UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

SANKTOKH SOHAL, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. ELLIS YAN, *et al.*, Defendants.	No. 1:15-cv-00393-DAP Judge Dan Aaron Polster CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITY

I. INTRODUCTION

Lead Counsel has obtained a $7,175,000 cash Settlement Amount for the benefit of the Class.[1] The substantial recovery obtained for the Class was achieved through the skill, tenacity, and effective advocacy of Lead Counsel, who now respectfully moves this Court for an award of attorneys' fees in the amount of 25% of the Settlement Amount, or $1,793,750, plus expenses incurred in prosecuting this Litigation of $67,602.32, plus any accrued interest on both amounts.

Awarding the fee on the percentage basis is the appropriate method of compensating counsel in this case, and the requested fee is well within the range of percentages awarded in class actions in this District, Circuit, and across the country. The amount requested is warranted in light of the substantial and certain recovery obtained, the extensive efforts of counsel in obtaining the result, and the significant risks in bringing and prosecuting this Litigation on behalf of the Class. This Litigation was held to a high pleading standard under the Private Securities Litigation Reform Act of 1995 ("PSLRA") and therefore was extremely risky and difficult. Lead Counsel was mindful of the fact that, in this post-PSLRA environment, a greater percentage of cases are being dismissed more than ever before. The effect of the PSLRA is to make it more difficult for investors to bring and successfully resolve securities class actions. In cases filed after 2000, 44% of motions to dismiss have been granted in their entirety, and an additional 30% were granted in part. *See* Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* at 21 (NERA Jan. 23, 2017). This case fits that pattern, as it was dismissed twice and only resurrected

[1] Submitted herewith in support of approval of the proposed Settlement is the Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Settlement Brief"). The Court is also respectfully referred to the accompanying Declaration of Jack Reise in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Reise Decl." or "Reise Declaration"), for a more detailed history of the Litigation, the extensive efforts of Lead Counsel and the factors bearing on the reasonableness of the requested award of attorneys' fees and expenses. All terms used herein are defined in the Stipulation of Settlement, filed on April 12, 2017 (the "Stipulation"), unless otherwise indicated.

after Lead Plaintiff filed a successful motion for reconsideration of the Court's order dismissing the Second Amended Complaint. As the Fifth Circuit recognized: "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

In addition to the substantial risks in prosecuting this Litigation, the skill and effort to achieve the Settlement was substantial. While the case settled at a relatively early stage, a result encouraged by the courts and consistent with the purposes of the Federal Rules of Civil Procedure, Lead Counsel marshaled considerable resources and committed substantial amounts of time and expense in the prosecution of the Litigation. As set forth in the Reise Declaration, the Settlement was not achieved until Lead Counsel: (i) conducted a thorough pre-filing investigation of Lead Plaintiff's claims, including a meticulous review of TCPI's public filings, analyst reports, and media items, as well as information regarding UL and Energy Star® certifications; (ii) filed a detailed Amended Complaint after further investigation ("First Amended Complaint" or "FAC"); (iii) opposed Defendants' comprehensive motion to dismiss the FAC; (iv) filed a detailed Second Amended Complaint ("SAC") after further investigation; (v) opposed Defendants' comprehensive motion to dismiss the SAC; (vi) successfully moved the Court for reconsideration of its Order dismissing the SAC; (vii) met with a consultant expert with respect to damages and loss causation; (viii) reviewed non-public documents produced by Defendants in advance of, and to further, mediation; (ix) prepared thorough mediation materials for Jed Melnick, Esq. of JAMS; (x) attended an in-person mediation with Mr. Melnick and conducted further negotiations with Mr. Melnick's

assistance; and (xi) negotiated and documented the final terms of settlement contained in the Stipulation.[2] *See generally* Reise Decl.

Lead Counsel undertook the representation of the Class on a contingent fee basis and no payment has been made to counsel to date for its services or for the litigation expenses it has incurred on behalf of the Class. Lead Counsel firmly believes that the Settlement is the result of its diligent and effective advocacy, as well as its reputation for unwavering dedication to the interests of the class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In a case asserting claims based on complex legal and factual issues which were vigorously opposed by highly skilled and experienced defense counsel, Lead Counsel succeeded in securing a highly favorable result for the Class.

As discussed herein, as well as in the Settlement Brief and the Reise Declaration, the requested fee is fair and reasonable when considered under the applicable standards in the Sixth Circuit and is well within the range of awards in class actions in this Circuit and courts nationwide. Moreover, the requested expenses are reasonable in amount and were necessarily incurred for the successful prosecution of the litigation.

II. LEAD PLAINTIFF'S COUNSEL ARE ENTITLED TO THE REASONABLE ATTORNEYS' FEE REQUESTED HEREIN

A. Lead Plaintiff's Counsel Are Entitled to a Fee from the Common Fund They Obtained

The Supreme Court has long recognized the "common fund" exception to the general rule that a litigant bears his or her own attorneys' fees. *Trs. v. Greenough*, 105 U.S. 527, 532 (1882). The rationale for the common fund principle was explained in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), as follows:

[2] The efforts of counsel in achieving this Settlement are set forth in greater detail in the accompanying Reise Declaration.

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. . . . Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

The common fund doctrine both prevents unjust enrichment and encourages counsel to protect the rights of those who have very small claims. The Supreme Court has emphasized that private actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [Securities and Exchange] Commission action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).[3]

B. The Court Should Award Attorneys' Fees Using the Percentage Approach

The diligent efforts of Lead Plaintiff's Counsel have resulted in the creation of the Settlement Amount of $7,175,000. Courts generally favor awarding fees from a common fund based upon the percentage-of-the-fund method. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class"); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Greenough*, 105 U.S. at 532. The PSLRA also supports the use of the percentage-of-the-fund method. *See* 15 U.S.C. §78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."). Thus, Congress followed the Supreme Court's lead and endorsed the efficacy of the percentage approach to fee awards in securities class actions.

---

[3] *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (noting that the Court has "long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions").

Consistent with Supreme Court authority, the Sixth Circuit has also endorsed the use of the percentage method for determining attorneys' fee awards in common fund cases. *See*, *e.g.*, *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-16 (6th Cir. 1993). District courts in this Circuit have virtually uniformly shifted to the percentage method in awarding fees in common fund cases, particularly in securities cases.[4] The Sixth Circuit is not alone in its use of the percentage approach. The vast majority of other circuits recognize the propriety of percentage fee awards in common fund cases and the shortcomings of the lodestar/multiplier method. For example, the District of Columbia Circuit adopted a "percentage-of-the-fund methodology . . . because it is more efficient, easier to administer, and more closely reflects the marketplace." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1270 (D.C. Cir. 1993).

Moreover, as noted by most courts approving the percentage-of-the-fund method, the percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for efficient prosecution, thereby benefiting both litigants and the judicial system. The percentage-of-the-fund method also "affords the Court greater flexibility in assuring that Counsel are adequately compensated for the results that they have achieved and the work that they have done, while also protecting the Class' interest in the fund." *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1280 (S.D. Ohio 1996).

---

[4] *See Plumbers & Pipefitters Nat'l Pension Fund v. Burns*, No. 3:05-cv-07393-JGC, slip op. at 1 (N.D. Ohio Nov. 30, 2016); *Schuh v. HCA Holdings, Inc.*, No. 3:11-cv-01033, slip op. at 1 (M.D. Tenn. Apr. 14, 2016); *In re Chemed Corp. Sec. Litig.*, No. 1:12-cv-00028-MRB, slip op. at 1 (S.D. Ohio July 15, 2014); *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 528 (E.D. Ky. 2010), *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011); *New Eng. Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006) ("[T]he Court will apply the percentage-of-the-fund method which is consistent with the majority trend."); and *In re Telectronics Pacing Sys.*, 186 F.R.D. 459, 483 (S.D. Ohio 1999) ("the preferred method in common fund cases has been to award a reasonable percentage of the fund to Class Counsel as attorneys' fees"), *rev'd on other grounds*, 221 F.3d 870 (6th Cir. 2000).

C. The Requested Fee Award Is Well Within the Applicable Range of Percentage-of-Fund Awards

In selecting an appropriate percentage award, the Supreme Court recognizes that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *Blum*, 465 U.S. at 903* ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

Lead Counsel's request for an award of attorneys' fees of 25% of the Settlement Fund is within the range of percentage awards made by courts in securities cases in this Circuit. *See, e.g.*, *HCA Holdings*, slip op. at 1 (awarding 30% of $215 million settlement amount, plus expenses); *Chemed*, slip op. at 2 (awarding 33% of $6 million settlement amount, plus expenses); *North Port Firefighters' Pension-Local Option Plan v. Fushi Copperweld, Inc.*, No. 3:11-cv- 00595, slip op. at 1 (M.D. Tenn. May 12, 2014) (awarding 33-1/3% of $3.25 million settlement amount, plus expenses); *Morse v. McWhorter*, No. 3:97-0370, slip op. at 1 (M.D. Tenn. Mar. 12, 2004) (awarding 33-1/3% of $49.5 million settlement, plus expenses); *In re Sirrom Capital Corp. Sec. Litig.*, No. 3-98-0643, slip op. at 6 (M.D. Tenn. Feb. 4, 2000) (awarding 33-1/3% of $15 million settlement, plus expenses).[5]

III. THE REQUESTED FEE IS REASONABLE UNDER THE *RAMEY* FACTORS

Although the Court of Appeals for the Sixth Circuit has not expressly directed a preference for either the percentage approach or the lodestar method in common fund cases, the standard is

[5] All unreported authorities are attached to the Appendix of Unreported Authorities Cited in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses, submitted herewith.

whether an award is reasonable under the circumstances. *See Rawlings*, 9 F.3d at 517 (recognizing the growing trend towards adoption of a percentage approach in common fund cases, but declining to adopt a hard and fast rule applying the percentage approach in common fund cases). In determining the "reasonableness" of attorneys' fees, the Sixth Circuit identified six relevant factors for consideration: "1) the value of the benefit rendered to the corporation or its stockholders, 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, 3) whether the services were undertaken on a contingent fee basis, 4) the value of the services . . ., 5) the complexity of the litigation, and 6) the professional skill and standing of counsel involved on both sides." *Ramey v. Cincinnati Enquirer, Inc*., 508 F.2d 1188, 1196 (6th Cir. 1974); *see also Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983). Applying the *Ramey* factors to this fee and expense request, this Court reasonably may conclude that the percentage-of-the-fund requested is justified under the circumstances of this case and the fee is fair and reasonable.

A. The Value of the Benefits Achieved

Lead Counsel has secured a settlement that provides for a substantial and certain cash payment of $7.175 million. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained").[6] This outstanding settlement was achieved as a direct result of the skill, effort, and tenacity of Lead Counsel in prosecuting this Litigation on behalf of the Class. There is no question that Lead Counsel took significant risks in obtaining this highly favorable result for the Class.

[6] *See also Rawlings*, 9 F.3d at 516 ("When awarding attorneys' fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved."); *In re Delphi Corp. Sec.*, 248 F.R.D. 483, 503 (E.D. Mich. 2008) ("The primary factor in determining a reasonable fee is the result achieved on behalf of the class."); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

While Lead Plaintiff believes that its claims have substantial merit, if litigation were to proceed, there is, nonetheless, a significant risk that the Class could recover less than the amount of the Settlement, or even nothing at all. Throughout the Litigation, Defendants have consistently maintained that Lead Plaintiff could not establish liability or damages and have challenged virtually every factual and legal issue in an effort to defeat Lead Plaintiff's claims. *See* Reise Decl., ¶¶36-46. For example, in their motions to dismiss, Defendants maintained that Lead Plaintiff could not demonstrate falsity, materiality, scienter (with respect to the Exchange Act claims) or loss causation. Indeed, proving loss causation is one of the major roadblocks that a plaintiff must overcome to successfully prosecute a securities class action and, if this Litigation continued, would have been a hotly contested issue. Reise Decl., ¶¶43-46; *see, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirmed a lower court ruling which granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor); *see also Meyer v. Greene*, 710 F.3d 1189 (11th Cir. 2013) (affirming order granting motion to dismiss, finding, among other things, that announcement of SEC investigation, without more, had failed to adequately support loss causation). As detailed in the Reise Declaration, in addition to the risk of proving loss causation, Lead Plaintiff would have faced significant risk in proving the falsity and materiality of Defendants' alleged misstatements. Reise Decl., ¶¶39-42.

Despite the significant risks of continued litigation, Lead Counsel achieved a result of significant value to the Class. The Settlement, which represents approximately 8.3% of Lead Plaintiff's consulting damages expert's maximum estimated damages, compares very favorably to other court-approved settlements in PSLRA cases. *See, e.g.*, *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in

recent shareholder class action settlements"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Feb. 1, 2007) ("The settlement . . . represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class actions securities litigations."); *see also* Settlement Brief, §III.B.

As detailed in the Settlement Brief and in the Reise Declaration, there were significant legal and factual roadblocks to obtaining a more favorable outcome in this Litigation. Reise Decl., ¶¶36-46. Despite these obstacles to recovery, Lead Counsel secured a sizeable and certain recovery for the benefit of the Class. As a result of this Settlement, Class Members will receive compensation for their losses in TCPI common stock now, and avoid the substantial expense, delay, and uncertainty of continued litigation.

B. Public Policy Considerations

The federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). The Supreme Court has emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman*, 472 U.S. at 310 (citation omitted); *Tellabs*, 551 U.S. at 313. The percentage-of-the-fund method is prevalent in common fund cases because plaintiffs' counsel in complex securities class action litigation are invariably retained on a contingent basis, largely due to the huge commitment of time and expense required. Adequate compensation to encourage attorneys to assume the risk of litigation is in the public interest. Indeed, without adequate compensation, it would be difficult to retain the caliber of lawyers necessary, willing, and able to properly prosecute to a favorable conclusion complex, risky, and expensive class actions such as this one. Thus, an important factor is "society's stake in rewarding attorneys who produce such

benefits in order to maintain an incentive to others." *Ramey*, 508 F.2d at 1196; *see also In re Prudential-Bache Energy Income P'ships Sec. Litig.*, MDL No. 888, 1994 U.S. Dist. LEXIS 6621, at *20-*21 (E.D. La. May 18, 1994).

Without the willingness of Lead Counsel to assume that task, members of the Class would not have recovered anything, let alone the many millions of dollars obtained here for their benefit. As actionable securities fraud exists and society benefits from strong advocacy on behalf of security holders, public policy favors the granting of the fee and expense application. *See also In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 U.S. Dist. LEXIS 70167, at *23-*24 (E.D. Tenn. Apr. 30, 2014) ("Awards of substantial attorneys' fees in cases like this are necessary to incentivize attorneys to shoulder the risk of nonpayment to expose violations of the law and to achieve compensation for injured parties.").

C. The Contingent Nature of the Fee

Lead Counsel undertook this Litigation on a contingent fee basis, assuming a significant risk that the Litigation would yield no recovery and leave counsel uncompensated. This risk encompasses not only the risk of zero payment, but also the risk of underpayment. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569-70 (7th Cir. 1992). Unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expenses since this case began in March 2015. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See Se. Milk*, 2013 U.S. Dist. LEXIS 70163, at *22 ("This Court finds that the fee awarded should fully reflect the risk taken by these lawyers and is a very substantial factor in this case which weighs in favor of the requested fee."); *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 1029, 1043 (S.D. Ohio 2001).

While securities cases have always been complex and difficult to prosecute, the PSLRA has only increased the difficulty in successfully prosecuting a securities class action. Lead Counsel addressed numerous difficult issues in opposing Defendants' motions to dismiss and in Lead Plaintiff's motion for reconsideration of the Court's order dismissing the SAC, and there was no guarantee that Lead Plaintiff's claims would survive further challenges. As one court has noted: "An unfortunate byproduct of the PSLRA is that potentially meritorious suits will be short-circuited by the heightened pleading standard." *Bryant v. Avado Brands, Inc.*, 100 F. Supp. 2d 1368, 1377 (M.D. Ga. 2000), *rev'd on other grounds sub nom. Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001).[7] Lead Plaintiff faced the substantial burden of proving, *inter alia*, that each of the Defendants was responsible for an omission or a misstatement that was material, that the omissions or misstatements impacted the market price of TCPI's common stock and caused damage to the Class, and, with respect to Lead Plaintiff's Exchange Act claims, that each Defendant acted with scienter. *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999).

As noted herein, in the Reise Declaration and in the Settlement Brief, Defendants steadfastly maintained that they did nothing wrong and would offer evidence, including the testimony of expert witnesses, to support their positions. Assuming the Court certified the class, and Lead Plaintiff was able to overcome Defendants' anticipated motion(s) for summary judgment after the completion of discovery, and prove liability at trial, it still would have faced significant risks in proving loss causation and damages.[8] Damages could be significantly reduced if Defendants prevailed on issues relating to liability, showed that any assumption made by Lead Plaintiff's causation and damages expert was incorrect or unreliable, or could show that any portion of the stock price decline was due

[7] Even strong cases that ultimately have been widely recognized as meritorious have been dismissed. *See Goldstein v. MCI Worldcom*, 340 F.3d 238 (5th Cir. 2003).

[8] Although the parties had not yet commenced class certification briefing, it was not certain that the Court would certify Lead Plaintiff's proposed class.

to factors other than the alleged fraud or that the market was inefficient. Lead Plaintiff realized that in the inevitable "battle of experts," the jury could have sided with Defendants' expert(s) and found no damages or only a fraction of the damages Lead Plaintiff claimed. *See In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, 2005 U.S. Dist. LEXIS 17456, at *16 (D. Mass. Aug. 17, 2005) ("History is replete with cases in which plaintiffs prevailed at trial on issues of liability, but recovered little or nothing by way of damages.") (collecting cases).

Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiff's counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. *See, e.g.*, *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (court granted summary judgment to defendants after eight years of litigation, and after plaintiff's counsel incurred over $6 million in expenses, and worked over 100,000 hours, representing a lodestar of approximately $48 million). Lead Counsel is aware of many other hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by members of the plaintiff's bar produced no fee for counsel. *See, e.g.*, *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 47-73 (S.D.N.Y. 2010) (after completion of extensive foreign discovery, 95% of plaintiffs' damages were eliminated by the Supreme Court's reversal of 40 years of unbroken circuit court precedents in *Morrison v. Nat'l Aust. Bank Ltd.*, 561 U.S. 247 (2010)). As the court in *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005) recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion.

As noted above, the Eleventh Circuit in *Hubbard* recently upheld a lower court's decision overturning a jury verdict because plaintiff did not present sufficient evidence to prove loss causation. *See Hubbard*, 688 F.3d 713. This is not an infrequent risk.[9]

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable and difficult effort. The contingent nature of Lead Counsel's representation strongly favors approval of the requested fee.

D. The Diligent Prosecution of the Litigation

In determining the reasonableness of a requested fee, one factor the trial court should consider is "'[t]he extent and nature of the services; the labor, time and trouble involved.'" *Id.* (citation omitted). Here, a considerable effort on the part of Lead Counsel was required to obtain this outstanding settlement. *See* Reise Decl., ¶¶66-72. As a result of that effort, a substantial and certain recovery of $7.175 million has been obtained at a relatively early stage of the Litigation without the substantial expense, delay, risk and uncertainty of continued litigation. Indeed, early settlements are encouraged by courts and are consistent with the purposes of the Federal Rules of Civil Procedure, which "'shall be construed and administered to ensure the ***just***, ***speedy***, ***and inexpensive determination*** of every action.'" *Xcel*, 364 F. Supp. 2d at 992 (quoting Fed. R. Civ. P. 1) (emphasis in original). Lead Plaintiff's Counsel have spent more than 1,800 hours with a

[9] *See, e.g.*, *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486-CW(EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict by jury); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Comput. Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608, at *1-*2 (N.D. Cal. Sept. 6, 1991) (following verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding the verdict).

resulting lodestar of $1,104,143.25 at current rates.[10] The requested fee represents a slight 1.62 multiplier of Lead Plaintiff's Counsel's time. A lodestar "cross-check" therefore confirms the reasonableness of the requested fee. The Sixth Circuit has endorsed the use of multipliers, recognizing that they "can serve as a means to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefits achieved." *Rawlings*, 9 F.3d at 516. In complex litigation, lodestar multipliers between two and five are commonly awarded. *See, e.g.*, *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, No. 1:09-SP-80000, 2010 U.S. Dist. LEXIS 128371, at *27 (N.D. Ohio Dec. 6, 2010).

As discussed in more detail in the Reise Declaration, the Settlement was not achieved until Lead Counsel, *inter alia*, conducted an extensive investigation of the factual and legal basis for Lead Plaintiff's claims; reviewed and analyzed an enormous quantity of publicly-available information about Defendants and the allegations; filed detailed complaints alleging Defendants' violations of the federal securities laws; opposed Defendants' attacks on the pleadings; moved the Court to reconsider its dismissal of the SAC; consulted with an expert with respect to loss causation and damages; reviewed documents produced by Defendants in advance of the mediation; drafted a detailed mediation statement; engaged in hard-fought settlement negotiations with the substantial assistance of Jed Melnick, Esq.; and negotiated the terms of the Stipulation and its exhibits. *See generally* Reise Decl. The significant resources devoted by Lead Counsel reflects the substantial effort entailed in bringing this difficult litigation to a successful and highly favorable conclusion for the Class. As set forth herein, in the Reise Declaration and the Settlement Brief, Defendants mounted a vigorous defense and fought Lead Plaintiff at every step. And Lead Counsel's work will

[10] The Supreme Court has indicated that the use of current rather than historical rates is appropriate in examining the lodestar because current rates more adequately compensate for inflation and loss of use of funds. *See Jenkins*, 491 U.S. at 283-84. Courts in this Circuit have also stated that it is proper to compensate counsel for delay by using current rates in examining lodestar. *See Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005).

continue following approval of the Settlement, as claims processing and administration continues. Given the risks involved and the result obtained, the requested fee is reasonable and appropriate.

E. The Complexity of the Litigation

The complexity of the issues is a significant factor to be considered in making a fee award. Courts have long recognized that securities class actions present inherently complex and novel issues. As Judge Finesilver noted decades ago in *Miller v. Woodmoor Corp.*, No. 74-F-988, 1978 U.S. Dist. LEXIS 15234 (D. Colo. Sept. 28, 1978):

> The benefit to the class must also be viewed in its relationship to the complexity, magnitude, and novelty of the case. . . .
>
> Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions. Courts are continually modifying and/or reversing prior decisions in an attempt to interpret the securities law in such a way as to follow the spirit of the law while adapting to new situations which arise. Indeed, many facets of securities law have taken drastically new directions during the pendency of this action. . . .
>
> The complexity of a case is compounded when it is certified as a class action. . . . Management of the case, in and of itself, is a monumental task for counsel and the Court.

Id. at *11-*12. Judge Finesilver's comments ring even more true today. While courts have always recognized that securities class actions carry significant complexities, the adoption of the PSLRA has made the successful prosecution of these cases even more complex and uncertain.

There is no question that from the outset this Litigation presented a number of sharply contested issues of both fact and law and that Lead Plaintiff faced formidable defenses to liability and damages. Lead Plaintiff's claims arise from Defendants' allegedly false and misleading statements and omissions regarding the Company's UL and Energy Star® approved products, adherence to its internal quality assurance and control processes and procedures, and material weakness in internal controls. Reise Decl., ¶11. Lead Plaintiff alleges that Defendant Yan caused the Company to completely disregard its internal quality assurance and control processes, thereby

selling mislabeled products as UL and Energy Star® approved. *Id.*, ¶20. Throughout the Litigation, Defendants have adamantly denied liability and asserted that they had absolute defenses to Lead Plaintiff's claims.

As discussed in the Reise Declaration and the Settlement Brief, substantial risks and uncertainties in this type of litigation, and in this case in particular, made it far from certain that a recovery, let alone a $7.175 million recovery, would ultimately be obtained. From the outset, this post-PSLRA action was an especially difficult and highly uncertain securities case, with no assurance whatsoever that it would survive Defendants' attacks on the pleadings, motion(s) for summary judgment, trial, and appeals. As the court noted in *In re Ikon Office Sols., Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000), "[t]here were the legal obstacles of establishing scienter, damages, causation . . . . The court also acknowledges that securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." The court's statements in *Ikon* are certainly applicable here.

Even if Lead Plaintiff obtained a significant judgment after trial, the inevitable appeals would follow. Despite the novelty and difficulty of the issues raised, counsel secured an excellent result for the Class. As a result, this factor strongly supports the requested award.

F. The Quality of the Representation

Lead Plaintiff's Counsel include locally and nationally known leaders in the fields of securities class actions and complex litigation. *See* Declarations of counsel, submitted herewith. The quality of the representation is best demonstrated by the substantial benefit achieved for the Class and the effective and efficient prosecution and resolution of the Litigation under difficult and challenging circumstances. The substantial recovery obtained for the Class is the direct result of the substantial efforts of highly skilled and specialized attorneys who possess significant experience in the prosecution of complex securities class actions. From the outset of the Litigation, Lead Counsel

engaged in a concerted effort to obtain the maximum recovery for the Class and committed considerable resources and time in the research, investigation, and prosecution of this case. Such quality, efficiency, and dedication support the requested fee. *See In re Rio Hair Naturalizer Prods. Liab. Litig.*, MDL No. 1055, 1996 U.S. Dist. LEXIS 20440, at *55-*56 (E.D. Mich. Dec. 20, 1996).

The quality of opposing counsel is also important when the court evaluates the services rendered by plaintiffs' counsel. *See, e.g.*, *Delphi*, 248 F.R.D. at 504 ("The ability of []Lead Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested."); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("Securities Lead Counsel obtained the Settlement in the face of vigorous opposition by defendants who were represented by some of the nation's leading law firms."). Lead Counsel was opposed in this Litigation by very skilled and highly respected counsel from Skadden, Arps, Slate, Meagher & Flom LLP, Baker & Hostetler LLP, Benesch, Friedlander, Coplan & Aronoff LLP, Shearman & Sterling LLP and Roetzel & Andress, LPA, firms with well-deserved reputations for vigorous advocacy in the defense of complex civil actions. The ability of Lead Counsel to obtain a favorable result for the Class in the face of such formidable opposition further evidences the quality of its work.

Thus, there can be no dispute that all of the factors discussed above weigh in favor of the fee and expense award requested, and that the Court should grant Lead Counsel's fee and expense application in its entirety.

IV. LEAD PLAINTIFF'S COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Lead Plaintiff's Counsel also request payment of expenses incurred by them in connection with the prosecution of this Litigation in the amount of $67,602.32. *See* accompanying Declaration of Jack Reise Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application

for Award of Attorneys' Fees and Expenses, and the Declaration of Jack Landskroner Filed on Behalf of Landskroner Grieco Merriman, LLC in Support of Application for Award of Attorneys' Fees and Expenses attesting to the accuracy of Lead Plaintiff's Counsel's expenses. The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace.[11] *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003). The categories of expenses for which counsel seek payment here are the type of expenses routinely charged to hourly clients and, therefore, should be paid out of the common fund.

A large component of Lead Plaintiff's Counsel's expenses are the costs of the investigation and Lead Plaintiff's consulting expert, with significant experience in loss causation and damages in securities class actions. These expenses were essential to developing the factual allegations and understanding the complex loss causation issues raised in this Litigation. Lead Plaintiff's Counsel also incurred the costs of computerized research. It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. Other expenses that were necessarily incurred in the prosecution of this Litigation include expenses for travel, mediation fees, photocopying, filing fees, postage and overnight delivery, and telephone and telecopier expenses. Because these were all necessary expenses incurred by Lead Plaintiff's Counsel, they should be paid from the Settlement Fund.

[11] *See also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *see also New Eng. Health Care*, 234 F.R.D. at 635 ("In determining whether the requested expenses are compensable, the Court has considered 'whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases.'") (citation omitted).

V. CONCLUSION

For all of the foregoing reasons, Lead Counsel respectfully requests that the Court approve its request for an award of attorneys' fees and expenses in the amounts requested. A proposed order will be submitted with Lead Counsel's reply papers, after the deadline for objections has passed.

DATED: June 23, 2017

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP

s/ Ellen Gusikoff Stewart

ELLEN GUSIKOFF STEWART (*pro hac vice*)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
E-mail: elleng@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
JACK REISE (*pro hac vice*)
SABRINA E. TIRABASSI (*pro hac vice*)
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3064 (fax)
E-mail: jreise@rgrdlaw.com
E-mail: stirabassi@rgrdlaw.com

Lead Counsel for Plaintiff

LANDSKRONER GRIECO MERRIMAN, LLC
JACK LANDSKRONER (Ohio Bar # 0059227)
1360 West 9th Street, Suite 200
Cleveland, OH 44113
Telephone: 216/522-9000
216/522-9007 (fax)
E-mail: jack@lgmlegal.com

Liaison Counsel

VANOVERBEKE MICHAUD & TIMMONY, P.C.
THOMAS C. MICHAUD
79 Alfred Street
Detroit, MI 48201
Telephone: 313/578-1200
313/578-1201 (fax)
E-mail: tmichaud@vmtlaw.com

Additional Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 23, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART (*pro hac vice*)