UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CNOVA N.V. SECURITIES LITIGATION This Document Relates To: All Actions	MASTER FILE 16 CV 444-LTS

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

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Pursuant to the October 11, 2017 Order Granting Preliminary Approval of Proposed Settlement, Granting Conditional Class Certification, and Providing for Notice to the Class ("Preliminary Approval Order"; Dkt. No. 131), Lead Counsel respectfully submit this memorandum of law in support of their motion for an award of attorneys' fees and reimbursement of expenses.[1]

I. PRELIMINARY STATEMENT

Lead Counsel seek an award of attorneys' fees of one-third (33 1/3%) of the Settlement Fund, or approximately $9,500,000, and $163,778.44 in reimbursement of costs and expenses Lead Counsel incurred in litigating this case on behalf of the Class. Lead Counsel have achieved an extraordinary result for the Class of $28,500,000 in cash plus interest earned thereon. Indeed, the Settlement here equates to a recovery that is significantly higher than the median recovery of individual class member's recoverable damages in similar securities class actions. *See* Declaration of Professor Geoffrey P. Miller, dated December 15, 2017 ("Miller Declaration" or "Miller Decl."), Exhibit C to the Appendix of Exhibits to the Brower Declaration[2] ("Appendix"), at ¶¶27-30.

The prosecution of this Action was undertaken by Lead Counsel on an entirely contingent basis. As more fully described below, Lead Counsel have incurred $2,502,956.25 in time and $163,778.44 in out-of-pocket expenses that would not be compensated or reimbursed unless

[1] Unless otherwise indicated, capitalized terms shall have the same meaning as set forth in the Stipulation and Agreement of Settlement, dated September 20, 2017 ("Stipulation"), attached as Exhibit 1 to the Declaration of David A.P. Brower In Support of Motion for: (1) Preliminary Approval of Settlement; (2) Certification of the Class for Purposes of Settlement; (3) Approval of Notice to the Class; and (4) Scheduling of a Final Approval Hearing, dated September 22, 2017. Dkt. No. 127. Lead Plaintiffs are also filing contemporaneously a motion and accompanying papers seeking final approval of the parties' proposed Settlement.

[2] Declaration of David A.P. Brower In Support of Lead Plaintiffs' Motion for Final Certification of the Class, Final Approval of Class Notice, Final Approval of the Proposed Settlement, Final Approval of the Proposed Plan of Allocation, and Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Brower Declaration" or "Brower Decl.").

Lead Counsel achieved a recovery for the benefit of the Class. Brower Decl. at ¶¶218-221.

Courts in this District and elsewhere frequently grant percentage-of-the-recovery fee awards where a common fund has been recovered for a class equal to, and, indeed, above the percentage of the Settlement Fund that Lead Counsel seek here. *See infra* pp. 14-16; Miller Decl. at ¶¶33-36. As demonstrated below, and in the accompanying Brower and Miller Declarations, the requested one-third fee award is eminently fair and reasonable, particularly in view of the substantial risks attendant to this litigation and the excellent result achieved. The requested fee is also fair and reasonable under either a lodestar/multiplier analysis or a "lodestar crosscheck." *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). The requested fee represents a 3.79 multiplier of Lead Counsel's lodestar, which is equal to, and in many cases lower than, multipliers awarded in such cases. Miller Decl. at ¶¶89-90.

In accordance with the Court's October 11, 2017 Preliminary Approval Order, as of December 11, 2017, 9,175 Notices were mailed (ten were remailed) to potential Class Members beginning on October 23, 2017, the Publication Notice was disseminated three separate times over *PR Newswire* and *Business Wire* (on October 31, November 7, and November 14, 2017), and the Notice and related documents are posted on the website of the Claims Administrator (www.choosegcg.com/cases-info/CNV). *See* Affidavit of Jose C. Fraga Regarding Mailing of the Notice and Proof of Claim Form and Publication of the Summary Notice, dated December 13, 2017, at ¶¶3, 7-9, Exhibit A to the Appendix. Both notices described the proposed Settlement, the maximum attorneys' fees Lead Counsel would seek (up to 33 1/3%), and Class Members' right to object to that request. No objections have been received thus far relating to the requested attorneys' fees.[3] In addition, the Notice advised that Lead Counsel would seek

[3] The deadline for requests for exclusion and objections is January 24, 2018. Accordingly, Lead Counsel

reimbursement of expenses not to exceed $300,000. Lead Counsel seek reimbursement of expenses of $163,778.44 – well below that ceiling. Nevertheless, no objections have yet been received to that higher potential reimbursement request.

In sum, the proposed Settlement here, which was achieved solely through the efforts of Lead Counsel in the face of a vigorous defense, represents an outstanding result in an exceedingly difficult multinational case. Consequently, Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses should be granted.

II. FACTUAL BACKGROUND

For a full discussion of the procedural history and summary of the Action, as well as the proposed Settlement, the Court is respectfully referred to the accompanying Brower Declaration. This memorandum will, instead, focus on the legal and factual matters relevant to attorneys' fees awards in class actions where a common fund has been recovered for a plaintiff class.

III. ARGUMENT

A. Lead Counsel Are Entitled To An Award Of Attorneys' Fees

1. The Legal Standards Governing Awards of Attorneys' Fees

It is well-settled that attorneys who represent a class and achieve a benefit for the members of that class are entitled to be compensated for their services. The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than . . . 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 Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939); *Central R.R. & Banking Co. v.*

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will report to the Court twenty-one days before the Final Approval Hearing scheduled for March 15, 2018 to address requests for exclusion and any objections.

Pettus, 113 U.S. 116, 126 (1885); *Trustees v. Greenhough*, 105 U.S. 527, 536 (1882).

In addition to providing fair compensation, awards of attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons" and, as a result, help to discourage future alleged misconduct of a similar nature. *In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008).[4] Indeed, the Supreme Court has repeatedly emphasized that private securities actions, such as this one, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the U.S. Securities and Exchange Commission ("SEC"). *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 313 (2007); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the marketplace . . . by deterring fraud . . . through the availability of private securities fraud actions.").[5]

As in most other Circuits, the "common fund" doctrine has been approved by the Second Circuit and courts in this District. *See, e.g., Goldberger*, 209 F.2d at 47 (finding that the common fund doctrine "prevents unjust enrichment [for] those benefitting from a lawsuit without contributing to its cost"); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999); *In re*

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[4] *See also In re Veeco Instruments Sec. Litig*., No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85554, at *8 (S.D.N.Y. Nov. 7, 2007) (same); *In re Giant Interactive Grp., Inc. Sec. Litig*., 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (an award of appropriate attorneys' fees should "provid[e] lawyers with sufficient incentive to bring common fund cases that serve the public interest" and "attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so") (citations omitted). In the long run, fees that fully reward excellent results encourage the successful prosecution of meritorious cases.

[5] *Accord Bateman Eichler, Hill Richards, Inc., v. Berner*, 472 U.S. 299, 310 (1985) (securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action'") (quoting *JI Case Co. v. Borak*, 377 U.S. 426, 432 (1964). Indeed, as Congress recognized in passing the PSLRA in 1995: "Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely on government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs. This legislation seeks to return the securities litigation system to that high standard."

American Bank Note Holographics, 127 F. Supp. 418, 430 (S.D.N.Y. 2001) (holding that "the costs of litigation should be spread among the fund's beneficiaries"); *see also* FED. R. CIV. P. 23(H) (providing that "the court may award reasonable attorneys' fees and nontaxable costs authorized by law").

2. Lead Counsel Should Be Awarded A Percentage of the Common Fund

Lead Counsel respectfully submit that this Court should award a fee based on a percentage of the common fund obtained for the Class. While Lead Counsel's requested fee is also reasonable when analyzed or cross-checked under the lodestar/multiplier methodology (*see infra* pp. 19-23), the Supreme Court has indicated that attorneys' fees in common fund cases should be generally based on a percentage of the fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed to the class").[6] Indeed, the Second Circuit has expressly approved the "percentage-of-the-fund" method for awards of fees in common fund cases, recognizing that "the lodestar method proved vexing" and has resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-49.[7]

See H.R. Conf. Rep. No. 104-369, at 31, 1995 WL 709276, at 730 (1995).

[6] *See also Savoie*, 166 F.3d at 460 ("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"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (stating that the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation" and noting that the "trend in this Circuit is toward the percentage method.") (citation omitted); *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194 (SAS), 2011 U.S. Dist. LEXIS 17747, at *6 (S.D.N.Y. Feb. 23, 2011) ("The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation."); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *43 (S.D.N.Y. Dec. 23, 2009) ("the percentage method continues to be the trend of district courts in this Circuit and has been expressly adopted in the vast majority of circuits").

[7] All Courts of Appeal to consider the matter have approved the use of the percentage method with two

The text of the Private Securities Litigation Reform Act of 1995 ("PSLRA") itself supports awarding attorneys' fees in securities cases using the percentage method, as it 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). Several courts have concluded that, in using this language, Congress expressed a preference for the percentage method when awarding attorneys' fees in securities class actions. *See, e.g.*, *Telik*, 576 F. Supp. 2d at 586; *In re WorldCom, Inc. Sec. Litig*., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (PSLRA expressly contemplates that "the percentage method will be used to calculate attorneys' fees in securities fraud class actions"); *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (by using this language, Congress "indicated a preference for the use of the percentage method" rather than the lodestar method).

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, the trend among the District Courts in this Circuit, and the language of the PSLRA, Lead Counsel respectfully submits that the Court should award the attorneys' fees based on a percentage of the Settlement. *See* Miller Decl. at ¶¶18, 21-22.

Circuits (the Eleventh and D.C. 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, 305-07 (1st Cir. 1995); *In re AT&T Corp., Sec. Litig*., 455 F.3d 160, 164 (3d Cir. 2006); *Union Assets 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, 515-17 (6th Cir. 1993); *Harman v. Lyphomed, Inc*., 945 F.2d 969, 975 (7th Cir. 1991); *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1157 (8th Cir. 1999); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). "The Fourth Circuit has not determined the preferred method for calculating attorneys' fees where the common fund has been generated on behalf of a class," but "District courts within the Fourth Circuit have consistently endorsed the percentage method." *Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-cv-24599,

3. The Percentage Fee Requested is Reasonable and Should be Granted

In this case, Lead Counsel seek one-third of the Settlement Fund in attorneys' fees. In *Goldberger*, the Second Circuit set forth the following factors for courts to consider in this Circuit to consider when analyzing fee applications in a common fund case:

(1) the magnitude and complexities of the litigation;

(2) the risk of the litigation;

(3) the quality of representation;

(4) the requested fee in relation to the settlement;

(5) public policy considerations; and

(6) the time and labor expended by counsel.

209 F.3d at 50; *see also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

Moreover, the "key consideration required by the PSLRA 'is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007) (quoting Advisory Comm. Notes to FED. R. CIV. P. 23, 2003 Amendments); *see also* Miller Decl. at ¶23.[8] Here, the requested fee is in line with awards typically granted in securities class actions in this Circuit, and is particularly reasonable in light of Lead Counsel's clear satisfaction of the *Goldberger/Grinnell* factors, including the excellent results achieved.

a. The Complexity, Magnitude, and Risks of Litigation

The "magnitude and complexities" and the "risk of the litigation" are "'perhaps the

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2015 U.S. Dist. LEXIS 92855, at *9-*10 (S.D. W.Va. July 14, 2015).

[8] The results achieved is discussed in extensive detail in Lead Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of the Proposed Settlement ("Settlement Memorandum"), submitted

foremost factor[s] to be considered in determining' the award of appropriate attorneys' fees." *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 173 (S.D.N.Y. 2007) ("*ML Tech.*") (citing cases); *accord In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 U.S. Dist. LEXIS 9450, at *54 (S.D.N.Y. Feb. 1, 2007) ("*ML Funds*"). This factor is discussed at length in the Brower Declaration (at ¶¶175-88), the Settlement Memorandum (at 7-13), and the Miller Declaration (at ¶¶41-51). Suffice it to say, the obstacles to Lead Plaintiffs' success on the merits and recovery on a judgment larger than the amount offered by the Settlement are legion. As the Second Circuit recognized in *Grinnell*, "despite the most vigorous and competent of efforts, success is never guaranteed." 495 F.2d at 471. A trial could turn on close questions of law and fact and also would involve a high degree of risk. The costs and duration of pretrial motion practice, discovery, trial preparation, and trial would likely be very substantial (especially here where the witnesses and discovery are located in other countries and the documents are not in English), and appeals could follow regardless of the outcome at trial.

Indeed, the foreign aspects of this Action presented unique difficulties that created additional, unusual risks to success on the merits, which are discussed fully in the Settlement Memorandum (at 7-13) and the Brower Declaration (at ¶¶175-88). Some risks included establishing personal jurisdiction over the Individual Defendants, each of whom are foreigners with limited contacts with the United States, and properly effecting service of process on such Defendants in accordance with international conventions and treaties. Other issues concerned the fact that documents and key witnesses were located abroad where the discovery rules are

herewith, at 23-24, the Brower Declaration (at ¶¶161-74), and the Miller Declaration (at ¶¶24-32), and will not be repeated here.

very different from the United States and it was not clear whether Lead Plaintiffs would even be able to obtain the discovery, how much, and how long it would take. Depositions alone would be extremely complicated, as Lead Plaintiffs would have to pursue depositions in as many as four countries, all of which follow the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. *See also In re Sadia S.A. Sec. Litig.*, No. 08-9528, 2011 U.S. Dist. LEXIS 149107, at *5 (S.D.N.Y. Dec. 28, 2011) ("First, continuing the litigation would be expensive because the defendants and all fact witnesses are in Brazil. . . . A potential trial would be complicated by the court's lack of subpoena power over many witnesses. In addition, it is not certain that courts in Brazil would enforce a U.S. securities fraud class action judgment."); *In re China Sunergy Sec. Litig.*, No. 07-7895, 2011 U.S. Dist. LEXIS 53007, at *14 (S.D.N.Y. May 13, 2011) ("[T]he Company's location in China would have posed a barrier that would have increased the difficulty and expense of discovery, and might have made it impossible to collect some of the evidence or take depositions necessary to prove Plaintiffs' claims.").[9] Furthermore, even assuming complete success on the merits at trial, the ability to enforce a class action judgment (or, indeed, any judgment) in some of the countries where Defendants are located presented significant, if not insurmountable, risks. *See* Brower Decl. at ¶185. These were but a few of the unique hurdles resulting from the primarily foreign aspects of this case that Lead

[9] *See also In re Gilat Satellite Networks, Ltd.*, No. 02-1510, 2007 U.S. Dist. LEXIS 68964, at *31 (E.D.N.Y. Sept. 18, 2007) ("the costs of litigating are anticipated to be significant, since extensive discovery remains to be completed and since both Gilat and the companies with which Gilat did business under the allegedly fraudulent scheme are located overseas, which will increase the cost and complexity of discovery."); *Berlinsky v. Alcatel Alsthom Compagnie Generale D' Electricite*, 970 F. Supp. 348, 352 (S.D.N.Y. 1997) ("However, there was one complicating factor which is important: defendant is a foreign corporation. . . . [T]his increased the risk contingency . . . Moreover, a judgment rendered against it by this court may have been difficult to enforce. Finally, though discovery, because it was conducted on an informal basis throughout most of this litigation, was not burdensome, had any formal discovery requests been necessary, counsel would have been forced to spend considerably more time and effort procuring the information it needed from a foreign source."). *See also* Settlement Memorandum at 11 (citing cases).

Plaintiffs would have needed to overcome to obtain a recovery for the Class.[10]

Moreover, one effect of the PSLRA has been to make it harder for investors to bring and successfully recover in securities class actions. Thus, just undertaking representation of a class in this type of case entails very substantial risks not faced in other types of litigation.

Lead Counsel faced not only these risks but additional risks specific to the claims and reached a very substantial Settlement for the benefit of the Class. Lead Plaintiffs encountered, and would have certainly continued to encounter, significant risks in overcoming the negative loss causation defense under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k(e), as well as other necessary elements to establish violations of the securities laws. Brower Decl. at ¶¶196-98 (detailing the various risks). While Lead Plaintiffs and Lead Counsel believe they had meritorious responses to any of Defendants' arguments, a battle of the experts would have certainty ensued, and a jury might have been swayed by Defendants' arguments and find in their favor. *See* Brower Decl. at ¶199.

Moreover, Lead Counsel's efforts were undertaken from the outset on a wholly contingent basis. "The courts of this Circuit, including this district, have expressly recognized that the contingent nature of counsel's fee, with the built-in risk of litigation, is a highly relevant factor in determining the fee to be awarded." *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *81 (S.D.N.Y. Nov. 26, 2002); *accord American Bank Note Holographics*, 127 F. Supp. at 430; *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *78-*79 ("Lead Counsel undertook this Action on a wholly contingent basis, investing

[10] Courts have long recognized that securities class actions are notoriously complex and difficult to prove. *See, e.g.*, *Fogarazzo*, 2011 U.S. Dist. LEXIS 17747, at *10 ("securities actions are highly complex"); *In re Flag Telecom Holdings*, No. 02-cv-3400, 2010 U.S. Dist. LEXIS 119702, at *43 (S.D.N.Y. Nov. 5, 2010) (courts have long recognized that securities class litigation is "notably difficult and notoriously uncertain") (citation omitted).

substantial amounts of time and money to prosecute this litigation with no guarantee of compensation or even the recovery of out-of-pocket expenses.").[11] Despite the very real possibility that Lead Plaintiffs might not prevail and that counsel would receive nothing for their efforts, Lead Counsel devoted substantial amounts of their time and resources to press the Class Members' claims. As the Second Circuit has long recognized:

> No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. 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.

Grinnell, 495 F.2d at 470 (citation omitted).

Courts have acknowledged that the risk of non-payment in similarly complex cases is very real and is heightened when, as here, Lead Counsel press to achieve the very best result possible. Indeed, there are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. Even judgments initially affirmed on appeal by an appellate panel have no assurance of a recovery. *See, e.g.*, *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (after 11 years of litigation, and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs'

[11] *See also Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *79 ("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 Warner Commun's. Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.") (citations omitted); Third Circuit Task Force on Selection of Class Counsel, 74 TEMP. L. REV. 689, 691-92 (Winter 2001) ("It is plaintiffs' counsel who work to obtain whatever recovery any member of the class who has not opted out of the litigation will receive. The fact that there will be no payment if there is no settlement or trial victory means that there is greater risk for plaintiffs' counsel in these class action cases than in cases in which an hourly rate or flat fee is guaranteed. The quid pro quo for the risk, and for the delay in receiving any compensation in the best of circumstances, is some kind of risk premium if the case is successful.").

claims were dismissed by an en banc decision and plaintiffs recovered nothing). Lead Counsel did, indeed, press for a very high percentage recovery for Class Members (in some cases, a 100% recovery of Class Members' most likely recoverable damages at trial before attorneys' fees and expenses, Brower Decl. at ¶¶161-74), rejecting numerous lower offers to settle, and, thus, risking the collapse of the settlement negotiations and the potential of non-payment.

Similarly, even the most promising cases can be eviscerated by a sudden change in the law after years of litigation. *See, e.g.*, *In re Alstom SA Sec. Litig*., 741 F. Supp. 2d 469 (S.D.N.Y. 2010) (after completion of extensive foreign discovery, 95% of the class's damages were eliminated by the Supreme Court's reversal of 40 years of unbroken circuit court precedent in *Morrison v. Nat'l Austl. Bank Ltd*., 561 U.S. 247 (2010)). Other significant cases have been lost after the investment of tens of thousands of hours of attorney time and millions of dollars on expert and other litigation costs at summary judgment or after trial. *See* Settlement Memorandum at 12-13.[12]

Unlike counsel for the Defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel have not been compensated for any of their time (3,741.80 hours) with a lodestar value of $2,502,956.25, or compensated for any of their $163,778.44 in litigation expenses incurred over the course of the Action. Moreover, Lead Counsel would not have been compensated for their time or expenses at all had they been

[12] *See, e.g.*, *Robbins v. Koger Props., Inc*., 116 F.3d 1441 (11th Cir. 1997) (reversal of jury verdict of $81 million against accounting firm after a 19-day trial); *Bentley v. Legent Corp*., 849 F. Supp. 429 (E.D. Va. 1994) (directed verdict after plaintiffs' presentation of its case to the jury), *aff'd sub nom., Herman v. Legent Corp*., 50 F.3d 6 (4th Cir. 1995); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendants after five years of litigation); *Anixter v. Home-Stake Prod. Co*., 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict following two decades of litigation); *In re Apple Computer Sec. Litig*., No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *In re JDS Uniphase Corp. Sec. Litig*., No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict after four weeks of trial).

unsuccessful in this Action. Because the fee to be awarded in this matter is entirely contingent, the only certainties from the outset were that there would be no fee without a successful result, and that a successful result, if any, could be achieved only after lengthy and difficult effort.

Taking into account the significant complexity of the issues, the magnitude and risks of the Action, the unusual foreign aspects of this case, and the contingent nature of the representation, the requested fee is reasonable and justified. *Accord ML Tech*, 246 F.R.D. at 172-73 ("Securities class litigation 'is notably difficult and notoriously uncertain.' . . . The Court agrees here that 'this Case is complex with difficult liability issues.'") (citations omitted); *ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *47-*48 (same). Thus, the magnitude, complexity, and risks of this litigation all support approval of the request for attorneys' fees.

b. Quality of Representation

Another *Goldberger/Grinnell* factor is the quality of the representation. *See In re Warner*, 618 F. Supp. at 748 ("[T]he quality of plaintiffs' counsels' work can be measured by a number of factors, including the benefit obtained for the class . . ."). Here, the high quality of the representation by Lead Counsel is clearly evidenced by the recovery obtained for the Class, which reflects a recovery of individual Class Members' compensable damages many times larger than recoveries in similar securities class actions. *See* Miller Decl. at ¶¶25-30; Brower Decl. at ¶¶161-74, 205-06.

The standing, reputation, and prior experience of plaintiffs' counsel are also relevant in determining fair compensation. *In re Union Carbide*, 724 F. Supp. at 165. The résumé of Lead Counsel's firm, Exhibit F to the Appendix, clearly demonstrate that Brower Piven includes highly experienced practitioners in areas of complex class action and securities litigation, some with more than 35 years of experience in the area. *See also* Miller Decl. at ¶¶37-38, 40.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered. *See, e.g.*, *Warner*, 618 F. Supp. at 749.[13] Lead Counsel were faced with formidable opposition in this litigation as Defendants were represented by White & Case LLP, Wachtell, Lipton, Rosen & Katz, O'Melveny & Myers LLP, and Morrison & Foerster LLP, all of whom spared no effort or expense in the defense of their clients. That Lead Counsel were able to obtain the very substantial recovery here when faced with such formidable opposing counsel is additional confirmation of the quality of the representation, and likewise supports the reasonableness of Lead Counsel's fee request. *See* Miller Decl. at ¶39; Brower Decl. at ¶¶223-24; *ML Tech*, 246 F.R.D. at 174 ("The quality of opposing counsel is also important in evaluating the quality of Class Counsels' [sic] work.") (quoting *In re KeySpan Corp. Sec. Litig.*, CV 2001-5852 (ARR) (MDG), 2005 U.S. Dist. LEXIS 29068, at *35 (S.D.N.Y. Aug. 25, 2005)).

c. The Requested Fee Award in Relation to the Settlement

"When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *In re Comverse Tech., Inc.*, No. 06-CV-1825 (NGG) (RER), 2010 U.S. Dist. LEXIS 63342, at *10 (E.D.N.Y. June 24, 2010) (citation omitted).

"Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions." *Warner*, 618 F. Supp. at 749 (citations omitted). The one-third percentage of the recovery fee award that Lead Counsel requests here is consistent with attorneys' fees awarded to successful plaintiffs' counsel in other federal securities class actions

[13] *See also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement"); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, No. 03 MDL 1529, 2006 U.S. Dist. LEXIS 84621, at *15 (S.D.N.Y. Nov. 17, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the

in this Circuit (*see, e.g.*, *China Sunergy*, 2011 U.S. Dist. LEXIS 53007, at *16 ("the requested attorneys' fees of 33 and 1/3% are reasonable. The compensation requested was negotiated with the Lead Plaintiff and is within the range of percentage fees awarded in the Second Circuit.") (citing other cases in the Circuit)),[14] and in other circuits.[15] *See* Miller Decl. at ¶¶35-36 & Exs. 2 & 3 thereto. Moreover, attorney fee awards of one-third or more of a common fund recovered is also consistent with attorney fee awards to successful plaintiffs' counsel in other types of class actions in this Circuit,[16] and in other circuits.[17] *See id*.

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country' also evidences the high quality of lead counsel's work") (citation omitted).

[14] The following is a non-comprehensive list of *reported* cases in this Circuit where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in federal securities law class actions. *See, e.g.*, *In re Giant Interactive Group, Inc*., 279 F.R.D. at 166; *Fogarazzo*, 2011 U.S. Dist. LEXIS 17747, at *1; *Menkes v. Stolt-Nielsen S.A.*, No. 3:03CV00409, 2011 U.S. Dist. LEXIS 7066, at *14 (D. Conn. Jan. 25, 2011); *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL) (RLE), 2003 U.S. Dist. LEXIS 8239, at *6 (S.D.N.Y. May 15, 2003); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003); *Maley*, 186 F. Supp. 2d at 367-68 (citing *In re APAC Teleservs., Inc. Sec. Litig.*, No. 97 Civ. 9145, 1999 U.S. Dist. LEXIS 17908, at *2 (S.D.N.Y. Dec. 10, 2001)); *Dubin v. E.F. Hutton Group, Inc*., 878 F. Supp. 616, 626 (S.D.N.Y. 1995); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993).

[15] The following is a non-comprehensive list of cases in other Circuits where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in federal securities law class actions. *See, e.g., In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 463 (9th Cir. 2000); *In re Southeastern Milk Antitrust Litig*., No. 2:07-cv-208, 2013 U.S. Dist. LEXIS 70167, at *31 (E.D. Tenn. May 17, 2013) (33 1/3%, totaling over $52 million); *In re Titanium Dioxide Antitrust Litig*., No. 10-cv-00318, 2013 U.S. Dist. LEXIS 176099, at *8 (D. Md. Dec. 13, 2013) (33 1/3% on $163.5 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340, 2009 U.S. Dist. LEXIS 133251, at *17 (D. Del. Apr. 23, 2009) (33 1/3% fee from $250 million settlement fund)*; In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-CV-1014, 2005 U.S. Dist. LEXIS 6680, at *35, *51 (E.D. Pa. Apr. 18, 2005); *In re Heritage Bond Litig*, 02-ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *61 (C.D. Cal. June 10, 2005); *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 497-98 (E.D Pa. 2003); *In re Gen. Instru. Sec. Litig.*, 209 F. Supp. 2d 423, 431-34 (E.D. Pa. 2001); *In re Pub. Serv. Co.*, No. 91-0536M, 1992 U.S. Dist. LEXIS 16326, at *21 (S.D. Cal. July 28, 1992); *Antonopulos v. N. Am. Thoroughbreds, Inc*., No. 87-0979G (CM), 1991 U.S. Dist. LEXIS 12579, at *8-*9 (S.D. Cal. May 6, 1991) (awarding one-third fee plus expenses in securities class action); *Howes v. Atkins*, 668 F. Supp. 1021, 1027 (E.D. Ky. 1987) (40%); *Zinman v. Avemco Corp*., No. 75-1254, 1978 U.S. Dist. LEXIS 20079, at *4-*5 (E.D. Pa. Jan. 18, 1978) (50%).

[16] The following is a non-comprehensive list of *reported* cases in this Circuit where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in non-securities class actions. *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, No. 09-CV-118

d. The Time and Labor to Produce an Excellent Settlement

The recovery obtained for the Class would not have been possible without the efforts of Lead Counsel, who devoted more than a year and a half and 3,741.80 hours of time to prosecuting this Action on a purely contingent basis.

As detailed in the Brower Declaration, Lead Counsel has expended a tremendous amount of effort and resources in investigating, filing, prosecuting, and resolving this Action. *See*

(VM), 2012 U.S. Dist. LEXIS 78929, at *11 (S.D.N.Y. June 1, 2012); *Alli v. Boston Mkt. Corp.*, No. 3:10-cv-00004-JCH, 2012 U.S. Dist. LEXIS 54695, at *9 (S.D.N.Y. Apr. 17, 2012; *Sewell v. Bovis Lend Lease LMB, Inc.*, No. 09 Civ. 6548 (RLE), 2012 U.S. Dist. LEXIS 53556, at *38 (S.D.N.Y. Apr. 16, 2012); *Guippone v. BH S&B Holdings, LLC*, No. 09 Civ. 01029 (CM), 2011 U.S. Dist. LEXIS 126026, at *38 (S.D.N.Y. Oct. 28, 2011); *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 U.S. Dist. LEXIS 105775, at *37 (S.D.N.Y. Sept. 16, 2011); *Reyes v. Altamarea Group*, No. 10-CV-6451 (RLE), 2011 U.S. Dist. LEXIS 115984, at *19 (S.D.N.Y. Aug. 16, 2011); *Hens v. ClientLogic Operating Corp.*, No. 05-CV-3815, 2010 U.S. Dist. LEXIS 139126, at *6 (W.D.N.Y. Dec. 21, 2010); *Clark v. Ecolab Inc.*, No. 07 Civ. 8623, 2010 U.S. Dist. LEXIS 47036, at *27 (S.D.N.Y. May 11, 2010); *Khait v. Whirlpool Corp*., No. 06-6381, 2010 U.S. Dist. LEXIS 4067, at *22 (E.D.N.Y. Jan. 20, 2010); *Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811 (MGC), 2010 U.S. Dist. LEXIS 1445, at *3, *16 (S.D.N.Y. Jan. 6, 2010); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270 (PAC), 2009 U.S. Dist. LEXIS 27899, at *16 (S.D.N.Y. Mar. 31, 2009); *Stefaniak v. HSBC Bank USA, N.A.*, No. 1:05-CV-720 S, 2008 U.S. Dist. LEXIS 53872, at *9-*10 (W.D.N.Y. June 28, 2008); *Spann v. AOL Time Warner, Inc*., No. 02 Civ. 8238 (DLC), 2005 U.S. Dist. LEXIS 10848, at *24 (S.D.N.Y. June 7, 2005); *In re Med. X-Ray Film Antitrust Litig*., No. CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *20 (E.D.N.Y. Aug. 7, 1998); *Van Gemert* v. *Boeing Co.*, 516 F. Supp. 412, 414 (S.D.N.Y. 1981); *Beech Cinema, Inc. v. Twentieth Century Fox Film Corp.*, 480 F. Supp. 1195, 1198 (S.D.N.Y. 1979).

[17] The following is a non-comprehensive list of *reported* cases in other Circuits where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in non-securities class actions. *See, e.g., In re United States Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (36%); *Waters v. Cooks Pest Control, Inc.*, No. 2:07-CV-00394 LSC, 2012 U.S. Dist. LEXIS 99129, at *43 (N.D. Ala. July 17, 2012)*; Temp. Servs. v. Am. Int'l Group, Inc.*, No. 3:08-CV-00271-JFA, 2012 U.S. Dist. LEXIS 86474, at *19, *36 (D.S.C. June 22, 2012); *In re Schering-Plough Corp.*, No. 08-1432, 2012 U.S. Dist. LEXIS 75213, at *17-*22 (D.N.J. May 31, 2012); *Hall v. AT&T Mobility LLC*, No. 07-5325, 2010 U.S. Dist. LEXIS 109355, at *71-*72 (D.N.J. Oct. 13, 2010); *In re Ready-Mixed Concrete Antitrust Litig*., No. 1:05-CV-00979-SEB-TAB, 2010 U.S. Dist. LEXIS 85003, at *13 (S.D. Ind. Aug. 17, 2010); *Helmick v. Columbia Gas Transmission*, No. 2:07-cv-00743, 2010 U.S. Dist. LEXIS 65808, at *15 (S.D. W. Va. July 1, 2010); *Payson v. Capital One Home Loans, LLC*, No. 07-CV-2282-DWB, 2009 U.S. Dist. LEXIS 25418, at *9 (D. Kan. Mar. 26, 2009); *In re Vitamins Antitrust Litig*., No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 25067, at *68 (D.D.C. July 19, 2001); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1131-32 (W.D. La. 1997) (36% from a $127 million fund); *Antonopulos*, 1991 U.S. Dist. LEXIS 12579, at *8-*9; *Gaskill v. Gordon*, 942 F. Supp. 382, 388 (N.D. Ill. 1996) (38%); *In re Ampicillin Antitrust Litig*., 526 F. Supp. 494, 499 (D.D.C. Oct. 29, 1981) (45%).

Brower Declaration, *passim*. These efforts included, among other things:

- identified potential claims available to purchasers of Cnova ordinary shares;
- conducted a substantial factual investigation, including a comprehensive review of publicly available information regarding Cnova and the events and circumstances at issue in the Action;
- reviewed public filings, articles, analyst reports, and other documents concerning Cnova;
- retained and consulted extensively with their economics, financial and damages experts;
- served the foreign defendants;
- drafted a detailed consolidated amended complaint and an Amended and Supplemental Consolidateed Class Action Complaint, which incorporated information contained in the Annual Report for fiscal year ended December 31, 2015 or disclosed after the filing of the amended complaint;
- reviewed and analyzed approximately one million pages of documents, including approximately 175,000 documents produced by Defendants;
- interviewed the lead investigator to discuss the forensic analysis that was completed during the course of the internal investigation, and counsel to Cnova who led the internal investigation of events in Brazil;
- consulted with foreign attorneys in England, France and Brazil;
- successfully negotiated the proposed Settlement under the auspices of Judge Layn Phillips (U.S.D.J. Ret.), including multiple in-person mediation sessions – and which culminated in the negotiation, drafting and execution of the Stipulation and related documents;
- worked closely with Lead Plaintiffs' damages consultant to develop a proposed plan for allocating the Settlement Fund to the Class;
- responded to inquiries from investors relating to the Settlement; and
- prepared the papers seeking final approval of the proposed Settlement.

The significant amount of time and effort devoted to this Action by Lead Counsel

confirm that the fee request here is reasonable. *See also* Miller Decl. at ¶¶52-55, 77-82.

Furthermore, notwithstanding the expenditure of a large amount of time, Professor Miller has reviewed the hours and allocation of work between and among the attorneys at Lead Counsel's firm and has opined that, for a securities litigation of this type, the time expended by Lead Counsel was reasonable, supporting the proposition that Lead Counsel expended their time usefully, efficiently, and without unnecessary or duplicative efforts. *See* Miller Decl. at ¶82 Accordingly, the time and labor expended by counsel amply supports the requested fee.

e. Public Policy Considerations Fully Support the Requested Fee

The Second Circuit has also held that "public policy considerations" should be afforded weight when determining the fee awarded to plaintiffs' counsel in class actions. *See Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *83 ("[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation); *ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *69 (same). Private lawsuits, such as this, serve to further the objective of the federal securities laws to protect investors and consumers against fraud and other deceptive practices. *Eltman v. Grandma Lee's, Inc*., No. 82 Civ. 1912, 1986 U.S. Dist. LEXIS 24902, at *25 (E.D.N.Y. May 28, 1986); *see also Bateman Eichler*, 472 U.S. at 310 (holding that lawsuits brought by investors provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action'") (citations omitted); *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.").

The Second Circuit has taken into account the social and economic value of class actions and the need to encourage counsel to undertake such litigation. *See, e.g., Alpine Pharmacy v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973). As a practical matter, class actions

can be maintained only if competent counsel can be obtained to prosecute them. This will occur if courts award reasonable and adequate compensation for their services where successful results are achieved. As former Chief Judge Brieant stated in *Union Carbide*, 724 F. Supp. at 169:

> [a] large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken.

Here, the Settlement was achieved despite the absence of any convictions or civil recoveries that Lead Counsel is aware of by the Department of Justice, the SEC, or any other domestic or foreign governmental agency for violations of any federal or state securities laws against any of the Defendants arising out of the events at issue in this Action.[18] Thus, Lead Counsel's willingness to assume the risks of this litigation resulted in the *only* recovery for the Class from the Defendants. *See In re Priceline.com, Inc. Sec. Litig.*, No. 00 Civ. 1884 (AVC), 2007 U.S. Dist. LEXIS 52538, at *17 (D. Conn. July 20, 2007) ("the award of the percentage requested here will encourage enforcement of the securities laws and support attorneys' decisions to take these types of cases on a contingent fee basis").

Indeed, for most Class Members, this class action was the only hope of obtaining compensation for the losses they suffered as a result of the allegations here, so a class action was the most efficient manner in which to prosecute the claims of Class Members. Thus, public policy favors granting Lead Counsel's request for fees. *See also* Miller Decl. at ¶¶92-93.

4. Lead Counsel's Fee Request is Reasonable Under a Lodestar/Multiplier Analysis and Should Be Granted

Even where courts use the percentage-of-the-recovery methodology to award attorneys'

[18] Here, the Company did state in a July 22, 2016 press release that it disclosed its commencement of its internal review in December 2015 to the staff of the SEC's Division of Enforcement as well as the French Autorité des Marchés Financiers (AMF) and the Dutch Authority for the Financial Markets (AFM), and was cooperating with the agencies.

fees, the Second Circuit has encouraged the practice of using the lodestar/multiplier approach to perform a "cross-check" on the reasonableness of the percentage awarded. *ML Tech*, 246 F.R.D. at 175-76. Here, under the lodestar/multiplier approach, the requested attorneys' fees are fair and reasonable.

The lodestar is calculated by multiplying the number of hours expended on the entire litigation by a particular attorney by his or her current hourly rate. The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices – *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J., concurring in part, dissenting in part) ("market standards should prevail"); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'") (citing *Blum*, 465 U.S. at 896 n.11). In addition, the Supreme Court and other courts have held that the use of *current* rates is proper since such rates more adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).[19] Here, the rates used by Lead Counsel are commensurate with market rates that courts in this District and around the country have repeatedly found to be reasonable given the nature of such work and the risks associated with prosecuting class actions on a contingent basis. *See* Miller Decl. at ¶¶58-76; Brower Decl. at ¶¶232-33.

The total lodestar for services here, through December 12, 2017, was $2,502,956.25. This represents 3,741.80 hours spent by attorneys, Of Counsel, Investigators/Reviewers, and a

[19] Courts in this Circuit have long approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment that is inherent in class actions, inflationary losses, and the loss of access to legal and monetary capital that could otherwise have been employed had class counsel been paid on a current basis during the pendency of the litigation. *See N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1153 (2d Cir. 1983); *Union Carbide*,

paraprofessional. The division of time between the various attorneys and paraprofessions who worked on this Action demonstrates that the work was distributed efficiently among partners, associates, Of Counsel, and other staff. *See* Brower Decl. at ¶¶231. Moreover, the amount of participation by senior personnel in this litigation was justified "because the large majority of the hours worked were spent on complicated tasks, such as the drafting of pleadings and motions, and conducting extensive settlement negotiations." *ML Tech*., 246 F.R.D. at 176 (finding that "[t]here is no indication that counsel failed to delegate work, where appropriate, to more junior personnel"); *ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *73-*74 (same).[20] Furthermore, as Professor Miller opines, the rates charged by the attorneys at Brower Piven are not only consistent with, but in many cases, far lower than the rates charged for attorneys of comparable education and experience at the hourly law firms that Lead Counsel litigates against in the communities in which they practice, including at the firms Lead Counsel litigated against in this Action. *See* Miller Decl. at ¶¶58-76. Accordingly, the hourly rates charged by Lead Counsel are also reasonable. *See Blum*, 465 U.S. at 896 n.11 (1984) (a reasonable plaintiff's counsel's billing rate in representative litigation is one "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation"; "rates charged in private representation may afford relevant comparison."); *Savoie*, 166 F.3d at 463 (same).

Typically, under the lodestar method of fee computation, a multiplier is applied to the lodestar in order to compensate for the results achieved, the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other

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724 F. Supp. at 163; *Veeco*, 2007 U.S. Dist. LEXIS 85554, at *28-*29.

[20] "Nevertheless, where used as a mere cross-check, the hours documented by counsel need not be

Grinnell/*Goldberger* factors. *See In re Global Crossing*, 225 F.R.D. 436, 467-68 (S.D.N.Y. 2004).[21]

"Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District." *In re EVCI Career Colleges Holding Corp. Sec. Litig*., No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *56 n.7 (S.D.N.Y. 2007); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. Nov. 9, 1998) (holding that "multipliers of between 3 and 4.5 have become common"); *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (same).[22] Lead Counsel's requested fee of one-third of the Settlement Fund represents a

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exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

[21] *See also Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *76 ("Under the lodestar method, 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."); *Comverse*, 2010 U.S. Dist. LEXIS 63342, at *14 ("Where . . . counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar."); *In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d 752, 761 (S.D. Ohio 2007) ("the Court rewards [] lead counsel that takes on more risk, demonstrates superior quality, or achieves a greater settlement with a larger lodestar multiplier").

[22] *See also In re Credit Default Swaps Antitrust Litig*., No. 13MD2476 DLC, ECF No. 554 (S.D.N.Y. April 18, 2016) (6.36 multiplier); *Cornwell v. Credit Suisse Grp*., No. 08 Civ. 03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011) (awarding fee representing a multiplier of 4.7); *Telik*, 576 F. Supp. 2d at 590 ("In contingent litigation, lodestar multipliers of over 4 are routinely awarded by courts, including this Court."); *In re UnitedHealth Grp. Inc. PSLRA Litig*., 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) ($925 million settlement, 6.5 multiplier); *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F. Supp. 2d 732, 791 (S.D. Tex. 2008) ($7.2 billion settlement, 5.2 multiplier); *Cardinal Health*, 528 F. Supp. at 767 (multiplier of 5.9); *In re Nortel Networks Corp. Sec. Litig*., No. 05-MD-1659 (LAP), slip op. at 12, ECF No. 77 (S.D.N.Y. Dec. 26, 2006) ($1.043 billion settlement, 4.77 multiplier); *WorldCom*, 388 F. Supp. 2d at 354 ($6.1 billion settlement, 4.03 multiplier); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (multiplier of 6.96).; *In re Charter Comm'cs, Inc. Sec. Litig*., No. 4:02-CV-1186 CAS, 2005 U.S. Dist. LEXIS 14772, at *56 (E.D. Mo. June 30, 2005) (multiplier of 5.6); *In re Linerboard Antitrust Litig*., MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at *50 (S.D.N.Y. June 2, 2004) (finding that "the average multiplier approved in common fund class actions was 4.35") (citing Stuart J. Logan, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REPORTS 167 (2003)); *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to 4.65 multiplier and holding that such was "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re Cendant Corp. Litig*., 243 F. Supp. 2d 166, 174 (D.N.J. 2003) ($3.3 billion settlement, 4.2 multiplier); *In re Waste Mgmt., Inc. Sec. Litig.*, No. H-99-2183, slip op. at 64 (S.D. Tex. May 10, 2002) (approving a multiplier of 5.3); *Di Giacomo v. Plains All Am. Pipeline*, No. H-99-4137, 2001 U.S. Dist. LEXIS 25532, at *31-*32 (S.D. Tex. Dec. 19, 2001) (multiplier of 5.3); *Roberts v. Texaco, Inc*., 979 F. Supp. 185, 197

multiplier of 3.79 times Lead Counsel's aggregate lodestar. As demonstrated above, this is well within the range of multipliers deemed reasonable by courts in the Second Circuit. *See also* Miller Decl. at ¶¶83-91.

Based on the analysis of the *Goldberger*/*Grinnell* factors above and in the Brower and Miller Declarations, Lead Counsel submit that they have produced, through the quality of their representation and their experience, an excellent result for the Class in a case fraught with significant litigation risks on a fully contingent basis against experienced and well-financed opponents. Accordingly, Lead Counsel is entitled to a substantial multiplier of their lodestar. Given the requested attorneys' fee reflects a 3.79 muliplier of their lodestar, the requested one-third fee request is both fair and reasonable.

B. Lead Counsel Should be Reimbursed for Expenses Reasonably Incurred in Connection with this Action

Lead Counsel also requests reimbursement of their litigation expenses that were reasonably and necessarily incurred in the prosecution of this Action. "It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *86. Indeed, in this District, "[c]ourts routinely grant the expense requests of class counsel." *Gilat*, 2007 U.S. Dist. LEXIS 68964, at *60 (quotations omitted).

Moreover, "[g]ranting requests for expenses is consonant with the public policy underlying fee awards in common fund cases." *Key-Span Corp. Sec. Litig.*, 2005 U.S. Dist. LEXIS 29068, at *59. "Since counsel in a class action will necessarily incur substantial costs and expenses over the course of many years and will presumably have paid the expenses by the

(S.D.N.Y. 1997) (5.5 multiplier); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905, 1992 U.S. Dist. LEXIS 12702, at *22 (S.D.N.Y. Aug. 24, 1992) (multiplier of 6.0).

time a fee request is considered by the Court, providing for reimbursements of costs and expenses is a component of affording adequate compensation to counsel in order to encourage attorneys to pursue common fund cases." *Id*.; *see also China Sunergy*, 2011 U.S. Dist. LEXIS 53007, at *17 (in a class action, attorneys may 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'") (citation omitted); *ML Tech*, 246 F.R.D. at 178 ("Counsel is entitled to reimbursement from the common fund for reasonable litigation expenses") (citing cases); *ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *78-*79 (accord); *In re Independent Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.") (internal quotation marks omitted); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may 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' of those clients") (citation omitted).

As detailed in the Brower Declaration, Lead Counsel incurred a total of $163,778.44 in litigation expenses on behalf of Class from the inception of the Action through December 12, 2017. Brower Decl. at ¶242. Reimbursement of these expenses is fair and reasonable. The expenses for which Lead Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour.[23] These expenses include, among others, the costs of experts and consultants, online legal and factual

[23] *See, e.g.*, *Global 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 [and] [f]or this reason, they are properly chargeable to the Settlement fund.") (citation omitted).

research, maintaining the electronic discovery platform that was used to review, analyze and organize the documents produced during the course of the Action, court fees, travel expenses, copying costs, facsimile charges, court reporting services, postage and delivery expenses, and mediation fees. Brower Decl. at ¶¶242-43.

The Notices advised that Lead Counsel would be seeking reimbursement of litigation expenses in an amount not to exceed $300,000, to be paid from the Settlement Fund. Although the actual request is significantly less than projected in the Notices, to date, no objections have been received regarding the maximum expense figure set forth therein.

In sum, Lead Counsel respectfully submit that the expenses sought here ($163,778.44) were all reasonably and necessarily incurred, are of the type customarily reimbursed in securities cases, and should be approved.

IV. CONCLUSION

The recovery of $28.5 million under the proposed Settlement represents an excellent result achieved in a risky case in the face of determined adverse parties. Accordingly, for all of the reasons set forth herein and in the Brower Declaration, Lead Counsel respectfully submit that the requested fee is fair and reasonable and request that the Court award attorneys' fees equal to one-third of the Settlement Fund, and their litigation expenses in the amount of $163,778.44, together with interest thereon at the same rate as earned on the Settlement Fund until paid.

Dated: December 22, 2017

BROWER PIVEN
A PROFESSIONAL CORPORATION

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I served true and correct copies of the foregoing Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses on all counsel by causing copies to be sent by the ECF system.

/s/ David A.P. Brower
David A.P. Brower