



**GRANTED WITH MODIFICATIONS**

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

KENNETH CARR, individually and  
on behalf of all others similarly  
situated, and derivatively and on behalf  
of nominal defendant ADVANCED  
CARDIAC THERAPEUTICS, INC.,

Plaintiff,

v.

NEW ENTERPRISE ASSOCIATES,  
INC., PETER JUSTIN KLEIN, DUKE  
S. ROHLEN, ARIS  
CONSTANTINIDES, MICHAEL J.  
PEDERSON, NEW ENTERPRISE  
ASSOCIATES 14, L.P., NEA  
PARTNERS 14, LIMITED  
PARTNERSHIP, NEA 14 GP,  
LIMITED PARTNERSHIP, and NEA  
VENTURES 2014, LIMITED  
PARTNERSHIP,

Defendants,

and

ADVANCED CARDIAC  
THERAPEUTICS, INC.,

Nominal Defendant.

C.A. No.: 2017-0381-AGB

**ORDER AND FINAL JUDGMENT**

On this \_\_\_\_ day of \_\_\_\_\_, 2019, a hearing having been held  
before this Court to determine whether the terms and conditions of the Stipulation  
and Agreement of Compromise, Settlement, and Release dated January 8, 2019 (the

“Stipulation”),<sup>1</sup> which is incorporated herein by reference, and the terms and conditions of the settlement proposed in the Stipulation (the “Settlement”), are fair, reasonable, and adequate for the settlement of all Released Claims (defined below) that were or could have been asserted in the above-captioned stockholder class and derivative action (the “Action”); and whether an order and final judgment should be entered in the Action; and the Court having considered all matters submitted to it at the hearing and otherwise and for the reasons stated herein.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The distribution of the Settlement Notice and Summary Notice pursuant to and in the manner prescribed in the Scheduling Order entered on \_\_\_\_\_, 2019 (the “Scheduling Order”) is hereby determined to be the best notice practicable under the circumstances and in full compliance with Rules 23 and 23.1 of the Rules of the Court of Chancery, the requirements of due process, and applicable law. It is further determined that all members of the Class (defined below) and ACT Current Stockholders are bound by this Order and Final Judgment (the “Judgment”).

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<sup>1</sup> Capitalized terms (other than proper nouns) that are not defined herein shall have the meanings set forth in the Stipulation.

2. The Court confirms that the Action is a proper class action pursuant to Rules 23(a), 23(b)(1), and 23(b)(2) of the Rules of the Court of Chancery and confirms its prior certification of a Class as consisting of:

All ACT stockholders who held common stock, Series 1 Preferred Stock or Series A-1 Preferred Stock, as reflected in the June 23, 2014 Detail Capitalization Table of ACT, to the extent such stock has not since been transferred, sold or returned to ACT, or to any person or entity excluded by clauses (a) through (d), with the following excluded from the class: (a) the Defendants and any other individuals who served as officers or directors of, or counsel for, ACT between April 2, 2014 and October 31, 2014; (b) affiliates, employees, employers, principals, trust vehicles, and family members of any of the foregoing at any time since September 1, 2013; (c) any individual or entity whose holdings in ACT have included Series A-2 Preferred Stock; and (d) Abbott Ventures and its principals, employees and family members of such principals or employees.

3. Specifically, the Court finds that (a) the Class is so numerous that joinder of all members is impracticable; (b) there are common issues of fact and law sufficient to satisfy Rule 23(a)(2), including whether the Defendants breached or aided and abetted breaches of fiduciary duties to Class Members, and whether Plaintiff and the Class Members were injured as a consequence of Defendants' actions; (c) the claims of the representative Plaintiff are typical of the claims of absent Class Members in that they all arise from the same allegedly wrongful course of conduct and are based on the same legal theories, satisfying Rule 23(a)(3). The representative Plaintiff and Class Counsel are adequate representatives of the Class, satisfying Rule 23(a)(4). The prosecution of separate actions by individual Class

Members would create a risk of inconsistent adjudications which would establish incompatible standards of conduct for the Defendants, and, as a practical matter, the disposition of the Action will influence the disposition of any pending or future identical cases brought by other Class Members, satisfying Rule 23(b)(1); and there were allegations that Defendants acted or refused to act on grounds generally applicable to the Class, satisfying Rule 23(b)(2).

4. Plaintiff Kenneth Carr is appointed Class Representative with respect to the Class Claims.

5. With respect to the Derivative Claims, the Court finds that Plaintiff Kenneth Carr has held stock in ACT continuously since the time of the conduct complained of in the Action and is currently a stockholder in ACT, has standing to prosecute the Action, and is an adequate representative of all current stockholders of ACT.

6. Pursuant to Court of Chancery Rules 23 and 23.1, the Settlement of the Class Claims and Derivative Claims as provided for in the Stipulation is approved as fair, reasonable, and adequate, and in the best interests of Plaintiff, the Class, the ACT Current Stockholders and ACT.

7. The Parties to the Stipulation are hereby authorized and directed to consummate the Settlement in accordance with the terms and provisions of the

Stipulation, and the Register in Chancery is directed to enter and docket this Judgment.

8. The Class Claims and Derivative Claims are hereby dismissed with prejudice, on the merits, and without costs, other than set forth herein.

9. Upon the Effective Date, Plaintiff, and all Class Members, on behalf of themselves, their legal representatives, heirs, executors, administrators, estates, predecessors, successors, predecessors-in-interest, successors-in-interest, and assigns, and any person or entity acting for or on behalf of, or claiming under, any of them, and each of them, shall thereupon fully, finally, and forever, release, settle, and discharge the Released Defendant Parties from and with respect to every one of the Released Class Claims, and shall thereupon be forever barred and enjoined from commencing, instituting, or prosecuting any Released Class Claim against any of the Released Defendant Parties.

10. Upon the Effective Date, Defendants on behalf of themselves, their legal representatives, heirs, executors, administrators, estates, predecessors, successors, predecessors-in-interest, successors-in-interest, and assigns, and any person or entity acting for or on behalf of, or claiming under, any of them, and each of them, shall thereupon fully, finally, and forever, release, settle, and discharge the Released Plaintiff Parties from and with respect to every one of the Released Defendant Claims, and shall thereupon be forever barred and enjoined from

commencing, instituting, or prosecuting any of the Released Defendant Claims against any of the Released Plaintiff Parties.

11. Neither the Stipulation, nor the fact or any terms of the Settlement, or any communications relating thereto, shall be deemed evidence, or an admission or concession by any Party or their counsel, Class Member, ACT Current Stockholder or any other Released Defendant Party or Released Plaintiff Party, of any fault, liability, or wrongdoing whatsoever, as to any facts or claims alleged or asserted in the Action, or as to the validity or merit of any of the claims or defenses alleged or asserted in the Action. The Stipulation is not a finding or evidence of the validity or invalidity of any claims or defenses in the Action, any wrongdoing by any Party, Class Member, ACT Current Stockholder or other Released Defendant Party or Released Plaintiff Party, or any damages or injury to any Party, Class Member, or other Released Defendant Party or Released Plaintiff Party. Neither the Stipulation, nor any of the terms and provisions of this Judgment, nor any of the negotiations or proceedings in connection therewith, nor any of the documents or statements referred to herein or therein, nor the Settlement, nor the fact of the Settlement, nor the Settlement proceedings, nor any statements in connection therewith, (a) shall (i) be argued to be, used, or construed as, offered, or received in evidence as, or otherwise constitute an admission, concession, presumption, proof, evidence, or a finding of any liability, fault, wrongdoing, injury, or damages, or of any wrongful

conduct, acts, or omissions on the part of any of the Released Defendant Parties or Released Plaintiff Parties, or of any infirmity of any defense, or of any damage to Plaintiff, ACT Current Stockholder or any other Class Member, or (ii) otherwise be used to create or give rise to any inference or presumption against any of the Released Defendant Parties or Released Plaintiff Parties concerning any fact or any purported liability, fault, or wrongdoing of the Released Defendant Parties or Released Plaintiff Parties or any injury or damages to any person or entity; or (b) shall otherwise be admissible, referred to, or used in any proceeding of any nature, for any purpose whatsoever; *provided, however*, that the Stipulation and/or Judgment may be introduced in any proceeding, whether in the Court or otherwise, as may be necessary to argue and establish that the Stipulation and/or Judgment has *res judicata*, collateral estoppel, or other issue or claim preclusion effect or to otherwise consummate or enforce the Settlement and/or Judgment or to secure any insurance rights or proceeds of any of the Released Defendant Parties or Released Plaintiff Parties.

12. Class Counsel and Plaintiff are hereby awarded attorneys' fees, expenses, and a Plaintiff Compensatory Award in the sum of \$\_\_\_\_\_ in connection with the Class Action Claims, which sum the Court finds to be fair and reasonable. Such sum shall be paid pursuant to the provisions of the Stipulation.

13. If the Effective Date does not occur, this Judgment shall be rendered null and void and shall be vacated and all of the Parties shall be deemed to have reverted to their respective litigation status immediately prior to November 29, 2018, and they shall proceed in all respects as if the Stipulation had not been executed and the related orders had not been entered, and in that event all of their respective claims and defenses as to any issue in the Action shall be preserved without prejudice and all funds paid into the Settlement Fund (other than administrative fees and expenses already expended, including Notice and Administration Costs) shall revert back to the contributor(s) of such funds.

14. The binding effect of this Judgment and the obligations of Plaintiff and Defendants under the Settlement shall not be conditioned upon or subject to the resolution of any appeal from this Judgment that relates solely to the issue of Class Counsel's and Plaintiff's application for an award of attorneys' fees, expenses, and Plaintiff Compensatory Award.

15. All members of the Class shall be and are deemed bound by the Stipulation and this Judgment.

16. No person shall have any claim against Plaintiff, Class Counsel, the Settlement Administrator, or any other agent designated by Class Counsel, which arises from or relates to distributions made substantially in accordance with the Stipulation, the Plan of Allocation, or further orders of the Court. Plaintiff,

Defendants, and all other Released Parties shall have no responsibility or liability whatsoever for the investment or distribution of the Settlement Fund, the Plan of Allocation, the determination, administration, calculation, or payment of any claim or nonperformance of the Settlement Administrator, the payment or withholding of taxes owed by the Settlement Fund, or any losses incurred in connection therewith, except as otherwise provided in the Stipulation.

17. Without further order of this Court, the Parties may agree in writing to reasonable extensions of time to carry out any of the provisions of the Stipulation.

18. Without affecting the finality of this Judgment in any way, this Court reserves jurisdiction over all matters relating to the administration and consummation of the Settlement.

Dated: \_\_\_\_\_, \_\_, 2019

\_\_\_\_\_

Chancellor Bouchard

This document constitutes a ruling of the court and should be treated as such.

**Court:** DE Court of Chancery Civil Action

**Judge:** Andre G Bouchard

**File & Serve**

**Transaction ID:** 62835796

**Current Date:** Apr 04, 2019

**Case Number:** 2017-0381-AGB

**Case Name:** CONF ORD/ Kenneth Carr, Plaintiff v. New Enterprise Associates, Inc., et al., Defendants, and Advanced Cardiac Therapeutics, Inc., Nominal Defendant.

**Court Authorizer**

**Comments:**

With respect to paragraph 12, for the reasons stated on the record during today's hearing: (1) Dr. Carr is awarded an incentive fee of \$175,000 and (2) attorneys' fees and expenses are hereby awarded in the total amount of \$1,890,000, consisting of (a) \$258,000 to reimburse Dr. Carr for non-contingent attorneys' fees and expenses he incurred and (b) an award to Pollack Solomon Duffy, LLP in the amount of \$1,632,000.

/s/ **Judge Bouchard, Andre G**