with their theory of liability; (iv) Wallace and Minett were adequate Class Representatives; and (v) Wallace was a typical Class Representative. ECF Nos. 160 and 161.

137. Defendants filed their Reply Brief in Support of [Their] Objections to Report and Recommendation on Plaintiffs' Motion for Class Certification on July 27, 2020. ECF No. 162. There, they represented that Plaintiffs retreated from *de novo* review, failed to satisfy the demanding burden under Rule 23, and that purportedly "irrelevant" discovery "injected into the record" by Plaintiffs remained confidential. *Id.* at 6-7.

138. The Court heard Defendants' objections on October 6, 2020.

Defendants argued that: (i) Plaintiffs had not proven that a class-wide presumption of reliance should apply under Rule 23(b); (ii) the fifth *Cammer* factor was not given proper weight in the market efficiency analysis; and (iii) Mr. Coffman's event study was purportedly defective. *See*, Hearing Transcript (E.D. Mich. Oct. 6, 2020). Lead Plaintiffs offered counterarguments to each, and the Court took the motion under advisement. *See id.*; *see also* Minute Entry dated Oct. 6, 2020.

139. The Court overruled Defendants' objections and certified the class on November 19, 2020. ECF No. 193; *Dougherty v. Esperion Therapeutics*, 2020 U.S. Dist. LEXIS 216515 (E.D. Mich. 2020). In its Order, the Court opined that: (i) Plaintiffs demonstrated market efficiency (*id*. at *7-9); (ii) Defendants "failed to rebut the fraud-on-the-market presumption by showing lack of price-impact" (*id*. at *16); (iii) Plaintiffs satisfied predominance under FED. R. CIV. P. 23(b)(3) (*id*. at *17-20); (iv) Wallace and Minett satisfied the adequacy requirements needed for class certification (*id*. at *23-24); and (v) Wallace's trading activity in Esperion common stock did not render him atypical of the class (*id*. at *27). Accordingly, the Court certified the class and appointed Wallace and Minett as Class Representatives and KSF and RGRD as Class Counsel. *Id*.

J. Summary Judgment

140. When the Parties reached a Settlement agreement, cross motions for summary judgment were pending before the Court. They are described below.

1. Plaintiffs' Motion for Partial Summary Judgment

141. Lead Plaintiffs moved for partial summary judgment on certain elements of their claims, namely: (i) that Defendants' statements of August 17, 2015 were objectively false or misleading at the time that they were made; (ii) that said statements were material to investors at the time that they were made; (iii) that the August 17, 2015 statements were made with scienter; and (iv) that the Defendants statements of August 17, 2015 and the subsequent corrective disclosures of September 29, 2015 caused damages to Class Representatives and the Class. *See* ECF Nos. 173 through 175, inclusive (sealing motion and redacted documents); *see also* ECF Nos. 176 through 178, inclusive (filed under seal).

142. Extensively researched and carefully written, Lead Plaintiffs' Motion for Partial Summary Judgment was further supported by 86 exhibits, including some 65 documentary exhibits, 2 expert reports (by Lead Plaintiffs' retained experts Harvey Pitt and Chad Coffman), and 19 deposition transcripts (or excerpts from same). *See*, *generally*, ECF No. 173-2 (Declaration of Alexander L. Burns and Index of Exhibits in Support of Lead Plaintiffs' Motion for Partial Summary Judgment).

143. Defendants mustered three main arguments to oppose Lead Plaintiffs' motion: (i) that Plaintiffs' evidence actually established a ***lack*** of scienter; (ii) that the Plaintiffs' loss causation methodology was flawed; and (iii) that Defendants' statements concerning the necessity of a CVOT prior to approval, a "clear regulatory

path forward," and that Phase 3 testing remained "on track" were not materially false or misleading. *See*, *generally*, ECF No. 188.

144. Lead Plaintiffs replied to the Defendants' arguments, noting that Defendants did not appear to challenge the materiality of Defendants' August 17, 2015 statements. ECF No. 195. Among other things, Lead Plaintiffs' reply clarified the nature of Defendants' alleged misrepresentations (*see id.*, PageID.13907), provided additional context supporting finding scienter and falsity (*see id.*, PageID.13908-15), and further responded to arguments that no possible motive existed for the alleged fraud (*see id.*, PageID.13915-17). The reply further distinguished between loss causation and mitigation of damages, arguing that Defendants' opposition argued the latter but not the former. *Id*., PageID.13917-20.

145. The reply was supported by an additional 33 exhibits, including 21 documents and 12 relevant excerpts from deposition transcripts. *See*, *generally*, ECF No. 195-1 (Declaration of Alexander L. Burns and Index of Exhibits in Support of Lead Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment).

2. Defendants' Motion for Summary Judgment

146. Defendants filed their own motion, requesting that the Court find that Lead Plaintiffs had not established scienter or loss causation claims. *See*, *generally*, ECF No. 179. Defendants' motion contained a 50-page memorandum, and approximately 430 pages of exhibits, including 34 documents, 2 expert reports, and

12 excerpts from deposition transcripts. *See*, *generally*, ECF No. 179-1.

147. Lead Plaintiffs opposed Defendants' motion with a 26-page counterstatement of material facts. ECF No. 187, PageID.12933-60. Lead Plaintiffs' argument in opposition was thoroughly researched and systematically refuted each of Defendants' contentions that no genuine issue of material fact evinced a lack of scienter and loss causation. *Id*., PageID.12960-78. Lead Plaintiffs' opposition contained an additional 17 exhibits, including 11 documents, 1 transcript from an earlier hearing, and 6 excerpts from relevant deposition testimony. *See*, generally, ECF No. 187-1 (Declaration of Kevin A. Lavelle and Index of Exhibits in Support of Lead Plaintiffs' Opposition to Defendants' Motion for Summary Judgment).

148. Defendants filed their reply brief on November 20, 2020. ECF No. 194.

3. Lead Plaintiffs Opposed Defendants' *Daubert* Motion to Exclude Expert Testimony

149. Relatedly, Defendants sought to exclude the expert testimony of Chad Coffman, CFA at both summary judgment and at trial. ECF No. 189, PageID.13370. Defendants' 13-page memorandum of points and authorities was supported by four exhibits, including three expert reports (including one by Defendants' own economist, Dr. Paul Gompers) and excerpts from Mr. Coffman's deposition of July 26, 2019. *See*, *generally*, ECF No. 189-2 (Declaration of Morgan R. Mordecai In Support of Defendants' Motion to Exclude Expert Testimony of Chad Coffman, CFA). Among other things, the Defendants argued that Mr. Coffman's methodology

was flawed, failing to disaggregate purportedly confounding information which may have contributed to the decline of Esperion's share price following the disclosures of September 28, 2015.

150. Lead Plaintiffs opposed the motion on November 6, 2020, arguing that Defendants simply disagreed with Mr. Coffman's well-founded conclusion that there was no confounding information to disaggregate, and that such disagreement was hardly grounds to exclude the expert's testimony under FED. R. EVID. 702 and the admissibility standards described in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and its progeny. *See*, *e.g.*, ECF No. 190, PageID.13720; *id*., PageID.13738-43. The opposition brief further outlined Mr. Coffman's background, qualifications, and the foundation for his opinions (*see id*., PageID.13722-34), and the legal standards for admissibility (*see id.*, PageID.13734-36). More than 75 pages of exhibits supported the response, including excerpts from Coffman's and Gompers' deposition transcripts, four analyst reports regarding Esperion originally published following the corrective disclosures of September 28, 2015, and an analyst call transcript from September 28, 2015.

151. Defendants filed a 13-page reply. ECF No. 191.

152. The motion was unresolved at the time that the Settlement was reached.

K. Later Attempts at Mediation Yield Success

153. Following dispositive motion briefing, the Parties engaged in a second

mediation session *via* videoconference, as an in-person session was precluded by the ongoing COVID-19 pandemic. This time, the mediation was conducted by Judge Rosen of JAMS, a former Chief Judge in this District, who was well positioned to advise the Parties of the strengths and weaknesses of their respective cases.

154. In advance of the mediation, the Parties submitted a Joint Mediation Statement with evidentiary support to Judge Rosen on October 29, 2020. The mediation session followed on November 3, 2020. While the Parties did not reach a resolution at that time, Judge Rosen continued to facilitate negotiations through telephonic conferences with the Parties.

155. After further discussion, the Parties held a third mediation session on February 3, 2021. Shortly thereafter, Judge Rosen provided a mediator's proposal to settle the Litigation for $18.25 million. The Parties conferred both separately and together, finally reaching an agreement in principle on March 10, 2021.

156. The Parties executed the Settlement Term Sheet on March 12, 2021, and subsequently negotiated the substantive terms of the agreement. They executed a Stipulation of Settlement on April 26, 2021, and thereafter Class Representatives filed their unopposed motion for preliminary approval of the Settlement. *See* ECF Nos. 209, 210, and 211. The Court granted the motion on May 6, 2021. ECF No. 212.

IV. ADEQUACY OF THE SETTLEMENT

A. The Settlement is in the Best Interests of the Class and Merits Approval

1. Review of Sixth Circuit Factors Support Approval

157. Lead Counsel respectfully refers the Court to the Memorandum of Law in Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation (the "Settlement Memorandum"), submitted herewith, for a full analysis of the facts and law supporting final approval of the Settlement. Courts in the Sixth Circuit consider several factors to determine whether a settlement is fair, reasonable, and adequate, including: '"(1) the risk of fraud or collusion [*i.e.*, whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining]; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.'" *Sheick v. Auto. Component Carrier LLC*, 2010 U.S. Dist. LEXIS 110411, at *43 (E.D. Mich. 2010) (collecting cases). All factors support the proposed Settlement.

158. First, courts "presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary." *Id.* at *53. Here, the Parties engaged in arm's-length mediation with two experienced mediators, and there is no

evidence undermining the integrity of their agreement. *See id.* at *54-57 (approving of arm's-length negotiating process). As part of the mediation process, the Parties submitted and exchanged detailed position statements and gave thorough presentations at each mediation session explaining each side's position and responding to opposing arguments. This factor further supports approval.

159. Second, the "complexity, expense and likely duration of the litigation" weigh in favor of this Settlement. "Securities litigation class actions are inherently complex," and "the complexity of these cases cannot be overstated." *New England Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008) ("*Fruit of the Loom*"). On top of the inherently complex nature of securities litigation, this case additionally required analysis of pharmaceutical industry relationships and the drug approval process.

160. Furthermore, substantial time and expense has already been invested in this Litigation and continuing to litigate would consume even more time and money. At the time the Parties reached their agreement in principle to settle, the Court had not yet ruled on Lead Plaintiffs' Motion for Partial Summary Judgment or Defendants' Motion for Summary Judgment. Although Lead Counsel believe that their motion would have been granted, prevailing at the summary judgment stage is rare. In addition to the risks posed by Defendants' Motion for Summary Judgment,

Lead Plaintiffs also faced substantial risks going forward, including that: (a) Defendants would act upon their intent to appeal the Court's ruling on Class Certification; (b) Defendants would appeal the Court's ruling granting Lead Plaintiffs' Motion to Compel Privilege Log; (c) some or all of Lead Plaintiffs' experts—including experts on disclosures, regulatory processes, market efficiency, loss causation, and damages—might offer opinions that the Court excludes or that are not accepted by the jury; and (d) that Esperion might be unable to satisfy a judgment or settlement at a later time. Moreover, even if Lead Plaintiffs succeeded in proving all elements of their case at trial and obtained a jury verdict, Defendants would likely have appealed—a process that could possibly extend for years and might lead to a smaller recovery, or no recovery at all.

161. Third, the Parties have begun preparing for oral arguments on summary judgment. If neither party prevails at this stage, the Parties will begin preparations for trial, which will expend significant time and resources. This factor therefore weighs in favor of the Settlement.

162. Fourth, the likelihood of success on the merits also weighs in favor of the Settlement. Although Lead Counsel believe that Lead Plaintiffs would have ultimately prevailed on the merits at trial, Lead Counsel understand that the risks discussed above made the outcome of this Litigation uncertain. Defendants have consistently pointed to the lack of insider trading, arguing that Mayleben and others

had no motive to intentionally mislead investors, and have further argued that Plaintiffs had not marshaled sufficient evidence establishing that Defendants acted with extreme recklessness. Defendants have further claimed that ETC-1002's subsequent approval without the necessity of a completed CVOT further establishes an absence of scienter on August 17, 2015. Ultimately, the jury would need to gauge the credibility of Esperion's witnesses—which could have saved or doomed Plaintiffs' claims. Moreover, Plaintiffs would need to establish the full extent of class-wide damages, and address Defendants' arguments regrading confounding information on the September 28, 2015 disclosure date.

163. The proposed Settlement is well above the average recovery in securities class actions of this size. If Lead Plaintiffs prevailed on liability on ***all*** of their loss causation and damages theories, the maximum damages suffered by the Class is approximately $61 million. This amount includes the damages resulting from stock losses on two trading days following an alleged corrective disclosure. However, there is a significant risk that Lead Plaintiffs would not be able to prove loss causation. The $18.25 million Settlement thus represents approximately 30% of the Class's maximum recoverable damages, which is well above the range of other securities class action settlements with similar total losses. *See*, *e.g.*, Laarni T. Bulan & Laura E. Simmons, *Cornerstone Research: Securities Class Action Settlements: 2020 Review and Analysis*, at 6 (2021) (showing the median settlement percentage

for similarly sized cases in 2020 was only 5.3%).[13] *See also New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 237 (E.D. Mich. 2016) (compiling cases approving settlements representing as little as 3.8% of total damages), *aff'd sub nom. Marro v. N.Y. State Teachers' Ret. Sys.*, 2017 U.S. App. LEXIS 24073 (6th Cir. 2017).

164. The fifth and sixth factors, the opinions of class counsel and class representatives and the reactions of absent class members, also support settlement. Lead Counsel are experienced securities litigators and brought that experience to bear in concluding that the Settlement is in the best interests of the Class. Lead Plaintiffs are fully aware of the risks of continuing the Litigation and support the Settlement as well. *See* Wallace Decl., ¶ 10; *see also* Minett Decl., ¶ 10. Moreover, while notice of the Settlement has been widely disseminated to potential Class Members, Lead Counsel have received only one objection to the Settlement from Class Members. While this objection will be addressed in due course after the August 2, 2021 deadline to make objections has passed, this solitary objection does not challenge the merits of the Settlement, but rather only the requirement that a claim form be submitted. The reaction of the Class sufficiently weighs in favor of approval of the Settlement.

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[13] https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2020-Review-and-Analysis, (last accessed June 18, 2021)

2. Other Reasons for Approval

165. Additionally, the Settlement is in the best interest of the Class because it provides an immediate and certain recovery to the Class, which has already waited almost ***six*** years since the Defendants' initial statements of August 17 and September 28, 2015. Continued litigation will only further delay their recovery—if any—during resolution of the pending summary judgment motions, pre-trial motions, trial, and likely appeal.

166. Moreover, the ordinary delays associated with these proceedings are further aggravated due to the Court's backlog of cases which have been unable to proceed to trial due to the still-ongoing COVID-19 pandemic. The immediate recovery is a favorable result, given the time value of money and the delays that Class Members have already endured.

167. Also, the public interest strongly favors resolving this case through the proposed Settlement, which will eliminate the need for further litigation, provide a significant recovery for the Class years before any final verdict would otherwise be rendered, and free limited judicial resources. In addition, Lead Counsel are not aware of any charges or claims brought by the SEC or the Justice Department concerning the fraud allegations made here. Therefore, the Settlement is likely the only recovery available to Class Members to compensate them for their alleged economic harm, which further advances the public interest.

168. Accordingly, Lead Counsel and Lead Plaintiffs respectfully submit that the Settlement should be approved. It provides Class Members with a substantial benefit now, avoids the perils of continued litigation, and has been thoroughly vetted by Lead Counsel, Lead Plaintiffs, and an experienced mediator, all of whom believe it is in the best interests of the Class.

V. LEAD PLAINTIFFS' COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL ORDER REQUIRING ISSUANCE OF NOTICE

169. The Preliminary Approval Order, among other things, appointed Gilardi & Co., L.L.C. as the Claims Administrator, and directed the Claims Administrator to cause the mailing of the Notice of Pendency and Proposed Settlement of Class Action (the "Notice") and the Proof of Claim and Release (the "Proof of Claim") (together, the "Notice Package") to all potential Class Members identifiable with reasonable effort, no later than May 27, 2021. ECF No. 212, PageID.14820 at ¶ 8. The Preliminary Approval Order also directed the Claims Administrator publish the Summary Notice both in *Investor's Business Daily* and once over a national newswire service, not later than seven calendar days after the Notice Date. *Id*., PageID.14820-21 at ¶ 9.

170. The Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), submitted herewith, states that over 13,000 Notice Packages have been mailed to

potential Class Members, banks, brokers, and nominees beginning on May 27, 2021. Murray Decl., ¶¶ 6-11. The Summary Notice was published in *Investor's Business Daily* and transmitted over *BusinessWire* on May 31, 2021. *Id*. at ¶ 12. A toll-free telephone number is available to answer class member inquiries, as is a dedicated website for Class Members to find answers to frequently asked questions, note relevant deadlines, and obtain important documents related to the Settlement. *Id*. at ¶¶ 13-14. The site further offers an online option for submitting claims. *Id*. at ¶ 14.[14]

VI. THE PLAN OF ALLOCATION

171. Pursuant to the Preliminary Approval Order, and as set forth in the Notice, all Class Members who want to participate in the distribution of the Net Settlement Fund (*i.e.*, the Settlement Fund less (a) any Notice and Administration Costs, (b) any Taxes, and (c) the Fee and Expense Award) must submit a valid Proof of Claim with all required information postmarked or submitted online no later than September 24, 2021. *See* Notice (attached as Exhibit A to the Murray Decl.), at 1. As set forth in the Notice, the Net Settlement Fund will be distributed among Class Members who submit valid Proof of Claim forms according to the Plan of Allocation approved by the Court.

172. Lead Plaintiffs' damages expert developed the proposed Plan of

[14] All briefs and declarations supporting the Settlement and counsel's fee and expense request will be posted to the website upon their filing with the Court.

Allocation in consultation with Lead Counsel. Lead Counsel believe that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses due to the conduct alleged in the Amended Complaint.

173. The Plan of Allocation is set forth at pages 9-11 of the Notice. In developing the Plan of Allocation, Lead Plaintiffs' damages expert calculated the estimated amount of artificial inflation in Esperion's common stock which was allegedly caused by Defendants' alleged false and misleading statements and/or material omissions. In calculating the estimated artificial inflation allegedly caused by Defendants' alleged misrepresentations and omissions, Lead Plaintiffs' damages expert considered the market and industry adjusted price change in Esperion's stock price following the alleged corrective disclosures of September 28, 2015.

174. Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase of Esperion common stock during the Class Period that is listed in the Proof of Claim and for which adequate documentation is provided. The calculation of Recognized Loss Amounts will depend upon several factors, including when the Esperion stock was purchased and sold, and at what price. In general, the Recognized Loss Amount will be the difference between the estimated artificial inflation on the date of purchase and the estimated artificial inflation on the date of sale, or the difference between the actual purchase price and sales price,

whichever is less. *See* Notice at 9-11. The sum of a Claimant's Recognized Loss Amounts is the Claimant's recognized claim and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their recognized claims. *See id.* at 4, 9-11.

175. The Plan of Allocation was designed to equitably allocate the proceeds of the Net Settlement Fund among Class Members based on the losses they suffered on transactions in Esperion stock that were attributable to the conduct alleged in the Amended Complaint. Accordingly, Lead Counsel respectfully submit that the Plan of Allocation is fair and reasonable and should be approved by the Court.

176. As noted above, as of this writing, more than 13,000 copies of the Notice, which contains the Plan of Allocation, and advises Class Members of their right to object to the proposed Plan of Allocation, have been sent to potential Class Members. *See* Murray Decl., ¶ 11. To date, no Class Members have objected to the proposed Plan of Allocation.

VII. THE FEE AND EXPENSE APPLICATION SHOULD BE GRANTED

177. In addition to seeking final approval of the Settlement and Plan of Allocation, Lead Counsel are applying to the Court for an award of attorneys' fees of 32.5% of the Settlement Fund. Lead Counsel also request litigation costs and expenses incurred in connection with this Litigation from the Settlement Fund in the amount of $833,716.99. Finally, Lead Counsel request reimbursement to Lead

Plaintiffs in an aggregate amount of $15,000.00 related to their representation of the Class pursuant to 15 U.S.C. § 78u-4(a)(4). The legal authorities supporting the requested attorneys' fees and expenses are set forth in the concurrently filed Memorandum of Law in Support of Their Motion For (1) An Award Of Attorneys' Fees And Expenses And (2) Class Representatives' Reimbursement Of Costs And Expenses (the "Fee Memorandum"). The primary factual bases for the requested fees and expenses are summarized in the chart below, and in the following sections.[15]

SUMMARY CHART BY FIRM			
FIRM	**HOURS**	**LODESTAR**	**EXPENSES**
Kahn, Swick & Foti	8,513.70	$ 5,060,985.00	$ 391,344.16
Robbins Geller Rudman & Dowd	9,351.95	$ 6,065,804.50	$ 440,195.14
The Miller Firm	269.15	$ 174,583.00	$ 1,819.19
Holzer & Holzer	98.75	$ 81,531.25	$ 358.50
TOTAL	**18,233.55**	**$11,382,903.75**	**$833,716.99**

A. Class Counsel's Fee is Fair and Reasonable and Should Be Awarded

178. Based on the quality of the result, the work performed, the significant

[15] Plaintiffs' Counsels' respective declarations provide further detail of the costs and expenses incurred. *See* Declaration of Ryan Llorens Filed on Behalf of RGRD; Declaration of Ramzi Abadou Filed on Behalf of KSF; Declaration of Sharon S. Almonrode Filed on Behalf of The Miller Law Firm, P.C.; and Declaration of Corey D. Holzer Filed on Behalf of Holzer & Holzer, LLC, all submitted herewith.

risks of the Litigation, and the fully contingent nature of the representation, Class Counsel respectfully submit the requested fee award is fair, reasonable, and should be approved. As discussed in the Fee Memorandum, a 32.5% fee award is both well within the range of percentages awarded in securities class actions with comparable settlements in this Circuit, and represents approximately 50% of counsel's lodestar. Further, the Class was informed that Lead Counsel would request up to 32.5% of the Settlement Fund as attorneys' award. Class Counsel will address objections received by the **August 2, 2021** deadline in their reply papers, to be filed on or before **August 16, 2021**. *See* ECF No. 212, PageID.14824-25, at ¶ 19 (procedure for objecting); *see also Id.*, PageID.14827, at ¶ 21 (deadline for reply briefing); *see also* ¶ 8, *supra*.

179. The Class Representatives' declarations show their conclusion that Class Counsel's requested fee is fair and reasonable based on the work performed over nearly six years, the recovery obtained for the Class, and the risks of the Litigation. *See* Wallace Decl., ¶¶ 10-11; *see also* Minett Decl., ¶¶ 10-11.

180. The quality of the work performed by Class Counsel in attaining the Settlement should also be evaluated given the caliber of the opposition. Here, Defendants were represented by lawyers from Goodwin Procter LLP, which is a capable and renowned law firm that vigorously represented the interests of their clients throughout this Litigation. In the face of this experienced and formidable opposition, Class Counsel nonetheless persuaded Defendants to settle the Litigation

on terms favorable to the Class. Consequently, this factor further supports that the requested fee is reasonable and should be awarded.

B. Class Counsel's Requested Costs and Expenses Are Fair and Reasonable and Should Be Awarded

181. Class Counsel seek a total of $833,716.99 for litigation costs and expenses, to be paid from the Settlement Fund. These costs and expenses were reasonably incurred by Plaintiffs' Counsel in connection with commencing, litigating, and settling the claims asserted in the Litigation.

182. The Class was informed that Lead Counsel would seek litigation costs and expenses in an amount not to exceed $1,000,000.00. The total amount requested, $833,716.99, is significantly below the $1,000,000.00 that the Class was advised could be sought. To date, the only objection received does not challenge the maximum amount of expenses set forth in the Notice. Class Counsel will address any objections received in their reply papers, which will be filed on or before **August 16, 2021**. *See* ECF No. 212, PageID.14824-25, at ¶ 19 (procedure for objecting); *see also Id.*, PageID.14827, at ¶ 21 (deadline for reply briefing); *see* ¶ 8, *supra*.

183. From the beginning of the case, Class Counsel were aware that they might not recover any of their expenses, and, even in the event of a recovery, would not recover any of their expenditures until such time as the Litigation might be successfully resolved. Accordingly, Class Counsel were motivated to and did take appropriate steps to avoid incurring unnecessary expenses and to minimize costs

without compromising the vigorous and efficient prosecution of the case.

184. Moreover, Plaintiffs' Counsel's expenses were reasonable and necessary for the Litigation. Of the total litigation expenses: (i) $559,492.61, or 67%, was expended on Lead Plaintiffs' experts and consultants; (ii) $29,244.72, or 4%, was incurred for mediation services; (iii) $19,159.40, or 2%, was for online legal and financial research charges; (iv) $91,701.58, or 11%, was incurred for court reporting services for depositions; and (v) $86,526.87.24, or 10%, was for out-of-town travel for Court appearances, mediations, and depositions. The remainder represents expenses routinely charged to clients, including court fees, copying costs, postage, and delivery expenses. Accordingly, Lead Counsel respectfully submit that the requested costs and expenses should be awarded.

C. The Awards to Class Representatives Are Reasonable

185. The PSLRA limits a class representative's recovery to an amount "equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class," but also provides that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4). Here, as explained in Class Representatives' Declarations, submitted herewith, Class Representatives Ronald E. Wallace and Walter J. Minett are seeking reimbursement

in the amount of $7,500.00 each (collectively, $15,000.00), for their time related to their dedicated and active participation in the Litigation over the last nearly six years. *See* Wallace Decl., ¶¶ 4-9; *see also* Minett Decl., ¶¶ 4-9.

186. Many courts, including those in this Circuit, have approved reasonable payments to compensate class representatives for their time and effort on behalf of a class. Indeed, courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks v. Morgan Stanley & Co.*, 2005 U.S. Dist. LEXIS 24890, at *30 (S.D.N.Y. 2005); *see also In re Caraco Pharm. Labs., Ltd. Sec. Litig.*, No. 2:09-cv-12830-AJT-DAS PageID.2477 (E.D. Mich. 2013) (Tarnow, J.) (awarding an aggregate of $13,180 to three lead plaintiffs); *Zimmerman v. Diplomat Pharmacy, Inc., et al.*, No. 2:16-cv-14005, PageID.1802 (E.D. Mich. 2019) (Cohn, J.) (awarding lead plaintiffs an aggregate amount of $13,657.51, comprised of individual awards of $2,157.51, $2,500, and $9,000)*; New Eng. Health Care Emples. Pension Fund v. Fruit of the Loom, Inc*., 234 F.R.D. 627, 635 (W.D. Ky. 2006) (awarding an aggregate amount $27,500, consisting of $5,000 to one lead plaintiff and $7,500 each to the remaining three lead plaintiffs). The amount sought is based on Class Representatives' active involvement in the Litigation, from appointment as Lead Plaintiffs to Settlement. As

such, this request should be granted.

VIII. CONCLUSION

187. Given the significant recovery obtained for the Class, the substantial risks in further prosecuting this Litigation (described above and in the accompanying Settlement Memorandum), Class Representatives and Class Counsel respectfully submit that the Settlement and proposed Plan of Allocation should be approved as fair and reasonable. Class Counsel also respectfully request that their Fee and Expense Application, including awards to Class Representatives, be approved.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed this 19th day of July, 2021, at San Francisco, California.

s/ Ramzi Abadou
Ramzi Abadou

I declare under penalty of perjury that the foregoing facts are true and correct. Executed this 19th day of July, 2021, at San Diego, California.

s/ Ryan Llorens
Ryan Llorens

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on July 19, 2021, 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 e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/Ellen Gusikoff Stewart

ELLEN GUSIKOFF STEWART

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Mailing Information for a Case 2:16-cv-10089-AJT-RSW Dougherty v. Esperion Therapeutics, Inc. et al

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Ramzi Abadou**
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