

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| PANTHER PARTNERS INC., Individually | : | Civil Action No. 1:18-cv-09848-PGG |
| and on Behalf of All Others Similarly Situated, | : | |
| | : | <u>CLASS ACTION</u> |
| | : | |
| Plaintiff, | : | MEMORANDUM OF LAW IN SUPPORT |
| | : | OF LEAD COUNSEL’S MOTION FOR AN |
| vs. | : | AWARD OF ATTORNEYS’ FEES AND |
| | : | EXPENSES AND AN AWARD TO |
| JIANPU TECHNOLOGY INC., DAQING | : | PLAINTIFF PURSUANT TO 15 U.S.C. §77z- |
| (DAVID) YE, YILU (OSCAR) CHEN, | : | 1(a)(4) |
| JIAYAN LU, CAOFENG LIU, CHENCHAO | : | |
| ZHUANG, JAMES QUN MI, KUI ZHOU, | : | |
| YUANYUAN FAN, DENNY LEE, RONG360 | : | |
| INC., GOLDMAN SACHS (ASIA) L.L.C., | : | |
| GOLDMAN SACHS & CO. LLC, MORGAN | : | |
| STANLEY & CO. INTERNATIONAL PLC, | : | |
| J.P. MORGAN SECURITIES LLC, CHINA | : | |
| RENAISSANCE SECURITIES (HONG | : | |
| KONG) LIMITED, CHINA RENAISSANCE | : | |
| SECURITIES (US) INC., LAW DEBENTURE | : | |
| CORPORATE SERVICES INC. and | : | |
| GISELLE MANON, inclusive, | : | |
| | : | |
| Defendants. | : | |
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I. INTRODUCTION

After more than three years of hard-fought litigation, Lead Counsel secured a \$7,500,000 settlement for the benefit of the Settlement Class. This is a very good result given the serious obstacles to recovery, the credible defenses to liability and damages that Defendants have articulated, the fact that the Court might have accepted those arguments at summary judgment, and the recovery relative to the amount of maximum estimated recoverable damages suffered by the Settlement Class.¹ To obtain this Settlement, Lead Plaintiff and Lead Counsel overcame a number of significant challenges during the course of the Action, which could have resulted in zero recovery for the Settlement Class. In recognition of these risks and the excellent result obtained, Lead Counsel now respectfully move this Court for an award of attorneys' fees of 33-1/3% of the Settlement Amount and \$31,019.24 in expenses that were reasonably and necessarily incurred in prosecuting and resolving the Action, plus interest on both amounts.² In addition, Lead Plaintiff Panther Partners, Inc. ("Panther Partners") seeks a modest award of \$2,500 for its service to the Settlement Class. *See* Declaration of Panther Partners, Inc. in Support of Lead Plaintiff's Motion for (1) Final Approval of the Settlement and Plan of Allocation; and (2) an Award of Attorneys' Fees

¹ Capitalized terms used herein are defined and have the meanings contained in the Stipulation of Settlement (ECF No. 107) (the "Stipulation"), the accompanying Joint Declaration of Erin W. Boardman and Todd Kammerman in Support of: (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and an Award to Plaintiff Pursuant to 15 U.S.C. §77z-1(a)(4) ("Joint Decl."), and in the Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation ("Settlement Memorandum"), submitted concurrently herewith. Internal citations are omitted and emphasis is added throughout unless otherwise noted.

² Lead Counsel means Robbins Geller Rudman & Dowd LLP and Abraham, Fruchter & Twersky, LLP. *See* Declaration of Erin W. Boardman Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."); and Declaration of Jack G. Fruchter Filed on Behalf of Abraham, Fruchter & Twersky, LLP in Support of Application for Award of Attorneys' Fees, Expenses and Award to Plaintiff ("AFT Decl."), submitted herewith.

and Litigation Expenses and an Award to Plaintiff (“Panther Partners Decl.”) at ¶5, submitted herewith.

As set forth below, the relevant factors articulated in the Second Circuit’s *Goldberger* decision strongly support the requested award. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Significantly, following an extensive Court-ordered notice program in which over 14,300 copies of the Notice were mailed to Potential Settlement Class Members and nominees, to date not a single Settlement Class Member has objected to the requested fees or the expenses (not to exceed \$75,000, as set forth in the Notice).³

As detailed below, in the Joint Declaration, and in the Settlement Memorandum, the Settlement achieved here following more than three years of intense litigation against determined adversaries, and represents an excellent result for Lead Plaintiff and the Settlement Class, particularly when judged in the context of the significant litigation risks in this Action. The \$7.5 million Settlement that Lead Counsel and Lead Plaintiff obtained provides the Settlement Class with an immediate and certain recovery in a case that faced significant risks to establishing falsity and damages. Joint Decl., ¶¶51-56. In achieving this result, Lead Counsel worked 2,589 hours over the course of this complex litigation, all on a contingency basis, with no guarantee of ever being paid.

Lead Counsel believe that an attorney fee award of 33-1/3%, together with payment of litigation expenses, properly reflects the many significant risks taken by Lead Counsel in prosecuting the Action, as well as the result achieved. When examined under either of this Circuit’s methods of contingency fee determination (*i.e.*, percentage of the fund or lodestar), it is abundantly clear that an award of fees of 33-1/3% – which has been agreed to by Lead Plaintiff (*see* Panther Partners Decl.,

³ As of the date of this fee memorandum, which is before the March 4, 2022 deadline for filing objections, Lead Counsel have not received any objection to the fee and expense request. If any timely objections are received from Settlement Class Members, Lead Counsel will address them in their reply brief, which will be filed with the Court no later than May 5, 2022.

¶4) – is reasonable, and well within the range of attorneys’ fees awarded in similar complex, contingency cases. In addition, the expenses requested by Lead Counsel and the award to Lead Plaintiff pursuant to 15 U.S.C. §77z-1(a)(4) are reasonable in amount.

II. HISTORY AND BACKGROUND OF THE LITIGATION

A detailed description of Lead Plaintiff’s claims and Lead Counsel’s vigorous prosecution of this case are set forth in the accompanying Joint Declaration. For the sake of brevity, the Court is respectfully referred to that declaration.

III. ARGUMENT

A. Lead Counsel Are Entitled to an Award of Attorneys’ Fees and Expenses from the Common Fund

The Supreme Court has long recognized 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.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Goldberger*, 209 F.3d at 47; *Fresno Cnty. Emps.’ Ret. Ass’n. v. Isaacson/Weaver Family Tr.*, 925 F.3d 63, 68 (2d Cir. 2019), *cert denied*, __U.S.__, 140 S. Ct. 385 (2019). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally toward the costs associated with litigation pursued on their behalf. *See Goldberger*, 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007).

Courts have recognized that in addition to providing just compensation, awards of fair attorneys’ fees from a common fund also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *10-*11 (S.D.N.Y. May 9, 2014), *aff’d sub nom. Arbuthnot v.*

Pierson, 607 F. App'x 73 (2d Cir. 2015); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); *Veeco*, 2007 WL 4115808, at *2. Indeed, the Supreme Court has emphasized that private securities actions, such as this one, provide “‘a most effective weapon in the enforcement’ of the securities laws and are ‘a 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)); accord *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

Courts in this Circuit have consistently adhered to this precedent. See *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2004 WL 2397190, at *10 (S.D.N.Y. Oct. 26, 2004) (“It is well established that where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to ‘a reasonable fee – set by the court – to be taken from the fund.’”); *Fresno Cnty.*, 925 F.3d at 68. Fairly compensating Lead Counsel for the risks they took in bringing this Action is essential because “[s]uch actions could not be sustained if plaintiffs’ counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class.” *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

B. The Court Should Award a Reasonable Percentage of the Common Fund

Lead Counsel respectfully submit that the Court should award a fee based on a percentage of the common fund obtained. Courts routinely find that the percentage-of-the-fund method, under which counsel is awarded a percentage of the fund that it creates, is the preferred means to determine a fee because it “‘directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.’” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); see also *Hayes v. Harmony Gold Mining Co., Ltd.*, 509 F. App'x 21, 24 (2d Cir. 2013) (“[A]s the district court recognized, the prospect of a

percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class.”). The percentage approach also recognizes that the quality of counsel’s services is measured best by the results achieved and is most consistent with the system typically used in the marketplace to compensate attorneys in non-class contingency cases.⁴

The Supreme Court has indicated that attorneys’ fees in common-fund cases generally should be based on a percentage of the fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (“[U]nder the ‘common fund doctrine,’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class.”). The Second Circuit has expressly approved the percentage method, recognizing that “the lodestar method proved vexing” and had resulted in “an inevitable waste of judicial resources.” *Goldberger*, 209 F.3d at 48-49 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys’ fees, although the lodestar method may also be used); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (stating that the “percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases”). Indeed, the Second Circuit has acknowledged that the “trend in this Circuit is toward the percentage method.” *Wal-Mart Stores*, 396 F.3d at 121; *see also City of Providence*, 2014 WL 1883494, at *11-*12.⁵

⁴ *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) (“The percentage method better aligns the incentives of plaintiffs’ counsel with those of the class members because it bases the attorneys’ fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work. . . . The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs’ counsel”); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011) (The “advantages of the percentage method . . . are that it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made, and that it is consistent with the system typically used by individual clients to compensate their attorneys.”).

⁵ All federal Courts of Appeal to consider the matter have approved the percentage method, with two circuits requiring its use in common-fund cases. *See In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re GMC Pick-Up*

The determination of attorneys' fees using the percentage-of-the-fund method is also supported by the PSLRA, which provides 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" recovered for the class. 15 U.S.C. §77z-1(a)(6). Courts have concluded that, by drafting the PSLRA in such a manner, Congress expressed a preference for the percentage, as opposed to the lodestar, method of determining attorneys' fees in securities class actions. *See Veeco*, 2007 WL 4115808, at *3; *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 465-66 (S.D.N.Y. 2004).

Given the Supreme Court's indication that the percentage method is proper in this type of case, the Second Circuit's explicit approval of the percentage method in *Goldberger* and *Fresno*, as well as the trend among the district courts in this Circuit and the language of the PSLRA, the Court should award attorneys' fees based on a percentage of the fund.

C. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). An "ideal proxy" for the award should reflect the fees upon which common fund plaintiffs negotiating in an efficient market for

Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821-22 (3d Cir. 1995); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-56 (10th Cir. 1988); *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). The Eleventh and District of Columbia Circuits require the use of the percentage method in common-fund cases. *See Faught*, 668 F.3d at 1242; *Swedish Hosp.*, 1 F.3d at 1271.

legal services would agree.” *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014). Lead Plaintiff has negotiated a 33-1/3% cap with Lead Counsel. If this were a non-class action, the customary fee arrangement would be contingent and in the range of 33% of the recovery. *See 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.”) (Brennan, J., concurring).

Lead Counsel’s efforts have resulted in a \$7.5 million settlement. This recovery of over 9% of Lead Plaintiff’s estimated maximum recoverable damages is a very good result in a pre-trial settlement in a PSLRA case. The percentage of the Settlement Fund that Lead Counsel requests to be paid is fair and reasonable in light of the substantial benefit Lead Counsel’s work has conferred on the Settlement Class.

The requested 33-1/3% fee is well within the range of percentage fees awarded by courts within the Second Circuit in other comparable securities cases. *See, e.g., Hawaii Structural Ironworkers Pension Tr. Fund v. AMC Ent. Holdings, Inc.*, No. 1:18-cv-00299-AJN-SLC, ECF No. 60 (S.D.N.Y. Feb. 14, 2022) (awarding 33-1/3% of \$18 million settlement); *Machniewicz v. Uxin Ltd., et al.*, No. 1:19-cv-0822-MKB-VMS, ECF No. 61 (E.D.N.Y. Sept. 8, 2021) (awarding 33.33% of settlement); *In re PPD AI Grp. Inc. Sec. Litig.*, No. 18-CV-6716 (TAM), 2022 WL 198491, at *17 (E.D.N.Y. Jan. 21, 2022) (approving plaintiffs’ counsel’s request for attorneys’ fees in the amount of one third of the settlement fund); *Strougo v. Barclays PLC*, No. 1:14-cv-05797-VM-DCF, ECF No. 146 (S.D.N.Y. June 3, 2019) (awarding 33% of \$27 million settlement); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. 12-2389, 2015 WL 6971424, at *9 (S.D.N.Y. Nov. 9, 2015) (awarding 33% of \$26.5 settlement), *aff’d*, 674 F. App’x 37 (2d Cir. 2016); *In re Patriot Nat’l Inc. Sec. Litig.*, No. 1:17-cv-01866-ER, 2019 WL 5882171, at *1 (S.D.N.Y. Nov. 6, 2019) (awarding 33-1/3% fee

plus expenses); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-cv-2548(VSB), 2019 WL 4734396, at *6 (S.D.N.Y. Sept. 23, 2019) (awarding one-third of \$75 million recovery).

D. The Fee Request Is Reasonable When a Lodestar Cross-Check Is Applied

When using the percentage-of-the-fund method, courts can also look to “hours as a ‘cross check’ on the reasonableness of the requested percentage,” *Goldberger*, 209 F.3d at 50, “to ensure that an otherwise reasonable percentage fee would not lead to a windfall.” *Colgate-Palmolive*, 36 F. Supp. 3d at 353. When used as a “mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.” *Goldberger*, 209 F.3d at 50.

The lodestar method requires a two-part analysis: “first, to determine the lodestar, the court multiplies the number of hours each attorney spent on the case by each attorney’s reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney’s work.” *City of Providence*, 2014 WL 1883494, at *13. Performing the lodestar calculation here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Lead Counsel and their paraprofessionals spent 2,589 hours prosecuting this case, producing a total lodestar amount of \$1,863,898.50 when multiplied by counsel’s billing rates. *See* Robbins Geller Decl. ¶4; AFT Decl., ¶4.⁶ The attorneys’ fees requested by Lead Counsel herein, \$2,500,000, represents a slight multiplier of 1.34 to Lead Counsel’s lodestar.⁷

⁶ In determining whether the rates are reasonable, the Court should take into account the attorneys’ professional reputation, experience, and status. Here, the lawyers and paraprofessionals of Lead Counsel are experienced securities practitioners with track records of success, and among the most prominent and well-regarded securities practitioners in the nation. Lead Counsel’s hourly rates are reasonable and have recently been judicially approved. *See* Hr’g Tr. at 160:22-24, *In re Am. Realty Cap. Props., Inc. Litig.*, No. 15-MC-40(AKH) (S.D.N.Y. Jan. 23, 2019) (“I find your lodestar reasonable, the rates appropriate and, in relationship to the work that you did, reasonable.”)

In cases of this nature, fees representing multiples above lodestar are regularly awarded to reflect the contingency-fee risk and other relevant factors. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) (“a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors”); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG) (RER), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (“Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar.”).

Accordingly, in complex contingent litigation, lodestar multipliers of between 2 and 5 have been commonly awarded. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5); *Christine Asia Co., Ltd. v. Yun Ma*, No. 1:15-md-02631(CM)(SDA), 2019 WL 5257534, at *19 (S.D.N.Y. Oct. 16, 2019) (awarding fee representing a 2.15 multiplier, which court found to be “well within the range commonly awarded in securities class actions of this complexity and magnitude”); *In re BHP Billiton Ltd. Sec. Litig.*, No. 1:16-cv-01445-NRB, 2019 WL 1577313, at *1-*2 (S.D.N.Y. Apr. 10, 2019) (awarding fee representing 2.7 multiplier); *Telik*, 576 F. Supp. 2d at 590 (“In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court.”). *See also Bellifemine v. Sanofi-Adventis U.S. LLC*, No. 07 Civ. 2207 (JGK), 2010 WL 3119374, at *6 (S.D.N.Y. Aug. 6, 2010) (multiple of 2.05); *Ellenburg III v. JA Solar Holdings Co., Ltd.*, No. 1:08-cv-10475-JGK, ECF No. 88 (S.D.N.Y. June 30, 2011) (multiplier of 2.10).

(Ex. A hereto); Hr’g Tr. at 25:12-16, *Kaess v. Deutsche Bank AG*, No. 09-cv-01714 (GHW)(RWL) (S.D.N.Y. June 11, 2020) (“I find that these billable rates [for Robbins Geller] based on the timekeeper’s title, specific years of experience, and market rates for similar professionals in their fields . . . to be reasonable in this context.”) (Ex. B hereto).

⁷ The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Jenkins*, 491 U.S. at 283-84.

Here, while shouldering the risk of non-recovery, Lead Counsel litigated this case on a contingency basis for more than three years, working 2,589 hours for the benefit of the Settlement Class. Accordingly, the modest lodestar multiplier here is reasonable under the circumstances.

The lodestar/multiplier is to be used merely as a cross-check on reasonableness. To find otherwise undermines the principles supporting the percentage approach and encourages needless lodestar building litigation. *See also In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 196 (E.D. Pa. 2000) (“The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel’s request of thirty percent.”). Lead Counsel invested substantial time and effort prosecuting this Action against Defendants to a successful completion.

As detailed in the Joint Declaration, based on their efforts in litigating this case and producing an excellent result, Lead Counsel believe the requested fee, whether calculated as a percentage of the fund or in relation to counsel’s lodestar, is manifestly reasonable. Moreover, as discussed below, each of the factors cited by the Second Circuit in *Goldberger* also strongly supports a finding that the requested fee is reasonable.

E. The Relevant Factors Confirm that the Requested Fee Is Reasonable

In *Goldberger*, the Second Circuit explained that whether the court uses the percentage-of-the-fund method or the lodestar approach, it should continue to consider the traditional criteria that reflect a reasonable fee in common fund cases, including:

- the time and labor expended by counsel;
- the risks of the litigation;
- the magnitude and complexity of the litigation;
- the requested fee in relation to the settlement;
- the quality of representation; and

- public policy considerations.

Goldberger, 209 F.3d at 50. Consideration of these factors demonstrates that the requested fee is fair and reasonable.

1. The Time and Labor Expended by Counsel

Lead Counsel expended substantial time and effort pursuing the Action on behalf of the Settlement Class. Since the Litigation began in October 2018, Lead Counsel and their paraprofessionals devoted 2,589 hours to prosecuting the Settlement Class' claims. As detailed in the Joint Declaration, submitted herewith, counsel, among other things:

- conducted an extensive investigation into the underlying facts;
- researched the law relevant to the claims asserted and Defendants' potential defenses thereto, and drafted a detailed amended complaint;
- successfully opposed Defendants' motion to dismiss the complaint for failure to state a claim;
- met and conferred with Defendants pursuant to Federal Rule of Civil Procedure 26;
- propounded discovery on Defendants;
- prepared for and participated in mediation with Greg Lindstrom of Phillips ADR;
- conducted post-mediation settlement negotiations; and
- negotiated and drafted the Stipulation and exhibits thereto, as well as the motion for preliminary approval of the Settlement.

See generally Joint Decl.

Moreover, Lead Counsel, with the assistance of their damages consultant, prepared the proposed Plan of Allocation. Throughout the Action, Lead Counsel staffed the matter efficiently and avoided any unnecessary duplication of effort. Moreover, additional hours and resources will necessarily be expended assisting Settlement Class Members with the completion and submission of their Proof of Claim and Release forms, shepherding the claims process, and responding to

Settlement Class Member inquiries. *See Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 Civ. 4825(JLC), 2013 WL 1364147, at *6 (S.D.N.Y. Apr. 2, 2013). The significant amount of time and effort devoted to this case by Lead Counsel to obtain a \$7.5 million recovery, work that will not end with the Court's approval of the Settlement, confirms that the 33-1/3% fee request is reasonable.

2. The Risks of the Litigation

a. The Contingent Nature of Lead Counsel's Representation Supports the Requested Fee

The risk undertaken in the litigation is often considered the most important *Goldberger* factor. *Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at *5; *Telik*, 576 F. Supp. 2d at 592. The Second Circuit has recognized that the risk associated with a case undertaken on a contingent fee is an important factor in determining an appropriate fee award:

No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974). “Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.” *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004); *Am. Bank Note*, 127 F. Supp. 2d at 433 (concluding it is “appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award”); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 417 (S.D.N.Y. 1997) (“Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.”). This risk encompasses not just the risk of no payment, but also the risk of underpayment. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569-70 (7th Cir. 1992) (reversing district court's fee award where court failed to account for, among other things, risk of underpayment to counsel). When considering the

reasonableness of attorneys' fees in a contingency action, the court should consider the risks of the litigation at the time the suit was brought. *See Goldberger*, 209 F.3d at 55; *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011).

Lead Counsel undertook this Action on a wholly contingent-fee basis, investing a substantial amount of time and money to prosecute a risky action with no guarantee of compensation or even the recovery of expenses. Unlike Defendants' Counsel, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel have not been compensated for any time or expenses since this case began in October 2018, and would have received no compensation or payment of their expenses had this case not been resolved successfully.

From the outset, Lead Counsel understood that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for investing the time and money the case would require. In undertaking that responsibility, Lead Counsel were obligated to assure that sufficient attorney and paraprofessional resources were dedicated to prosecuting the Action and that funds were available to compensate staff and to pay for the considerable costs that a case such as this entails. Under these circumstances, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis.

In addition to advancing litigation expenses, Lead Counsel faced the possibility that they would receive no attorneys' fees at all. Indeed, it is possible that, if not for this Settlement, the entire case may have been disposed of at summary judgment.⁸

⁸ Moreover, it is wrong to presume that a law firm handling complex contingent litigation always wins. There are numerous class actions in which lead counsel expended thousands of hours and yet received no remuneration, despite their diligence and expertise. *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 725 (11th Cir. 2012) (affirming judgment as a matter of law following jury verdict partially in plaintiff's favor); *In re Oracle Corp. Sec. Litig.*, No. C 01-00988-SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (court granted summary judgment for defendants after eight years of litigation, after lead counsel incurred

Losses in contingent-fee litigations, especially those brought under the PSLRA, are exceedingly expensive. Lead Counsel’s assumption of the contingency fee risk strongly supports the reasonableness of the requested fee. *See Flag Telecom*, 2010 WL 4537550, at *27 (“Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award.”); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) (“There was significant risk of non-payment in this case, and Plaintiffs’ Counsel should be rewarded for having borne and successfully overcome that risk.”).

b. Risks of Establishing Liability and Damages

While Lead Plaintiff remains confident in its claims, its ability to ultimately prove liability was far from certain. As detailed in the Joint Declaration and in the Settlement Memorandum, Defendants raised numerous challenges to Lead Plaintiff’s allegations of falsity, causation, and damages. Joint Decl., ¶¶51-56. Even assuming *arguendo* that Lead Plaintiff was able to overcome Defendants’ likely summary judgment and *Daubert* motions, these arguments would no doubt be raised again prior to and at trial. Therefore, whether Lead Plaintiff ultimately would prove liability under the Securities Act was far from assured.

Moreover, there is no way to know how a jury would decide these issues. The damage assessments of the parties’ respective trial experts would become a “battle of experts.” The outcome of such battles is never predictable, and there existed the very real possibility that a jury could be swayed by experts for Defendants to minimize the Settlement Class’ losses or to show that the losses

over \$7 million in expenses, and worked over 100,000 hours, representing a lodestar of approximately \$40 million); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556, at *1 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (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 basis of 1994 Supreme Court opinion).

were attributable to factors other than the alleged misstatements and omissions. Thus, even if Lead Plaintiff prevailed as to liability at trial, the judgment obtained might well be only a fraction of the damages claimed.

3. The Magnitude and Complexity of the Litigation

The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel. *See Chatelain v. Prudential-Bache Sec. Inc.*, 805 F. Supp. 209, 216 (S.D.N.Y. 1992). It is widely recognized that "shareholder actions are notoriously complex and difficult to prove." *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 (WHP), 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008); *see also Christine Asia*, 2019 WL 5257534, at *18 ("Securities class actions in particular are 'notably difficult and notoriously uncertain.'"). "[S]ecurities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *Ikon*, 194 F.R.D. at 194; *see also In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575(SWK), 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) ("[T]he legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages. These challenges are exacerbated . . . where a number of controlling decisions have recently shed new light on the standard for loss causation."). This case was no exception. As described in the Joint Declaration, this Action involved a number of difficult and complex questions concerning liability, loss causation, and damages in a case that would have required extensive additional efforts by Lead Counsel to obtain discovery in China and ultimately prepare for trial.

The trial of liability issues alone would have involved substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, much of which, if it could be obtained, would require translation, vigorously contested motions, and the considerable expenditures of judicial resources. Because this case revolved around "difficult, complex, hotly disputed, and

expert-intensive issues,” this factor favors awarding a 33-1/3% fee. *City of Providence*, 2014 WL 1883494, at *16.

4. The Quality of Representation Supports the Requested Fee

The quality of the representation by Lead Counsel is another important factor that supports the reasonableness of the requested fee. Lead Counsel submit that the quality of the representation here is best evidenced by the quality of the result achieved. *See generally* Settlement Memorandum; *see also Flag Telecom*, 2010 WL 4537550, at *28; *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007). Lead Counsel demonstrated a great deal of skill to achieve a settlement at this level in this particular case. Lead Counsel are experienced securities class action and complex litigation practitioners. *See* Robbins Geller Decl., Ex. C; AFT Decl., Ex. C. This Settlement is attributable to the diligence, determination, hard work, and reputation of counsel, who developed, litigated, and successfully negotiated the Settlement of this Action and a substantial cash recovery in a very difficult case, without the risk of trial. *See Teachers’ Ret. Sys.*, 2004 WL 1087261, at *6.

Finally, courts repeatedly recognize that the quality of the opposition faced by Lead Counsel should also be taken into consideration in assessing the quality of counsel’s performance. *See, e.g., Marsh ERISA*, 265 F.R.D. at 148 (“The high quality of defense counsel opposing Plaintiffs’ efforts further proves the caliber of representation that was necessary to achieve the Settlement.”); *Veeco*, 2007 WL 4115808, at *7 (among the factors supporting award of attorneys’ fees was that defendants were represented by “one of the country’s largest law firms”). Here, Defendants are represented by lawyers from Skadden, Arps, Slate, Meagher & Flom LLP and Ropes & Gray LLP, who presented skilled defenses and spared no effort in representing their clients. Notwithstanding this formidable opposition, Lead Counsel’s ability to present a strong case and to demonstrate its willingness to

continue to vigorously prosecute the Action through trial and then inevitable appeals enabled Lead Counsel to achieve a very favorable Settlement for the benefit of the Settlement Class.

5. Public Policy Considerations

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. *See Woburn Ret. Sys. v. Salix Pharms., Ltd.*, No. 14-CV-8925 (KMW), 2017 WL 3579892, at *7 (S.D.N.Y. Aug. 18, 2017) (fee award was “appropriate, and not excessive, to encourage future securities class actions”); *Flag Telecom*, 2010 WL 4537550, at *29 (if the “important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate [Lead] Counsel for the value of their efforts, taking into account the enormous risks they undertook”); *Maley*, 186 F. Supp. 2d at 373 (“In considering an award of attorney’s fees, the public policy of vigorously enforcing the federal securities laws must be considered.”). Accordingly, public policy favors granting Lead Counsel’s fee and expense application here.

6. The Settlement Class’ Reaction to the Fee Request to Date Supports the Requested Fee

To date, the Claims Administrator has sent more than 14,300 copies of the Notice to Potential Settlement Class Members and nominees informing them, *inter alia*, that Lead Counsel intended to apply to the Court for an award of attorneys’ fees in an amount not to exceed 33-1/3% of the Settlement Amount, plus expenses not to exceed \$75,000, plus interest on both amounts.⁹ The time to object to the fee request expires on March 4, 2022. To date, however, not a single objection to the fee and expense amounts set forth in the Notice has been received. Such a “low level of objection is

⁹ *See* accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, Ex. A (Notice).

a ‘rare phenomenon.’” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). The fact that no objections have been received to date supports the fairness of the fee request.

IV. LEAD COUNSEL’S EXPENSES ARE REASONABLE AND WERE NECESSARY TO THE PROSECUTION OF THIS ACTION

Lead Counsel also respectfully request an award of \$31,019.24 in expenses incurred while prosecuting the Action. Submitted herewith are declarations regarding these expenses, which are properly recovered by counsel. *See* Robbins Geller Decl., ¶¶5-6; AFT Decl., ¶¶5-6. *See, e.g., In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated “‘for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were ‘incidental and necessary to the representation’”); *Flag Telecom*, 2010 WL 4537550, at *30 (“It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class.”); *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (court may compensate class counsel for reasonable expenses necessary to the representation of the class).

Lead Counsel’s modest expenses include, for example, filing and Business Wire fees, the costs of mediating the Settlement Class’ claims, and computerized research. A complete breakdown by category of the expenses incurred is set forth in the accompanying Robbins Geller and AFT declarations. These expenses were critical to Lead Counsel’s success in achieving the Settlement. *See Glob. Crossing*, 225 F.R.D. at 468 (“The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which ‘the paying, arms’ length market’ reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund.”). So far, not a single objection to the expense amount set forth in the Notice has been received. Accordingly, Lead Counsel respectfully

request payment for these expenses, plus interest earned on such amount at the same rate as that earned by the Settlement Fund.

V. THE PROPOSED AWARD TO LEAD PLAINTIFF IS REASONABLE

The PSLRA permits plaintiffs to seek an “award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.” 15 U.S.C. §77z-1(a)(4). “Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.” *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468, at *22 (S.D.N.Y. July 21, 2020).

Here, Lead Plaintiff dedicated meaningful time to successfully litigating the Action by supervising counsel’s efforts, remaining abreast of developments in the litigation, and ultimately approving the terms of the Settlement. Panther Partners Decl., ¶¶3-4. These are “precisely the types of activities that support awarding reimbursement of expenses to class representatives.” *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 CIV 8144(CM), 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009).

Accordingly, Lead Plaintiff respectfully requests that the Court grant its modest request, in the amount of \$2,500, as reimbursement for its “reasonable costs and expenses incurred in managing this litigation and representing the [Settlement] Class.” *Id. See also Veeco*, 2007 WL 4115808, at *12 (awarding approximately \$15,900 for time spent supervising litigation and characterizing such awards as “routine”).

VI. CONCLUSION

Lead Counsel’s efforts over the last three years have resulted in an outstanding result for the Settlement Class. Based on the foregoing, and the entire record herein, Lead Counsel respectfully

request that the Court award attorneys' fees of 33-1/3% of the Settlement Amount, plus expenses in the amount of \$31,019.24, plus interest on both amounts, and \$2,500 to Lead Plaintiff Panther Partners.

DATED: February 18, 2022

Respectfully submitted,

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& DOWD LLP
SAMUEL H. RUDMAN
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s/Erin W. Boardman

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Lead Counsel for Lead Plaintiff

CERTIFICATE OF SERVICE

I, Erin W. Boardman, hereby certify that on February 18, 2022, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice.

s/ Erin W. Boardman

ERIN W. BOARDMAN

EXHIBIT A

K1NAARCHps

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 In Re:

15-MC-40 (AKH)

4 AMERICAN REALTY CAPITAL
5 PROPERTIES, INC. LITIGATION,

6 Fairness Hearing

7 -----x

8 New York, N.Y.
9 January 23, 2019
10:15 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN

12 District Judge

13 APPEARANCES

14 ROBBINS GELLER RUDMAN & DOWD LLP
15 Attorneys for TIAA and Class Plaintiffs
16 BY: DEBRA J. WYMAN, ESQ.
17 MICHAEL J. DOWD, ESQ.
18 ROBERT M. ROTHMAN, ESQ.
ELLEN GUSIKOFF-STEWART, ESQ.

19 GLANCY PRONGAY & MURRAY LLP
Attorneys for the Witchko Derivative
20 BY: MATTHEW M. HOUSTON, ESQ.

21 MILBANK LLP
Attorneys for Defendant ARCP
22 BY: SCOTT A. EDELMAN, ESQ.

K1NAARCHps

1 THE COURT: Who is going to do the application for
2 Robbins Geller?

3 MR. DOWD: I will, your Honor. Michael Dowd.

4 THE COURT: Good morning, Mr. Dowd.

5 MR. DOWD: Good morning, your Honor.

6 THE COURT: I've read your extensive declaration, that
7 is, the declaration of Ms. Wyman.

8 I want to take up just your fees, your activities.
9 The first to file the class action lawsuit were four firms, who
10 don't seem to be involved: Pomerantz LLP, Wolf Popper LLP, Wolf
11 Haldenstein LLP, and the Rosen Law Firm. Is it clear that they
12 are making no claim?

13 MR. DOWD: They are making no claim, your Honor.

14 THE COURT: OK. Did they do anything in the lawsuit?

15 MR. DOWD: No, your Honor. I mean, I'm sure they
16 filed complaints early on. But the Court, when it appointed us
17 lead plaintiff, told us to work with other firms and form a
18 working group, a global working group. And there were a group
19 of firms, I believe it was nine firms, that agreed to be part
20 of that working group and to work on the case. And we've
21 submitted their time with our time. And those are the only
22 attorneys that would be entitled to fees in this casement.

23 THE COURT: The second thing, I did not appreciate how
24 many counsel there were. My impression was that there were
25 three or four at the time that I said what you said.

K1NAARCHps

1 MR. DOWD: Pardon me, your Honor?

2 THE COURT: I didn't know there were nine other law
3 firms involved.

4 MR. DOWD: There were, your Honor. The Court --

5 THE COURT: I didn't know that, I said. When I asked
6 you to coordinate services and organize the plaintiffs' group,
7 I thought there were just two or three law firms.

8 MR. DOWD: No, they were not. And they each had
9 clients in the case, except I believe there was one firm that
10 did not. But they each had clients. They were all class reps.
11 They were all either on our "may call" or "will call" witness
12 list. And so they provided valuable service. And they did a
13 lot of work in the case. We've limited it and tried to give
14 them discrete projects or dealing with just their plaintiffs,
15 you know, because that's what we thought the Court wanted with
16 the working group, and we did do that. Their time is about 10
17 percent of our time. And I think that's fair considering what
18 they did in the case.

19 THE COURT: You have a rather detailed description of
20 the various things you were doing.

21 MR. DOWD: Yes, your Honor. That would be in
22 Ms. Wyman's, the longer declaration.

23 THE COURT: The declaration in support of application
24 for award of attorney's fees and expenses is what I'm looking
25 at. I have the larger one as well.

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1 Ms. Wyman's affidavit identifies the lawyers -- all
2 your firm?

3 MR. DOWD: Yes. They're all our firm.

4 THE COURT: Why so many lawyers?

5 MR. DOWD: Well, your Honor, there are different
6 people that helped with different tasks. When I looked at it,
7 this is what struck me. We had a working group that I really
8 thought were the people that were going to be responsible for
9 trying this case. That group was about 15 people, 13 lawyers
10 and the two forensic accountants that were involved in it from
11 beginning to end. Those 15 people account for about 72 percent
12 of our lodestar, \$47 million, just those 15 people. They were
13 all people that the Court would probably be familiar with or
14 would have seen their names. Certainly most of us have been
15 here in court.

16 And then if you add in the four people at our office,
17 three of our internal staff attorneys and another associate,
18 that were primarily responsible for the document review, so
19 that would be another four people, bringing it to 19. I think
20 those people together would account for about 82 percent of our
21 entire lodestar.

22 So it may look like a lot of people because there were
23 timekeepers that did individual things or who were on the case
24 for a given period of time. But if you look at those people
25 that really drove the case, you're talking about the 15 main

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1 people that did everything. That's 72 percent of the time.

2 And if you take in those other four that were responsible for a
3 lot of the document work, that's, I think, about 82 percent of
4 the lodestar.

5 THE COURT: 12 people billed more than a thousand
6 hours.

7 MR. DOWD: Yes, your Honor.

8 THE COURT: How many people were involved in your
9 firm, Mr. Edelman? Roughly.

10 MR. EDELMAN: Your Honor, I would bet a comparable
11 number. This was complicated litigation in a big case.

12 THE COURT: I understand.

13 MR. EDELMAN: That doesn't sound at all outlandish to
14 me. Their the core team.

15 THE COURT: OK. Then I pass that observation.

16 MR. DOWD: That's just Mr. Edelman's firm. There were
17 also Grant Thornton's lawyers.

18 THE COURT: They had a separate job to do.

19 MR. DOWD: Well, and we had to do the job on the other
20 side of them as well.

21 THE COURT: That's true.

22 MR. DOWD: They had, at summary judgment --

23 THE COURT: Mr. Dowd, I withdraw that implied
24 criticism.

25 The hourly rates, for example, what did Jason Forge

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1 do?

2 MR. DOWD: Jason Forge, your Honor? Jason Forge was a
3 critical part of this team. He worked on the case primarily
4 towards the end at summary judgment, when he got ready for
5 trial. He did fantastic work with their damages experts. He
6 was a former assistant U.S. attorney. He was an AUSA who did
7 huge cases in LA and San Diego before I talked him into coming
8 over to our firm. He's a great lawyer, your Honor. He's been
9 in front of you. I don't think he argued in this case. He was
10 certainly in the courtroom. He's argued in other cases that
11 I've been on with him in front of this Court. So you've met
12 him.

13 THE COURT: Now, the top billing rate of \$1,150 of
14 Samuel Rudman, \$1,250, he only had 29 hours.

15 MR. DOWD: It's really, it's probably Mr. Coughlin,
16 myself, and Mr. Robbins.

17 THE COURT: Several billing more than a thousand
18 dollars. Those seem like New York rates rather than San Diego
19 rates.

20 MR. DOWD: Well, Mr. Rudman is in New York. But I
21 think you should look at the rates for lawyers that do this
22 type of litigation. If you look, the *National Law Journal* said
23 over a thousand dollars an hour is common now for partners. If
24 you look at some of the firms on the other side of this case --

25 THE COURT: I wouldn't try.

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1 MR. DOWD: We submitted a declaration showing that
2 Weil Gotshal -- and they were on the other side of this case,
3 good lawyers -- we showed that they filed an application in the
4 Sears bankruptcy earlier last year, and they had nine lawyers,
5 at \$1500 an hour, and dozens at over a thousand dollars an
6 hour. So higher than us.

7 THE COURT: The bankruptcy rates are out of sight, and
8 that's often because the allowances are heavily discounted.

9 Tell me now how the other firms worked.

10 MR. DOWD: How did the other firms work? What did
11 they do, your Honor?

12 THE COURT: What did they do, yes.

13 MR. DOWD: Well, I can tell you that, for example, if
14 you just go down the list, if you start with Lowey Dannenberg,
15 for example. They represented Corsair. And Corsair was a
16 shareholder and class member for the Cole shares and also the
17 May 2014 common stock offering. Corsair produced, I believe,
18 145,000 pages of documents, all of which had to be reviewed for
19 privilege. They were on our "will call" witness list. They
20 are on, I believe, also a "may call" witness list. Their
21 client was deposed. They also assisted with the summary
22 judgment briefing on the discrete project that Ms. Wyman gave
23 them.

24 THE COURT: What project was that?

25 MR. DOWD: Do you remember which briefing it was?

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1 MS. WYMAN: Your Honor, we needed some assistance with
2 the research of some tricky issues, and we asked them to help
3 us with that, and they prepared --

4 THE COURT: You what?

5 MS. WYMAN: We asked them to help us with some
6 research and prepared an insert to one of the briefs.

7 MR. DOWD: So you're looking at, your Honor, document
8 review, analysis of the claims, data collection, motion to
9 dismiss, negotiation of discovery disputes. Ms. Wyman would
10 have had to coordinate with them for what their --

11 THE COURT: You're taking it out of their declaration,
12 what you just said.

13 MR. DOWD: Pardon me?

14 THE COURT: What you just read, is that from their
15 declaration?

16 MR. DOWD: It's from their declaration, yes, your
17 Honor, that was submitted.

18 THE COURT: Now, Motley Rice makes no description in
19 its declaration. What did they do?

20 MR. DOWD: Motley Rice, your Honor, they had two
21 clients in the case. They had the national sheet metal workers
22 union. And they were on both the Cole and the May 2014
23 offering. They were on our "will call" witness list,
24 Mr. Myers. They had also Union Asset Management, which was a
25 German entity that was on the July and December 2013 bond

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1 claims. They had two witnesses that they produced,
2 Mr. Riechwald and Mr. Fischer, who came over from Germany, as I
3 recall, to have their depositions taken. Similarly, Sheet
4 Metal Workers had Mr. Myers, so they had three days of
5 deposition testimony. And all three of those witnesses were on
6 our "will call" witness list. They are coming.

7 They also assisted us, as I recall, with the motion to
8 dismiss briefing that related, I think, to the Exxon exchange.
9 They attended the first mediation. And they would have spent a
10 lot of time on depo prep and the depositions. And they also
11 would have interacted, I'm sure, with Ms. Wyman in terms of
12 document production and disputes with the defendants, so that,
13 you know, their views would be expressed to the defendants as
14 well.

15 THE COURT: Johnson Fistel.

16 MR. DOWD: Johnson Fistel, your Honor, represented
17 their client in the case. There was a class rep. It was Paul
18 Matten. He was an ARCT IV shareholder. He was on our "may
19 call" witness list, I believe. They also assisted, they gave
20 us an associate who came to our office, I believe, in New York,
21 and assisted with document review of the defendants' documents.
22 They also produced documents for their client. And I believe
23 Mr. Matten was also interviewed by the Department of Justice
24 when they were insistent that they wanted one of our class
25 reps, or a couple of our class reps, to be interviewed about

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1 their case.

2 THE COURT: Cohen Milstein.

3 MR. DOWD: Cohen Milstein, your Honor, represented the
4 New York City funds. They were in the July 2013 offering, the
5 Cole offering, the May 2014 offering. They produced two
6 witnesses on behalf of the New York City funds, Horan and
7 Jeter. They were both deposed. They were both on our "will
8 call" witness list. They had, your Honor, as I recall,
9 produced 190,000 pages of documents, which had to be reviewed.
10 And they would have been involved, I'm sure, in checking class
11 cert issues. And I believe they assisted also with the motion
12 to dismiss briefing as well, your Honor. So they provided a
13 valuable service. A lot of their work was related to New York
14 City funds. Obviously, if we were trying a case in front of
15 your Honor, in front of a New York jury, it would certainly be
16 helpful to have New York City funds here.

17 THE COURT: What would they testify on?

18 MR. DOWD: They would have testified about their
19 purchases in all the different offerings as class reps.

20 THE COURT: Those would have come in by stipulation.

21 MR. DOWD: Your Honor, they don't come in by
22 stipulation.

23 THE COURT: Well, it's a matter of record what they
24 bought and when they bought.

25 MR. DOWD: Yes. And no one says, we're going to

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1 stipulate to it, your Honor. I've tried a couple of these
2 cases.

3 THE COURT: There would have been stipulations.

4 MR. DOWD: Well, I've tried cases, and there weren't
5 stipulations.

6 THE COURT: You would not need any witnesses on this,
7 and I don't know that the witnesses would have contributed
8 anything.

9 I'm reacting because a million dollars for each of
10 these law firms, given the \$65 million of lodestar that you put
11 into the case, seems excessive.

12 MR. DOWD: I don't think it was, your Honor. I think
13 what they did, in terms of their clients and document
14 production, producing the documents, defending them at
15 depositions -- we didn't take their depositions. The
16 defendants deposed them.

17 THE COURT: I understand. But the knowledge of a
18 class member is derivative and really irrelevant. The
19 knowledge is derivative of what the lawyer finds and irrelevant
20 because it doesn't prove any proposition against the
21 defendants. I understand that these depositions are taken as a
22 matter of course by defendants, and they have to be, the
23 clients have to be represented and there's a certain time of
24 preparation, but over a million dollars for each, without time
25 records showing anything, I haven't seen any time records for

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1 them.

2 MR. DOWD: Well, your Honor, again, we started out
3 from a different premise. We seek a percentage of the fee, a
4 percentage of the fund, as our fee. And that's the trend in
5 the Second Circuit. I know I've argued with your Honor about
6 this in the past. But that's how we seek a fee. When my firm
7 is working on a case --

8 THE COURT: I just don't do that, Mr. Dowd. I told
9 you in the past, I believe that people who just do it on a
10 basis of percentage do not want to go through the rigor of
11 review and time. I'll award lodestar. And I'll be candid with
12 you right now; you will get an award for your lodestar as well,
13 not as much as you asked for, but you'll get an award. I'm not
14 sure about those other firms. I don't know what they
15 contributed. I don't have a justification of their time. I
16 don't know what activities took up their time. I don't know
17 how they distributed their work between partners and
18 associates. I don't understand the substantial expense factors
19 that they put into this case. It's hard questions.

20 MR. DOWD: They did break down their time by who the
21 timekeepers were. And they also broke down their expenses.
22 Those are attached to their declarations that they each
23 submitted.

24 But, again, your Honor, when my firm goes into a case,
25 we negotiated with TIAA. We negotiated for a percentage fee.

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1 And we're not sitting there thinking, let's bring in 50 for
2 attorneys to sit in a room reviewing documents so we can build
3 up our lodestar. And that's the problem with the lodestar
4 analysis. I'm just being honest with your Honor. It
5 encourages lawyers to hire for people that do nothing to add
6 value to the case. And we don't do that.

7 THE COURT: You don't do that.

8 MR. DOWD: No, we don't. We work for a percentage.
9 That's what we asked for. If we put people on an assignment,
10 it's because we needed it done. You know, at summary judgment
11 the defendants had like 60 people in the courtroom.

12 THE COURT: You had expenses paid outside bankruptcy
13 counsel, \$171,000, so that they can file a motion in the
14 bankruptcy court to get permission so that they could litigate
15 in this court.

16 MR. DOWD: That's correct, your Honor.

17 THE COURT: That's a lot of money.

18 MR. DOWD: I understand that, your Honor. And when
19 the Court ordered us to go protect those claims and get the
20 stay lifted, we had to hire bankruptcy counsel. It's not
21 like --

22 THE COURT: Did you pay them, or are they waiting to
23 get paid?

24 MR. DOWD: No, we paid them.

25 THE COURT: You are out of pocket.

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1 MR. DOWD: That's out of pocket for us.

2 And, again, you know, there was a court order saying,
3 you know, go defend the thing in bankruptcy. I'm not a
4 bankruptcy lawyer.

5 THE COURT: That's right. It is a large amount.

6 MR. DOWD: I understand.

7 THE COURT: One is a simple motion, to lift stay,
8 which is ordinarily granted in relationship to a large case
9 like this.

10 MR. DOWD: And then I think they also had to keep
11 monitoring it, and I think they probably made other
12 appearances. I'm not positive -- I know they did. Right?

13 THE COURT: It's too high a fee.

14 MR. DOWD: I understand, your Honor. And we paid out
15 of pocket. We're not trying to give money away. I mean, if
16 you cut it, it just cuts my money. I don't think they're going
17 to give it back.

18 THE COURT: Why weren't they required to make an
19 application?

20 MR. DOWD: Because we didn't consider them part of a
21 contingent fee. They wanted to get paid hourly, and that's
22 what we paid.

23 THE COURT: You paid over a million dollars to
24 Crowninshield Financial Research, Inc.

25 MR. DOWD: We absolutely did, your Honor.

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1 THE COURT: And you have people on in your firm who do
2 the same work. No?

3 MR. DOWD: They do similar work. And frankly a lot of
4 the partners at our firm know a lot about damages. I mean,
5 that million dollars, your Honor, was, we had to spend it. I
6 cannot tell you how much work they did.

7 THE COURT: Were they going to be witnesses?

8 MR. DOWD: Pardon me?

9 THE COURT: Were they going to be --

10 MR. DOWD: Yes. It's Dr. Feinstein. He also
11 testified in front of you on class cert. He was going to
12 testify again at trial, your Honor.

13 THE COURT: Was his deposition taken?

14 MR. DOWD: His deposition was taken four times, your
15 Honor.

16 THE COURT: So this million dollars reflects that
17 activity.

18 MR. DOWD: Absolutely. And the defendant has six
19 experts, on just loss causation. And you throw in truth on the
20 market, they had 12. And I guarantee you, because I've worked
21 with some of them, they paid a lot more than a million dollars
22 for their 12 guys or six people, whatever you want to call
23 them.

24 THE COURT: They're not asking me to give them any
25 allowances to have a law firm relationship with a client who

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1 will or will not pay, I think, in advance. I will not give you
2 that. You paid William H. Purcell Consulting over \$350,000 --

3 MR. DOWD: We did.

4 THE COURT: -- for testimony concerning due diligence
5 issues. I remarked that I did not see the due diligence issues
6 as having experts. It was really a fact and a law issue.

7 MR. DOWD: Yes. And then defendants --

8 THE COURT: I understand that, given defendants'
9 insistence to have experts of that like, and a certain degree
10 of uncertainty whether they will or will not be able to use
11 them, you need to have your own.

12 MR. DOWD: Correct. And they had three.

13 THE COURT: What about Harvey Pitt?

14 MR. DOWD: Harvey Pitt, your Honor --

15 THE COURT: \$200,000 to Harvey Pitt --

16 MR. DOWD: Like 198,000.

17 THE COURT: -- to trace securities.

18 MR. DOWD: Well, and he was also going to testify
19 about the SEC regulatory framework.

20 THE COURT: I told you I wasn't going to allow that.

21 MR. DOWD: No, I think you said I could award for
22 that. In fact, I'm pretty sure you awarded that --

23 THE COURT: No. When I commented, you said that he
24 was going to trace shares, a job that an accountant could do.

25 MR. DOWD: I think you also said he could testify

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1 about the SEC regulatory framework as well.

2 THE COURT: No, I did not.

3 MR. DOWD: I think you did, your Honor.

4 And, you know, your Honor, a lot of Mr. Pitt's bill is
5 because the defendant showed up with between 15 and 20 lawyers
6 in Washington, D.C., to take his deposition for two days. At
7 the end of the first day, I walked out, because I said, this is
8 a waste of time. And then defendants filed a letter brief
9 complaining that I had walked out. And we had to go back for a
10 second day.

11 I didn't want to have Harvey Pitt get deposed twice to
12 talk about stuff that, you know, frankly I thought was not that
13 remarkable.

14 THE COURT: You have almost \$50,000 paid to John
15 Barron and \$384,000 to the firm that Barron went to.

16 MR. DOWD: Correct. Barron.

17 THE COURT: Barron.

18 MR. DOWD: We could have had several experts on
19 accounting. And we found a REIT auditor and accountant who was
20 going to testify to both, as to the company and as to Grant
21 Thornton. I think his expenses are very reasonable.

22 THE COURT: I find your lodestar reasonable, the rates
23 appropriate and, in relationship to the work that you did,
24 reasonable. I'll go into lodestar a bit later.

25 The next firm I want to hear from is Lowey Dannenberg.

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1 MR. SKELTON: Good morning, your Honor. Thomas
2 Skelton of Lowey Dannenberg. Ms. Hart sends her apologies.
3 She had a client meeting in California with a client who was in
4 hospice care and may pass at any time and felt that she needed
5 to keep that appointment.

6 THE COURT: Thank you.

7 MR. SKELTON: Your Honor, my firm represents the
8 Corsair group of funds. They had a \$19 million loss and were
9 the second largest shareholder at the lead plaintiff stage. We
10 were obviously not appointed lead counsel. Throughout the
11 course of the case, we took our direction from Robbins Geller.
12 We worked on numerous aspects of the case, including, as set
13 forth in Ms. Hart's declaration, motions to dismiss, motions
14 for class certification, motions for summary judgment.

15 THE COURT: What did you do on the motion to dismiss?

16 MR. SKELTON: We did discrete projects and we reviewed
17 motion papers at the direction of lead counsel, particularly in
18 any issues that might have related to Corsair. And they would
19 apply throughout the case. Much of our work was specifically
20 directed to issues that related to Corsair. For example, one
21 of the issues that went throughout the case was the issue of
22 tracing, as Mr. Dowd alluded to. We were able to find
23 documents through our document platform that showed, in
24 connection with the May 2014 offering, that Corsair purchased
25 shares at the offering price on the date of the offering from

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1 one of the underwriters at a price that was outside of the
2 trading price on that given day.

3 THE COURT: That's an accountant's work for Corsair.
4 Why was it your work?

5 MR. SKELTON: Corsair retained to us perform these
6 services and to represent them in the case. And the issue was
7 whether we could trace the shares to the offering. And our
8 work, we did the work analyzing the documents and providing the
9 information to --

10 THE COURT: But normally that work would be done
11 internally within a company. Corsair is what, a management
12 company?

13 MR. SKELTON: It's an investment manager, yes.

14 THE COURT: Investment manager.

15 MR. SKELTON: Yes.

16 THE COURT: An investment manager knows what he
17 bought, what he sold, when he bought it, how much he paid.

18 MR. SKELTON: An investment manager would have had to
19 find all the documents and analyze them. We analyzed them in
20 the context of the arguments that the defendants were making
21 regarding tracing. They argued that we couldn't trace the
22 shares to the offering because shares are fungible and they're
23 held electronically and therefore we couldn't recover on the
24 Section 11 claims. And the client, this is --

25 THE COURT: You bought these shares on the offerings,

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1 did you not?

2 MR. SKELTON: Corsair brought the shares on the
3 offering, yes.

4 THE COURT: Which offering did you buy on?

5 MR. SKELTON: The May 2014 offering, as well as Cole
6 merger shares. But the offering at issue was the May 2014
7 offering.

8 THE COURT: Did you buy from the underwriters?

9 MR. SKELTON: Yes.

10 THE COURT: So what was the big problem?

11 MR. SKELTON: The problem was that the defendants were
12 arguing in the in limine motions and in summary judgment that
13 we couldn't trace the shares to the offering because shares are
14 fungible and, because we couldn't say that these particular
15 shares did not exist before the offering, we couldn't recover
16 on the Section 11 claim.

17 THE COURT: That's a legal issue.

18 MR. SKELTON: Yes. And we needed to argue that legal
19 issue with supporting documents. And the documents we were
20 able to find showed that Corsair purchased, on the date of the
21 offering, at the offering price, from one of the underwriters.
22 And we compared that to publicly available information that
23 showed that the lowest trading price of the day was above the
24 price at which Corsair purchased, so therefore they must have
25 purchased on the offering. This is not a routine analysis that

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1 Corsair would do. They didn't understand the nuances of
2 Section 11, of the 1933 Act. We did. They retained us to do
3 this, and that was part of what we did. And we were able to
4 establish, through documentary evidence, that the shares were
5 purchased on the offering. And ultimately, your Honor ruled in
6 favor of the plaintiffs on that issue.

7 Other matters that we dealt with --

8 THE COURT: What was your contribution to the result?

9 MR. SKELTON: Corsair was a certified class
10 representative. They purchased the shares on the open market.
11 They purchased shares in the Cole offering. They purchased
12 shares in the May secondary offering. All of our work, your
13 Honor, was done either at the direction of lead counsel or in
14 consultation with lead counsel, and consult --

15 THE COURT: Did you take any depositions of the
16 defendants?

17 MR. SKELTON: We did not, your Honor. We were not
18 asked to do that.

19 THE COURT: So all you did was represent your client.

20 MR. SKELTON: Well, we represented our client, who had
21 issues relating to the various -- the offering and the merger
22 and common shares. We were asked to perform tasks on the
23 summary judgment motion, on class certification.

24 THE COURT: In relationship to your client.

25 MR. SKELTON: Well, generally, in relation -- in

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1 relation to our client and other tasks that Ms. Wyman called me
2 and asked me if we could do certain research projects related
3 to omissions and related to the admissibility of the financial
4 restatement, which was an earlier issue that came up during the
5 case. Our client produced 145,000 pages of documents. We
6 reviewed the documents for responsiveness and privilege. We
7 dealt with issues relating to the ESI and follow-up questions
8 from the defendants regarding the documents that were produced.
9 Mr. Mishaan of Corsair was deposed. Mr. Rothman from Robbins
10 Geller attended the prep sessions, worked with us to get ready
11 for the deposition. He attended the deposition. And the
12 deposition went very well, and Corsair was certified as a class
13 representative by your Honor.

14 THE COURT: What did the interview with the Department
15 of Justice and the Securities and Exchange Commission have to
16 do with this lawsuit?

17 MR. SKELTON: Well, it involved parallel proceedings
18 that the SEC and the U.S. Attorney's Office were contemplating
19 bringing. They wanted to interview Corsair as a witness, and
20 we prepared our client -- and he was the same person who was
21 ultimately deposed.

22 THE COURT: So why should the class pay for that?

23 MR. SKELTON: Well, that was time that was spent
24 learning facts that the government had, and they presented
25 hypotheticals to us that helped us to understand some of the

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1 issues that they were considering. And we recognized that the
2 government has different burdens of proof and different
3 elements, but the underlying facts and the approach that the
4 government was taking helped to us understand better the
5 underlying facts in this case.

6 THE COURT: Why shouldn't that be a fee chargeable to
7 your client, rather than to the class?

8 MR. SKELTON: Well, the information that we learned
9 and that the client provided to the government was very similar
10 to the information that was being argued in the case. The
11 adjusted funds from operations was one of the issues that was
12 discussed at that meeting. And we believed that that helped
13 sharpen our focus. And Mr. Mishaan, who was the witness at the
14 SEC and DOJ meeting, was also the deponent that Corsair
15 proffered for his deposition.

16 THE COURT: These interviews with the Department of
17 Justice and with the SEC were not on the record, were they?

18 MR. SKELTON: No, your Honor.

19 THE COURT: They couldn't be used in the lawsuit.

20 MR. SKELTON: No, they could not be used to be
21 submitted as evidence. But it was helpful to us in
22 understanding the government's approach and learning facts
23 about the case that helped us proceed.

24 Just to put a finer point on it, your Honor, the
25 interview was a short interview. It lasted a couple hours. We

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1 had a prep session the day before. It was not a lengthy period
2 of time. But we do believe that the information that we
3 learned during that process was helpful.

4 THE COURT: How much of your fees went into that?

5 MR. SKELTON: I could find it in our time sheets and
6 submit this, your Honor, but it was probably six to eight hours
7 of my time and a couple of hours of Ms. Hart's time.

8 MR. DOWD: Your Honor, could I just mention one thing?
9 This happens in our cases sometimes, and it did here, where DOJ
10 reaches out and says, we want a victim witness, and since you
11 already have a lawsuit, we want your victim witness. And the
12 first thing I say to them and I'm sure is what we said in this
13 case -- I think Mr. Forge dealt with it -- is, get out of here,
14 go find your own witnesses. And then they say, well, you know,
15 if we want, we can subpoena your witnesses.

16 And so I think at times, you get stuck in this
17 position with the U.S. Attorney's Office. And I say, you got
18 to go in there and protect them because I don't know what
19 they're going to write down, that your witness may or may not
20 have said, and turn over in Jencks Act discovery before their
21 trial.

22 And so you have to protect your witness. And it's not
23 our fault, your Honor. We always tell them just go away, find
24 your own witnesses, OK, you do your job, we'll do ours. It's
25 not like they are going to help us.

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1 And I say that with all due respect. I used to be an
2 assistant U.S. attorney, so --

3 THE COURT: One last question. If I were to give a
4 lesser bonus to your and to the other firms than I give to
5 Robbins Geller, would that it be unjust?

6 MR. SKELTON: Well, as I understand it, your Honor,
7 Robbins Geller as lead counsel has the discretion, unless your
8 Honor orders otherwise, to distribute the fees in accordance
9 with its discretion as to the contributions that were made by
10 the firms. We believe that our contribution was valid and
11 meritorious, but of course Robbins Geller, they did the lion's
12 share of the work, they took the depositions, they did a
13 phenomenal job and they got a phenomenal result.

14 THE COURT: My thought was that I would make awards to
15 each of your firms so that Robbins Geller would not have the
16 burden of redistribution.

17 MR. SKELTON: That is certainly within your
18 discretion, your Honor, to do that and to award what you think
19 our firms' contribution was. We do believe we contributed to
20 the success of the case. I believe that Robbins Geller agrees
21 with that. Obviously Robbins Geller did the lion's share of
22 the work. They took the depositions. And they created a
23 tremendous result. So I'm not going to sit here and tell you
24 that your Honor has to award me the same multiplier that
25 Robbins Geller gets. They were lead counsel. But we do

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1 believe that our contribution was meritorious and that our time
2 was valid and that our application should be granted.

3 THE COURT: Thank you.

4 MR. SKELTON: Thank you, your Honor.

5 THE COURT: Tell me your name again?

6 MR. SKELTON: Thomas Skelton from Lowey Dannenberg.

7 THE COURT: I'll hear Motley Rice next.

8 MR. DOWD: Your Honor, I'm not sure that all the
9 co-counsel came. I mean, we were here to present for them,
10 just like everything else in this case. We tried to keep a
11 tight rein on everybody just so that there wouldn't be waste of
12 time. And I'm pretty sure Cohen Milstein was here on Tuesday
13 and they may have sent a different person today because they
14 couldn't be here again today. But most of the people, we told
15 them, we submitted your time and we'll argue for you. And
16 that's typically the way we did things in this case. We didn't
17 want ten firms showing up. I mean, the Court's order said, "As
18 reported in yesterday's status conference, lead plaintiff's
19 counsel, Robbins Geller, will work with and lead a working
20 group of all interested plaintiff's counsel." And that's what
21 we did.

22 THE COURT: I understand, Mr. Dowd. But I have to
23 examine the reasonableness of all the constituent parts of your
24 fee, of your fee request, notwithstanding that you're
25 requesting for everybody.

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1 I'm looking at Mr. Levin's declaration, Mr. Levin
2 being a member of Motley Rice. That firm does not have offices
3 in New York, does it?

4 MR. DOWD: I don't know whether they have an office in
5 New York.

6 They do. Mr. Rothman says they do.

7 THE COURT: But the lawyers that worked on the case,
8 were they from the New York office or another office?

9 MR. ROTHMAN: There was one lawyer who was either from
10 Westchester or Kentucky, maybe from Connecticut, and the rest,
11 Mr. Levin is in the South Carolina office.

12 THE COURT: It doesn't seem to be right to charge for
13 transportation. I will disallow that charge.

14 I don't know what they did. What did they do in the
15 case?

16 MR. DOWD: Well, I talked to you about that already,
17 your Honor. They had the sheet metal workers. They produced
18 Mr. Myers for his deposition. They also had Union Asset
19 Management.

20 THE COURT: Tell me what they did to contribute to the
21 victory.

22 MR. DOWD: Well, that does contribute to the victory,
23 your Honor. You're producing deponents and witnesses who
24 bought different offerings that contribute to the victory. I
25 mean, they flew these guys over, as I understand it, from

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1 Germany to have their depositions taken, which is probably part
2 of the travel expenses in this case. They assisted with the
3 motion to dismiss briefing on the Exxon exchange. They
4 attended the first mediation. They did all that depo prep and
5 depo work. They produced respectively about, between them, the
6 two plaintiffs, over 26,000 pages of documents, your Honor.

7 THE COURT: Johnson Fistel.

8 MR. DOWD: Johnson Fistel we talked about as well.
9 That was Paul Matten. He was one of the ARCT IV witnesses.
10 They also assisted with the document review. They lent us an
11 associate to assist with document review.

12 They also produced about 1100 pages of documents on
13 behalf of Mr. Matten. I believe their client was also
14 interviewed by the DOJ.

15 THE COURT: The Weiss law firm, are they here? Is
16 Weiss here?

17 MR. DOWD: I don't believe so, your Honor. Again, we
18 kept tight reins on everybody to try to keep the numbers down.

19 THE COURT: This is an interest in their fee, not a
20 matter of -- they're not getting paid for coming here today.
21 They just have an interest in getting paid.

22 What about the Weiss law firm? What did they do?

23 MR. DOWD: Their client was Simon Abadi. He was, I
24 believe, in the Cole offering. And they produced documents for
25 their client. Their client was deposed in the case. He was on

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1 one of the "may call" witness lists. And so they did do work
2 that related to their client in the case.

3 THE COURT: Stull Stull & Brody.

4 MR. DOWD: Stull Stull & Brody represented
5 Dr. Esposito and another gentleman named Noah Bender. Esposito
6 was one of the witnesses that really gave a standing on ARCT
7 IV. He was together with Mr. Matten. But Dr. Esposito was
8 deposed, and he was on our "will call" witness list because he
9 gave a standing on the ARCT IV issue. And so they would have
10 represented Dr. Esposito at his deposition and assisted with
11 anything related to Dr. Esposito's briefing.

12 THE COURT: Gardy & Notis.

13 MR. DOWD: Gardy & Notis, your Honor, they had a
14 client who was not named as a class rep in this case named
15 Shenker. I think that he sought lead plaintiff appointment.
16 However, because they were on the Cole exchange, they went down
17 to Maryland because there had been a securities case against
18 Cole, and they tried to make sure, their primary role was to
19 make sure that our claims, our claims asserted in this case,
20 didn't get cut out in the release in the Maryland Cole case.
21 Not only did they argue below in this case, in the district
22 court, but then I believe they also argued it on appeal as
23 well, your Honor. And so that was their main role in the case,
24 was objections and appeals in the Cole case to protect our
25 clients to make sure their claims didn't get released in

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1 Maryland, in sort of an end-around. And so that was the work
2 we gave them to do, and they did it, and they did it well.

3 THE COURT: The Polaszek Law Firm.

4 MR. DOWD: The Polaszek Law Firm represented the City
5 of Tampa funds. They were on the May 2014 offering. They
6 produced their client, who was one of the class reps, was
7 Ernest Carrera, on behalf of Tampa, obviously, and he was on
8 our "may call" witness list at the end of the day. They
9 produced documents. Their client was deposed.

10 Frequently, when I looked at their lodestar, I was
11 thinking I would have thought it would have been higher. But
12 that was just my view.

13 THE COURT: Cohen Milstein.

14 MR. DOWD: Cohen Milstein we discussed. They
15 represented the New York City funds. They were on a host of
16 offerings, I think three different offerings. They produced
17 two witnesses, Mr. Horan and Mr. Jeter. They were both
18 deposed. They were both on our "will call" witness list. They
19 did significant work in the case. They produced 190,000 pages
20 of documents that had to be reviewed for privilege and
21 responsiveness. And they also assisted with the motion to
22 dismiss briefing in the case, as I recall. And so I think that
23 their work was very good, and they did a good job, and helped
24 us with the case.

25 MR. LOMETTI: Your Honor, I'm sorry. It's Chris

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1 Lometti from Cohen Milstein. Julie Reiser was here on Tuesday,
2 is in court in California, had a mediation, actually, in
3 California today. She couldn't be here. I'm here if you have
4 any additional questions.

5 But I think there may have been four offerings that
6 the New York City funds were involved with.

7 THE COURT: Did you take part in any depositions
8 against defendants?

9 MR. LOMETTI: No, your Honor.

10 THE COURT: Or any motions?

11 MR. LOMETTI: I think the firm worked on the motion to
12 dismiss, on class cert issues, and I believe -- Michael,
13 correct me if I'm wrong -- but there was some work that the
14 firm did in relation to the investment managers in general.
15 New York City funds had five investment managers, and there was
16 a time where the defendants were possibly wanting to depose
17 some or all of them and we had to fight that, and which we did
18 successfully. And we may have been involved with other
19 investment manager-type issues as well in the case, your Honor.

20 MR. DOWD: That's correct, your Honor.

21 THE COURT: Thank you.

22 And Levi & Korsinsky.

23 MR. DOWD: They had clients Mitchell and Bonnie Ellis.
24 They were on the ARCT IV offering. They were on our "may call"
25 witness list. They produced documents. The defendants did not

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1 take their depositions. I noted that their expenses were zero,
2 which was consistent with that. But that would have been their
3 primary role: protecting their client, producing documents,
4 reviewing them, and responding to issues on motion to dismiss
5 that dealt with their clients.

6 THE COURT: If I were to give you whatever I give you,
7 as a fee for everyone, what would be the methodology of
8 distribution?

9 MR. DOWD: What would be our process? I think we
10 would have to --

11 THE COURT: Your theory of distribution.

12 MR. DOWD: We would have to look at what everyone did
13 and then figure out how to divide it. A large part of it would
14 be based on what the Court ordered and how much we got, and we
15 would have to think that through and then talk to the firms and
16 make a decision. That's what would happen. It's not like
17 there's some mathematical equation that we use.

18 THE COURT: I feel I want to reward your law firm more
19 than the others proportionally.

20 MR. DOWD: Your Honor, I will say this. In this case,
21 we kept those co-counsel to 10 percent of our lodestar,
22 basically. And they did work on the case. And they did good
23 work, with everything they had to do. And they cooperated with
24 us. And they worked with their witnesses. And it added value
25 to the case. I don't think it's fair --

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1 THE COURT: I'm sure they did. But the driving force
2 in this case --

3 MR. DOWD: Absolutely.

4 THE COURT: -- and the reason that the result is
5 uncommon, was the work of your firm.

6 MR. DOWD: I understand, your Honor. But I can't
7 stand here and denigrate these other firms that I feel made a
8 legitimate contribution to this case. And I won't do it.

9 THE COURT: OK. I'll take a short break and then
10 I'll --

11 MR. DOWD: Your Honor, I would like to address some
12 other issues too for the Court's consideration.

13 THE COURT: Go ahead.

14 MR. DOWD: Is that all right?

15 THE COURT: Yes, go ahead.

16 MR. DOWD: Because I know the Court goes with the
17 lodestar approach. I understand. But, you know, in this case,
18 TIAA, the lead plaintiff, did a great job. And the Court
19 actually said they did an excellent job in this case. They
20 held our feet to the fire. We had an ex ante negotiated fee
21 agreement with them, before we were appointed lead plaintiff,
22 calling for 12.4 percent of the fee.

23 THE COURT: How much?

24 MR. DOWD: 12.4 percent. You have to do some math on
25 it. But that's what it comes out to. That's where the 127

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1 million comes from, your Honor.

2 TIAA is one of the largest retirement systems in the
3 world, your Honor. They have almost a trillion dollars in
4 assets.

5 THE COURT: I'm familiar with that.

6 MR. DOWD: All I'm saying is, they're used to dealing
7 with lawyers, and they drove a good bargain on behalf of
8 themselves and the class at 12.4 percent. If you look at the
9 Second Circuit law, it says an ex ante negotiated fee
10 agreement, the Second Circuit has said, should be given serious
11 consideration by the court. Other judges in this court have
12 said it's entitled to a presumption of reasonableness or
13 correctness, starting with Judge Lynch, back in the *Global*
14 *Crossing* case, probably almost 15 years ago.

15 THE COURT: From the point of view of a client wanting
16 to litigate, there's a choice of paying as you go on a time
17 basis, but the model for defendants is, the client takes each
18 bill that comes and looks at it and says, well, I don't need
19 this service or that service or you billed me too much on that,
20 and you make adjustments. And at the end of the day, when you
21 have a recovery, if the client has been paying you on a time
22 basis and you want a bonus, the client will often say, well, I
23 hired you because you're good, and I hired you because I'm
24 willing to pay the high rates that you charge. So why should I
25 also pay a bonus?

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1 You're getting a percentage from TIAA in lieu of pay
2 as you go. Therefore you've had to wait. And therefore, from
3 the perspective of TIAA, which is one of the beneficiaries of
4 many in this lawsuit, it's not really arm's-length bargaining.

5 MR. DOWD: It is, though, your Honor.

6 THE COURT: It's an indication.

7 MR. DOWD: I understand.

8 THE COURT: I accept it as an indication.

9 MR. DOWD: I'll telling you just what some other
10 courts have said.

11 THE COURT: I understand.

12 MR. DOWD: That 12.4 --

13 THE COURT: I understand some give lodestar and some
14 give percentages.

15 MR. DOWD: Right.

16 THE COURT: I give lodestar. I don't give
17 percentages.

18 MR. DOWD: But the negotiated fee agreement is given a
19 presumption of reasonableness in courts. And that 12.4
20 percent, your Honor, it's lower, lower than what a lot of
21 people get. It is a contingent fee. We're not getting paid by
22 the hour. It's contingent-fee litigation. And people do it on
23 a percentage basis. That's how it works. And in this
24 courthouse last year somebody got 25 percent on 250 million.
25 The Second Circuit in November affirmed 13 percent on 2.3

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1 billion, your Honor, in a case.

2 THE COURT: The Court of Appeals does not want to
3 substitute itself for my judgment in the case. It's tough
4 work. There are very few legal principles involved.

5 MR. DOWD: Your Honor, can I just ask you to consider
6 two other issues?

7 The defendants, in connection with the audit committee
8 investigation and, you know, our suit, as well as other issues,
9 totaled \$264 million that they spent. Now, that's not just our
10 case.

11 THE COURT: Say that again.

12 MR. DOWD: 264 million.

13 THE COURT: Who?

14 MR. DOWD: The defendants. That's what ARCP paid for
15 everything that resulted from the audit committee
16 investigation, a lot of which we had to duplicate and a lot of
17 which was probably directly on our case. They spent \$69 1/2
18 million just in the first three quarters of 2019. In the first
19 three quarters of 2019 I know the lion's share of that money
20 had to be defending our case. 69 1/2 million, that's more than
21 my lodestar, just for three quarters last year.

22 I would ask the Court to consider that. These numbers
23 are not crazy.

24 When you look at what happened in this case, your
25 Honor, I mean, the quality of the representation, I can tell

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1 you, your Honor --

2 THE COURT: I'm not going to cut your lodestar, if
3 that's what you're worrying about.

4 MR. DOWD: No, no, I'm not worried about that. I'm
5 worried about trying to get more than my lodestar.

6 THE COURT: You'll get more.

7 MR. DOWD: I would like to get as much as I could.

8 THE COURT: I could give you all 12.2 percent, but I'm
9 not going to give you that much.

10 MR. DOWD: All right, your Honor. Just consider this.
11 Bloomberg News, 2017, had an analyst that said this case would
12 settled for between 33 and 117 million dollars. We got 1.052
13 billion. Last summer, JPMorgan said, based on what they paid
14 the opt-out litigants in this case, which were huge funds, huge
15 funds -- Vanguard, PIMCO, BlackRock -- they said that we get
16 450. And we got 1.025 billion, your Honor.

17 I just, I can't sit down before I tell you that. I
18 mean, we did a remarkable job. And we should benefit from
19 that -- for not taking the 450 and coming in and getting the
20 same lodestar award, for saying, no, we're going to roll the
21 dice on summary judgment and make this case worth more for the
22 class, your Honor. And that's what we did. And we should be
23 rewarded for taking that risk.

24 That's all I ask the Court to consider. I know the
25 Court wants to rule, and I don't want to belabor it, but I ask

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1 you to consider that.

2 THE COURT: What did you perceive to be the risk, the
3 probability, of my granting summary judgment to the defendant?

4 MR. DOWD: I don't know. To be honest, your Honor, I
5 thought that we could very possibly get thrown out on Grant
6 Thornton, who ended up paying 50 million --

7 THE COURT: What did you think that?

8 MR. DOWD: I don't know. Because I think that
9 auditors get out of these cases an awful lot. I think they did
10 a study and only like 2 percent --

11 THE COURT: They were not responsible for the AFFO --

12 MR. DOWD: Exactly.

13 THE COURT: But they were responsible to know how
14 their numbers were being used.

15 MR. DOWD: No, I understand that.

16 THE COURT: And their numbers were being used in a way
17 that you considered and you were likely to prove to be false
18 and misleading.

19 MR. DOWD: But it was a risk. And you look at some of
20 these other people that filed opt-out cases, they weren't
21 taking that risk.

22 THE COURT: I don't mean to denigrate what you did.
23 Because I think what you did was very good. A 50 percent
24 discount of proveable damage is a much lower figure than that,
25 because the number of over \$2 billion ascribable to the overall

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1 damage is subject to many, many pitfalls, failures of claims
2 and the like. So your achieving over a billion dollars is
3 highly significant.

4 MR. DOWD: Thank you.

5 THE COURT: And I don't want to take away from it. I
6 think you did outstanding work. I think you have to be
7 rewarded for your persistence and your stubbornness and for
8 your leadership in the case. You stood up to the most powerful
9 law firms in the City of New York and were their equal.

10 MR. DOWD: Thank you, your Honor.

11 THE COURT: However, your lodestar rates for partners
12 are pretty high.

13 MR. DOWD: They're also lower than the rates of the
14 firms on the other side.

15 THE COURT: Yes. But they had to get it on a
16 pay-as-you-go basis, and you're getting it from me.

17 MR. DOWD: Well, that's even better, your Honor.

18 THE COURT: You have a significantly lower expense.

19 MR. DOWD: They're \$1500 an hour, your Honor.

20 THE COURT: I know.

21 MR. DOWD: They got it in 2014 and 2015, some of these
22 firms. That money is worth 50 percent more now, because they
23 got it then and they had higher rates than us. You know, I
24 mean, it's not -- our rates are not high, you know what. I
25 mean --

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1 THE COURT: We have an imperfect world.

2 MR. DOWD: I understand that. But, you know, my world
3 isn't much different from theirs when it comes to, you know,
4 meeting salary obligations and funding expenses and everything
5 else. I don't get paid on the 30th day of every month like
6 they do.

7 THE COURT: Is the transportation from San Diego --
8 you're in San Diego, right?

9 MR. DOWD: Yes, your Honor.

10 THE COURT: And Ms. Wyman is in San Diego.

11 MR. DOWD: Yes.

12 THE COURT: Are your transportation costs chargeable
13 as an expense?

14 MR. DOWD: Yes, it is an expense.

15 THE COURT: You're taking advantage of a lower cost
16 structure in San Diego, significantly lower structure.
17 Charging the transportation cost and asking to be paid New York
18 rates, that's significant.

19 MR. DOWD: Your Honor, our transportation costs were
20 significantly higher because we cut out a lot of the airline
21 fees. So out of pocket I'm losing about 130 grand on that,
22 your Honor.

23 THE COURT: I'll take a short recess.

24 (Recess)

25 THE COURT: I've considered the arguments, read the

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1 fee justifications and the expense itemizations. I find the
2 lodestars of each of the firms reasonable and appropriate and
3 the expenses reasonable as well.

4 My award for all of the counsel who will be sharing
5 this fee is \$100 million, plus allowance of expenses of
6 \$5,164,539.91.

7 It comes out to a multiplier of 1.376, but regardless
8 of the accuracy of my arithmetic, the number is \$100 million of
9 fee and \$5,164,539.91.

10 I believe that, in this case, as I said before, the
11 services delivered by the Robbins Geller firm were outstanding,
12 that Ms. Wyman, Mr. Dowd, and your colleagues, Mr. Rothman, did
13 outstanding work. I think in the fees of some of the other
14 firms it was hard for me to see the same amount of
15 productivity, in terms of obtaining the result, and in some
16 cases whether or not all the fees that were presented were fees
17 that should be allowed. But it's very hard to pierce through
18 this, as Mr. Dowd has suggested that everything went into the
19 final result, and so I determined that each of the firms would
20 be considered as having had a full lodestar, and that the
21 add-on, the bonus, would be done in the aggregate for all
22 firms.

23 How the fees are ultimately allocated is something, I
24 guess, the firms are going to have to work out for themselves.
25 As I understand it, I have no continuing jurisdiction, should

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1 there be any dispute.

2 There's no interest to be awarded on this amount. It
3 will be paid, how did you say, about third, Mr. Dowd, one third
4 on when?

5 MR. DOWD: Yes, your Honor. There's a third now, a
6 third in 90 days, and a third on the initial distribution, the
7 big distribution.

8 THE COURT: OK. And it will be payable by the funds
9 that have already been paid by the defendants.

10 MR. DOWD: Yes, your Honor. The money, we got the
11 money in October, your Honor.

12 THE COURT: All the money.

13 MR. DOWD: Yes. And that actually, if we had awaited
14 the final approval like a lot of firms do -- they don't fight
15 for that. We've made the class about \$4 million on that alone,
16 just by standing, holding out for that.

17 THE COURT: That's not unusual. Payment on the
18 agreement.

19 MR. DOWD: A lot of people won't fight for it anymore,
20 your Honor.

21 THE COURT: OK. That's my award. And I congratulate
22 all of you. Thank you very much.

23 MR. DOWD: Thank you, your Honor.

24 MS. WYMAN: Thank you, your Honor.

25 MS. GUSIKOFF STEWART: Thank you, your Honor.

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1 MR. HOUSTON: Your Honor --

2 THE COURT: Two minutes.

3 MR. DOWD: Your Honor, we have an order that we
4 adjusted, I think we filed it yesterday, to reflect a third, a
5 third, a third. And I think our expenses went down about
6 \$9,000.

7 THE COURT: Hand it up. Then I'll talk to
8 Mr. Houston.

9 MR. DOWD: Oh, it has a percentage in it. So if you
10 want us to just submit one later?

11 THE COURT: Yes.

12 MR. DOWD: Or I can write it in now, whichever you
13 prefer.

14 THE COURT: You can write it in now.

15 Meanwhile, I'll hear from Mr. Houston.

16 MR. HOUSTON: Your Honor, very briefly. We had a
17 couple issues with process on the submissions in the derivative
18 matter. We have asked for, with counsel for VEREIT, that we be
19 given the opportunity to file a reply statement once they have
20 gone through our time records and identified their issues. We
21 think this will create the greatest and clearest record.

22 THE COURT: I think this is what you do. Without
23 giving me anything, give Mr. Edelman what you propose.

24 Mr. Edelman will then give you his objections. You will
25 negotiate to whatever extent you feel appropriate. And then

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1 there will be a filing on a joint basis, just the way you do
2 with a 2(e) letter, so I don't get separate filings. So just
3 give me the outside date by which you can accomplish all that.
4 Discuss it with Mr. Edelman. And then we'll issue an order.

5 MR. HOUSTON: Your Honor, that was the second issue.
6 We have discussed some dates. We had asked for a month to put
7 together the records in accordance with your Honor's directive
8 on Tuesday.

9 THE COURT: How much time do you want?

10 MR. HOUSTON: OK. So we'll take that month.
11 Mr. Edelman, how long do you want? Do you want your two weeks
12 that you suggested, or longer than that, to review what we are
13 submitting?

14 MR. EDELMAN: Your Honor, so as I understand it, you
15 want us to do a joint letter.

16 THE COURT: At the end.

17 MR. EDELMAN: At the end?

18 THE COURT: Outlining the positions.

19 MR. EDELMAN: And do you want us to be limited to the
20 page limits? Because as I understand it, Mr. Houston is
21 planning on now submitting a different set of time records.

22 THE COURT: What do you propose?

23 MR. EDELMAN: I would propose that Mr. Houston submit
24 whatever he wants to submit. To the extent that there was
25 stuff in the time records that shouldn't have been in there,

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1 take them out, put them in a letter responding to our position.
2 We put in a letter responding to that. And then your Honor is
3 in a position to decide. And we do it as quickly as we can.
4 We've already had extensive briefing and argument on this.

5 MR. HOUSTON: The only problem with that is that we
6 never did get the chance to respond to the initial issues. And
7 Mr. Edelman has already said that, on review of the next
8 submission of records, there may be additional issues.

9 THE COURT: Mr. Houston, February 21, you file with
10 the Court your submission, backed up by whatever supporting
11 data you think is appropriate.

12 Mr. Edelman, on March 13, you respond.

13 MR. EDELMAN: Thank you, your Honor.

14 THE COURT: And Mr. Houston, another week, March 20,
15 to reply. And I'll endeavor to decide on the papers or, if I
16 need to see you, I'll do that as well.

17 OK? Are those dates satisfactory?

18 MR. EDELMAN: Thank you, your Honor.

19 MR. HOUSTON: Yes. Thank you, your Honor.

20 THE COURT: All right.

21 Anything further?

22 MR. EDELMAN: Yes. Your Honor, on behalf of VEREIT
23 and, I think, all the counsel, we want to thank you for all
24 your work and your attention and your good humor throughout
25 what was a very contentious fight. Thank you.

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1 MR. DOWD: Thank you, your Honor. And I would also
2 thank your staff as well. They were fabulous too.

3 THE COURT: Yes. The staff is fantastic and they make
4 people look good, to the extent I look good. Metaphorically
5 speaking.

6 It's been a pleasure to have you. It's not common to
7 have a case this well argued, this well presented. There were
8 lots of discovery issues throughout. Your ability to cooperate
9 in this procedure that I have facilitated my work enormously,
10 and where I couldn't resolve it, we had hearings on a short
11 basis. My goal in this, which I don't suppose was
12 accomplished, was to reduce transaction costs as much as
13 possible and move the case along as much as I could. You'll
14 judge me whether I succeeded or not, but that was my goal. And
15 I think it was facilitated by the way you cooperated with each
16 other, while at the same time representing your respective
17 clients most zealously. So I thank you.

18 MR. DOWD: Thank you.

19 MR. EDELMAN: Thank you, your Honor.

20 MS. WYMAN: Thank you, your Honor.

21 THE COURT: When is finality, Mr. Dowd?

22 MR. DOWD: Well, there's no objection, so it should be
23 30 days from judgment, which I believe the Court entered
24 yesterday.

25 THE COURT: What about my not giving a fee award yet?

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1 I've done everything in the class action.

2 MR. DOWD: Oh, no, they are separate cases. They
3 weren't even consolidated ever. They were coordinated for
4 discovery but not consolidated, so my case is down right now,
5 and it will be final in 30 days because there are no
6 objections.

7 MR. EDELMAN: Also, it's our understanding that the
8 derivative judgment makes that case final and the fee issue is
9 separate.

10 THE COURT: Will be supplementary to the judgment.

11 MR. HOUSTON: Yes. That's right, your Honor.

12 THE COURT: OK. Thank you.

13 MR. DOWD: Thank you.

14 MR. EDELMAN: Thank you again, your Honor.

15 (Adjourned)

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EXHIBIT B

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 NORBERT G. KAESS, et al,

4 Plaintiffs,

5 v.

09 CV 1714 (GHW) (RWL)
Telephone Conference

6 DEUTSCHE BANK AG, et al.,

7 Defendants.

8 -----x
New York, N.Y.
9 June 11, 2020
4:30 p.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13 APPEARANCES

14 GLANCY PRONGAY & MURRAY LLP
15 Attorneys for Plaintiffs

16 BY: BRIAN P. MURRAY
-and-

17 ROBBINS GELLER RUDMAN & DOWD LLP

18 BY: THEODORE J. PINTAR
ERIC NIEHAUS
KEVIN LAVELLE

19 CAHILL GORDON & REINDEL LLP
20 Attorneys for Deutsche Bank Defendants

21 BY: DAVID JANUSZEWSKI
SAMUEL MANN

22 SKADDEN ARPS SLATE MEAGHER & FLOM LLP
Attorneys for Underwriter Defendants

23 BY: WILLIAM J. O'BRIEN
ANDREW BEATTY

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1 (The Court and all parties appearing telephonically)

2 THE COURT: This is Judge Woods.

3 Is there a court reporter on the line?

4 (Pause)

5 THE COURT: Let me just say a few words at the outset
6 of today's conference.

7 First, you should conceive of this conference as if it
8 was happening in the courtroom. As you know, the dial-in
9 information for this call is publicly available; members of the
10 public and the press are welcome to dial in.

11 Second, let me ask you to all keep your phones on mute
12 at all times when you're not speaking on the phone. I can hear
13 some background noise right now, shuffling some paper. We
14 should not hear any background noise during the course of the
15 conference. Please keep your phones on mute at all times when
16 you are not speaking during the conference. That will help us
17 to keep a clear record of what we say today.

18 Third, I'd like to ask each of the people who will
19 speak during this conference to please identify themselves each
20 time that they speak during this conference. So, if you speak
21 during this conference, you should say your name each time that
22 you speak. You should do that regardless of whether or not
23 you've spoken previously during the conference. That will help
24 us to keep a clear record of today's conference.

25 Last, as you've heard, there is a court reporter on

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1 the line. You should not be surprised if he chimes in at any
2 point. If he does, and if he asks you to do something to help
3 him to hear or understand what you're saying, please do what he
4 asks. That will help us to, again, keep a clear record of the
5 conference today.

6 Because there is a court reporter on the line
7 transcribing the conference, I'm ordering that there be no
8 recordings or rebroadcasts of any portion of the conference.

9 So, with those introductory remarks in hand, let me
10 turn to the parties.

11 I'd like to ask for counsel for each side to identify
12 counsel who are on the line for each of the parties and any
13 representatives for each of the parties. What I'm going to ask
14 is that, if you can, that one person from each side identify
15 herself and the members of her team; that way, we won't have to
16 hear many people chiming in at a time.

17 So let me begin with counsel for plaintiffs.

18 Who's on the line for plaintiffs?

19 MR. PINTAR: Good afternoon, your Honor. It's Ted
20 Pintar, and I'm here with Eric Niehaus and Kevin Lavelle, from
21 Robbins Geller Rudman & Dowd, for plaintiffs.

22 THE COURT: Good. Thank you very much.

23 Who is on the line for defendants?

24 MR. MURRAY: Excuse me. I hate to interrupt, but this
25 is also for plaintiffs, Brian Murray, from Glancy Prongay &

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1 Murray. Sorry to interrupt you.

2 Now the defendants.

3 THE COURT: Fine.

4 Counsel for defendants?

5 MR. JANUSZEWSKI: Good afternoon, your Honor. This is
6 David Januszewski, and I have my colleague, Samuel Mann. We
7 are both from Cahill Gordon & Reindel, representing Deutsche
8 Bank and the Deutsche Bank defendants. And on the line, we
9 also have, from Deutsche Bank, Stella Tipi, in-house counsel at
10 Deutsche Bank.

11 THE COURT: Good. Thank you very much.

12 So, counsel --

13 MR. O'BRIEN: I'm sorry. Good afternoon, your Honor.
14 I just wanted to introduce myself and my colleagues. William
15 J. O'Brien and Andrew Beatty, from the firm of Skadden Arps
16 Slate Meagher & Flom, on behalf of the underwriter defendants.

17 THE COURT: Good. Thank you very much.

18 So, counsel, first, let me thank you all for being on
19 the call. I scheduled this conference as a settlement hearing
20 or approval hearing with respect to the proposed resolution of
21 this case. I have reviewed all of the materials that have been
22 submitted on the docket to date in connection with this matter.
23 I'd like to hear, however, from each of the parties, to hear,
24 in particular, if there's anything that any of you would like
25 to add to any of your written submissions in connection with

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1 the proposed resolution of the case.

2 Let me begin with counsel for plaintiffs.

3 Counsel?

4 MR. PINTAR: Again, good afternoon, your Honor. Ted
5 Pintar, for plaintiffs.

6 I had a number of things I wanted to mention just at
7 the outset. Obviously, we're here on the final approval of an
8 \$18.5 million settlement. We are very proud of that result.
9 As we have indicated, and I won't repeat all of what's in the
10 papers, but it represents a very significant percentage of
11 reasonably recoverable damages.

12 On February 27, 2020, this Court entered its
13 preliminary approval order. Pursuant to that order, notice was
14 disseminated. The claims administrator mailed over 112,000
15 notice packages, published the summary notice in the Wall
16 Street Journal and Business Wire, and set up a settlement
17 website where the notice and other settlement-related documents
18 were posted.

19 And, as a result, there was one objection. It's not
20 clear to me whether that has been withdrawn. I won't attempt
21 to characterize Mr. Agay's email. We submitted it to the
22 Court. He indicates, however, that he would not be
23 participating today. There were only four opt-outs. And I do
24 have some information on claims to date. Over 11,000 claims
25 have been submitted, and they are still processing claims --

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1 the mailed claims, so that number is likely to rise even from
2 there.

3 So, we believe that not only is it a good settlement,
4 that the class has reacted very positively to it, and, as you
5 know, today we're asking the Court to enter three orders: The
6 final judgment, the order approving plan of allocation, and the
7 order awarding attorneys' fees and expenses and award to class
8 plaintiffs. Other than that, your Honor, I certainly don't
9 have anything to add to our papers. I'm happy to address any
10 questions the Court may have, though.

11 THE COURT: Good. Thank you very much, counsel.

12 Let me hear from each of the groups of defendants.

13 First, counsel for the Deutsche defendants.

14 MR. JANUSZEWSKI: Yes, your Honor. Again, this is
15 David Januszewski, from Cahill Gordon.

16 We have nothing to add to what was submitted, which
17 was designed to address the objection that my friend just
18 addressed. We have nothing to add to that.

19 THE COURT: Good. Thank you very much.

20 Counsel for the remaining defendants, anything that
21 you'd like to add to your written submissions?

22 MR. O'BRIEN: Yes. William O'Brien, from the firm of
23 Skadden Arps Slate Meagher & Flom, on behalf of the underwriter
24 defendants.

25 And like Mr. Januszewski, we have nothing further to

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1 add.

2 THE COURT: Good. Thank you very much.

3 Is there anyone else on the line who wishes to be
4 heard?

5 So, hearing none, counsel, I'm going to approve the
6 proposed resolution of this action, or series of actions. What
7 I'd like to do is to ask you to place your phones, again, on
8 mute, if you would, please. I'd like to review the reasoning
9 for my decision. I'm going to do so now orally. At the end,
10 I'll take up the two orders and judgment that the parties have
11 proposed. Let me begin with, first, an overview.

12 So, I. Overview:

13 Plaintiffs brought this securities class action in
14 February 2009 on behalf of all persons who purchased the
15 7.35 percent Noncumulative Trust Preferred Securities of
16 Deutsche Bank Capital Funding Trust X and/or the 7.60 percent
17 Trust Preferred Securities of Deutsche Bank Contingent Capital
18 Trust III securities from Deutsche Bank AG pursuant to public
19 offerings from November 6, 2007, to February 14, 2008.
20 Plaintiffs allege that defendants violated Sections 11,
21 12(a)(2), and 15 of the Securities Act (the "Securities Act")
22 and (15, U.S.C., Section 77k, 771(a)(2), and 77o) by omitting
23 material facts from the offering documents. See declaration of
24 Eric I. Niehaus ("Niehaus dec."), Docket No. 308, paragraph 3.

25 Since then, plaintiffs have extensively litigated this

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1 case. The parties have engaged in significant motion practice,
2 and have completed fact discovery. Niehaus declaration
3 paragraphs 3-4. Now, plaintiffs seek final approval of the
4 class action settlement and approval of their plan for
5 allocating the net proceeds of the settlement. Plaintiffs'
6 counsel also seek an award of attorneys' fees and litigation
7 costs, and the lead plaintiffs seek an award for expenses
8 incurred while representing the class.

9 Judge Batts presided over this case for almost the
10 entire time that it has been pending in this court. The case
11 was reassigned to me on February 20, 2020, after Judge Batts'
12 untimely death.

13 II. Class Certification:

14 On October 2, 2018, pursuant to Rule 23 of the Federal
15 Rules of Civil Procedure, Judge Batts granted plaintiffs'
16 motion to certify a class defined as: All persons or entities
17 who purchased or otherwise acquired the 7.35 percent
18 Noncumulative Trust Preferred Securities of Deutsche Bank
19 Capital Funding Trust X ("7.35 percent Preferred Securities"),
20 and/or the 7.60 percent Trust Preferred Securities of Deutsche
21 Bank Contingent Capital Trust III ("7.60 percent Preferred
22 Securities"), pursuant or traceable to the public offerings
23 that commenced on or about November 6, 2007, and February 14,
24 2008. Excluded from the class are defendants, the officers and
25 directors of Deutsche Bank, and the underwriter defendants at

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1 all relevant times, members of their immediate families and
2 their legal representatives, heirs, successors, or assigns and
3 any entity in which defendants have or had a controlling
4 interest. Docket No. 224 at 10.

5 III. Approval of the Settlement Agreement:

6 Rule 23(e) requires court approval for a class action
7 settlement to ensure that it is procedurally and substantively
8 fair, reasonable, and adequate. Federal Rule of Civil
9 Procedure 23(e). To determine procedural fairness, courts
10 examine the negotiating process leading to the settlement.
11 Wal-Mart Stores, Inc. v. Visa USA, Inc., 396 F.3d 96, 116
12 (2d Cir. 2005). To determine substantive fairness, courts
13 analyze whether the settlement's terms are fair, adequate, and
14 reasonable according to the factors set forth in City of
15 Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

16 The court examines procedural and substantive fairness
17 in light of the "strong judicial policy favoring settlements"
18 of class action suits. Wal-Mart Stores, 396 F.3d at 116. A
19 "presumption of fairness, adequacy, and reasonableness may
20 attach to a class action settlement reached in arm's-length
21 negotiations between experienced capable counsel after
22 meaningful discovery." Id. "Absent fraud or collusion,
23 [courts] should be hesitant to substitute [their] judgment for
24 that of the parties who negotiated the settlement." In re EVCI
25 Career Colls. Holding Corp. Sec. Litig., 2007 WL 2230177, at *4

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1 (S.D.N.Y. July 27, 2007).

2 A. Procedural Fairness:

3 The settlement is procedurally fair, reasonable,
4 adequate and not a product of collusion. The settlement was
5 reached after the parties had conducted a thorough
6 investigation and evaluated the claims and defenses; the
7 agreement in principle was reached after sessions with the
8 Honorable Judge Layn R. Phillips, a former United States
9 District Judge and an experienced mediator of securities class
10 actions and other complex litigation. Niehaus declaration
11 paragraph 6, 129. In advance of the mediation, the parties
12 exchanged detailed mediation statements addressing both
13 liability and damages. *Id.* The parties reached a final
14 resolution on September 12, 2019, with the assistance of Judge
15 Phillips, after formal mediation. *Id.*

16 B. Substantive Fairness:

17 The settlement is also substantively fair. The
18 factors set forth in Grinnell provide the analytical framework
19 for evaluating the substantive fairness of a class action
20 settlement. The Grinnell factors are: (1) the complexity,
21 expense, and likely duration of the litigation; (2) the
22 reaction of the class; (3) the stage of the proceedings and the
23 amount of discovery completed; (4) the risks of establishing
24 liability; (5) the risks of establishing damages; (6) the risks
25 of maintaining the class action through the trial; (7) the

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1 ability of the defendants to withstand a greater judgment; (8)
2 the range of reasonableness of the settlement fund in light of
3 the best possible recovery; and (9) the range of reasonableness
4 of the settlement fund to a recovery in light of all of the
5 attendant risks of litigation. Grinnell 295 F.2d at 463.
6 Litigation here through trial will be complex, expensive, and
7 long. It has been complex, expensive, and long. Thus, the
8 first Grinnell factor weighs in favor of final approval. See
9 In re Payment Card Interchange Fee & Merch. Disc. Antitrust
10 Litig., 330 F.R.D. 11, 36 (E.D.N.Y 2019) ("Settlement is
11 favored if settlement results in substantial and tangible
12 present recovery, without the attendant risk and delay of
13 trial.").

14 With respect to the second factor, the class members'
15 reaction to the settlement has been overwhelmingly positive.
16 Of the 112,397 notice packets mailed to potential members of
17 the settlement class, four exclusion requests were received.
18 Supplemental declaration of Ross D. Murray (Supplemental Murray
19 Dec.") Docket No. 324, Paragraphs 4, 6. Only one class member,
20 Mr. Richard Agay, objected. See Richard Agay letter ("Agay
21 letter") Docket No. 320-21.

22 That objection did not challenge the settlement, the
23 resolution of this case, the reasons for the settlement, the
24 manner in which class plaintiffs and lead counsel prosecuted
25 the litigation, the work lead counsel performed, or lead

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1 counsel's fee and expense application. Instead, the objection
2 asserted only that Mr. Agay received his copy of the notice
3 late, and that he was confused by certain aspects of the
4 submission, and that the claims administrator did not
5 sufficiently respond to Mr. Agay's telephonic inquiry. On
6 June 5, 2020, Mr. Agay emailed lead counsel in an email that I
7 construe as him withdrawing his objections, perhaps because he
8 recognized that he was apparently persuaded by the response of
9 the parties showing that he was not entitled to recovery in the
10 suit. See Docket No. 329. While Mr. Agay received his notice
11 later than expected, he received it with enough time to submit
12 objections, and the delay was caused by a failure at his
13 broker. His objection does not suggest that the overall
14 distribution or notice program was ineffective in design or
15 execution.

16 The absence of objections, with the exception of one
17 retail investor, who literally withdrew his objection, coupled
18 with the minimal number of requests for exclusion, strongly
19 supports the finding that the settlement plan of allocation and
20 fee and expense requests are fair, reasonable, and adequate.
21 See *In re Citigroup, Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382
22 (S.D.N.Y. 2013); *In re Bisys Sec. Litig.*, 2007 WL 2049726, at
23 *1 (S.D.N.Y. July 16, 2007); *In re Veeco instruments Inc. Sec.*
24 *Litig.*, 2007 U.S. Dist. LEXIS 85629, at *40.

25 In sum, the overall favorable response demonstrates

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1 that the class approves of the settlement and supports final
2 approval.

3 The plaintiffs completed fact discovery, so counsel
4 "had an adequate appreciation of the merits of the case before
5 negotiating." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 475
6 (S.D.N.Y. 2013) (quoting *In re Warfarin Sodium Antitrust Litig.*,
7 391 F.3d 516, 537 (3rd Cir. 2004); see also Niehaus declaration
8 paragraph 5. Lead plaintiffs spent significant time and
9 resources analyzing and litigating the legal and factual issues
10 of this case, including an extensive factual and legal
11 investigation into the settlement class's claims and engaging
12 in the detailed formal mediation process. Niehaus declaration
13 paragraph 5.

14 Turning to the fourth and fifth factors, the risk of
15 establishing liability and damages further weighs in favor of
16 final approval. "Litigation inherently involves risks." *In*
17 *re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126
18 (S.D.N.Y. 1997). Indeed, the primary purpose of settlement is
19 to avoid the uncertainty of a trial on the merits. See *Velez*
20 *v. Majik Cleaning Serv., Inc.*, 2007 WL 7232783, at *6 (S.D.N.Y.
21 June 25, 2007). Here, plaintiffs face significant risks as to
22 both liability and damages; defendants challenged the premise
23 that the allegedly omitted information was material and the
24 notion that plaintiffs could prove that the drop in price was
25 related to the allegedly omitted information. See Niehaus

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1 declaration paragraphs 106, 115 to 17. The proposed settlement
2 eliminates these uncertainties. These factors, therefore,
3 weigh in favor of final approval.

4 The risk of obtaining class certification is
5 nonexistent here. Therefore, the sixth Grinnell factor weighs
6 in favor of final approval. Settlement generally eliminates
7 the risk, expense, and delay inherent in the litigation process
8 as a whole.

9 Turning to the seventh factor, there is nothing to
10 suggest that Deutsche Bank or the underwriter defendants would
11 be unable to withstand a greater judgment than the settlement
12 amount. "But a defendant is not required to empty its coffers
13 before a settlement can be found adequate." Shapiro v.
14 JP Morgan & Co., 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24,
15 2014) (quotation omitted).

16 Deutsche Bank's financial circumstances -- or I should
17 say the defendants' financial circumstances do not ameliorate
18 the force of the other Grinnell factors, which lead to the
19 conclusion that the settlement is fair, reasonable, and
20 adequate.

21 Finally, the amount of the settlement, in light of the
22 best possible recovery and the attendant risks of litigation,
23 weighs in favor of final approval. The determination of
24 whether a settlement amount is reasonable "is not susceptible
25 of a mathematical equation yielding a particularized sum." In

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1 re Austrian & German Bank Holocaust Litig., 80 F.Supp. 2d 164,
2 178 (S.D.N.Y. 2000). Instead, "There is a range of
3 reasonableness with respect to a settlement - a range which
4 recognizes the uncertainties of law and fact in any particular
5 case and the concomitant risks and costs necessarily inherent
6 in taking any litigation to completion." Newman v. Stein, 464
7 F.2d 689, 693 (2d Cir. 1972).

8 Here, lead plaintiffs assert that the settlement would
9 constitute 47 percent of the estimated recoverable damages.
10 Niehaus declaration paragraph 19. This is a reasonable result
11 when compared to the median ratio of settlement to investor
12 losses of 2.1 percent for securities class action settlements
13 in 2019. Id. Therefore, the amount of this immediate recovery
14 is reasonable, and this factor weighs in favor of final
15 approval.

16 Weighing the Grinnell factors, I find that the
17 settlement is substantively fair and weigh in favor of final
18 approval.

19 IV. Plan of Allocation:

20 "To warrant approval, the plan of allocation must also
21 meet the standards by which the settlement was
22 scrutinized - namely, it must be fair and adequate...an
23 allocation formula need only have a reasonable, rational basis,
24 particularly if recommended by experienced and competent class
25 counsel." In Re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d

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1 319, 344 (S.D.N.Y. 2005)(citation and quotation omitted). "A
2 plan of allocation need not be perfect," in re EVCI Career
3 Colleges Holding Corp. Sec. Litig., 2007 WL 2230177, at *11
4 (S.D.N.Y. July 27, 2007)(collecting cases), or "tailored to the
5 rights of each plaintiff with mathematical precision,"
6 PaineWebber, 171 F.R.D. at 133; see also RMed
7 International, Inc. v. Sloan's Supermarkets, Inc., 2000 WL
8 420548, at *2 (S.D.N.Y. April 18, 2000) (recognizing that
9 "aggregate damages in securities fraud cases are generally
10 incapable of mathematical precision"). Thus, "In determining
11 whether a plan of allocation is fair, courts look primarily to
12 the opinion of counsel." In re EVCI Career Colleges Holding
13 Corp. Sec. Litig., 2007 WL 2230177, at *11.

14 Lead counsel, who are experienced and competent in
15 complex class actions, prepared the plan of allocation in
16 connection with plaintiffs' damages expert. Niehaus
17 declaration paragraphs 100, 134. The settlement fund, minus
18 attorneys' fees and expenses, will be allocated on a pro rata
19 basis according to the relative size of class members'
20 "Recognized claims." Id. at paragraphs 9, 10. The expert has
21 calculated an estimated individual class members' claim based
22 on (i) allegations when the alleged concealed facts and trends
23 became known (i.e., realization events); (ii) an event study
24 that estimates price changes in the securities as a result of
25 realization events; and (iii) the statutory formula used to

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1 calculate recoverable damages during the settlement class
2 period. Declaration of Steven P. Feinstein ("Feinstein dec"),
3 Docket No. 177-1, paragraphs 29-42.

4 Because the plan of allocation has a clear rational
5 basis, equitably treats the class members, and was devised by
6 experienced and estimable class counsel, the Court finds it
7 fair and adequate. See *In re Telik, Inc. Sec. Litig.*, 576
8 F.Supp. 2d, 570, 581 (S.D.N.Y. 2008).

9 V. Dissemination of Notice:

10 On February 27, 2020, the Court entered an order
11 granting preliminary approval of the settlement as "fair,
12 reasonable and adequate" to class members. In accordance with
13 that order, lead counsel retained Gilardi & Co. LLC ("Gilardi")
14 as claims administrator to supervise and administer the notice
15 procedure in connection with the settlement and to process all
16 claims. Declaration of Ross D. Murray ("Murray dec"), Docket
17 No. 310, paragraph 2.

18 Gilardi sent a copy of the notice to potential members
19 of the settlement class. First, Gilardi mailed, by first class
20 mail, the notice packet to 283 nominees - banks, brokerage
21 companies, and other institutions - that Gilardi had in its
22 proprietary database. *Id.* at paragraph 5.

23 Next, Gilardi mailed the notice packet to 4,643
24 additional institutions or entities on the U.S. Securities and
25 Exchange Commission's ("SEC") list of active brokers and

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1 dealers. Id. paragraph 5.

2 Gilardi also delivered electronic copies of the notice
3 packet to 381 registered electronic filers, primarily
4 institutions and third-party filers, and to the depository
5 trust company ("DTC") on the DTC legal notice system ("LENS"),
6 which enables bank and broker nominees to contact Gilardi for
7 copies of the notice for their beneficial holders. Id.
8 paragraph 7. Gilardi received multiple responses and
9 additional names of potential settlement class members from
10 individuals or other nominees, with requests for over 64,000
11 notice packets to be forwarded directly to nominees' customers.
12 Id. paragraph 9. Gilardi also published the summary notice in
13 the Wall Street Journal and transmitted it over Business Wire.
14 Id. paragraph 11. Gilardi also posted the date and time of the
15 hearing on the settlement website. Id. paragraph 12.

16 Gilardi ultimately mailed a total of 112,397 notice
17 packets, including mailing notice packets to persons a second
18 time when the first set were returned as undeliverable.
19 Supplemental Murray declaration paragraph 4.

20 These notices apprised settlement class members, among
21 other things, of: (i) the amount of the settlement; (ii) the
22 reasons why the parties are proposing the settlement; (iii) the
23 maximum amount of attorneys' fees and expenses that will be
24 sought; (iv) the identity and contact information for
25 representatives of lead counsel available to answer questions

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1 concerning the settlement; (v) the right of settlement class
2 members to object to the settlement; (vi) the right to request
3 exclusion from the settlement class; (vii) the binding effect
4 of a judgment on settlement class members; (viii) the dates and
5 deadlines for certain settlement-related events; and (ix) the
6 way to obtain additional information about the action and the
7 settlement by contacting lead counsel and the settlement
8 administrator. See Federal Rule of Civil Procedure
9 23(c)(2)(B).

10 I find that these efforts fairly and adequately
11 advised class members of the terms of the settlement, as well
12 as the right of Rule 23 class members to opt out of, or to
13 object to the settlement, and to appear at the final fairness
14 hearing today. I find that the notice and its distribution
15 comported with all constitutional requirements, including those
16 of due process.

17 VI. Attorneys' Fees, Costs and Expenses:

18 Lead counsel requests attorneys' fees in the amount of
19 what the Court calculates to be \$6,166,666.67 plus interest
20 earned at the same rate as the settlement fund. This amounts
21 to one-third of the settlement fund, or 33.3 percent of the
22 settlement fund. Lead counsel also seeks reimbursement of:
23 (i) \$1,203,502.39 in litigation expenses in total, with Robbins
24 Geller Rudman & Dowd LLP ("Robbins Geller") seeking
25 \$1,170,981.31, Glancy Prongay & Murray seeking \$28,740.22, and

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1 Murray Frank LLP seeking \$3,780.86; and (ii) to approve the
2 award to the lead plaintiffs, or class plaintiffs, of "20,000
3 in the aggregate pursuant to 15, U.S.C., Section 77Z-1(a)(4) in
4 connection with their representation of the class." Niehaus
5 declaration paragraph 17.

6 Now, the trend in the Second Circuit is to use the
7 percentage of the fund method to compensate attorneys in common
8 fund cases, although the Court has discretion to award
9 attorneys' fees based on the lodestar method or the percentage
10 of recovery method. See *Fresno County Employees' Ret.*
11 *Association v. Isaacson/Weaver Family Trust*, 925 F.3d 63, 68
12 (2d Cir. 2019).

13 The notice provided to class members advised that
14 class counsel would apply for attorneys' fees for up to
15 33.3 percent of the settlement fund, in addition to litigation
16 costs not to exceed 1.3 million. See Gilardi declaration
17 Exhibit A Notice at 2. No class member objected to the
18 request.

19 A. Goldberger Factors:

20 Reasonableness is the touchstone when determining
21 whether to award attorneys' fees. In *Goldberger v. Integrated*
22 *Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), the Second Circuit
23 set forth the following six factors to determine the
24 reasonableness of a fee application: (1) the time and labor
25 expended by counsel; (2) the magnitude and complexities of the

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1 litigation; (3) the risk of the litigation; (4) the quality of
2 representation; (5) the requested fee in relation to the
3 settlement; and (6) public policy considerations. Id at 50.

4 1. Class Counsel's Time and Labor:

5 Plaintiffs' counsel have expended more than 26,000
6 hours of attorney time in total over the course of this action,
7 the vast majority of which was time expended by of counsel at
8 Robbins Geller. Declaration of Eric Niehaus in support of lead
9 counsel's motion for an award of attorneys' fees ("Niehaus fee
10 declaration"), Docket No. 311 paragraph 5. Niehaus declaration
11 paragraph 135.

12 2. Magnitude and Complexity of the Litigation:

13 The size and difficulty of the issues in a case are
14 significant factors to be considered in making a fee award. In
15 re Prudential Sec, Inc. Ltd. Partnership Litig., 912 F. Supp.
16 97, 100 (S.D.N.Y. 1996). "In evaluating the settlement of a
17 securities class action, federal courts, including this Court,
18 have long recognized that such litigation is notably difficult
19 and notoriously uncertain." In re Flag Telecom Holdings Ltd.
20 Sec. Litig., 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010)
21 (quotation omitted). This case is one of substantial
22 magnitude. In addition to all of the complications that are
23 attendant to any large securities class action, this matter
24 involved events that happened over ten years ago, extensive
25 discovery, and litigation. The amount sought by plaintiffs'

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1 counsel is commensurate with the magnitude and complexity of
2 this litigation.

3 3. The Risk of Litigation:

4 As discussed, lead counsel faced significant risk in
5 prosecuting this action and proving the merits of the claims.
6 All of the fact-finding has concluded. Given the complexity of
7 the case, the risk at summary judgment and trial is
8 significant. Defendants adamantly denied any wrongdoing, and,
9 in the event that litigation had continued, would have
10 continued to aggressively litigate their defenses through
11 summary judgment, Daubert motions, trial, and any appeals.

12 4. Quality of Representation:

13 Lead counsel has considerable expertise in securities
14 litigation. See Robbins Geller resume, Niehaus fee
15 declaration, Exhibit G; see also declaration of Brian P. Murray
16 filed on behalf of Glancy Prongay & Murray LLP in support of
17 application for award of attorneys' fees and expenses ("Murphy
18 fee declaration"). Robbins Geller attorneys are currently
19 "lead or [are] named counsel in hundreds of securities class
20 action or large institutional-investor cases" and are
21 "responsible for the largest securities class action in
22 history." Niehaus fee declaration, Exhibit G. RiskMetrics
23 Group has recognized Glancy Prongay & Murray as one of the top
24 plaintiffs' law firms in the United States in its securities
25 class action services report for every year since the inception

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1 of the report in 2003. See Murphy fee declaration, Exhibit I.

2 The high quality of defense counsel opposing
3 plaintiffs' efforts further proves the caliber of
4 representation that was necessary to achieve the settlement.
5 Cahill Gordon & Reindel and Skadden Arps Slate Meagher & Flom
6 are two prominent defense firms, and "the ability of
7 plaintiffs' counsel to obtain a favorable settlement for the
8 class in the face of such formidable opposition confirms the
9 quality of their representation of the class." In re Marsh
10 ERISA Litig., 265 F.R.D. 128, 148 (S.D.N.Y. 2010).

11 Accordingly, the Court finds that this Goldberger
12 factor weighs in favor of the requested fee award.

13 5. The Requested Fee in Relation to the Settlement:

14 Generally, courts consider the size of a settlement to
15 ensure that the percentage awarded does not constitute a
16 windfall. In this case, the requested fee is 33.3 of the
17 settlement, within the range of reasonableness, in light of
18 other class action settlements in this circuit. See Mohny v.
19 Shelly's Prime Steak, Stone Crab & Oyster Bar, 2009 WL 5851465,
20 at *5 (S.D.N.Y. Mar. 31, 2009) ("Class counsel's request for
21 33 percent of the settlement fund is typical in class action
22 settlements in the Second Circuit.").

23 6. Public Policy Considerations:

24 When determining whether a fee award is reasonable,
25 courts consider the social and economic value of the class

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1 action "and the need to encourage experienced and able counsel
2 to undertake such litigation." In re Sumitomo Copper Litig.,
3 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999). "Courts have, as a
4 generic matter, frequently observed that the public policy of
5 vigorously enforcing the federal securities laws must be
6 considered in calculating an award." In re BioScrip, Inc. Sec.
7 Litig., 273 F.Supp. 3d 474, 502 (S.D.N.Y. 2017) (quotation
8 omitted) affirmed sub nom. Fresno County Employees Retirement
9 Association v. Isaacson/Weaver Family Trust, 925 F.3d 63
10 (2d Cir. 2019).

11 Vigorous, private enforcement of the federal
12 securities laws can only occur if private investors can obtain
13 some parity in representation with that available to large
14 corporate defendants. Accordingly, public policy favors
15 granting lead plaintiffs' fee request.

16 After considering all of the Goldberger factors, the
17 requested fee award appears to be reasonable.

18 B. Lodestar "Cross Check":

19 In Goldberger, the Second Circuit "encouraged the
20 practice of requiring documentation of hours as a 'cross check'
21 on the reasonableness of the requested percentage."

22 Goldberger, 209 F.3d at 50. "Of course, where used as a mere
23 cross-check, the hours documented by counsel need not be
24 exhaustively scrutinized by the district court." Id.

25 As of April 17, 2020, plaintiffs' counsel have

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1 expended over 26,000 hours in total in this case, resulting in
2 a total lodestar of \$16,069,646. Niehaus fee declaration
3 paragraph 4, Exhibit A; Murphy fee declaration, Exhibit A.
4 Robbins Geller expended 17,356.85 hours with a lodestar of
5 \$12,021,477, Glancy Prongay & Murray LLP expended 8,097.8 hours
6 with a lodestar of \$3,639,826.50, the Frank Murray LLP expended
7 562.2 hours with a lodestar of \$355,902.50. Id. Plaintiffs'
8 counsel submitted declarations and time reports in support of
9 their motion for attorneys' fees. Id. Counsel submitted a
10 summary time records detailing the billable rate and hours
11 worked by each attorney and professional support staff in this
12 case. I find that these billable rates based on the
13 timekeeper's title, specific years of experience, and market
14 rates for similar professionals in their fields nationwide and
15 in New York, where Robbins Geller LLP is based, to be
16 reasonable in this context.

17 Based on plaintiffs' counsel's requested
18 fee - one-third of the settlement, or by the Court's
19 calculation, \$6,166,666.67 - the lodestar yields a negative
20 "cross-check" multiplier of about 0.38; therefore, the fee is
21 well below the typically awarded multipliers in this circuit.
22 "Courts regularly award lodestar multipliers from 2 to 6 times
23 lodestar in this circuit." *Fleisher v. Phoenix Life Insurance*
24 *Company*, 2015 WL 10847814, at *18 (S.D.N.Y. Sept. 9,
25 2020) (quotation omitted) (collecting cases). Thus, the lodestar

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1 "cross-check" confirmation that plaintiffs' counsel requested
2 fee is reasonable.

3 The Court therefore finds that, based on the
4 Goldberger factors and the lodestar "cross-check," that
5 plaintiffs' counsel's requested fees are reasonable.

6 C. Litigation Expenses:

7 Plaintiffs' counsel requests \$1,203,502.39 total in
8 litigation expenses, including filing fees, process service,
9 mailing expenses, document management and hosting services,
10 investigative and expert witnesses, legal research, travel and
11 mediation. See Niehaus fee declaration paragraph 5, Exhibit B.
12 Robbins Geller seeks \$1,170,981.31, Glancy Prongay & Murray
13 seeks \$28,740.22, and Murray Frank LLP seeks \$3,780.86. The
14 largest component of plaintiffs' counsel's expenses was the
15 cost of experts and consultants, amounting to \$750,458, or
16 approximately 62 percent of total expenses. Niehaus fee
17 declaration paragraph 6. The next largest components of
18 plaintiffs' counsel's expenses were for transportation, hotels,
19 and meals (\$227,852.66), court transcripts and deposition
20 materials (\$68,030.54), and mediation (\$27,210). See Niehaus
21 fee declaration, Exhibit B. The notice disclosed that lead
22 counsel would seek up to \$1,300,000 in litigation expenses. No
23 objection to these expenses was received.

24 "It is well-established that counsel who create a
25 common fund are entitled to the reimbursement of expenses that

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1 they advance to a class." In re Giant Interactive Group, Inc.,
2 279 F.R.D. 151, 165 (S.D.N.Y. 2011); see also In re Indep.
3 Energy Holdings, 302 F.Supp. 2d 180, 183 Note 3 (S.D.N.Y.
4 2003). "Attorneys may be compensated for reasonable
5 out-of-pocket expenses incurred and customarily charged to
6 their clients as long as they were 'incidental and necessary to
7 the representation of those clients.'" (quotation omitted).
8 The expenses for which lead counsel seeks payment are the type
9 of expenses that courts typically approve. See In re Global
10 Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y.
11 2004). Therefore, the Court finds that the requested
12 litigation expenses are reasonable and necessary to the
13 representation of the class and are appropriately reimbursed to
14 class counsel.

15 D. Lead Plaintiffs' Expenses:

16 Lead plaintiffs seek an award of \$20,000 for both of
17 them in recognition of the time and expense that they incurred
18 on behalf of the class. Motion in support, Docket No. 307, at
19 31; see also Niehaus declaration paragraph 17. 15, U.S.C.,
20 Section 77Z-1(a)(4) allows "the award of reasonable costs and
21 expenses (including lost wages) directly relating to the
22 representation of the class to any representative party serving
23 on behalf of a class."

24 As set forth in their declaration, lead plaintiffs
25 dedicated a significant amount of time to the successful

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1 prosecution of this action, including by reviewing pleadings
2 and motions, discussing strengths and risks of the case, and
3 consulting with lead counsel regarding settlement. Kaess and
4 Farrugio declaration paragraphs 2 through 12. These are the
5 kinds of activities which regularly are found to support awards
6 to class representatives.

7 As set forth in their declaration, lead plaintiffs
8 assert that the value of their time and resources invested in
9 this case is substantially in excess of the \$20,000 award that
10 they seek here. Id. And the application here is consistent
11 with the notice, which disclosed that "Class plaintiffs may
12 seek an award pursuant to 15, U.S.C., Section 77z-1(a)(4) in
13 connection with their representation of the class in an amount
14 not to exceed \$20,000 in the aggregate." Murphy fee
15 declaration, Exhibit A notice.

16 Thus, I find that the requested award of \$20,000 to
17 lead plaintiffs is reasonable.

18 VII. Conclusion:

19 In conclusion, I approve the class action settlement
20 for \$18,500,000 and approve the plan for allocating the net
21 proceeds of the settlement. I also award plaintiffs' counsel
22 attorneys' fees in the amount of what the Court calculates to
23 be \$6,166,666.67, plus interest earned at the same rate as the
24 settlement fund. This amounts to one-third of the settlement
25 fund, or 33.3 percent of the settlement fund. I am also

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1 awarding \$1,203,502.39 in litigation expenses to be divided as
2 outlined by lead counsel. Finally, I award lead plaintiffs
3 \$20,000 in the aggregate for time and expenses incurred while
4 representing the class.

5 So, counsel, thank you very much for your patience as
6 I got through the reasoning for my decision to approve the
7 settlement here.

8 I received the proposed orders and judgment, and I
9 expect to act on those promptly after today's conference.

10 Is there anything else that we should take up now,
11 before we adjourn?

12 First, counsel for plaintiffs?

13 MR. PINTAR: Not for plaintiffs, your Honor. Again,
14 Ted Pintar. Thank you very much.

15 THE COURT: Thank you.

16 Counsel for the Deutsche Bank defendants?

17 MR. JANUSZEWSKI: Your Honor, David Januszewski.

18 Nothing else from us.

19 THE COURT: Good. Thank you.

20 Counsel for the underwriter defendants?

21 MR. O'BRIEN: Yes. William O'Brien, from Skadden Arps
22 Slate Meagher & Flom LLP.

23 Nothing further from us as well.

24 THE COURT: Good. Thank you, all.

25 COUNSEL: Thank you. * * *