IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: MUNICIPAL MORTGAGE & EQUITY, LLC, SECURITIES AND DERIVATIVE LITIGATION	**MDL 08-MD-1961** **ALL CLASS ACTIONS**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, APPROVAL OF THE PLAN OF ALLOCATION, CLASS CERTIFICATION, AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Plaintiffs William D. Felix and Paul B. Engel (collectively, "Plaintiffs")[1], on behalf of the Class,[2] respectfully submit this memorandum of law in support of their motion for final approval of the class action Settlement, approval of the Plan of Allocation, certification of the Class, and an award of attorneys' fees and reimbursement of expenses.

INTRODUCTION

The terms of the Settlement are set forth in the Stipulation, submitted to the Court on April 20, 2015. Under the terms of the Stipulation, Defendants will pay a total of up to $826,820 into an escrow fund (the "Settlement Fund") to be distributed to members of the Class[3] and for the payment of attorneys' fees and expenses. As discussed at length below, Plaintiffs request that the Court approve this Settlement, as it is an excellent recovery in light of the extremely difficult nature of the case, achieved after over seven years of litigation, multiple appeals involving complex and novel issues, and a Supreme Court petition for writ of certiorari. In addition, to effectuate the Settlement, the Court should certify the Class and approve the proposed Plan of Allocation for the proceeds of the Settlement. Finally, the Court should approve Plaintiffs'

[1] The following plaintiffs were also parties in the Action and appellants in the United States Court of Appeals for the Fourth Circuit: Robert Yates, Alan S. Barry, David Young, Charles Dammeyer, David Kremser, and Elk Meadow Investments, LLC. Their claims were dismissed by the Court and the dismissal was affirmed by the Fourth Circuit. The Class's Dividend Reinvestment Plan ("DRP") claims were the only ones sustained by the Court.

[2] Unless otherwise indicated, all capitalized terms have the same meanings as set forth in the Stipulation of Settlement dated April 15, 2015 (the "Stipulation" or "Stipulation of Settlement").

[3] As set forth in the Stipulation, the "Class" means all persons or entities who purchased or otherwise acquired common stock of Municipal Mortgage & Equity, LLC ("MuniMae") pursuant to MuniMae's DRP between May 3, 2004 and January 29, 2008 (the "Class Period"). Excluded from the Class are Defendants, members of Defendants' immediate families, any entity in which any Defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded persons (all solely in their capacity as such and not otherwise). Also excluded from the Class are those Persons who make Requests for Exclusion that are approved by the Court.

Counsel's request for an award of attorneys' fees and reimbursement of expenses, including expenses for notice and administration of the Settlement to The Garden City Group, Inc. ("GCG").

BACKGROUND OF THE LITIGATION AND SETTLEMENT

A brief summary of the background of the Settlement is set forth below. For a full discussion of the history of the litigation, the Court is respectfully referred to the accompanying Declaration of Charles J. Piven In Support of Final Approval of Class Action Settlement, Plan of Allocation, and Application For An Award of Attorneys' Fees and Reimbursement of Expenses, dated July 27, 2015 ("Piven Declaration" or "Piven Decl.").

This action originally consisted of five class actions and five derivative actions filed in the District of Maryland and Southern District of New York. On August 13, 2008, the United States Judicial Panel on Multidistrict Litigation transferred all cases pending in the Southern District of New York to the District of Maryland for coordinated proceedings before the Honorable Judge Marvin J. Garbis (the "Court"). On August 27, 2008, the Court consolidated the actions and appointed Robert Yates, Alan S. Barry, David Young, Carlo Hornsby, Ed Friedlander and William D. Felix as Lead Plaintiffs and their counsel, the law firms of Berger & Montague, P.C. ("Berger & Montague") and Brower Piven, A Professional Corporation, ("Brower Piven," and collectively with Berger & Montague, "Co-Lead Counsel") as Co-Lead Counsel, with Brower Piven having principal responsibility for Class members asserting claims under the Securities Act, and Berger & Montague having principal responsibility for Class members asserting claims under the Exchange Act. On December 5, 2008, Lead Plaintiffs filed their Consolidated and Amended Class Action Complaint (the "Complaint").

The Complaint asserts claims against Defendants for alleged violations of §§11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act") in connection with the February Secondary Public Offering

("SPO") and claims against Defendants under §§11, 12(a)(2) and 15 of the Securities Act in connection with purchases of MuniMae stock pursuant to MuniMae's DRP. The Complaint also asserts claims against Defendants for alleged violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated by the Securities and Exchange Commission (the "fraud claims").

Defendants filed motions to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on March 12, 2009. On June 26, 2012, the Court issued a memorandum opinion and order (the "Order") denying Defendants' motions to dismiss plaintiffs' claims under §§11, 12(a)(2) and 15 of the Securities Act in connection with purchases of MuniMae stock pursuant to MuniMae's DRP, holding that those claims were timely and adequately pled. With respect to the non-DRP claims under §11 of the Securities Act, the Court found that plaintiffs alleged actionable material misrepresentations and omissions, and that Plaintiffs' §11 claims in connection with the February Secondary Public Offering ("SPO") were pled with particularity, were not barred by the one-year statute of limitations under §13 of the Securities Act, and should not be dismissed for lack of standing. The Court nevertheless dismissed those claims, holding that the §11 claims relating to the SPO were time-barred under the three-year statute of repose of §13 of the Securities Act. Finally, the Court granted Defendants' Motion to Dismiss relating to the claims under §10b for failure to plead scienter sufficiently.

Following issuance of the Order, the parties agreed and jointly requested that the Court issue a Fed. R. Civ. P. 54(b) judgment to permit immediate appeal of the Court's dismissals of the claims under §§10(b) and 20(a) of the Securities Exchange Act of 1934, and §§11, 12(a)(2) and 15 of the Securities Act, relating to the SPO (the "Judgment"). On November 14, 2012, the Court issued a Rule 54(b) Determination and a separate Judgment Pursuant to Rule 54(b), ruling that a "final judgment can be

entered resolving the claims presented in Counts One, Two, Six, Seven, and Eight of the Complaint" and that "[t]here is no just reason for delay in the entry of such a judgment." The Court also retained jurisdiction over the claims under §§11, 12(a)(2) and 15 of the Securities Act in connection with the DRP, but stayed proceeding with those claims pending the outcome of the appeal of the dismissal of the other claims in the Complaint.

On November 30, 2012, Plaintiffs timely appealed from the Order and Judgment, and subsequently filed an Amended Notice of Appeal on December 4, 2012. On March 7, 2014, the Fourth Circuit Court of Appeals issued an order and opinion affirming the opinion of the Court on all grounds. The following plaintiffs were also parties in the District Court and appellants in the Fourth Circuit: Robert Yates, Alan S. Barry, David Young, Charles Dammeyer, David Kremser, and Elk Meadow Investments, LLC. Their claims were dismissed by the District Court and the dismissal was affirmed by the Fourth Circuit.

On June 5, 2014, Plaintiff Charles Dammeyer filed a Petition for Writ of Certiorari in the Supreme Court, which was denied on October 6, 2014.

Following dismissal of the claims by the District Court in June 2012, counsel for Plaintiffs and the Class, whose claims were the only ones to survive Defendants' motions to dismiss, engaged in extensive negotiations with Defendants regarding the settlement of the claims of DRP investors. Those negotiations, which were concluded after the denial of certiorari by the United States Supreme Court, resulted in this settlement on behalf of the purchasers of MuniMae common stock pursuant to MuniMae's DRP.

ARGUMENT

A. The Proposed Settlement Should Be Approved

1. The Approval Process And Standards Governing Class Action Settlements Under Fed. R. Civ. P. 23

Federal courts strongly favor settlement of class actions on terms negotiated by the parties. *Carson v. American Brands, Inc.*, 450 U.S. 79, 87-88 (1981) (allowing interlocutory appeal of district court order refusing to enter consent decree settling class action); *cf. Evans v. Jeff D.*, 475 U.S. 717, 732-36 (1986) (explaining benefits of class action settlements for plaintiffs, defendants and the courts). Accordingly, "[c]ourts should foster settlement [of class actions] in order to advantage the parties and promote 'great saving in judicial time and services.'" *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989)).[4]

The Federal Rules of Civil Procedure provide that a class action "shall not be . . . compromised without approval of the [district] court . . . ." Fed. R. Civ. P. 23(e). "[T]he role of a court in reviewing the proposed settlement of a class action under Fed. R. Civ. P. 23(e) is to assure that the procedures followed meet the requirements of the rule and comport with due process and to examine the settlement for fairness and adequacy." *Vaughns v. Board of Educ.*, 18 F. Supp. 2d 569, 578 (D. Md. 1998).

Generally, approval of a class action settlement involves a two-stage procedure. *Benway v. Res. Real Estate Services, LLC*, No. WMN-05-3250, 2011 WL 1045597, at *4 (D. Md. Mar. 16, 2011) (citing *Horton*

[4] *See also Zimmerman v. Bell*, 800 F.2d 386, 392 (4th Cir. 1986) (noting that by approving settlement, "disputes are resolved" and "the resources of litigants and courts are saved"); *United States Fid. & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1572 (D.S.C. 1991) (noting three policies at work in a Rule 10b-5 case: punishing wrongdoers, limiting liability to relative culpability, and encouraging settlements); *In re United States Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits."); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[I]n class action suits, there is an overriding public interest in favor of settlement.").

v. Merrill Lynch, Pierce, Fenner & Smith, 855 F. Supp. 825, 827 (E.D.N.C. 1994)); *see also* Manual For Complex Litigation, Fourth Ed. §30.41 at 236 (West/Fed. Jud. Cntr. 1995) (hereafter, "Manual"). In the first stage, the court gives preliminary approval and directs that notice under Rule 23(e) be given to the class members. Manual §13.14 at 172-73. Here, that occurred on May 21, 2015, when the Court entered the preliminary approval order, which was revised on May 22, 2015 ("Preliminary Approval Order").

In the second stage, the court holds a "fairness" hearing at which all interested persons may be heard before the court gives final approval to the proposed settlement. *Benway*, 2011 WL 1045597, at *4; *Horton*, 855 F. Supp. at 827. *See also* Manual §13.14 at 173. At the fairness hearing, the court is asked to analyze various factors to determine if the proposed settlement is "fair" and "adequate." *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *Whitaker v. Navy Fed. Credit Union*, No. 09CV2288, 2010 WL 3928616, at *2 (D. Md. Oct. 4, 2010); *In re Tyson Foods, Inc.*, No. RDB-08-1982, 2010 WL 1924012, at *2 (D. Md. May 11, 2010). Ultimately, approval of a class action settlement is committed to "the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances." *Evans*, 475 U.S. at 742; *accord Jiffy Lube*, 927 F.2d at 158.[5] In assessing the fairness and adequacy of a proposed settlement, "there is a strong initial

[5] In exercising its discretion, the court may limit the settlement hearing on fairness to what is necessary to make "an informed, just and reasoned decision." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). The court should not turn the settlement hearing on fairness into a complete trial on the merits, or attempt to resolve unsettled legal issues. *Id.* at 1172-73. Indeed, "[t]he trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Cotton*, 559 F.2d at 1330 (internal quotation marks omitted); *see also Hoffman v. First Student, Inc.*, No. WDQ-06-1882, 2010 WL 1176641, at *2 (D. Md. Mar. 23, 2010) ("court's role is more balancing of likelihoods rather than an actual determination of the facts and law in passing upon . . . the proposed settlement.") (internal quotation and citation omitted). However, those objecting to the settlement, if any, should be heard at the fairness hearing. *Flinn*, 528 F.2d at 1173.

presumption that the compromise is fair and reasonable." *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (internal quotation marks omitted); *see also Hoffman*, 2010 WL 1176641, at *2 (finding that there is a "strong presumption in favor of finding a settlement fair.") (internal quotations and citations omitted); *Vaughns*, 18 F. Supp. 2d at 578 (strong public policy favors settlement agreements, and courts should approach them with a presumption in their favor).

In *Jiffy Lube*, the Fourth Circuit established standards for determining final approval of a class action settlement in a case alleging violations of the federal securities laws. 927 F.2d 155 at 158. The Court of Appeals adopted a bifurcated analysis, separating factors relating to the "fairness" of the settlement from those relating to the "adequacy" of the settlement. *Id.* at 158-59. The relevant circumstances and factors, analyzed below, all squarely support the fairness and adequacy of the Settlement.

2. The Settlement Is Fair Under the *Jiffy Lube* Factors

The Settlement is clearly fair under *Jiffy Lube.* As this Court has annunciated, "a settlement is fair if it 'was reached as a result of good faith bargaining at arm's length, without collusion.'" *Tyson Foods*, 2010 WL 1924012, at *2 (quoting *Jiffy Lube*, 927 F.2d at 159). To make this determination, the Court examines four factors: (1) the posture of the case at the time the settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation. *Jiffy Lube*, 927 F.2d at 159; *see also Tyson Foods*, 2010 WL 1924012, at *2 (same); *Whitaker*, 2010 WL 3928616, at *2 (same).

Plaintiffs and Co-Lead Counsel believe that this Settlement, which represents substantially a full recovery for the Class members whose claims are the only ones that remain viable in the Action, is fair, reasonable and adequate. While Plaintiffs believe that the claims asserted in the Action have merit, Plaintiffs also recognize the expense, length and uncertainty that continued proceedings would entail. Therefore,

resolving this Action though this Settlement is in the best interests of the Class. Due to the unique circumstances of this settlement, including the fact that only a small fraction of the alleged damages remain viable due to the dismissal of all claims other than those related to the DRP, and the fact that the Settlement provides nearly a full recovery for those remaining viable claims, some aspects of the standard analysis of the settlement are not as relevant because the recovery is truly outstanding given the circumstances.

a. The Posture Of The Case At The Time Of The Settlement Supports Final Approval

The posture of this Action demonstrates that the Settlement is fair. Since this Action was commenced, Lead Plaintiffs have diligently and vigorously pursued their claims against the Defendants. Settlement was not reached until after the parties had fully litigated Defendants' motion to dismiss the Complaint, appealed the claims that had been dismissed in the Court's June 26, 2012 Order, including the filing of a petition for certiorari to the Supreme Court of the United States. Co-Lead Counsel also retained the services of experts to assist them in analyzing various issues presented in the Action. Plaintiffs and their Counsel were thus as informed as they were likely ever to be regarding the strengths and weaknesses of their claims and Defendants' defenses when the Settlement was reached and that allowed them to balance the benefits of the Settlement with the risk that Plaintiffs may not be able to obtain a larger recovery after a complex trial. Thus, the Settlement was only reached "at a fairly advanced stage of the proceedings through non-collusive, arm's-length negotiations," demonstrating that the Settlement is fair. *Tyson Foods, Inc.*, 2010 WL 1924012, at *2.

b. Extent of Discovery

Lead Plaintiffs conducted an extensive investigation prior to filing the Complaint. This investigation included a thorough and detailed review of MuniMae's public filings before, during and after the Class Period (including SEC filings, publicly available annual reports, press releases, news articles, and other

media reports), research into the opinions of analysts that followed the stock and ratings agencies, interviews with confidential witnesses with knowledge of the allegations against MuniMae, and the retention of a forensic accounting experts. Following the Court's June 26, 2012 Order on Defendants' motions to dismiss, Lead Plaintiffs appealed the Order in an effort to continue litigating these claims, but those appeals were denied, leaving only the DRP claims remaining to be litigated. This Settlement provides nearly a 100% recovery to the Class, which consists of MuniMae investors who purchased MuniMae shares through the DRP. This substantial, if not full, recovery negated the need to continue litigating the case and engage in formal discovery. Instead, the Class will receive immediate and substantial compensation for the claims that were not dismissed.

In other words, the size of the settlement, in combination with the dismissal of all other claims, negates the need for Plaintiffs to continue litigating the case and engaging in discovery, which would only delay any benefits achieved through litigation. The Settlement was nevertheless entered into only after thorough investigation and analysis by Plaintiffs' Counsel. Accordingly, this factor favors a finding of fairness. *See, e.g., Jiffly Lube*, 927 F.2d at 159 (supporting inference of fairness when parties had only conducted informal discovery); *Whitaker*, 2010 WL 3928616, at *3 (extensive internal investigations prior to formal discovery, coupled with briefings on motions to dismiss, sufficient to demonstrate fairness).

c. The Negotiation Process Supports The Fairness Of The Settlement

The negotiations process also demonstrates the fairness of the Settlement, as it was conducted at arm's-length by informed, experienced counsel, and generated a Settlement representing approximately 100% of the estimated total class-wide damages that would be recoverable. *See, e.g.*, *Kay Co. v. Equitable Prod. Co.*, No. 2:06-CV-00612, 2010 WL 1734869 (S.D. W. Va. Apr. 28, 2010). In this case, the negotiations did not begin until all appeals regarding Plaintiffs' claims had been decided.

This history demonstrates that the settlement negotiations took place at arm's-length, were not in any sense collusive, and were procedurally fair. *Horton*, 855 F. Supp. at 830 (negotiations that occurred two years into the litigation, and took five months, demonstrated arm's length bargaining and lack of collusion). Accordingly, this factor favors a finding that the Settlement is fair.

d. Plaintiffs' Counsel Are Highly Experienced In Securities Class Action Litigation

The experience of counsel weighs in favor of the fairness of the Settlement. In determining the fairness of a proposed settlement, the opinion of experienced counsel is given considerable weight. *Flinn*, 528 F.2d at 1773; *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (same). This is particularly true where, as here, there is no indication of any collusion between the parties. *S. Carolina*, 139 F.R.D. at 339 ("Finding no indication of any collusion, it is therefore appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole.").

Co-Lead Counsel for the Class are highly-experienced class action firms with national reputations. Copies of their firm resumes are attached to the Piven Declaration as Exhibit A to Exhibit 2 and Exhibit C to Exhibit 3. Additional counsel for the Class are also highly qualified. *See* Piven Decl., Ex. C to Ex. 4 and Ex. A to Ex. 5. Accordingly, this factor as well supports a finding that the Settlement is fair.

In sum, based upon an analysis of the foregoing factors, the Court should conclude that the Settlement is fair.

3. The Settlement Is Adequate Under the *Jiffy Lube* Factors

The Settlement is also "adequate." A court must evaluate five factors in determining the adequacy of a settlement, including: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the

anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement. *Jiffy Lube*, 927 F.2d at 159. In considering the strength of the merits of Plaintiffs' case, as well as the existence of any difficulties of proof (factors 1 and 2 above), a court should not attempt to resolve unsettled factual or legal questions. *Carson*, 450 U.S. at 88 n.14 (citing *Protective Comm. for Indep. Stockholders v. Anderson*, 390 U.S. 414 (1968)).

a. The Strength of Plaintiffs' Case Relative To The Clear Difficulties of Proof And Strong Defenses Strongly Favors Approval Of The Settlement

In light of the fact that the Settlement provide nearly full compensation to the Class, and that any greater compensation obtained through litigation is extremely unlikely, this factor is not especially relevant in evaluating the fairness of this Settlement. Nevertheless, the Settlement is clearly adequate in light of the difficulties Plaintiffs would have had to overcome to achieve a larger recovery for the Class. Perhaps the most important factors in evaluating the adequacy of a class action settlement are the relative strength of the plaintiffs' case and the existence of any defenses or difficulties of proof. *Horton*, 855 F. Supp. at 831. As the court stated in *South Carolina Nat'l Bank*:

> An integral part of the strength of the case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation. Other courts recognize that stockholder litigation is notably difficult and notoriously uncertain. Although the plaintiffs in this, as in any case, may firmly believe that their claims have merit, the complexities and uncertainties characteristic of class action securities litigation, and the associated expenses of such litigation, make it appropriate for such plaintiffs to compromise their claims pursuant to a reasonable settlement.

139 F.R.D. at 340 (citations omitted).[6]

[6] Other courts have recognized that the uncertainties of litigation are particularly acute in shareholder class actions. *See, e.g.*, *Mills Corp.*, 265 F.R.D. at 257 ("While all cases carry the potential for uncertain (continued…)

Plaintiffs here advanced claims under Charles §§11, 12, and 15 of the Securities Act and under §§10(b) and 20(a) of the Exchange Act. The Exchange Act claims were dismissed, and the Securities Act claims were partially dismissed and partially sustained pursuant to the Court's June 28, 2012 Order. The possibility of any recovery on the dismissed claims was extinguished once the Court of Appeals affirmed the dismissal and the United States Supreme Court denied the petition for a writ of certiorari.

At the time the Settlement was reached, Plaintiffs achieved a terrific recovery for the Class. If the litigation continued, they were unlikely to achieve any better result and certainly would have substantially increased expenses despite relatively small damages for the Class's claims, as well as facing the possibility that the Class in this Action would not be certified, that the Action would not survive summary judgment, or that some or all of the claims would be dismissed before trial. Had the case gone to trial, Defendants would have asserted myriad factual and legal defenses, including that MuniMae's DRP Registration Statement did not contain any materially false and/or misleading statements, negative causation, negative reliance and standing. *See* Piven Declaration (detailing risks involved).

Assuming that Plaintiffs overcame all of these risks and prevailed fully at trial, they would still face the uncertain prospect of defending their victory through an appeal. Although any attorney prefers to write the brief with the pink cover, the risks in preserving securities class action recoveries are real. *See, e.g.*, *Robbins*, 116 F.3d 1441 (reversing $81 million jury verdict and ordering entire litigation dismissed); *Glickenhaus & Co. v. Household Int'l, Inc*., 787 F.3d 408 (7th Cir. 2015) (reversing a $2.46 billion

(. . .continued)
verdicts, securities cases in particular are complex and difficult to prove."); *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("Stockholder litigation is notably difficult and unpredictable.").

judgment on loss causation issues and ordering new trial); *Anixter v. Home-Stake Prod.*, 77 F.3d 1215 (10th Cir. 1996) (1988 jury verdict in case initiated in 1973 overturned in 1996 on basis of 1994 Supreme Court opinion); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (multimillion dollar judgment reversed after 11 years of litigation and lengthy trial).

Moreover, in a securities class action, even after success on the merits at trial, a claims process would be required to fix Defendants' actual liability to each member of the Class. It is a well-known fact that in class actions all class members who have a right to make a claim do not. Thus, when weighed against the substantial risks to succeeding on all issues of liability and damages, the Settlement is an extraordinary result.

In light of the real litigation risks, not only in securities litigation generally, but with respect to the particular facts of this case, the proposed Settlement, which reflects nearly 100% of recoverable damages with the very real possibility that claiming Class members will recover 100% of their best possible trial recoveries even after the payment of attorneys' fees and expenses from the common fund portion of the Settlement, speaks volumes for the outstanding recovery here and greatly outweighs the risk of speculating for a higher recovery through further litigation. *See S. Carolina*, 139 F.R.D. at 340 ("the complexities and uncertainties characteristic of class action securities litigation, and the associated expenses of such litigation, make it appropriate for such plaintiffs to compromise their claims pursuant to a reasonable settlement."); *see also In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 665 (E.D. Va. 2001) (quoting *S. Carolina Nat. Bank*). Balanced against all of the risks outlined above and in the Piven Declaration, Plaintiffs have recovered a Settlement that represents the entirety of the damages that they believe could have been recovered if Plaintiffs were completely successful in the Action.

4. Additional Litigation Is Likely To Be Protracted And Extremely Costly

Virtually all securities actions are inherently complex, and this Action was no different. The case has

now been actively litigated for over seven years, including investigations, the filing of a consolidated complaint, motion practice, appeals, and now, settlement. If the litigation were to continue, a substantial amount of discovery, including document production and depositions, would need to occur, expert reports would have been prepared, and class certification and summary judgment motions would have been filed and litigated before the case was trial ready. The actual trial would have required hundreds of hours of additional work and the expenditure of enormous amounts of money that are required to try a complex commercial action of this type using the requisite modern trial techniques. The case likely would have been tried by a jury, and the side that lost would almost certainly file an appeal, which could take additional years. These facts clearly support a finding that the Settlement is adequate. *See, e.g.*, *Whitaker*, 2010 WL 3928616, at *3 (adequacy determination bolstered by finding that, "absent settlement, multiple stages of litigation remain that would be time-consuming and costly"); *Tyson Foods*, 2010 WL 1924012, at *3 ("Prosecuting this case to an outcome on the merits would undoubtedly have been a time-consuming and costly proposition."); *Kay Co.*, 2010 WL 1734869, at *7 ("Complex litigation such as this would be very costly to maintain, as the Parties represent they expected to take many additional lengthy depositions and also engage in the continued production and review of documents. Further, maintenance of this action, according to the Parties, would require extensive review by experts who would be costly to both sides.").

5. Objections to the Settlement

The reaction of the Class to the proposed Settlement to date strongly supports final approval. Importantly, the existence of objections to a proposed class action settlement is not dispositive. Indeed, "[i]n litigation involving a large class, it would be 'extremely unusual' not to encounter objections." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478 (S.D.N.Y. 1998). Here, the Notice was mailed to more than 10,273 potential members of the Class (an additional 83 Notices were also re-mailed

due to updated addresses provided by the U.S. Postal Service), setting forth the terms of the Settlement in detail. The Notice also informs Class members of their right to object to the Settlement and the procedure for doing so. The deadline for filing objections to the Settlement is August 10, 2015. As of the date of this submission, it is notable that no objections to the Settlement have been received.[7]

A few objections to securities class action settlements are to be expected. The existence of even a significant number of objections, however, does not render a proposed class action settlement unfair, unreasonable or inadequate. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (citation omitted)("a low level of objections is a 'rare phenomenon.'"); *see also Vaughns v. Board of Educ.*, 18 F. Supp. 2d 569, 580 (D. Md. 1998) ("a very limited degree of opposition to the settlement" and a lack of "significant or consistent criticism of the settlement" warrants approval). On the other hand, the absence of negative feedback from Class members plainly evidences an overall favorable response of the Class members to the Settlement. *Flinn*, 528 F.2d at 1173 ("[t]he attitude of the members of the class, as expressed directly or by failure to object, after notice to the settlement is a proper consideration for the trial court, though a settlement is not unfair nor unreasonable simply because a large number of class members oppose it.") (citations omitted); *Jiffy Lube*, 927 F.2d at 159 (Fourth Circuit acknowledges that district court had given "great weight to the fact that only one of over 12,000 class members notified expressed opposition to the terms of settlement"); *Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995); *Vaughns*, 18 F. Supp. 2d at 580 (lack of "significant or consistent criticism of the settlement" favors approval); *Whitaker*, 2010 WL 3928616, at *2 (finding of adequacy supported by minimal opposition to

[7] Plaintiffs will file an update with final numbers on objections prior to the Settlement Hearing.

proposed settlement).[8]

In light of all of the foregoing factors, there should be little doubt that the Settlement is adequate.[9] Plaintiffs respectfully submit that the Court approve the Settlement and find that it is in the best interest of the Class, conferring a valuable benefit and ending costly, uncertain and protracted litigation.

B. The Plan Of Allocation Is Fair And Reasonable

Approval of a plan for the distribution of settlement proceeds in a class action is governed by the same standards as approval of the settlement: it must be fair and adequate. *MicroStrategy,* 148 F. Supp. 2d at 668 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284–85 (9th Cir.1992) and *In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994)). An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *In re*

[8] *See also Sala v. National R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989) ("[T]he reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy."); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313-14 n.15 (3d Cir. 1993) (holding that small proportion of objectors constituted tacit consent to settlement); *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (finding only twenty-nine objectors from 281-member class (10%) "strongly favors settlement"); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995) (holding that "substantial silent consent weighs in favor of certification" where approximately 100 out of 30,000 class members objected or opted out of class); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450 (D.N.J. 1997), *aff'd*, 148 F.3d 283, 318 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 890 (1999) (settlement approved where only 2 percent of the class objected); *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997); *Schwartz v. Novo Industri A/S*, 119 F.R.D. 359, 363 (S.D.N.Y. 1988); *In re GNC*, 668 F. Supp. at 451 (in class action context, silence of substantial portion of class as to notification of settlement may be construed as consent).

[9] Plaintiffs do not make any representations concerning Defendants' ability to withstand a larger judgment, but this factor carries little weight because the Settlement is adequate for reasons unrelated to Defendants' ability to pay. *See, e.g., In re Red Hat, Inc. Sec. Litig.*, No. 5:04-CV-473-BR(3), 2010 WL 2710517, at *4 (E.D.N.C. June 11, 2010) ("There have been no representations as to the solvency, or lack thereof, of the Defendants, and the Court gives that factor little or no weight."), report and recommendation adopted, No. 5:04-CV-473-BR, 2010 WL 2710446 (E.D.N.C. July 8, 2010).

Veeco Instruments Inc. Sec. Litig., No. 05 MDL 01695 (CM), 2007 WL 4115809, at *13 (S.D.N.Y. Nov. 7, 2007); *White v. NFL*, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993), *aff'd*, 41 F.2d 402 (8th Cir. 1994).

The Plan of Allocation, fully described in the Piven Declaration and in the Notice, reflects, as near as possible, the per share damages that claiming members of the Class would recover after a successful trial in a post-trial claims administration process. Because the proposed allocation mirrors the damage theories that would most likely have been proffered at trial by Plaintiffs, Plaintiffs' Counsel submits it is eminently fair, reasonable and equitable. Courts also consider the reaction of a class to a plan of allocation. *Maywalt v. Parker & Parsley Petroleum Co.*, No. 92 Civ. 1152 (RWS), 1997 U.S. Dist. LEXIS 97, *11-12 (S.D.N.Y. Jan. 6, 1997), *aff'd sub nom., Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513 (2d Cir. 1998); *In re PaineWebber*, 171 F.R.D. at 126. The Notice described the proposed Plan of Allocation in detail, and indicated that the deadline for objecting to the Plan of Allocation is August 10, 2015. To date, no one has filed an objection to the Plan of Allocation. Accordingly, the Plan of Allocation is fair and adequate, taking into account the specific facts of the case and relevant legal precedents, and Plaintiffs request that it be approved.

C. The Notice Program Satisfies The Requirements of Due Process

As discussed in the Piven Declaration and the Affidavit of Jose C. Fraga Regarding Mailing of Notice of Proposed Settlement of Class Action and Claim Form, Publication, and Requests for Exclusion Received to Date ("Fraga Aff."), dated July 24, 2015 ("Fraga Aff."), an extensive notice program, by mail and by publication as approved by the Court's Preliminary Approval Order, has been effectuated by Plaintiffs. *See* Piven Decl. at ¶¶53-58. Over 10,273 copies of the detailed Notice were mailed directly to potential Class members and to banks, brokers and nominees for forwarding to members of the Class. *See* Fraga Aff. at ¶8. In addition, a Summary Notice was published in the form of a press release over

BusinessWire on June 29, 2015, July 1, 2015 and July 6, 2015. *See id*. at ¶9. Further, the relevant documents were all posted in full on the website established for this Settlement, http://www.gardencitygroup.com/cases-info/MME/. *See id*. at ¶11. GCG also maintained a toll-free telephone number to accommodate inquiries from Class members. *Id.* at ¶10. This notice program was tailored to reach as many members of the Class as practicable, and clearly meets the due process requirements of Rule 23 of the Federal Rules of Civil Procedures, which calls for "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 156 (1974).

The Notice was also clearly sufficient with respect to its content. *See Maher v. Zapata Corp.*, 714 F.2d 436, 451 (5th Cir. 1983) (notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them . . . ."). Courts have repeatedly sustained notices in cases where the notice included only very general information. *See, e.g., In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223-24 (5th Cir. 1981); *In re Equity Funding Corp. of Am. Sec. Litig.*, 603 F.2d 1353, 1361-62 (9th Cir. 1979); *Mendoza v. United States*, 623 F.2d 1338, 1351-52 (9th Cir. 1980). Here, by contrast, the Notice clearly: identifies members of the Class and the affected securities; includes a lengthy description of the proceedings, the terms of the Settlement and the Plan of Allocation; states the maximum amount of Plaintiff Counsel's request for an award of attorneys' fees and expenses; explains the rights of members of the Class to request exclusion or appear and object and explains the procedures for doing so; details who is entitled to participate in the Settlement; and notifies those Class members who wish to appear of the time and place of the hearing on the Settlement. In addition, the Notice includes, on its face: the estimated value of the Settlement proposed to be distributed to Class members; provides a statement of the parties' disagreement as to the potential damages recoverable in the case;

provides a statement as to the amount of the requested attorneys' fees and costs sought by Plaintiffs' Counsel on a per share basis; provides the identity, address and phone numbers of Plaintiffs' Counsel for the purposes of obtaining additional information and answering questions; and provides a brief statement explaining the reasons why the parties are proposing the Settlement. Such notices are adequate. *MicroStrategy,* 148 F. Supp. 2d at 670.

D. Certification of the Class Is Proper

By the Preliminary Approval Order, the Court also certified this action as a class action for purposes of the Settlement. Certification of the Class was appropriate because Plaintiffs satisfied each of "the four prerequisites established in Rule 23(a): (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; and (4) adequacy of representation. Fed. R. Civ. P. 23(a)." *Gunnells v. HealthPlan Services, Inc.*, 348 F.3d 417, 423 (4th Cir. 2003).

- *Numerosity* – The proposed Class Members in this Settlement all purchased MuniMae common stock pursuant to MuniMae's DRP between May 3, 2004 and January 29, 2008. Plaintiffs estimate that there are hundreds of potential Class Members holding upwards of 26,679 affected shares, thus making joinder of all Class Members impracticable. *See Gunnells*, 348 F.3d at 425 (class of 1,400 "easily" satisfies numerosity requirement). Therefore, the numerosity requirement is met.

- *Commonality* – Defendants allegedly made a series of materially untrue and misleading statements and omissions that caused Class members to purchase the Company's common stock at inflated prices throughout the Class Period through the Company's DRP. Furthermore, Plaintiffs allege that these false and misleading statements violated §§11, 12(b) and 15 of the Securities Act. Such questions satisfy the commonality requirement of Rule 23(a). *See Gunnells*, 348 F.3d at 425.

- *Typicality* – Plaintiffs' claims and the claims of the putative Class members are typical because they arise out of the same alleged course of conduct and are based on the same theories as those of the absent class members. The evidence required to prove Plaintiffs' claims would establish the same violation by Defendants for every member of the putative Class. Additionally, Plaintiffs are not subject to any unique defenses that could make them atypical Class Members. Therefore, the typicality requirement is met. *See id.*

- *Adequacy* – Plaintiffs are purchasers of MuniMae common stock who relied on the Company's allegedly false and misleading disclosures and omissions, and suffered the same financial harms as the other stockholders who participated in the DRP. Therefore, Plaintiffs were "part of the same class and possess the same interest and suffer[ed] the same injury as [all other] class members." *Id.* (internal citation and quotation marks omitted). Second, Plaintiffs' Counsel are highly qualified and have substantial experience in securities class actions and other complex litigation. As a result, Plaintiffs are adequate representatives of the proposed Class, and their counsel are qualified, experienced and capable of prosecuting this action, in satisfaction of Rule 23(a)(4).

In addition, Plaintiffs satisfied the additional requirements for certification under Rule 23(b)(3) that: (1) questions of law or fact common to the members of the class predominate over questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See* Fed. R. Civ. P. 23(b)(3); *Gunnells*, 348 F.3d at 423.

- *Common questions of law or fact predominate* – As explained above, Defendants' liability to all members of the Class turns upon certain common questions of law and fact that exist as to all members of the Class. Accordingly, liability issues that are shared by all Class members predominate over any individual issues that may be presented by Class members' claims. *See Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 624 (1997) ("Predominance is a test readily met in certain cases alleging consumer or securities fraud").

- *Superiority* – Rule 23(b)(3) provides that the following factors should be considered in assessing the superiority of class resolution of plaintiffs' claims: "(a) the interest of members of the class in individually controlling the prosecution . . . of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by… member of the class; (c) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action." *See Gunnells*, 348 F.3d at 425-26. Here, each of those factors weighs in favor class certification. Since joinder of all members of the Class is impracticable, and because the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation renders it virtually impossible for most members of the Class individually to seek redress for the wrongful conduct alleged. *Id.* Moreover, Plaintiffs know of no difficulty in the management of this action that preclude its maintenance as a class action.

Accordingly, the Court's certification of the Class for settlement purposes in the Preliminary Approval Order was proper and warranted.

E. Application For An Award of Attorneys' Fees and Reimbursement Of Expenses

Plaintiffs additionally request an award of $82,904.88 (Settlement Fund amount of $676,820 x 30% = $203,046 - $120,141.12 (expenses) = $82,904.88) in attorneys' fees, as well as litigation-related expenses (which are $120,141.12) out of the Settlement Fund.[10] Additionally, Defendants have also agreed to pay Co-Lead Counsel $150,000 over and above the Settlement Fund in attorneys' fees and expenses, which is not otherwise available for distribution to the Class. Based on the damages likely recoverable in the Action and the prompt resolution of the Action on behalf of the Class,[11] the Settlement represents an outstanding result in a challenging case. In addition to the typical risks of complex business litigation, this case is subject to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which presented unique risks and difficulties. As former Justice Sandra Day O'Connor (sitting by designation) noted in *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009), "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Id.* at 235. Plaintiffs submit that, under the circumstances here, the fee is reasonable for the services provided to the Class. The requested fee is well within the percentage range of fees awarded by courts in similar cases and, utilizing the guidelines endorsed by courts in the Fourth Circuit, the requested fee is reasonable and eminently fair, particularly in light of the excellent result achieved in a difficult case.

The Settlement was achieved through the skill, experience, diligence, and effective advocacy of Plaintiffs' Counsel. Plaintiffs' Counsel undertook this Action on a fully contingent basis and, therefore, they have, to date, received no compensation of any kind for their efforts. The Settlement was reached only after

[10] This request is consistent with the maximum award Co-Lead Counsel stated they would seek in the Notice.

[11] In Preliminary Approval Order, this Court preliminarily certified the Class.

seven years of hard-fought litigation, appeals and adversarial negotiations between the parties. As a result, Plaintiffs' Counsel submit that, under any recognized methodology for awarding successful plaintiff's attorneys fees in class actions, the requested fee is fair and reasonable.

Further, as a cross-check, the requested fee represents a huge negative multiplier of 0.047 of the $4,936,589.75 combined lodestar of Plaintiffs' Counsel who devoted 7,880 hours to the prosecution of this Action on a wholly contingent basis, *see* Piven Decl. at Exs. 2-5, which is way less than multipliers routinely awarded by courts. Thus, Plaintiffs' Counsel respectfully submit that the attorneys' fees and the expenses sought are fair and reasonable, and should be approved.

Class Members appear to agree. In accordance with this Court's Preliminary Approval Order, 10,273 copies of the Notice were sent to potential members of the Class and Nominees by first-class mail beginning on June 19, 2015 (including 83 remailed Notices), and a Summary Notice was published three separate times on *BusinessWire*, national online news wire services. *See* Fraga Aff. at ¶¶5-9. The Notice informed Class members that Plaintiffs' Counsel would make an application for an award of attorneys' fees and for reimbursement of expenses not to exceed 30% of the Settlement Fund, plus an additional $150,000 which Defendants agreed to pay as attorneys' fees and expense.

For the reasons set forth in the Piven Declaration, and herein, Plaintiffs' Counsel respectfully submit that their requested award of attorneys' fees and reimbursement of expenses should be granted.

1. Plaintiffs' Counsel Should Be Awarded A Reasonable Percentage of the Common Fund Recovered

Co-Lead Counsel seek an award of fees in a total amount of $232,904.88 ($150,000 of which is not from the Settlement Fund, but being paid by Defendants), not including expenses. The award of attorneys' fees under the "common fund" doctrine is premised on a court's equitable power to compensate a person who maintains a suit that results in the creation, preservation, or increase of a fund in which others have a

common interest. *See Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 126 (1885). *See also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939). The Supreme Court long ago recognized that where counsel's efforts have created a "common fund" to benefit not only the individual client, but also others similarly situated, counsel should be compensated out of that common fund. *See Boeing*, 444 U.S. at 478; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Central R.R.*, 113 U.S. at 387; *Trustees v. Greenough*, 105 U.S. 527, 536 (1882); *see also Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 758 (S.D. W.Va. 2009) ("When a class settlement results in the creation of a common fund for the benefit of the class members, reasonable attorneys' fees may be awarded from the common fund."). In granting fees in cases such as this, courts have consistently recognized that such awards serve the dual purpose of encouraging representatives to seek redress for injuries caused to members of the public. *See Mills*, 396 U.S. at 396. *Accord Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 328 (1980) (the financial inducements offered by the class action procedure have played an important role "in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."). Here, Plaintiffs' Counsel have recovered a substantial common fund for the benefit of the Class and are, therefore, entitled to payment from that fund created by their labor.

The method for awarding fees in common fund class action litigation has come full circle. Until the early 1970s, most courts calculated fee awards based on a "reasonable percentage" of the amount recovered. *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771-72 (11th Cir. 1991) ("From the time of the *Pettus* decision in 1885 until 1973, fee awards granted pursuant to the common fund exception were computed as a percentage of the fund"). *See also Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, Oct. 8, 1985 (Arthur R.

Miller, Reporter), *reprinted in* 108 F.R.D. 237, 242 (1985) (the "*Task Force Report*"). Compensating plaintiffs' counsel in common fund cases on a percentage basis has several advantages. First, the percentage method is consistent with, and, indeed, is intended to mirror practice in the private marketplace, where contingent fee attorneys typically negotiate percentage fee arrangements with their clients and are customarily compensated by a percentage of the recovery. *See Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 437-38 (D. Md. 1998). Second, and even more importantly, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. Finally, the percentage-of-recovery method also has the salutary effect of conserving judicial resources. Percentage fees are simple to calculate, are not subject to manipulation, and do not require the court to "second guess" each and every decision made by counsel during the course of a complex case. *Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 502-03 (E.D. Va. 1995).

In the 1970s, an alternative lodestar/multiplier approach was developed, initially by the Third Circuit, as an alternative to the percentage method. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) ("*Lindy I*"), *on remand*, 382 F. Supp. 999 (E.D. Pa. 1974), *aff'd in part, vacated in part*, 540 F.2d 102, 116-18 (3d Cir. 1976) ("*Lindy II*"). However, courts have moved away from the lodestar approach in recent years in common fund cases, encouraged by the Supreme Court's pronouncement in 1984 that "under the 'common fund doctrine.' . . . a reasonable [attorneys'] fee is based on a percentage of the fund bestowed on the class. . . ." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

Support for the percentage method in the federal courts is now overwhelming. Since the decision in *Blum*, two circuits now require the use of the percentage-of-the-recovery method in common fund cases, *see Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I*, 946 F.2d at 774, and other

circuits[12] have authorized use of the percentage approach in common fund cases. As another court in this Circuit recently noted, "[w]hile the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating attorneys' fees in common fund cases." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009) (citing cases); *see also Muhammad v. Nat'l City Mortgage, Inc*., No. 2:07-0423, 2008 U.S. Dist. LEXIS 103534, at *17 (S.D. W. Va. Dec. 19, 2008) ("Awarding attorney fees as a percentage of the benefit to the class is the preferable and prevailing method of determining fee awards in class actions that establish common funds for the benefit of the class."); *Strang*, 890 F. Supp. 499, 502; *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 787 (E.D. Va. 2001) ("This methodology is less cumbersome to apply than the lodestar computation, and it has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases, particularly those cases with a high probability of success. Understandably, the trend in securities class actions and other common fund cases has been toward use of the percentage method"); *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 464 n.3 (S.D. W. Va. 2010) (finding that courts favored use of the percentage method in common fund cases); *In re Wachovia Corp. ERISA Litig.*, No. 3:09-262, 2011 U.S. Dist. LEXIS 123109, at *15-*16 (W.D.N.C. Oct. 24, 2011) (same); *Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09-00687, 2011 U.S. Dist. LEXIS 92178, at *5-*7 (D.S.C. Aug. 17, 2011) (same); *Jones*, 601 F. Supp. 2d at 758-59 (same); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05-00187, 2007 U.S. Dist. LEXIS 2392, at *3-*4 (M.D.N.C. Jan. 10, 2007) (same). The *Manual for Complex*

[12] *See, e.g., Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43, 44 (2d Cir. 2000); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994); *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Brown v. Phillips Petrol. Co.*, 838 F.2d 451, 454 (10th Cir. 1988).

Litigation also endorses the use of the percentage-of-the-fund method in awarding attorneys' fees in common fund cases. *See Manual for Complex Litigation* §14.121, at 187 (4th ed. 2004) (commenting that "the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases") (footnotes omitted).

Furthermore, the PSLRA, which applies to this Action, counsels that fees in securities cases should be measured on a percentage basis. *See* 15 U.S.C. §77z-1(a)(6) ("[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed *a reasonable percentage* of the amount of any damages and prejudgment interest actually paid to the Class.") (emphasis added); *see also* Senate Report No. 104-98, 104th Congress, *reprinted in* 1995 U.S.C.C.A.N. 679, 687-90 (Senate Committee Report on the PSLRA criticizing the lodestar method and stating that the PSLRA intends fees to be based on a percentage but "[b]y not fixing the percentage of attorneys' fees and costs that may be awarded, the Committee intends to give the court flexibility in determining what is reasonable on a case-by-case basis. The provision focuses on the final amount of damages awarded, not the means by which they are calculated."). Thus, the clear Congressional intent under the PSLRA was to codify the conclusion already reached by most courts to replace the lodestar analysis with the percentage-of-the-recovery approach.

Finally, compensating plaintiffs' counsel in common fund cases on a percentage basis is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery, conserves judicial resources, and more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. *See* Charles Silver, *Due Process and the Lodestar*

Method: You Can't Get There From Here, 74 Tul. L. Rev. 1809, 1819-20 (2000) ("The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. . . . No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.") (footnotes omitted).

a. The Percentage Requested Is Reasonable

Courts in this Circuit have applied the following factors in determining the proper percentage of the recovery to award as attorneys' fees: (1) the results obtained for the class; (2) objections by members of the Class to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases. *See, e.g., Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 475 (W.D. Va. 2011); *Mills Corp.*, 265 F.R.D. at 261; *Wachovia*, 2011 U.S. Dist. LEXIS 123109, at *18-*19; *Kay Co.*, 749 F. Supp. 2d at 464. A consideration of these factors in the context of this case clearly demonstrates that the requested fee is reasonable.

1) The Results Obtained

"In determining the reasonableness of an award of attorneys' fees, the most critical factor is the degree of success obtained." *Rowles v. Chase Home Fin., LLC*, No. 9:10-01756, 2012 U.S. Dist. LEXIS 3264, at *11 (D.S.C. Jan. 10, 2012) (citing *Farrar v. Hobby*, 506 U.S. 103, 114, (1992) and *McKnight v. Circuit City Stores, Inc.*, No. 99-1007, 2001 U.S. App. LEXIS 13778, at *4-*5 (4th Cir. 2001)); *see also Pellegrin v. Nat'l Union Fire Ins.*, 605 F.3d 238, 247 (4th Cir. 2010). The Settlement is an excellent result for the Class. The benefits conferred upon the Class by Plaintiffs' Counsel's efforts are discussed in detail in the Piven Declaration. Plaintiffs and Plaintiffs' Counsel faced numerous obstacles in this litigation, yet as a

result of arduous litigation and Settlement negotiations, succeeded in obtaining an $826,820 cash Settlement. Further, because of this Settlement, Class Members will receive immediate recovery of approximately 100% of their compensable losses while simultaneously avoiding the substantial risks of no recovery had the Action been litigated and lost at the summary judgment stage, at trial or on appeal. Thus, the recovery here is outstanding and merits the requested award. *See, e.g.*, *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993).

2) No Objections To The Fee Request To Date

In this case, the Notice clearly and explicitly disclosed that Plaintiffs' Counsel intended to apply for attorneys' fees and expenses not to exceed 30% of the Settlement Fund in addition to $150,000 that Defendants have agreed to pay in attorneys' fees above and beyond the Settlement Fund. There have been ***no objections*** to either the Settlement itself or to the requested fee award filed to date.[13]

3) The Quality, Skill, And Efficiency Of Plaintiffs' Counsel

The standing and experience of Plaintiffs' Counsel are relevant in determining fair compensation. *See, e.g., Smith*, 2007 U.S. Dist. LEXIS 2392, at *6 ("The Court recognizes that it takes skilled counsel to manage a nationwide class action, carefully analyze the facts and legal claims and defenses . . . and bring a complex case to the point at which settlement is a realistic possibility"). Plaintiffs' Counsel's efforts in efficiently obtaining a very substantial recovery for the Class is the best indicator of their abilities. Plaintiffs' Counsel are highly competent and experienced practitioners in the field who have national reputations for successfully representing investors in complex class actions – a finding this Court already made when it appointed them to represent the Class at the outset of the Action. *See* Dkt. No. 9. In further evidence of this,

[13] The deadline for filing objections to any part of the Settlement is August 10, 2015.

the firm resumes of Brower Piven and Berger & Montague, as well as additional counsel for the Class are attached to the Piven Declaration. *See* Exhibits A to Exhibits 2 and 5; Exhibits C to Exhibits 3 and 4. Further, the results achieved here speak volumes for the quality of representation the Class has received.

The quality and vigor of opposing counsel is also important in evaluating the services rendered by Plaintiffs' Counsel. *See Smith*, 2007 U.S. Dist. LEXIS 2392, at *6 ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel"). The quality, experience and resources of defense counsel is also relevant to a plaintiff's counsel's fee award. As the court in *Muehler*, 617 F. Supp. at 1380, noted:

> The defense lawyers in these [complex class action] cases are frequently highly competent, highly compensated and provided with a substantial budget to defend these cases. The Federal courts should not encourage a standard of practice for the Plaintiffs' bar that deprives the absent class members of the quality representation necessary to fully and vigorously prosecute a case against such an adversary.

In this case, Defendants were represented by some of the most highly skilled and largest international defense firms in the world, including Gibson, Dunn & Crutcher LLP, Clifford Chance LLP and Goodwin Procter LLP, which possess almost unlimited resources and which spared no effort or expense in their vigorous advocacy for Defendants' positions.

4) The Complexity And Duration Of The Litigation

As discussed herein and in the Piven Declaration, this Action presented an extremely complex, difficult, and challenging litigation.

The heart of Plaintiffs' remaining claims was that Defendants issued materially false and misleading statements and omissions in the Company's DRP Registration Statement. Defendants had several affirmative defenses to this claim however, and if they prevailed on any of them, Plaintiffs' case would have been severely restricted or lost altogether. In addition to the difficulties Plaintiffs would face in attempting to

establish that Defendants' statements were materially false and/or misleading, Plaintiffs also faced a significant risks with respect to rebutting Defendants' negative causation defense, negative reliance defense, and that their shares were purchased directly from the issuer pursuant to the DRP Registration Statement.

Moreover, it was inevitable from the outset that this case would quickly devolve into a complicated "battle of the experts." "[I]t is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than a myriad of non-actionable factors such as general market conditions." *Warner Commc'ns*, 618 F. Supp. at 744-45. Thus, although Plaintiffs believe that they could and would have overcome each of these obstacles, it is readily apparent that there were substantial risks to achieving a recovery had the Settlement not been reached at this point in the proceedings.

Additionally, Plaintiffs' Counsel have devoted over 7,880 hours to the Action over the course of more than seven years. When the Settlement was reached, the Action was about to enter the discovery stage (although there had been exchanges of information regarding share issuances pursuant to the DRP), and if the Action was to proceed, there is no question that the completion of discovery, including expert discovery, summary judgment, a trial and the any appeals would entail substantial additional time for both Plaintiffs and Defendants. *See Lucas v. Kmart Corp.*, No. 99-01923, 2006 U.S. Dist. LEXIS 51420, at *18 (D. Colo. July 27, 2006) ("Large-scale class actions. . . necessarily require a great deal of work, and a concomitant inability to take on other cases."). Moreover, further litigation of this Action would also require many hours of the Court's resources and time, and it would be years before the Class would receive a recovery, if any. *See Muhammad*, 2008 U.S. Dist. LEXIS 103534, at *14-*15. Thus, this is another factor strongly supporting the requested award.

5) The Risk Of Nonpayment

It is well-recognized that an attorney is entitled to a much larger fee when the compensation is contingent than when it is fixed on a time or contractual basis. This Action was undertaken and prosecuted on a wholly contingent basis and recovery was never guaranteed. "Certainly, attorneys undertaking class actions bear substantial risks that the litigation will not result in payment. The attorneys risk defeat at several states of litigation: class certification, dispositive motions, and finally, trial." *Jones*, 601 F. Supp. 2d at 762. *See also Muhammad*, 2008 U.S. Dist. LEXIS 103534, at *22-*23.

It would be incorrect to presume that a law firm handling complex contingent litigation always wins. In fact, the factor labeled by the courts as "the risks of litigation" is not an empty phrase and tens of thousands of hours have been expended in losing efforts. In numerous cases, plaintiff's counsel working on a contingent basis, such as this, have expended thousands of hours only to receive no compensation. Moreover, there have been many hard-fought lawsuits where, because of (i) the discovery of facts unknown when the case was commenced, (ii) changes in the law while the case was pending, or (iii) decisions of judges or juries following a trial on the merits, that excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel. Losses such as these are exceedingly expensive and the risks plaintiffs' counsel undertake to litigate cases on a fully contingent basis -- here over seven years of litigation -- justifies a higher fee where Plaintiffs' Counsel are successful.

From the outset, there existed a real possibility that Plaintiffs would obtain no recovery, and, correspondingly, that Plaintiffs' Counsel would receive no compensation. As the Second Circuit stated in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), "perhaps the foremost of these factors [justifying a multiplier] is . . . the fact that, despite the most vigorous and competent efforts, success is never guaranteed." *Id.* at 471. *See also In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 747-49 (S.D.N.Y. 1985), *aff'd*,

798 F.2d 35 (2d Cir. 1986). This factor is particularly acute in securities cases. As the Ninth Circuit in *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), recognized, "the empirical evidence indicates that a relatively high proportion of [securities] class actions are not settled, but disposed of in defendant's favor on preliminary motions." *Id.* at 899 n.15. That risk has geometrically increased since the advent of the PSLRA.

Many of the specific risks involved in this litigation are detailed in the Piven Declaration, which included all of the risks traditionally associated with litigation, as well as the risks of denial of class certification; dismissal on summary judgment; rejection of Plaintiffs' damages theory; loss at trial; and the overturning of a verdict on appeal. *See, e.g., Robbins v. Koger Props., Inc.*, 129 F.3d 617 (11th Cir. 1997) (overturning an $81 million jury verdict). *See also AUSA Life Ins. Co. v. Ernst & Young*, No. 00-9472, 2002 U.S. App. LEXIS 13845, at *15 (2d Cir. 2002) (affirming district court's dismissal after a full bench trial and earlier appeal and remand); *Winkler v. NRD Mining, Ltd.*, No. 82-3318, 2000 U.S. Dist. LEXIS 21477, at *63 (E.D.N.Y. Mar. 31, 2000) (defense verdict after bench trial).

When Plaintiffs' Counsel undertook to represent Plaintiffs, it was with the expectation, since fulfilled, that counsel would have to devote, as they did, thousands of hours of hard work and advance large sums in out-of-pocket expenses to the prosecution of this Action. They also undertook those commitments without any assurance of ever getting paid for their efforts. The awareness of Defendants and their counsel that the leading members of the plaintiffs' bar are prepared and willing to risk it all by going to trial, rather than accept an unsatisfactory settlement, leads to meaningful recoveries in actions such as this. That awareness is absolutely essential to the ability of plaintiffs' counsel to bargain effectively on behalf of those whose interests they represent. Thus, the losses suffered by plaintiffs' counsel in other actions where inadequate settlement offers were rejected (and plaintiffs' counsel ultimately received little or no fee), should

be considered when awarding fees in successful endeavors.[14]

The fiercely-contested character of this case accentuated the risk of non-recovery from the start. Throughout the litigation, Defendants denied all wrongdoing and mounted a vigorous defense. Unlike Defendants' counsel who are paid on a current hourly, non-contingent basis, Plaintiffs' Counsel could only expect to be paid at the end of the Action if they were successful; however, like Defendants' counsel, Plaintiffs' Counsel must still meet payroll and other overhead costs on a current basis.[15] *See Rosenfeld v. Black*, 56 F.R.D. 604, 606 (S.D.N.Y. 1972) ("in these days of high costs, a lawyer's overhead is no small factor, especially in a contingent fee situation."). In addition, the cost to Plaintiffs' Counsel is not only the resources they directly devoted to this Action, but include lost opportunity costs in terms of other employment that Plaintiffs' Counsel could not accept to work on this case. Few businesses would be willing to make such a substantial investment knowing that there was a substantial risk of loss and, even if successful, there would be no return on that investment for several years.

6) Public Policy Considerations

"A strong public policy concern exists for rewarding firms for bringing successful securities litigation." *In re Ashanti Goldfields Sec. Litig.*, No. 00-717, 2005 U.S. Dist. LEXIS 28431, at *14 (E.D.N.Y.

[14] *See, e.g., McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967) ("The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services."); *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fl. 1992) ("The court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. . . . In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiffs' counsel in other actions where counsel received little or no fee) (citations omitted); *Perlman v. Feldmann*, 160 F. Supp. 310, 310 (D. Conn. 1958) ("Great weight is given to the contingent nature of fees with its accompanying risk that the stupendous labor and the substantial overhead and expense might go for naught. . . .").

[15] The delay in receipt of payment has been recognized by courts as justification for an enhancement multiplier to be applied to the "lodestar" time. *See, e.g., Warner Commc'ns*, 618 F. Supp. at 748.

Nov. 15, 2005); *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988) (courts must encourage private lawsuits to effectuate the securities laws' purpose of protecting investors); *Mills*, 265 F.R.D. at 263 ("The public benefits when capable and seasoned counsel undertake private action to enforce the securities laws."). 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). Counsel in complex securities class action litigation are invariably retained on a contingent basis, largely due to the scope of the commitment of time and expense required. Indeed, lawyers that pursue private suits such as this one on behalf of investors augment the overburdened SEC by "acting as 'private attorneys general.'" *Ressler*, 149 F.R.D. at 657. In addition, the typical class representative is unlikely to be able or willing to pursue risky long and protracted litigation at their own expense.

Thus, "public policy favors the granting of [attorneys'] fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions." *Id. See also Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 613 (D. Colo. 1974) ("The allowance must be sufficiently generous, in those cases in which a recovery is effected, to encourage competent counsel to accept representation in these private actions, which vindicate the Congressional purposes of the federal securities laws and the federal antitrust laws. The allowance of fees should have for a consideration sufficient incentive to competent counsel to remain in the field of public interest litigation."). Plaintiffs' Counsel pursued claims in an attempt to redress the substantial losses they allege Defendants caused Class members as a result of challenged omissions and misstatements. As federal courts have recognized, private enforcement of the federal securities laws is a necessary adjunct to government intervention. Therefore, while many of Plaintiffs' allegations may not be borne out, public policy still favors compensating counsel for their commitment of time and expenses in

pursuing the Action.

7) Awards in Similar Cases

In determining what percentage is appropriate, the object should be to "simulate the market" for counsel's services. *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572-73 (7th Cir. 1992) ("*Cont'l I*"). In applying the percentage method, courts in this Circuit and elsewhere have recognized that the "market" value for contingent legal services are generally between 33% and 50% of the recovery (exclusive of expenses), *see, e.g.*, *In re Merry-Go-Round Enters.*, 244 B.R. 327, 339-40 (D. Md. 2000) (finding 40% contingent fee yielding fee of $71 million reasonable),[16] and, as a result, courts across the country have frequently awarded

[16] *See also In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of recovery."); *Goldsmith v. Technology Solutions Co.*, No. 92-4374, 1995 U.S. Dist. LEXIS 15093, at *27 (N.D. Ill. Oct. 10, 1995) ("[W]here the percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery."); *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, MDL No. 888, 1994 U.S. Dist. LEXIS 6621, at *4 (E.D. La. May 18, 1994) ("Were this not a class action, attorney's fees would range between 30% and 40%, the percentages commonly contracted for in contingency cases."); *In re M.D.C. Holdings Sec. Litig.*, No. 89-0090, 1990 U.S. Dist. Lexis 15488, at *31 (S.D. Cal. Aug. 30, 1990) ("30-40% range common to non-representative contingent litigation"); *Braun v. Culp, Inc.*, No. 84-455, 1985 U.S. Dist. LEXIS 20373, at *7 (M.D.N.C. Apr. 26, 1985) ("in matter in which fees are contingent upon recovery, the fee is sometimes expressed as a percentage of the recovery and ranges from 25% to 40%); *In re Mego Fin Corp. Sec. Litig..*, 213 F.3d 454 (9th Cir. 2000) (affirming district court's award of 1/3 of $1.725 million settlement); *Maywalt v. Parker & Parsley Petroleum Co.*, 963 F. Supp. 310 (S.D.N.Y. 1997) (33.4%); *In re Safety Components Int'l, Inc. Sec. Litig.*, 166 F. Supp. 2d 72 (D.N.J. 2001) (awarding 1/3 of $4.5 million settlement); *In re Eng'g Animation Sec. Litig.*, 203 F.R.D. 417 (S.D. Iowa 2001) (awarding 1/3 of $7.5 million settlement); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-7694, 2001 U.S. Dist. LEXIS 20397 (N.D. Ill. Dec 10, 2001) (awarding 1/3 of $14 million settlement); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002) (awarding 1/3 of $11.5 million settlement); *In re Blech Sec. Litig*, No. 94-7696, 2002 U.S. Dist. LEXIS 23170 (S.D.N.Y. Dec. 4, 2002) (awarding 1/3 of $2.795 million and noting that this percentage is consistent with awards made in similar cases); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (awarding 1/3 of $1.5 settlement and citing cases awarding 1/3 in securities cases); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 484, 497 (E.D. Pa. 2003) ("the [one-third] fee request in this complex case is within the reasonable range."); *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., NA.*, No. 02-1475, 2005 U.S. Dist. LEXIS 13627 (continued…)

one-third or more of the recovery as attorneys' fees in common fund cases. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (one-third of the $586 million settlement fund); *Faircloth v. Certified Fin. Inc.*, No. 99-3097, 2001 U.S. Dist. LEXIS 6793, at *36-37 (E.D. La. May 16, 2001) (35% of settlement); *Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996) (38% of the settlement fund), *aff'd*, 160 F.3d 361 (7th Cir. 1998); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (33% of total recovery);; *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1380-81 (D. Minn. 1985) (35% of settlement); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 500 (D.D.C. 1981) (45% of settlement); *Lewis v. Musham*, No. 79-396, 1981 U.S. Dist. LEXIS 11926, at *1-*2 (S.D.N.Y. Apr. 10, 1981) (49% awarded).

Here, after diligently – and efficiently – prosecuting this Action on a fully contingent basis for over seven years, Plaintiffs' Counsel have obtained a very significant cash recovery for the Class. As compensation for this excellent result, Plaintiffs' Counsel seek thirty percent of the Settlement Fund for both attorneys' fees and expenses. As demonstrated above, the thirty percent of the recovery requested here is well within the range of percentages courts have awarded in common fund cases.

b. A Lodestar Cross-Check Confirms that the Requested Fee Is Reasonable

Although the percentage method is preferred, in employing the percentage method, some courts within the Fourth Circuit have also recommended that the percentage be "cross-check[ed]" against counsel's lodestar (*i.e.*, the hours spent by counsel multiplied by their hourly rates) to ensure the reasonableness of the

(. . .continued)
(C.D. Cal. June 10, 2005) (awarding 1/3 of $27.7 million settlement); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-1014, 2005 U.S. Dist. LEXIS 6680 (E.D. Pa. Apr. 18, 2005) (awarding 1/3 of $7 million settlement); *Wells v. Dartmouth Bancorp, Inc.*, 813 F. Supp. 126 (D.N.H. 1993) (41%); *Beech Cinema, Inc. v. Twentieth Century Fox Film Corp.*, 480 F. Supp. 1195 (S.D.N.Y. 1979) (53.2%), *aff'd*, 622 F.2d 1106 (2d Cir. 1980).

requested fee. *See, e.g., Mills*, 265 F.R.D. at 261; *Jones*, 601 F. Supp. 2d at 759-60 ("By using the percentage of fund method and supplementing it with a lodestar cross-check, a court can take advantage of the benefits of both methods."); *see also Smith*, 2007 U.S. Dist. LEXIS 2392, at *3-*4 (using the percentage method with lodestar "cross-check"; "a reasonable fee is normally a percentage of the Class recovery").

Here, the fee requested is more than appropriate under the lodestar/multiplier method. "The lodestar method requires the multiplication of the number of hours worked by a reasonable hourly rate, the product of which the Court can then adjust by employing a 'multiplier'" *Mills*, 265 F.R.D. at 260. Here, Plaintiffs' Counsel have incurred an aggregate lodestar of $4,936,589.75 based on 7,880 hours of attorneys' and paraprofessionals'[17] time billed at their regular, current hourly rates.[18] *See* Piven Decl., Exs. 2-5. This lodestar is then adjusted in light of a list of factors, most of which are the same as the factors discussed above with respect to the percentage method. *See Mills*, 265 F.R.D. at 261.

In common fund cases, courts frequently award counsel more than their lodestar - *i.e.* a multiple of their lodestar, or "multiplier" - to compensate for the risks of nonpayment discussed herein. *See, e.g., Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77-39, 1984 U.S. Dist. LEXIS 23595, at *52-*53 (N.D. Ill. Sept. 14, 1984) ("[T]he award of substantial attorneys' fees to the lawyer for the plaintiffs in a successful . . . class action is important to encourage the bringing of such actions . . . An award limited to normal time charges would, in my judgment, typically under compensate the lawyers for the class.") (internal quotations

[17] The determination of the appropriate market rates for paraprofessionals, like attorneys' rates, are to be assessed based on the custom and practice followed in the community utilized for charging such services to hourly clients. *See Missouri v. Jenkins*, 491 U.S. 274, 282 (1989).

[18] Application of current hourly rates is appropriate in calculating the lodestar figure. *See, e.g., Blum*, 465 U.S. at 886. In determining the appropriate billable rates to use, the Court is to analyze "customary rates for similar work in the community." *See Haught v. Louis Berkman, LLC*, No. 5:03-109, 2006 U.S. Dist. LEXIS 37909, at *8-*9 (N.D. W. Va. 2006).

and citations omitted). Awards to successful plaintiffs' counsel in common fund cases such as this of fees equal to multipliers of 3-4 times plaintiffs' counsel's lodestars are common,[19] and far higher multipliers are often awarded. *See e.g.*, *Weiss v. Mercedes-Benz*, 899 F. Supp. 1297, 1304 (D.N.J. 1995), *aff'd*, 66 F.3d 314 (3d Cir. 1995) (9.3 multiplier); *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894 (1st Cir. 1985) (6 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier); *In re Enron Corp. Sec., Deriv. & "ERISA" Litig.*, 586 F. Supp. 2d 732, 751 n. 20 (S.D. Tex. 2008) (awarding percentage fee equal to a multiple of 5.2 times lodestar); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 752, 767, 769 (S.D. Ohio 2007) (percentage fee equal to lodestar multiplier of 5.9).[20] Here, the requested fee represents a small fraction of Plaintiffs' Counsel's lodestar and, of course, with no multiplier.

Particularly in light of the outstanding results obtained for the Class, the lack of objections to either the Settlement or the requested fee, the quality, skill, and efficiency of the attorneys involved, the complexity

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[19] *See, e.g., Kurzweil v. Philip Morris Cos., Inc.*, No. 94-2373, 1999 U.S. Dist. LEXIS 18378, at *8 (S.D.N.Y. Nov. 30, 1999) (recognizing that multipliers of between 3 and 4.5 are common); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."); *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 U.S. Dist. LEXIS 68, at *49 (E.D. Pa. Jan. 4, 2001) (3.6 multiplier); *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990) ("[m]ost lodestar multiples awarded in cases like this are between 3 and 4"); *In re NASDAQ Market-Makers Anti-Trust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y 1998) (3.97 multiplier); *Berl v. Southland Corp.*, 3-90-1254, 1991 U.S. Dist. LEXIS 21800, at *2 (N.D. Tex. Nov. 1, 1991) (4.44 multiplier); *Rabin v. Concord Assets Group*, No. 89-6130, 1991 U.S. Dist. LEXIS 18273, at *3-*4 (S.D.N.Y. Dec. 19, 1991) (4.4 multiplier, noting that "[i]n recent years [where] multipliers of 3 and 4.5 [in class actions] have been common.") (quotation omitted).

[20] *See also Conley v. Sears, Roebuck & Co.*, 222 Bankr. 181, 182 (D. Mass. 1998) (8.9 multiplier); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *In re RJR Nabisco Sec. Litig.*, No. 88-7905, 1992 U.S. Dist. LEXIS 12702, at *22 (S.D.N.Y. Aug. 24, 1992) (6 multiplier); *Cosgrove v. Sullivan*, 759 F. Supp. 166, 169 (S.D.N.Y. 1991) (8.74 multiplier); *Muchnick v. First Fed. Sav. & Loan Ass'n*, No. 86-1104, 1986 U.S. Dist. LEXIS 19798, at *3-*4 (E.D. Pa. Sept. 29, 1986) (8.4 multiplier); *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915, 924 (E.D. Ky. 1986) (5 multiplier).

and duration of the litigation, and the risk of non-payment borne by counsel throughout seven years of litigation, this award is extremely reasonable and appropriate.

2. Plaintiffs' Counsel's Litigation Expenses Should Be Reimbursed

Plaintiffs' Counsel also seek reimbursement of $120,141.12 in litigation expenses they incurred in connection with prosecuting the Action. Reimbursement of a successful plaintiff's counsel's out-of-pocket expenses is appropriate. *See, e.g.*, *Microstrategy*, 172 F. Supp. 2d at 791. Whether expenses should be reimbursed in a case is dependent on whether such costs are the type typically billed by attorneys to paying clients in the marketplace. *See, e.g.*, *Wheeler v. Durham City Bd. of Educ.*, 88 F.R.D. 27, 34 (M.D.N.C. 1980); *Saleh v. Moore*, 95 F. Supp. 2d 555, 584-85 (E.D. Va. 2000), *aff'd*, 2001 U.S. App. LEXIS 11322 (4th Cir. May 31, 2001).[21]

Here, the requested expenses are summarized by category in the Piven Declaration, and detailed in the respective individual firm declarations of Plaintiffs' Counsel. *See* Piven Decl., Exs. 2-5. These expenses include, *inter alia*, the costs of photocopying, postage, messengers, filing fees, travel, long distance telephone, telecopier, computer database research, and the fees and expenses of Plaintiffs' experts. Plaintiffs' Counsel submit that these expenses were reasonably and necessarily incurred to achieve the result obtained for the Class,[22] and are the type typically charged to hourly paying clients. Plaintiffs' Counsel

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[21] *See also Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("In determining whether the requested expenses are compensable, the Court has considered 'whether the particular costs are the type routinely billed by attorneys to paying clients'") (citation omitted); *Meyer v. Citizens & S. Nat'l Bank*, 117 F.R.D. 180, 183 (M.D. Ga. 1987); *Edmonds v. United States*, 658 F. Supp. 1126, 1142-43 (D.S.C. 1987).

[22] *See In re Unisys Corp. Sec. Litig.*, C.A. No. 99-5333, 2001 U.S. Dist. LEXIS 20160, at *13-*14 (E.D. Pa. Dec. 6, 2001) (finding that fees and costs associated with expert witnesses and consultants, as well (continued…)

incurred these expenses carefully and avoided duplication of effort and, therefore, multiplying the expenses.

In addition, the Notice and Summary Notice informed members of the Class that Plaintiffs' Counsel would seek reimbursement of their expenses incurred in the prosecution of the Action. No member of the Class has objected to that request. Therefore, the requested expenses should be allowed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) certify the Class; (2) grant final approval to the Settlement of this Action; (3) approve the Plan of Allocation; (4) grant an award of attorneys' fees and reimbursement of expenses; and (5) reimburse the expenses GCG incurred to date.

Dated: July 27, 2015

Respectfully submitted,

/s/ Charles J. Piven

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(. . .continued)
as computer assisted legal research costs are often deemed incidental to a large litigation) (citations omitted); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (finding that plaintiffs' request for reimbursement of filing fees, expert fees, service of process, travel, legal research, as well as document production and review expenses, were "the type for which 'the paying, arms' length market' reimburses attorneys"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003) (holding that plaintiffs' counsel was entitled to reimbursement of all litigation related expenses including expenses concerning document productions, experts, consultants and travel.).

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