IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAN ANTONIO FIRE AND POLICE PENSION FUND, FIRE AND POLICE HEALTH CARE FUND, SAN ANTONIO, PROXIMA CAPITAL MASTER FUND LTD., and THE ARBITRAGE FUND, Plaintiffs, v. DOLE FOOD COMPANY, INC., DAVID H. MURDOCK and C. MICHAEL CARTER, Defendants.	Civil Action No. 1:15-cv-01140-LPS

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

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Dated: June 13, 2017

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Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") and Entwistle & Cappucci LLP ("Entwistle & Cappucci"), respectfully submit this memorandum of law in support of their motion, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, for an award of attorneys' fees in the amount of 25% of the Settlement Fund, or $18,500,000, plus interest at the same rate as earned by the Settlement Fund.[1] Lead Counsel also seek reimbursement of: (i) $638,890.06 in litigation expenses reasonably and necessarily incurred by Plaintiffs' Counsel[2] in prosecuting and resolving the Action; and (ii) $54,996.20 in costs and expenses incurred by Lead Plaintiffs directly related to their representation of the Settlement Class.

I. INTRODUCTION

The proposed Settlement, which provides for a $74,000,000 cash payment, is a very favorable result for the Settlement Class. In undertaking this litigation, counsel faced numerous challenges of proving both liability and damages that posed the serious risk of no recovery, or a lesser recovery than the Settlement Amount. The significant recovery obtained was achieved through the skill, tenacity, and effective advocacy of Lead Counsel, which litigated this Action on a fully contingent basis against highly skilled defense counsel.

As detailed in the accompanying Joint Declaration,[3] Lead Counsel vigorously pursued this litigation from its outset. Among other things, Lead Counsel: (i) objected to the release language

[1] All capitalized terms that are not otherwise defined herein shall have the meanings ascribed to them in the Amended Stipulation and Agreement of Settlement dated March 29, 2017 (D.I. 88-1) (the "Stipulation") or in the Joint Declaration of Katherine M. Sinderson and Vincent R. Cappucci in Support of (I) Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation and (II) Lead Counsel's Motion for An Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration").

[2] Plaintiffs' Counsel consists of Lead Counsel, Liaison Counsel Friedlander & Gorris, P.A., and additional counsel for the San Antonio Funds, Martin & Drought, P.C.

[3] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, among other

in the Delaware Chancery Court Settlement in order to ensure that the claims asserted in this Action were not released and that harmed Dole shareholders could therefore pursue recovery; (ii) conducted a wide-ranging investigation into the claims asserted in the Action, including the review and analysis of transcripts and the full evidentiary record of the Chancery Court Action, relevant SEC filings, press releases, earnings conference calls, media reports, and research reports by securities and financial analysts; (iii) retained and consulted with several experts in loss causation and damages; (iv) prepared a fact-intensive Amended Consolidated Class Action Complaint; (v) conducted substantial discovery, including obtaining more than 770,000 pages of documents produced by Defendants and certain non-parties, Lead Counsel's review of those documents, and the collection, review and production of thousands of pages from Lead Plaintiffs; (vi) prepared Lead Plaintiffs' class certification motion and brief, including working with their expert on a report regarding the efficiency of the market for Dole common stock; (vii) prepared a detailed mediation statement and a reply mediation statement; and (viii) engaged in extensive settlement negotiations, including an all-day mediation with the Honorable Layn R. Phillips, a former federal district court judge.

The Settlement achieved through Lead Counsel's efforts is a particularly favorable result when considering the significant hurdles that Lead Plaintiffs would have had to overcome in order to prevail in this complex securities fraud litigation. In undertaking this litigation, Lead Counsel faced numerous challenges to establishing liability and damages, which are detailed in the Joint Declaration at ¶¶ 60-81. The risk of losing was very real, and was enhanced by the fact that Lead Counsel would be litigating against a large corporate defendant, represented by highly skilled

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things: the history of the Action and a description of the services Lead Counsel provided for the benefit of the Settlement Class (¶¶ 11-58); the negotiations leading to the Settlement (¶¶ 51-55); and the risks and uncertainties of continued litigation (¶¶ 59-81).

defense counsel. Moreover, Plaintiffs alleged a novel damages theory, claiming that shareholders sold shares at artificially depressed prices (instead of the typical securities fraud claim relating to purchasing shares at artificially inflated prices). Despite those risks, Plaintiffs' Counsel collectively dedicated more than 16,000 hours of time to this litigation over the course of 19 months, on a fully contingent basis.

In light of the recovery attained, the time and effort devoted by Plaintiffs' Counsel, the work performed, the skill and expertise required, and the risks that counsel undertook, Lead Counsel submit that the requested fee award and the reimbursement of incurred expenses are fair and reasonable. As discussed below, the percentage fee requested is well within the range of fees that courts in this Circuit and elsewhere have awarded in securities class actions with comparable recoveries. Moreover, the requested fee represents a multiplier of 2.17 on Plaintiffs' Counsel's lodestar, which is well within the range of multipliers typically awarded in class actions with substantial contingency risks such as this one. In addition, the expenses for which Lead Counsel seek reimbursement were reasonable and necessary for the successful prosecution of the Action. Lead Plaintiffs, which are sophisticated institutional investors that actively managed and supervised the Action, have evaluated the request for fees and expenses and authorized it as reasonable.[4]

In addition, over 26,000 copies of the Notice have been mailed to potential Settlement Class Members and their nominees through June 12, 2017, and the Summary Notice was published in the national edition of *The Wall Street Journal* and transmitted over the *PR Newswire* on April

[4] *See* Declaration of Youlia Rowland on behalf of Proxima, Joint Decl. Ex. 2A ("Rowland Decl."), at ¶¶ 7-8; Declaration of Erik T. Dahler on behalf of San Antonio F&P, Joint Decl. Ex. 2B ("Dahler Decl."), at ¶¶ 7-8; Declaration of James Bounds on behalf of San Antonio Health, Joint Decl. Exhibit 2C ("Bounds Decl."), at ¶¶ 7-8; and Declaration of Roger Foltynowicz, on behalf of The Arbitrage Fund, Joint Decl. Exhibit 2D ("Foltynowicz Decl."), at ¶¶ 7-8.

21, 2017. *See* Declaration of Robert Cormio (Ex. 1 to the Joint Decl.) (the "Cormio Decl."), at ¶¶ 7, 8. The Notice advised potential Settlement Class Members that Lead Counsel would apply for an award of attorneys' fees in amount not to exceed 25% of the Settlement Fund, and reimbursement of litigation expenses (including reimbursement of the reasonable costs and expenses of Lead Plaintiffs) in an amount not to exceed $1,300,000. *See* Notice at ¶¶ 5, 68 (Cormio Decl. Ex. A). The fees and expenses sought by Lead Counsel do not exceed the amounts set forth in the Notice. Further, to date, no Settlement Class Member has objected to the requests for fees and expenses.

For the reasons set forth herein and in the Joint Declaration, Lead Counsel respectfully submit that the requested attorneys' fees and expenses are fair and reasonable under applicable legal standards and, therefore, should be awarded by the Court.

II. THE STANDARD GOVERNING THE AWARD OF ATTORNEYS' FEES IN COMMON FUND CASES

A. Lead Counsel are Entitled to a Fee from the Common Fund They Created

It is well settled that an attorney who maintains a lawsuit that results in the creation of a fund or benefit in which others have a common interest may obtain fees from that common fund. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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"); *In re Cendant Corp. Sec. Litig* ("*Cendant I*"), 404 F.3d 173, 197 (3d Cir. 2005) ("attorneys whose efforts create, discover, increase, or preserve a common fund are entitled to compensation") (citation omitted); *In re AT&T Corp., Sec. Litig.*, 455 F.3d 160 (3d Cir. 2006); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 582 F.3d 524, 540 (3d Cir 2009).

As courts recognize, in addition to providing just compensation, awards of fair attorneys' fees from a common fund ensure that "competent counsel continue[s] to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (citations omitted); *see also In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) ("There is also commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."). Indeed, the Supreme Court has emphasized that private securities actions such as the instant action provide "'a most effective weapon in the enforcement' of the securities laws and are 'necessary supplement to [SEC] 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)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

Courts in this Circuit adhere to these principles. *See, e.g.*, *In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *15 (E.D. Pa. Jan. 25, 2016) ("'The common fund doctrine provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the cost of his litigation, including attorneys' fees'") (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 n.39 (3d Cir. 1995)); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefits they have bestowed on class members."). Of course, the ultimate determination of the proper amount of attorneys' fees rests

within the sound discretion of the district court. *See Gunter*, 223 F.3d at 195; *GMC*, 55 F.3d at 821; *Viropharma*, 2016 WL 312108 at *15; *See also AT&T*, 455 F.3d at 168-69.

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

"For many years both the Supreme Court and Third Circuit have favored calculating attorneys' fees as a percentage of the class recovery." *In re CIGNA Corp. Sec. Litig.*, No. 02-8088, 2007 WL 2071898, at *4 (E.D. Pa. July 13, 2007) (citing *Boeing*, 444 U.S. at 478-79). The Third Circuit and the district courts within it have repeatedly approved the percentage-of-recovery method of awarding fees in common fund securities fraud cases "because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Rite Aid Corp. Sec. Litig*, ("*Rite Aid I*") 396 F.3d 294, 300 (3d Cir. 2005), (quoting *In re Prudential Ins. Co.*, 148 F.3d 283, 333 (3d Cir. 1998)); *see also AT&T*, 455 F.3d at 164 ("In a common fund case such as this one, the percentage-of-recovery method is generally favored."); *Viropharma,* 2016 WL 312108, at *15 ("The percentage-of-recovery method is 'generally favored' in cases involving a settlement that creates a common fund.") (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011)); *In re Cendant Corp. Litig.* ("*Cendant II*"), 264 F.3d 201, 220 (3d Cir. 2001) ("For the past decade, counsel fees in securities litigation have generally been fixed on a percentage basis rather than by the so-called lodestar method.").

The use of the percentage-of-recovery method also comports with the language of the PSLRA, which states that "[t]otal 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 . . . ." 15 U.S.C. § 78u-4(a)(6) (emphasis added); *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (when drafting the PSRLA, Congress "indicated a preference for the use of the percentage method").

Thus, "the PSLRA has made percentage-of-recovery the standard for determining whether attorneys' fees are reasonable." *Cendant I*, 404 F.3d at 188 n.7.

C. The Requested Fee Enjoys a Presumption of Reasonableness Because it Has Been Authorized by the Court-Appointed Lead Plaintiffs

The Third Circuit has explained that "courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel." *Cendant I*. at 220. Lead Plaintiffs, sophisticated institutional investors with extensive experience in negotiating fees with counsel and in evaluating the results of shareholder actions, are precisely the type of fiduciaries for the Settlement Class that Congress envisioned when it enacted the PSLRA.[5] Here, the Court-appointed Lead Plaintiffs have authorized the 25% fee requested after their diligent involvement in the Action. *See* Rowland Decl. ¶¶ 7-8; Dahler Decl. ¶¶ 7-8; Bounds Decl. ¶¶ 7-8; Foltynowicz Decl. ¶¶ 7-8. That fact is due significant weight. *See In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request.").

III. THE REQUESTED AMOUNT OF 25% OF THE SETTLEMENT FUND IS FAIR AND REASONABLE UNDER THE THIRD CIRCUIT *GUNTER* FACTORS

Under Third Circuit law, district courts have considerable discretion in setting an appropriate percentage-based fee award in traditional common-fund cases. *See, e.g.*, *Gunter,* 223 F.3d at 195 ("We give [a] great deal of deference to a district court's decision to set fees."); *GMC*,

[5] Congress enacted the PSLRA in large part to encourage investors with a significant financial stake in the outcome of a securities class action to assume control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." *See* H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.), 1995 WL 709276.

55 F.3d at 821. In exercising that broad discretion, the Third Circuit has noted that a district court should consider, "among other things," the following factors in determining a fee award: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Gunter,* 223 F.3d. at 195. These fee-award factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Id*.; *see also Schuler v. Meds. Co.*, No. 14-1149 (CCC) 2016 WL 3457218, at *9 (D.N.J. June 24, 2016). Each of these factors supports the award of the reasonable fee that Lead Counsel request here.

A. The Size and Nature of the Common Fund Created and the Number of Persons Benefited by the Settlement

Courts have consistently recognized that the result achieved is a major factor to be considered in awarding fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"); *Viropharma*, 2016 WL 312108 at *16.

Here, Lead Counsel have secured a Settlement that provides for a substantial and certain payment of $74,000,000, which is a substantial portion of the $211 million that Lead Plaintiffs' expert calculated the class could reasonably anticipate recovering at trial. To date, the Claims Administrator has mailed the Notice to over 26,000 potential Settlement Class Members and their nominees. *See* Cormio Decl. ¶ 7. As a result, a large number of Settlement Class Members will benefit from the Settlement Fund. *See In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) (amended June 4, 2004) ("The size of that [benefitted]

population is best estimated by the number of entities that were sent the notice describing the [Settlement].").

B. The Absence of Objections by Class Members to the Fee Request

The Notice, which was sent to over 26,000 potential Settlement Class Members and their nominees and posted on a publicly accessible website, provided that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund. *See* Cormio Decl. Ex. A (Notice) at ¶¶ 5, 68.[6] The Notice also advised Settlement Class Members that they could object to the fee request and explained the procedure for doing so. *Id.* at ¶¶ 75-81. There has been no objection to date.[7] This fact is significant, as the Settlement Class includes numerous sophisticated institutional investors with financial stakes in the litigation. As the Third Circuit recognizes, "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." *Cendant II,* 264 F.3d at 235.

C. The Skill and Efficiency of Lead Counsel

The proposed Settlement, which provides substantial benefit to the Settlement Class, required significant skill and demonstrates the ability of Lead Counsel. *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 131 (D.N.J. 2002) ("[t]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained") (quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000)); *see also Bodnar v. Bank of Am. N.A.*, No. 14-3224,

[6] A Summary Notice was also published in *The Wall Street Journal* and released over the *PR Newswire*. Cormio Decl. ¶ 8.

[7] The deadline for submitting objections is June 27, 2017. As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than July 11, 2017 addressing any objections that may be received.

2016 WL 4582084, at *9. (E.D. Pa. Aug. 4, 2016). The substantial and certain recovery obtained for the Settlement Class is the direct result of the efforts of highly skilled and specialized attorneys who possess substantial experience in the prosecution of complex securities class actions.[8] Indeed, Lead Counsel's reputation as attorneys who will zealously prosecute a meritorious case through trial and appeals enabled them to negotiate the outstanding recovery for the benefit of the Settlement Class.

The quality of opposing counsel is also relevant to evaluating the quality of Lead Counsel's services. *See, e.g.*, *Ikon*, 194 F.R.D. at 194; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). Here, Defendants were represented by Gibson, Dunn & Crutcher, LLP, a prominent law firm with undisputed experience and skill. Lead Counsel's ability to obtain a favorable settlement for the Settlement Class in the face of formidable legal opposition further confirms the quality of Lead Counsel's representation and supports the requested fee award.

D. The Complexity and Duration of the Litigation

Securities litigation is regularly acknowledged to be particularly complex and expensive litigation, usually requiring expert testimony on several issues, including loss causation and damages. *See, e.g.*, *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194 (SAS), 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("securities actions are highly complex"); *In re Genta Sec. Litig.*,

[8] Lead Counsel's experience is set forth in their firm resumes, which are attached as Exhibit 3 to the Declaration of Katherine M. Sinderson in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses Filed on Behalf of Bernstein Litowitz Berger & Grossmann LLP (the "Bernstein Litowitz Declaration") and Exhibit 3 to the Declaration of Vincent R. Cappucci in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses Filed on Behalf of Entwistle & Cappucci LLP (the "Entwistle & Cappucci Declaration"). The Bernstein Litowitz Declaration and the Entwistle & Cappucci Declaration are attached as Exhibits 3A and 3B, respectively, to the Joint Declaration.

No. 04-2123 (JAG), 2008 WL 2229843, at *3 (D.N.J. May 28, 2008) ("This [securities-fraud] action involves complex legal and factual issues, and pursuing them would be costly and expensive."); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB) 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) ("[R]esolution of [accounting and damages issues] would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on [scienter and loss causation] issues would [be] lengthy and costly to the parties.").

The $74,000,000 recovery here is substantial in light of the complexity of this case and the significant risks and expenses that the Settlement Class would have faced had this litigation continued. Lead Plaintiffs would have continued conducting extensive discovery including depositions, written discovery requests, and expert discovery. Lead Plaintiffs would also have had to litigate their motion for class certification, including related depositions. After the close of discovery, Defendants likely would have moved for summary judgment, which would require briefing and likely argument. Assuming summary judgment were not granted, counsel would have prepared a pre-trial order and submitted proposed jury instructions, and the parties would have submitted and argued motions *in limine*. Counsel would have incurred substantial time and expense preparing for trial, which would have been expensive, lengthy, and risky.

Moreover, even if the jury found Defendants liable after trial, there would have been substantial risk – given the unusual fact pattern here, including the lack of a corrective disclosure as would typically occur in a securities fraud action – that a post-trial damages award would have only modestly exceeded, if at all, the Settlement Amount. Any judgment would have then been subject to post-trial motions and, likely, a complex multi-year appellate process. *See Warner Commc'ns*, 618 F. Supp. at 747-48 ("Even a victory at trial is not a guarantee of ultimate success. If Lead Plaintiffs were successful at trial and obtained a judgment for substantially more than the

amount of the proposed settlement, defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.") The magnitude, expense, and complexity of this securities case – especially when compared with the significant and certain recovery that the Settlement achieves – further supports the reasonableness of Lead Counsel's fee request.

E. The Risk of Non-Payment

"Courts routinely recognize that the risks created by undertaking an action on a contingency fee basis militates in favor of approval." *In re Schering-Plough Corp.*, No. 08-1432 (DMC) (JAD), 2012 U.S. Dist. LEXIS 75213, at *19 (D.N.J. May 31, 2012); *see also Warner Commc'ns*, 618 F. Supp. at 747-49 (collecting cases). Lead Counsel undertook this action on an entirely contingent basis, taking the risk that the litigation would yield little or no recovery, and leave them uncompensated for their time, as well as for their out-of-pocket expenses. Lead Counsel have not been compensated for any time or expenses since the case began in 2015.

As the Joint Declaration details, Lead Counsel faced numerous significant risks in this case that easily could have resulted in no recovery, or a recovery smaller than the Settlement Amount, including risks that the claims could be dismissed on statute-of-limitations grounds (Joint Decl. ¶¶ 61-62), risks that the Chancery Court Memorandum Opinion on which many of Lead Plaintiffs' allegations were based would be given no preclusive effect (Joint Decl. ¶¶ 61,63), risks that Lead Plaintiffs would not be able to establish that Defendants made actionable false statements (Joint Decl. ¶¶ 64-68), and significant risks in proving loss causation and damages (Joint Decl. ¶¶ 70-81).

The risks that Lead Counsel have incurred strongly favor approval of the requested fee.

F. Significant Time Devoted to this Case by Lead Counsel

Since the inception of the case, Plaintiffs' Counsel have expended 16,026.20 hours in the prosecution of this litigation with a resulting lodestar of $8,531,309.50 and incurred $638,890.06 in litigation expenses for the benefit of the Settlement Class.[9] As discussed above and in the Joint Declaration, Plaintiffs' Counsel investigated and prosecuted this Action vigorously, although (in terms of the duration of the litigation) the case settled in a relatively short amount of time compared with some other securities-fraud class actions. Plaintiffs' Counsel's efforts included, *inter alia,* time spent in the initial investigation of the case; objecting to the Delaware Chancery Court release language; extensively reviewing the record of the Delaware Chancery Court litigation; working with damages experts; researching complex legal issues; preparing and filing the Amended Consolidated Class Action Complaint; conducting extensive document discovery; preparing Lead Plaintiffs' motion for class certification; preparing for the mediation and drafting a mediation statement and a reply mediation statement; negotiating the Settlement; preparing for and presenting the motion for preliminary approval; and finalizing the Settlement documents. At all times, Lead Counsel conducted their work with skill and efficiency, conserving resources and avoiding any duplication of efforts. The foregoing represents a very significant commitment of time and resources, while taking on the substantial risk of recovering nothing for their efforts. Accordingly, this factor favors granting the requested award of fees and expenses.

[9] *See* Entwistle & Cappucci Declaration, Bernstein Litowitz Declaration, Declaration of Joel Friedlander in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Friedlander Declaration"), and Declaration of Frank Burney in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Burney Declaration"). The Friedlander and Burney Declarations are attached as Exhibit 3C and Exhibit 3D, respectively, to the Joint Declaration.

G. The Requested Fee of 25% of the Settlement Fund is Within the Range of Fees Typically Awarded in Actions of This Nature

While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *GMC*, 55 F.3d at 822. Courts have noted that "[t]he median [fee] in class actions is approximately twenty-five percent, but awards of thirty percent are not uncommon in securities class actions." *Ikon*, 194 F.R.D. at 194 (awarding attorneys' fees of 30% of $110 million settlement).

The requested fee award of 25% in this case is in line with the fees typically awarded in similar securities class actions with comparable settlements, which strongly supports awarding the requested fee. *See, e.g.*, *In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 2001 WL 20928, at *14 (E.D. Pa. Jan. 4, 2001) (awarding 30% of $82.5 million settlement); *see also AT&T*, 455 F.3d at 170 (awarding 21.25% of $100 million settlement); *In re Rite Aid Corp. Sec. Litig*., ("Rite Aid II") 146 F. Supp. 2d 706, 734-36 (E.D. Pa. 2001) (awarding 25% of $193 million settlement); *In re Heckmann Corp. Sec. Litig.*, No. 1:10-cv-00378-LPS-MPT, slip op. at 2 (D. Del. June 26, 2014) (D.I. 308) (awarding 33.3% of $27 million settlement); *W. Pa. Elec. Emps. Pension Fund v. Alter*, 2014 WL 12618202 (E.D. Pa. Aug. 4, 2014) (awarding 30% of $13.25 million settlement).[10]

* * *

[10] *See also Billitteri v. Sec. Am., Inc.*, No. 3:09-cv-1568, 2011 WL 3585983, at *9 (N.D. Tex. Aug. 4, 2011) (awarding 25% of $80 million settlement); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 2 (S.D.N.Y. July 18, 2011), (D.I. 117) (awarding 27.5% of $70 million settlement, representing a 4.7 multiplier); *In re Priceline.com, Inc. Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement); *In re Philip Servs. Corp. Sec. Litig.*, No. 98 Civ. 835 (AKH), 2007 WL 959299, at *3 (S.D.N.Y. Mar. 28, 2007) (awarding 26% of $79.75 million settlement); *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (awarding 25% of $80 million settlement).

Accordingly, each of the *Gunter* factors supports Lead Counsel's requested fee of 25% of the Settlement Fund as fair and reasonable.

IV. THE REQUESTED FEE IS REASONABLE UNDER A LODESTAR CROSS-CHECK

Although courts in this Circuit almost uniformly apply the percentage approach to determine attorneys' fees in common fund cases like this one, a court may, but is not required to, use a lodestar "cross-check" to confirm the reasonableness of the requested fee.[11] A lodestar cross-check is a tool to "ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple." *Cendant I*, 404 F.3d at 188. "The goal of this practice is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." *Cendant II.,* 264 F.3d at 285.

The lodestar method, as set forth in the seminal case *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), involves a two-step process. First, the court ascertains the "lodestar" figure by multiplying the number of hours reasonably worked by the reasonable, normal hourly rate of counsel. Second, the court may adjust the lodestar to account for the contingent nature and risks of the litigation, the results obtained, and the quality of the services counsel has rendered. *See id.* at 167-68. A multiplier "need not fall within any pre-defined range, provided that the [d]istrict court's analysis justifies the award." *Schuler,* 2016 WL 3457218, at *10 (citing *Rite Aid I*, 396 F.3d at 307).

[11] "Even if such a cross-check is performed, 'the lodestar cross-check does not trump the primary reliance on the percentage of [the] common fund.'" *Bodnar,* 2016 WL 4582084, at *5 (quoting *Rite Aid I,* 396 F.3d at 307).

Finally, to perform the lodestar cross-check, the court should determine what the effective multiplier is, and then determine whether the resulting fee would be so unreasonable as to warrant a downward adjustment. As noted, the cumulative lodestar of the services performed by Plaintiffs' Counsel in this litigation is $8,531,309.50. Lead Counsel seek an award of 25% of the Settlement Fund, which equals $18,500,000 (before interest). Therefore, the requested fee represents a multiplier to counsel's time of 2.17. This multiplier is in line with, and in many instances substantially lower than, multipliers applied in other securities fraud cases. *See Bodnar*, 2016 WL 4582084, at *6 (holding that a 4.69 multiplier with respect to a $9,075,000 attorney fee award was "appropriate and reasonable"). Further, courts have awarded fees representing multipliers of 3, 4, 5, or even more times the lodestar to reflect the contingency-fee risk and other relevant factors. *See Schuler*, 2016 WL 3457218, at *9 (approving 3.57 multiplier); *In re Rite Aid Corp. Sec. Litig.*("*Rite Aid III*"), 362 F. Supp. 2d 587 (E.D. 2005) (6.96 multiplier); *Aetna*, 2001 WL 20928, at *15 (3.6 multiplier).

The declarations submitted by Plaintiffs' Counsel contain the lodestar calculations, showing that Plaintiffs' Counsel expended 16,026.20 hours of attorney and professional-support-staff time prosecuting this Action. *See* Bernstein Litowitz Decl. ¶ 5 & Ex. 1; Entwistle & Cappucci Decl. ¶ 5 & Ex. 1; Friedlander Decl. ¶ 5 & Ex.1; Burney Decl. ¶ 3. These hours have been multiplied by the current hourly rates[12] of the attorneys and professional support staff who worked on the litigation to arrive at the base lodestar amount of $8,531,309.50. The lodestar cross-check and 2.17 multiplier here confirms that the fee request here is reasonable and in the range regularly

[12] In determining whether the rates are reasonable, the court should take into account the attorneys' legal reputation, experience, and status. The accompanying declarations of counsel include descriptions of the legal background and experience of the firms that worked on this case, which support the hourly rates submitted.

approved by courts in the Third Circuit. *See Martin v. Foster Wheeler Energy Corp.*, No. 3:06-CV-0878, 2008 WL 906472, at *8 (M.D. Pa. Mar. 31, 2008) ("Lodestar multiples of less than four (4) are well within the range awarded by district courts in the Third Circuit."); *Prudential*, 148 F.3d at 341 ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").

V. LEAD COUNSEL'S APPLICATION FOR REASONABLY INCURRED LITIGATION EXPENSES SHOULD BE APPROVED

Lead Counsel also respectfully request that this Court reimburse $638,890.06 in litigation expenses that Plaintiffs' Counsel advanced in the prosecution of this Action. All of those expenses, which are set forth in declarations submitted by Plaintiffs' Counsel, were reasonably necessary for the prosecution of this litigation. *See* Bernstein Litowitz Decl. ¶ 7; Entwistle & Cappucci Decl. ¶ 7; and Friedlander Decl. ¶ 7. Counsel in a class action are entitled to recover expenses that were "adequately documented and reasonable and appropriately incurred in the prosecution of the class action." *Viropharma*, 2016 WL 312108, at *18 (quoting *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)).

The expenses for which Lead Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed hourly.[13] These expenses include, among others, expert fees, on-line research, court reporting and transcripts, photocopying, and postage expenses. The largest expense is for retention of Lead Plaintiffs' damages experts, which totals $408,046.50, or 64% of the total litigation expenses incurred by Plaintiffs' Counsel. The second largest expense is for the document management and litigation support from an electronic discovery vendor in the amount of $109,745.98, or 17% of the total

[13] A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Exhibit 4 to the Joint Declaration.

amount of expenses. Plaintiffs' Counsel also paid $16,500.00 for Lead Plaintiffs' portion of the mediation fees charged by former Judge Phillips. These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firm's hourly billing rates.

The Notice informed potential Settlement Class Members that Lead Counsel would apply for reimbursement of litigation expenses in an amount not to exceed $1,300,000.00, which may include the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Settlement Class. *See* Cormio Decl. Ex. A at ¶¶ 5, 68. The total amount of expenses requested by Lead Counsel is $693,886.26, which includes $638,890.06 in reimbursement of litigation expenses incurred by Plaintiffs' Counsel and $54,996.20 in reimbursement of costs and expenses incurred by Lead Plaintiffs, an amount significantly below the amount listed in the Notice. To date, there has been no objection to the request for expenses.

VI. LEAD PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. § 78U-4(A)(4)

In connection with their request for reimbursement of litigation expenses, Lead Counsel also seek reimbursement of the costs and expenses incurred directly by Lead Plaintiffs. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time and effort they spent on behalf of a class. In *In re Marsh & McLennan Cos., Inc. Securities Litigation*, No. 04 Civ. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), the court awarded $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class." *Id.* at *21. As the court noted, their efforts were

"precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id.*; *see also In re Royal Dutch/Shell Transp. Sec. Litig.*, No. 04-374 (JAP), 2008 WL 9447623, at *29 (D.N.J. Dec. 9, 2008) (awarding "$150,000 to Lead Plaintiffs [Pennsylvania State Employees' Retirement System and the Pennsylvania Public School Employees' Retirement System] to compensate them for their reasonable costs and expenses directly relating to their representation of the Class pursuant to 15 U.S.C. § 78u–4(a)(4)"); *In re Veritas Software Corp.. Sec. Litig.*, No. 1:04-cv-00831-SLR, slip op. at 1 (D. Del. Aug. 5, 2008) (Robinson, J.) (D.I. 144) (awarding each lead plaintiff $15,000 in PSLRA case); *In re Par Pharm. Sec. Litig.*, No. 06-3226 (ES), 2013 WL 3930091, at *11 (D.N.J. July 29, 2013) ($18,000 award to lead plaintiff in PSLRA case based on time and effort devoted to the case); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS) (SMG), 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, "the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation").

Here, for time spent by their employees furthering and supervising the prosecution of the Action, Lead Plaintiff Proxima seeks an award of $18,500.00; Lead Plaintiff San Antonio F&P seeks an award of $4,058.70; and Lead Plaintiff The Arbitrage Fund seeks an award of $32,437.50. *See* Rowland Decl. ¶¶ 9-11; Dahler Decl. ¶¶ 9-10; Foltynowicz Decl. ¶¶ 9-11. Employees of Lead Plaintiffs took an active role in the litigation, including reviewing significant pleadings and briefs in the Action, communicating regularly with Lead Counsel regarding developments in the Action, authorizing settlement discussions, monitoring the progress of settlement negotiations, and approving the Settlement. *See* Rowland Decl. ¶¶ 4-5, 11; Dahler Decl. ¶¶ 4-5, 10; Foltynowicz Decl. ¶¶ 4-5. The requested reimbursement amount is based on the number of hours that Lead

Plaintiffs' employees committed to these activities, multiplied by a reasonable hourly rate for their time. Moreover, as noted above, the Notice informed potential Settlement Class Members that Lead Counsel's request for reimbursement of expenses might include the reasonable costs and expenses of Lead Plaintiffs related to their representation of the Settlement Class, and there has been no objection to that request. The award sought by Lead Plaintiffs is reasonable and justified under the PSLRA based on their involvement in the Action from inception to the Settlement, and should be granted.

VII. CONCLUSION

For the foregoing reasons, Lead Counsel respectfully request that the Court award: attorneys' fees in the amount of 25% of the Settlement Fund, or $18,500,000 plus interest at the same rate as earned by the Settlement Fund; $638,890.06 in reimbursement of the reasonable litigation expenses that Plaintiffs' Counsel incurred in connection with the prosecution of the Action; $18,500.00 in reimbursement of costs of Lead Plaintiff Proxima; $4,058.70 in reimbursement of costs of Lead Plaintiff San Antonio F&P; and $32,437.50 in reimbursement of costs of Lead Plaintiff The Arbitrage Fund.

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Respectfully submitted,

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