UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

RAJESH M. SHAH, et. al., Plaintiffs, v. ZIMMER BIOMET HOLDINGS, INC., et. al. Defendants.	Case No. 3:16-cv-00815-PPS-MGG

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

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Court-appointed Lead Counsel respectfully submit this memorandum of law in support of its Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses.[1]

PRELIMINARY STATEMENT

Plaintiffs' Counsel[2] have succeeded in obtaining an all cash, non-reversionary settlement of $50,000,000 (the "Settlement") for the benefit of the Settlement Class in above-captioned action (the "Action"). This is an outstanding outcome in the face of substantial risks and is the result of Plaintiffs' Counsel's vigorous, persistent, and skilled efforts. Lead Counsel now respectfully move this Court for an award of attorneys' fees in the amount of 33.3% of the Settlement Fund (*i.e.*, $16,650,000 plus interest accrued thereon), and reimbursement of $1,595,402.94 in Litigation Expenses. The Litigation Expenses consist of $1,535,402.94 in expenses incurred by Plaintiffs' Counsel while prosecuting the Action, and $60,000 ($15,000 each) to Plaintiffs for reimbursement of the reasonable costs (including the cost of time spent) incurred in prosecuting the Action on behalf of the Settlement Class pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1(a)(4) and 78u-4(a)(4).

As detailed below and in the accompanying Wolke Declaration,[3] the Settlement

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[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated April 14, 2020 (ECF No. 246-1) (the "Stipulation"), or the concurrently filed Declaration of Kara M. Wolke in Support of: (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Wolke Declaration" or "Wolke Decl."). Citations herein to "¶__" and "Ex. __" refer, respectively, to paragraphs in and exhibits to, the Wolke Declaration.

[2] Plaintiffs' Counsel consists of Court-appointed Lead Counsel, Glancy Prongay & Murray LLP ("GPM"); Court-appointed liaison counsel, Katz Korin Cunningham PC ("KKC"); and additional counsel Kirby McInerney LLP ("Kirby"). ¶1.

[3] The Wolke Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the procedural history and the prosecution of the claims at issue; the negotiations leading to the proposed Settlement; the risks and uncertainties of continued litigation; and a description of the services Class Counsel have provided for the benefit of the Settlement Class.

represents an excellent recovery for the Settlement Class under the circumstances. In the absence of a settlement, the Action likely would have continued for years through the completion of fact discovery, expert discovery, summary judgment, trial, and likely appeals. Plaintiffs and their counsel faced substantial obstacles in proving liability and damages, yet nevertheless reached a timely and substantial resolution for the Settlement Class.

The Settlement was not achieved easily. Defendants were represented by highly skilled litigators, and Plaintiffs' Counsel faced numerous hurdles and risks from the outset, including the heightened pleading standards of the PSLRA, high cost of fact and expert discovery needed to litigate a complex securities fraud case, and substantial risk of non-payment. These are not idle risks. "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (O'Connor, J., by designation); *see Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (observing that "Defendants prevail outright in many securities suits."). Indeed, a significant number of cases are dismissed at the outset. Nor do the risks end at the pleading stage. Even when a plaintiff is successful at trial, payment is not guaranteed. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 414, 433 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion in securities action after 13 years of litigation on loss causation grounds and error in jury instructions); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing securities action with prejudice).

Despite facing long odds, Plaintiffs' Counsel have vigorously pursued this case for over three and a half years. *See generally* ¶¶23-90. Among other things, Plaintiffs' Counsel:

- conducted a comprehensive investigation into the allegedly wrongful acts, which included, among other things: (1) reviewing and analyzing (a) Zimmer Biomet

Holdings, Inc.'s ("ZBH" or the "Company") filings with the U.S. Securities and Exchange Commission ("SEC"), (b) public reports, blog posts, research reports prepared by securities and financial analysts, and news articles concerning ZBH, (c) transcripts of ZBH's investor calls, and (d) documents produced in response to numerous Freedom of Information Act requests to the U.S. Food and Drug Administration ("FDA") and appeals thereof; (2) retaining and working with a private investigator who conducted numerous interviews of former Company employees and other third parties with potentially relevant information; and (3) reviewing and analyzing court filings and other publicly available material related ZBH;

- drafted the initial complaint in the Action;
- made the sole Lead Plaintiff application pursuant to the PSLRA;
- retained and worked with FDA, accounting, market efficiency, loss causation and damages experts;
- drafted and filed two amended complaints, including the comprehensive, factually-detailed, 172-page Second Amended Class Action Complaint for Violations of the Federal Securities Laws, plus exhibits, based on the foregoing investigation;
- researched and drafted oppositions to Defendants' motions to dismiss;
- opposed Defendants' motion to amend the Court's September 26, 2018 Opinion and Order to include a certification under 28 U.S.C. § 1292(b) and to stay proceedings pending appeal (the "1292 Motion"), and presented argument in opposition thereto;
- researched and fully briefed the motion for class certification, which included working with Professor Daniel Fischel on the submission of his opening and supplemental reports on market efficiency, taking the deposition of Defendants' class certification expert, Dr. Vinita Juneja, and defending the depositions of each of the four Plaintiffs, Wedge Capital Management (an advisor to Plaintiff UFCW Local 1500), Professor Fischel and Winslow Capital Management, LLC (another advisor to UFCW Local 1500);
- negotiated a comprehensive confidentiality order to govern the treatment of confidential evidence produced in this case;
- engaged in extensive discovery, including, but not limited to: (1) serving six sets of requests for production of documents on Defendants; (2) responding to interrogatories and document requests directed to each of the Plaintiffs; (3) collecting, conducting a privilege review, and producing documents to Defendants; (4) serving twenty eight (28) comprehensive third-party subpoenas *duces tecum*; (5) participating in lengthy and detailed meet and confer negotiations with counsel for Defendants and numerous third parties regarding search terms and/or the scope of document requests or subpoenas *duces tecum*; (6) reviewing and analyzing more than 1.23 million pages of documents produced by Defendants and third parties; (7) serving two sets of requests for admissions; (8) identifying 32 percipient witnesses for deposition and preparing deposition kits for 28 of them, consisting of an outline of questions and relevant documents for use at their depositions; and (9) preparing deposition kits for the noticed Rule 30(b)(6) deposition of ZBH;

- drafted two detailed mediation statements, including relevant exhibits, that set forth the facts of the case and analyzed liability, loss causation, and damages;
- participated in two separate, full-day mediation sessions overseen by the Honorable Daniel Weinstein (Ret.) and Jed Melnick, Esq., nationally recognized mediators of complex cases;
- drafted and negotiated the Stipulation and related exhibits;
- worked with Plaintiffs' damages expert to craft a plan of allocation that treats Plaintiffs and all other members of the proposed Settlement Class fairly; and
- drafted the preliminary approval and final approval briefs. ¶10.

As compensation for their considerable efforts on behalf of the Settlement Class, Plaintiffs' Counsel seek an award equal to 33.3% of the Settlement Fund and reimbursement of out-of-pocket litigation expenses in the amount of $1,535,402.94. The requested fee is reasonable and consistent with the market rate for fees regularly awarded in class action settlements within the Seventh Circuit. The reasonableness of the requested fee may also be confirmed by the use of a lodestar cross-check. Here, the requested fee would result in a multiplier of 1.13, which is well within the range of multipliers that are commonly awarded in complex class actions with substantial contingency risks.

For these reasons, as well as those set forth below and in the Wolke Declaration, Lead Counsel respectfully submit that the requested attorneys' fees are fair and reasonable under the applicable standards and should be awarded by the Court. The Litigation Expenses requested by Plaintiffs' Counsel and Plaintiffs are likewise reasonable and the expenses were necessarily incurred in the successful prosecution of the Action. Accordingly, they too should be approved.

ARGUMENT

I. Lead Counsel's Request For Attorneys' Fees Should Be Approved

A. Lead Counsel Are Entitled to an Award of Attorneys' Fees From The Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a

common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Similarly, the Seventh Circuit has held that "[w]hen a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund." *Florin v. Nationsbank of Ga., N.A.* ("*Florin I*"), 34 F.3d 560, 563 (7th Cir. 1994); *see also Sutton v. Bernard*, 504 F.3d 688, 691-92 (7th Cir. 2007) (the "common fund doctrine" is "based on the equitable notion that those who have benefited from litigation should share in its costs").

B. The Market Price is Measured as a Percentage of The Fund

"The Seventh Circuit is unique among federal circuits in that it requires district courts to replicate the market for legal services when it sets fees in class actions." Ex. 2 (Joint Declaration of Professors Brian Fitzpatrick and Charles Silver in Support of Lead Counsel's Motion for an Award of Attorneys' Fees ("Fitzpatrick and Silver Declaration")), at ¶21 (citing cases, including: *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 246 (7th Cir. 2014) ("[W]e always seek to replicate the market value of an attorney's services . . . ."); *Silverman*, 739 F.3d at 957 ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") ("We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services . . . .")).

Although courts within this Circuit "have discretion to choose either the lodestar or the percentage method of calculating fees" in common fund cases, *In re Trans Union Corp. Privacy Litig.*, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), the Seventh Circuit has strongly

endorsed the percentage of the fund method because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate'" (emphasis in original)); *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund . . . in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis"); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009) ("percentage of the fee method is preferable because it more closely replicates the contingency fee market rate for counsel's legal services.").

Indeed, the prevailing, if not exclusive, method of compensating class counsel is by a contingent fee arrangement: "The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *Florin I*, 34 F.3d at 565, quoting *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992).

The Seventh Circuit also has recognized "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin I*, 34 F.3d at 566; *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 572-73 (noting that it is easier to award a percentage "than it would be to hassle over every item or category of hours and expenses and what multiple to fix and so forth"). And they have likewise acknowledged the many disadvantages of the lodestar method. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979-80 ("*Synthroid II*") (7th Cir. 2003) (noting that the lodestar method may create a conflict of interest between the attorney and client); *Kaufman v. Am. Express Travel Related Servs., Co.*,

2016 WL 806546, at *13 n.19 (N.D. Ill. Mar. 2, 2016) ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive.").

Given the goal of trying to mimic the market, and the pros and cons of each method, it is no surprise that "[w]hen determining a reasonable fee, the Court of Appeals for the Seventh Circuit uses the percentage basis rather than a lodestar or other basis." *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) (citation omitted); *see also In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015) (stating that the percentage method has "emerged as the favored method for calculating fees in common-fund cases in this district."); Fitzpatrick and Silver Declaration, ¶¶27-39 (discussing advantages and disadvantages of various methods of awarding attorneys in class actions and explaining why the percentage of the fund method best replicates the market for plaintiff side legal services).[4]

Accordingly, Lead Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund obtained.

C. The Requested Fees Are Fair and Reasonable as a Percentage of the Fund

When considering the reasonableness of a requested fee award, the Seventh Circuit "has consistently directed district courts to do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692 (citation omitted). In applying this standard, Courts in the Seventh Circuit consider the following factors: (1) "awards made by courts in other class actions"; (2) "the quality of legal services rendered"; and (3) "the contingent nature of the case."

[4] Use of the percentage method in the context of securities fraud cases is further supported he text of the PSLRA, which provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount" recovered for the class. 15 U.S.C. §§ 77z-1(a)(6) and 78u-4(a)(6); *see also In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (the PSLRA contemplates that "the percentage method will be used to calculate attorneys' fees in securities fraud settlements.").

Taubenfeld v. AON Corp., 415 F.3d 597, 600 (7th Cir. 2005); *see also Synthroid I*, 264 F.3d at 721 (reasonableness "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case"). Each of these factors strongly support the requested fee.

1. A Fee Award of 33.3% Is Well Within the Range of Fees Awarded in Similar Cases Within the Seventh Circuit

"[A]ttorneys' fees from analogous class action settlements are indicative of a rational relationship between the record . . . and the fees awarded by the district court." *Taubenfeld*, 415 F.3d at 600. In complex class actions like this one, courts within the Seventh Circuit have held that percentages in the range of 33⅓% to 40% of the recovery are appropriate. *See Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) ("33⅓% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33⅓% to 40% of the amount recovered."); *Gaskill*, 160 F.3d at 362-63 (approving 38% fee in securities class settlement); *Will v. Gen. Dynamics Corp.*, 2010 WL 4818174, at *2 (S.D. Ill. Nov. 22, 2010) ("Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered."); *Teamsters Local Union No. 604 v. Inter–Rail Transp., Inc.*, 2004 WL 768658, at *1 (S.D. Ill. Mar. 19, 2004) ("In this Circuit, a fee award of thirty-three and one-third (33⅓%) in a class action i[s] not uncommon"); *City of Greenville v. Syngenta Crop Protection, Inc.*, 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012) (awarding one-third of $105 million fund, plus roughly $8.5 million in costs, and holding that "[w]here the market for legal services in a class action is only for contingency fee agreements,

and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered."); *Goldsmith v. Tech. Sols. Co*., 1995 WL 17009594, at *8 (N.D. Ill. Oct. 11, 1995) (collecting cases and stating that "courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery.").[5] Accordingly, Lead Counsel's request comports with the authority in this Circuit.

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[5] *See also Matthias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (court recognizes that 33 to 40% represents the usual contingent fee percentage); *Heekin v. Anthem, Inc.*, 2012 WL 5878032, at *5 & n.3 (S.D. Ind. Nov. 20, 2012) (awarding 33.3% of $90 million fund in securities class action, plus expenses; collecting numerous cases in this circuit where courts supported "a percentage market rate of 33.3%" when granting attorneys' fees); *In re Lithotripsy Antitrust Litig*., 2000 WL 765086, at *2 (N.D. Ill. June 12, 2000) (noting that "[m]any courts in this district have utilized" the percentage method to set fees in class actions, "33.3% of the fund plus expenses is well within the generally accepted range of the attorneys fee awards"); *Campbell v. Advantage Sales & Mktg. LLC*, 2012 WL 1424417, at *2 (S.D. Ind. Apr. 24, 2012) (one-third of recovery, plus expenses); *In re Guidant Corp. ERISA Litig.,* No. 05-CV-1009, ECF No. 194 at 2 (S.D. Ind. Sept. 10, 2010) (38% of the common fund, plus expenses) (Ex. 14); *In re Ready–Mixed Concrete Antitrust Litig.,* 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (one-third of the common fund, plus expenses); *Hale v. State Farm Mut. Auto. Ins. Co*., 2018 WL 6606079, at *13, 16 (S.D. Ill. Dec. 16, 2018) (one-third of $250 million common fund); *Gupta v. Power Sols. Int'l, Inc.*, 2019 WL 2135914, at *1 (N.D. Ill. May 13, 2019) (one-third of $8.5 million common fund, plus expenses); *Spano v. Boeing Co.*, 2016 WL 3791123, at *2 (S.D. Ill. March 31, 2016) ("A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law."); *Dairy Farmers*, 80 F. Supp. 3d at 862 (one third of $46 million common fund plus expenses); *Standard Iron Works v. ArcelorMittal*, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) ("The Court finds that a 33% fee [of $163.9 million common fund] comports with the prevailing market rate for legal services of similar quality in similar cases."); *Beesley*, 2014 WL 375432, at *4 (one-third of $30 million common fund plus expenses); *Fosbinder-Bittorf v. SSM Health Care of Wisconsin, Inc.*, 2013 WL 5745102, at *1 (W.D. Wis. Oct. 23, 2013) (one-third of the common fund); *George v. Kraft Foods Global, Inc.*, 2012 WL 13089487, at *4 (N.D. Ill. June 26, 2012) (one-third of common fund plus expenses); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 601 (N.D. Ill. 2011) (one-third of common fund); *Will*, 2010 WL 4818174, at *4 (same); *Martin v. Caterpillar Inc.*, 2010 WL 11614985, at *2 (C.D. Ill. Sept. 10, 2010). ("[C]ourts in the Seventh Circuit award attorney fees 'equal to approximately one-third or more of the recovery.' The Seventh Circuit itself has specifically noted that 'the typical contingent fee is between 33 and 40 percent.'"); *In re Great Lakes Dredge & Dock*, No. 13-CV-02115, ECF No. 78 at 6 (N.D. Ill. Sep. 17, 2015) (one-third of common fund, plus expenses) (Ex. 15); *In re Acura Pharms., Inc. Sec. Litig.*, No. 10-CV-5757, ECF No. 102 at 5 (N.D. Ill. Mar. 14, 2012) (same) (Ex.16); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09 C 7666, ECF No. 693 at ¶7 (N.D. Ill. Jan. 22, 2014) (same) (Ex. 17); *In*

2. A Fee Award of 33.3% Is Consistent With Contingent Fee Agreements Entered Into By Sophisticated Clients

"It is not the function of judges in fee litigation to determine the equivalent of the medieval just price." *In re Cont'l Ill. Sec. Litig*., 962 F.2d at 568. Instead, counsel is "entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." *Id*. at 572; *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000) ("[W]hat is reasonable is what an attorney would receive from a paying client in a similar case.").

As demonstrated by Professors Fitzpatrick and Silver in their Joint Declaration, the case law cited above is an accurate reflection of the market for contingent legal services in complex litigation. Indeed, "when seeking to recover money in risky commercial lawsuits involving large stakes, sophisticated business clients typically agree to pay contingent fees of at least 33⅓ percent." Fitzpatrick and Silver Decl., ¶48. "[S]tudies show that large sophisticated corporations . . . tend to pay the lawyers they hire on contingency, either with graduated rates that increase over time to more than 40% or with flat rates of 33⅓% or more." *Id*. at ¶44. For instance, one study of contingent patent litigation found that in "agreements using a flat fee, the mean rate was 38.6% of the recovery," and for those "that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%." *Id*. at ¶45, citing David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012).

Professors Fitzpatrick and Silver also discuss a series of related pharmaceutical antitrust cases, in which approximately 20 drug wholesalers sued drug manufacturers on a contingency

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re Potash Antitrust Litig., No. 1:08-CV-6910, ECF No. 589 at 2 (N.D. Ill. June 12, 2013) (same) (Ex. 18).

fee basis. Fitzpatrick and Silver Decl., ¶46. Several of the plaintiffs were Fortune 500 size or bigger, most or all had in-house or personal counsel monitoring the litigations, and billions of dollars were at stake. *Id.* Based on their experience as experts in many of these cases, and having compiled the data from the entire set of cases between April 2003 and April 2020 for their joint Declaration, Professors Fitzpatrick and Silver report that: (a) where there were pre-litigation fee agreements, "the agreements called [for fees] of 33⅓ percent"; (b) "in the vast majority of cases, one or more class members—often class members comprising a majority of the class's damages—voiced affirmative *support* for the fee request"; and (c) "*not a single class member* objected to the fee request in *any* of the cases." *Id.* at ¶47 (emphasis in original). Consequently, Professors Fitzpatrick and Silver believe that "[i]t is hard to draw any other conclusion than in this sophisticated market, [] contingency fees of 33⅓ percent are the norm," and that "this factor, too, supports class counsel's fee request." *Id.*; *see also id.* at ¶¶43-44 (discussing fee agreements in other high dollar class action cases where sophisticated clients entered into contingency fee agreements for between 33⅓% and 40%).

3. The Market Rewards Risk, and this Case Was Tremendously Risky

As noted by the Seventh Circuit in *Synthroid I*, "the market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear." *Synthroid I*, 264 F.3d at 721; *see also Silverman*, 739 F.3d at 958 ("The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel."); *Sutton*, 504 F.3d at 693 (reversing district court's fee award and stating "[b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated"). Thus, "[w]hen determining the reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel

assumed in undertaking the lawsuit." *Dairy Farmers*, 80 F. Supp. 3d at 847-48. "[T]his consideration incentivizes attorneys to accept and (wholeheartedly) prosecute the seemingly too-big-to-litigate wrongs hidden within the esoteric recesses of the law, ensuring that the attorneys are compensated for their work at the end of the day." *Id*. at 848. In applying this factor, "risk is to be assessed as of the time of the inception of the litigation." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1208 (N.D. Ill. 1989).[6]

Here, Plaintiffs' Counsel undertook the Action on a fully contingent basis, assuming the significant risk that the litigation would yield no recovery and leave them uncompensated. Unlike counsel for Defendants, who are typically paid an hourly rate and regularly reimbursed for their expenses, Plaintiffs' Counsel have not been compensated for ***any*** time or reimbursed for any of their significant out-of-pocket expense since this case began ***over three and a half years ago***. ¶147. And the risks in this case were not illusory; rather, they were very real from the time Lead and Liaison Counsel initiated the Action on behalf of Lead Plaintiff Shah, and they continued throughout the litigation. ¶149. Leaving aside the many obstacles to recovery inherent in a complex securities fraud class action—including, but not limited to, the PSLRA's heightened pleading standard and automatic stay of discovery (15 U.S.C. §§ 77z-1(b)(1) and 78u-4(b)(3)(B))—this was an particularly unattractive and highly risky case.

"One proxy for assessing risk is whether the litigation followed on the heels of some prior criminal or civil proceeding involving the same parties or subject matter." *Dairy Farmers*, 80 F. Supp. 3d at 848. "This inquiry provides insight into whether class counsel benefitted from

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[6] *See also Florin I,* 34 F.3d at 565 (directing district court to determine fair attorneys' fees in class action by considering the probability of success at the outset of litigation); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 572 ("The object in awarding a reasonable attorney's fee ... is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible.").

the work of others, which acts a red flag for judges assessing fee petitions." *Id.* Moreover, cases that follow an SEC or governmental investigation tend to settle for significantly more money. *See* Fitzpatrick and Silver Declaration, ¶56. In the instant case, there was no governmental or journalistic investigation of any sort. Rather, "Plaintiffs' counsel (and their teams and experts) were truly the authors of the favorable outcome for the class." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015); *In Re: Syngenta Ag Mir 162 Corn Litig.*, 2018 WL 6436074, at *12 (D. Kan. Dec. 7, 2018) (concluding that attorney fee award of 1/3 in super-mega-fund case was justified, in part, by the fact that the "case did not involve a government investigation or prosecution of the defendant").[7]

Another indicia of the riskiness of this case is the fact that there were no other cases filed, and no other lead plaintiff movants. *See* Fitzpatrick and Silver Declaration, ¶55. The PSLRA requires the plaintiff or plaintiffs who file the first class action complaint to "publish[], in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—(I) of the pendency of the action, the claims asserted therein, and the purported class period; and (II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as

[7] *See also Silverman*, 2012 WL 1597388, at *3 (fee request supported by fact that "there were no governmental investigations or prosecutions related to the alleged fraud upon which Class Counsel could rest their theory of the case. Rather, they investigated the facts and developed their theory of liability from scratch, involving significant time and expense."); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 434 (S.D.N.Y. 2016) ("While many class actions are filed on the heels of a government investigation, the claims in this case were formulated entirely from the findings of a private investigation."); *George v. Kraft Foods Global, Inc.*, No. 08-CV-3799, ECF No. 344 at 4 (N.D. Ill. June 26, 2012) (Ex. 19) (one-third of the total recovery as attorneys' fee because class counsel's work "illustrates an exceptional example of a private attorney general risking breathtaking amounts of time and money while overcoming many obstacles for the benefit of [the class]"); Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?*, 65 The Journal of Finance 2213, 2225 (2010) (private lawyers were the first to discover fraud only 3% of the time).

lead plaintiff of the purported class." 15 U.S.C. §§ 77z-1(a)(3)(A) and 78u-4(a)(3)(A). Lead Plaintiff Shah published notice in this case, and yet there were no other movants. ECF No. 18. This "[l]ack of competition not only implies a higher fee, but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman*, 739 F.3d at 958.

Moreover, this was not a restatement case. When companies restate their financials, they are admitting a material misstatement of their financial reporting. A case predicated on a restatement is, therefore, less risky because the misstatement and materiality elements of a securities fraud claim are already met. *See* Fitzpatrick and Silver Declaration, ¶54 ("cases with financial restatements tend to be less risky than others because they are more likely to survive motions to dismiss as the evidence of defendants' knowledge being clearer."); *In re Schering-Plough Corp. Enhance Sec. Litig.*, 2013 WL 5505744 at *30 (D.N.J. Oct. 1, 2013) (granting fee request where the case was the antithesis of cases where liability is virtually certain due to a financial restatement); *In re Xcel Energy, Inc., Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 995 (D. Minn. 2005) (noting that one of the many hurdles plaintiffs faced was the fact that the case did not involve a restatement of financials).

While the focus of the inquiry is on assessing risk at the beginning of the case, it should be noted that the litigation risks did not end with the filing of the complaint or even with the partial denial of the motions to dismiss. At the time the Parties agreed in principle to settle the Action, the Court had not yet decided Plaintiffs' motion for class certification. Had the Court denied Plaintiffs' motion, the potential recovery would have been dramatically reduced, or eliminated altogether. ¶¶92-93, 114. Moreover, the Court could have revisited the issue at any time. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (even if a class is certified, "there is no guarantee the certification would survive through trial, as

Defendants might have sought decertification or modification of the class"). Nor did the risks end there, Plaintiffs would still have to ***prove*** their case. As this Court noted in its 1292(b) Opinion and Order, "in the end, . . . of course more than mere allegations will be necessary to survive summary judgment or win at trial. As with all lawsuits, if the admissible evidence does not live up to the allegations, plaintiffs won't win their case." *Shah v. Zimmer Biomet Holdings, Inc.*, 2019 WL 762510, at *9 (N.D. Ind. Feb. 20, 2019).

In short, at no point in this litigation were Plaintiffs' Counsel "assured of a paycheck." *Florin II*, 60 F.3d at 1247. Thus, this factor militates in favor of the requested fee.

4. The Quality of Legal Services Rendered was High and Resolution of the Case Required a Tremendous Amount of Work

The "market price for legal fees depends . . . in part on the quality of [the firm's] performance, [and] in part on the amount of work necessary to resolve the case." *Sutton*, 504 F.3d at 693); *see also See Silverman v. Motorola, Inc.*, 2012 WL 1597388, at *3 (N.D. Ill. May 7, 2012), *aff'd*, 739 F.3d 956 (7th Cir. 2013) (approving requested fee and noting that "[t]he representation that Class Counsel provided to the class was significant, both in terms of quality and quantity"). Courts have acknowledged that securities actions have become even more difficult from a plaintiff's perspective in the wake of the PSLRA, the effect of which is to make it harder for investors to bring and successfully conclude securities class actions. *See Jorling v. Anthem, Inc.*, 836 F. Supp. 2d 821, 831 (S.D. Ind. 2011) (discussing the PSLRA's "heightened pleading requirements, making it more difficult for plaintiffs to survive a motion to dismiss, and thus receive the keys to unlock the discovery process"); *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("The court also acknowledges that securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA."). Moreover,

"prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987).

From the inception of the Action, Plaintiffs' Counsel engaged in a concerted effort to obtain the maximum recovery for the Settlement Class. This case required a massive, in-depth investigation, extensive briefing and discovery efforts, comprehensive knowledge of the securities laws, and the skill to respond to a host of legal and factual issues raised by Defendants at every step of the litigation. ¶¶23-90. It also required a willingness to take risk. Indeed, Plaintiffs' Counsel demonstrated a willingness to continue to litigate rather than accept a settlement that was not in the best interest of the Settlement Class, as evidenced by the fact that the first mediation did not result in resolution of the case. ¶¶83-85; *see also Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *17 (N.D. Ill. May 14, 2019) ("Here, plaintiffs' counsel faced significant risk of nonpayment after the first two unsuccessful mediations"). Instead, Plaintiffs' Counsel continued engaging in lengthy and costly discovery efforts and accepted the risk that the Court might adversely decide the pending class certification motion, which could have had catastrophic consequences. ¶¶59-82. As a result of their diligent efforts, skill and expertise, and willingness to accept risk, Plaintiffs' Counsel negotiated an excellent result for the Settlement Class.[8]

The quality of opposing counsel is also important in evaluating the quality of Plaintiffs' Counsel's work. *See Beesley*, 2014 WL 375432, at *2 ("Litigating this case against formidable defendants and their sophisticated attorneys required Plaintiffs' Counsel to demonstrate extraordinary skill and determination."). Here, Plaintiffs' Counsel were opposed by skilled and

[8] The work performed by Plaintiffs' Counsel is summarized *supra* in the Preliminary Statement, is detailed in the Wolke Declaration (¶¶23-90) and was the result of approximately 29,276.90 hours of work on this case. *See, infra*, § I.D.

highly respected lawyers with well-deserved reputations for vigorous advocacy in the defense of complex civil cases such as this one. ¶152. In the face of this formidable opposition, Plaintiffs' Counsel were able to develop the Action to the point where they were able to obtain a highly favorable result for the Settlement Class. Thus, this factor weighs in favor of the requested fee. *See Spano*, 2016 WL 3791123, at *3 (awarding one-third of $57 million settlement where, among other reasons, class counsel "added great value to the Class throughout the litigation through the persistence and skill of their attorneys.").

5. This Was High Stakes Litigation

By virtually any metric, this was high stakes, complex litigation. Under Plaintiffs' best-case scenario—the total maximum damages would be approximately $625 million. Defendants, however, had raised a number of credible arguments concerning loss causation and damages that—if accepted—would have substantially reduced recoverable damages. For example, if Plaintiffs failed to prove loss causation for the October 31, 2016 disclosure, the Settlement Class's estimated maximum recoverable damages would have been reduced to approximately $95 million. ¶114. Either number equates to a significant amount of alleged investor damages.

Furthermore, this Action involves thousands of Settlement Class Members who were allegedly defrauded by Defendants. For most Settlement Class Members, the costs to successfully prosecute an individual action are so high that a class action is realistically the only way that they would receive any relief. The large number of Settlement Class Members who will be receiving compensation in this case confirms the high stakes of this litigation.

Additionally, the Supreme Court has repeatedly 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); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal . . . securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)."). There were, therefore, important public policy concerns at issue.

Finally, the amount work performed, and hours expended, by Plaintiffs' Counsel on this litigation, and the more than a million and a half dollars of out-of-pocket costs, demonstrates that this is far from a run-of-the-mill litigation. For all of these reasons, this factor strongly supports the requested fee. *See Silverman*, 2012 WL 1597388, at *3 (granting requested fee award in securities class action where the "risk of nonpayment and the stakes of this complex securities fraud case were significant.").

6. The Reaction of the Class Supports the Requested Award

Pursuant to the Court's Opinion and Order preliminarily approving the Settlement and providing for the dissemination of the Notice (ECF No. 251, the "Preliminary Approval Order"), the mailing of the Notice of the Settlement to over 154,600 potential Settlement Class Members and nominees commenced on June 19, 2020. Ex. 3 (Declaration of Luiggy Segura) at ¶¶2-12. The Notice informed Settlement Class Members that Lead Counsel would apply for attorneys' fees of up to 33⅓% of the Settlement Amount, plus expenses not to exceed $1,900,000, and were advised of their right to object to Lead Counsel's fee and expense request. Ex. 3-A (the Notice). While the date to file objections has not yet passed, to date, no Settlement Class Member has objected to the application for attorneys' fees and expenses. ¶153. This is significant, especially considering the huge size of the Settlement Class and the increasing trend of investor activism in

securities class actions. *See Spano*, 2016 WL 3791123, at *1 ("This Court finds the lack of any significant number of objections to be a sign of the Class's overwhelming support for Class Counsel's request.").[9]

7. The Outstanding Result Supports The Requested Fee

Although somewhat derivative of the risk analysis, results matter. *See* Fitzpatrick and Silver Declaration, ¶57. And here, the result—ranging from 8% to 53% of the maximum class-wide damages potentially recoverable—was excellent. Indeed, there was a very real possibility that the Court at summary judgment, the jury at trial, or the Court of Appeal, would have found that the alleged October 31, 2016, disclosure was completely unrelated to the alleged fraud. *See Glickenhaus*, 787 F.3d at 433 (reversing and remanding jury verdict in securities fraud action on loss causation grounds and error in jury instructions). If that was the case, maximum potential class-wide damages would have been reduced by 85% (to approximately $95 million), meaning the $50 million recovery would equate to approximately 53% of provable damages. ¶¶100, 105, 114. Such a recovery is exceptional. *See* Ex. 8 (Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements 2019 Review and Analysis*, at p. 6 Figure 5 (Cornerstone Research 2020)) (reporting median percentage recoveries of 9.4 percent in cases alleging between $75-$149 million in damages, respectively, and 4.8 percent overall for all securities class actions). Accordingly, this factor strongly supports the requested fee.

D. The Requested Fee Is Also Reasonable Using the Lodestar Method

Unlike certain other jurisdictions, the Seventh Circuit does not use a lodestar calculation as a secondary measure of reasonableness when the percentage-of-the-recovery approach is employed. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011)

[9] Each of the Plaintiffs has approved Lead Counsel's request for attorneys' fees. *See* Exs. 4-7.

("consideration of a lodestar check is not an issue of required methodology"); *Synthroid II*, 325 F.3d at 979–80 ("The client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced.").[10] Nonetheless, Lead Counsel's requested attorneys' fees are reasonable under the lodestar method.

As detailed in the Wolke Declaration, Plaintiffs' Counsel spent 29,276.90 hours of attorney and other professional time prosecuting the Action for the benefit of the Settlement Class. ¶140; Exs. 9-11 (Plaintiffs' Counsel firm fee and expense declarations). Plaintiffs' Counsel's total lodestar, derived by multiplying the hours spent on the litigation by each attorney or other professional by his or her current hourly rate,[11] is $14,675,216.00.[12] Accordingly, the requested fee of 33.3% of the Settlement Fund, which equates to $16,650,000 (before interest), represents a multiplier of approximately 1.13 on Plaintiffs' Counsel's lodestar.[13] *Id*.

The requested 1.13 multiplier is well within the range of, and in fact is less than, multipliers commonly awarded in comparable complex litigation. *See Spano*, 2016 WL

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[10] *See also Beesley*, 2014 WL 375432, at *3 ("The use of a lodestar cross-check has fallen into disfavor."); *Will*, 2010 WL 4818174, at *3 ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive.").

[11] Lead Counsel submits that Plaintiffs' Counsel's rates are less than, or comparable to, those used by peer plaintiff and defense-side law firms litigating matters of similar magnitude. Indeed, defense firm rates, gathered by GPM from bankruptcy court filings nationwide, often exceed these rates. ¶142; Ex. 12. Additionally, GPM's rates were recently approved in *Gupta v. Power Sols. Int'l, Inc.*, 2019 WL 2135914, at *1 (N.D. Ill. May 13, 2019).

[12] The Supreme Court and the Seventh Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Mathur v. Bd. of Trustees of S. Ill. Univ.*, 317 F.3d 738, 744-45 (7th Cir. 2003) (to adjust for delay in payment, trial courts may calculate lodestars using "either current rates or past rates with interest"). Moreover, when conducting a lodestar cross-check, "[t]The Court may rely on summaries submitted by attorneys and need not review actual billing records." *Beesley*, 2014 WL 375432, at *3, n.1.

[13] The actual realized multiplier will decline over time, as Lead Counsel will devote additional attorney time to drafting the reply brief in further support of the Settlement, preparing for the Settlement Hearing, overseeing the processing of claims by the Claims Administrator, filing distribution motion(s), and overseeing the distribution of the net Settlement proceeds.

3791123, at *3 ("In risky litigation such as this, lodestar multiplier can be reasonable in the range between 2 and 5"); *Hale*, 2018 WL 6606079, at *14 (lodestar cross-check approving 2.83 multiplier); *Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 598 (N.D. Ill. 2011) (awarding one-third of the $9.5 million fund, equating to 2.5 multiplier, and stating that "[w]hile many courts in this circuit have criticized the use of a lodestar cross-check in common fund cases, the fee request here would nevertheless survive such an analysis."); *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 2015 WL 13546111, at *6 (W.D. Wis. Jan. 5, 2015) (approving attorney fee request of twice the lodestar value).

In sum, Lead Counsel's requested fee award is well within the range of what courts in this Circuit commonly award in class actions such as this one, whether calculated as a percentage of the fund or in relation to Plaintiffs' Counsel's lodestar.

II. The Request for Reimbursement of Litigation Expenses Should Be Approved

Attorneys who generate a common fund for a class are entitled to the reimbursement of reasonable litigation expenses from that fund. *See City of Greenville*, 904 F.Supp.2d at 910 (citing *Synthroid I*, 264 F.3d at 722). To prosecute the Action to resolution, Plaintiffs' Counsel incurred reasonable and necessary costs and expenses in the amount of $1,535,402.94. ¶157; *see also* Exs. 9-11 (Plaintiffs' Counsel firm fee and expense declarations).[14] Because the expenses at issue are the types reimbursed by individual clients in the marketplace, they should be reimbursed from the common fund. *See Synthroid I*, 264 F.3d at 722.

The largest component of expenses related to experts. Approximately 80.6% of total

[14] Plaintiffs' Counsel have provided a summary of their expenses, broken down into eighteen different categories. ¶157. This type of summary is sufficient for the Court to "perform its oversight function." *Hale*, 2018 WL 6606079, at *14 ("the Court concludes that the billing records provided—which broke the costs down into 16 separate categories of litigation expenses—include sufficient detail to allow the Court to perform its oversight function.").

expenses ($1,237,009.78), was expended on such services. ¶160. Plaintiffs' Counsel retained experts in the fields of FDA regulation, accounting, market efficiency, loss causation and damages. These experts were consulted at different points throughout the litigation in order to effectively frame the issues in the Action, gather and understand the relevant evidence, make a realistic assessment of provable damages, and structure a resolution of the Action. More specifically, the experts assisted in preparing the amended complaints, reviewing and distilling information obtained from Defendants and third parties (including the FDA), demonstrating market efficiency during class certification briefing, providing analysis related to loss causation and damages for use at the mediations, and drafting the proposed Plan of Allocation. ¶¶74-82.

Lead Counsel also utilized the services of an outside investigative firm to identify and interview witnesses to assist in the development of the facts involved in the case ($66,446.45, or approximately 4.3% of the total expenses). ¶161. Such services are absolutely essential when prosecuting an action under the PSLRA, where all discovery is stayed pending a resolution of the motion to dismiss. *See* 15 U.S.C. §§ 77z-1(b)(1) and 78u-4(b)(3)(B). Once discovery commenced, Lead Counsel required the use of litigation support services, which were needed to host the more than 1.2 million pages of electronic documents produced in the Action ($26,814.83, or approximately 1.7% of total expenses). ¶165.

Plaintiffs' Counsel were also required to travel in connection with court appearances, depositions and the mediations. Work-related transportation, lodging, and meal costs totaled approximately $53,510.83, or approximately 3.5% of aggregate expenses. ¶162. Air travel was at economy or premium economy rates (*i.e.*, not business or first class), and meals were capped at $50 per person. *Id.* Another component of expenses ($37,250.76, or approximately 2.4% of the total expenses), was Plaintiffs' share of mediation fees. ¶164. Judge Weinstein and Mr.

Melnick are nationally recognized mediators of complex actions such as this one, and their services were essential to the successful resolution of the case.[15]

Lastly, Lead Counsel seeks reimbursement for other expenses that are typically the types of expenses necessarily incurred in litigation and routinely charged to clients who are billed by the hour. They are, therefore, properly recovered by counsel. *See Beesley*, 2014 WL 375432, at *3 ("It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reporters; travel expense; copy, phone and facsimile expenses and mediation."); *Bell v. Pension Committee of ATH Holding Co., LLC*, 2019 WL 4193376, at *6 (S.D. Ind. Sept. 4, 2019) (same).

In terms of the reasonableness of the expenses, it is important to recognize that Plaintiffs' Counsel would have borne these costs had this case not reached a successful resolution. Thus, "[Plaintiffs'] Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent." *Beesley*, 2014 WL 375432, at *3. The reasonableness of the expenses is also confirmed by the fact that they equate to approximately 3.1% of the recovery, which "is less than the average of 4 percent of the relief for the class." *Hale*, 2018 WL 6606079, at *15 (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 J. Empirical Legal Stud. 27, 70 (2004)). Further, "the fact that [Plaintiffs'] Counsel does not seek interest as compensation for the time value of money or costs associated with advancing these expenses to the Class makes this fee request all the more reasonable." *Id.* Finally, the Notice informed potential Settlement Class

[15] *See Silverman*, 2012 WL 1597388, at *3 (describing Judge Weinstein as "a nationally-recognized and highly-respected mediator"); *Yang v Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (noting Mr. Melnick is a "highly qualified mediator.").

Members that Lead Counsel would apply for payment of expenses in an amount not to exceed $1,900,000. The amount of Litigation Expenses requested, $1,595,402.94, is below the amount listed in the Notice and, to date, there has been no objection to the request for expenses.

For all of these reasons, Lead Counsel respectfully requests that the Court approve reimbursement of the requested expenses.

III. Plaintiffs Are Entitled to Reimbursement of Costs Under the PSLRA

Pursuant to 15 U.S.C. §§ 77z-1(a)(4) and 78u-4(a)(4), Plaintiffs are permitted to recover unreimbursed costs (including the cost of time spent) incurred while serving on behalf of the class. Courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005).

Plaintiffs respectfully request awards of $15,000 for each Plaintiff. As set forth in their declarations, Plaintiffs, among other things: (a) regularly communicated with Plaintiffs' Counsel regarding the posture and progress of the case; (b) reviewed pleadings and briefs filed in the Action; (c) reviewed Court Orders; (d) responded to document requests by, and produced documents to, Defendants; (e) responded to interrogatories; (f) prepared and sat for their depositions; (g) reviewed the mediation statements; (h) consulted with Plaintiffs' Counsel regarding the mediation and settlement negotiations; and (i) evaluated and approved the proposed Settlement. Exs. 4-7.[16] The time it took to engage in these tasks is time that could

[16] It should be noted that UFCW Local 1500 agreed to step forward as an additional named Plaintiff because it purchased shares of ZBH common stock in the secondary offerings, and thus had standing to pursue the Securities Act claims. ¶25.

have been devoted to other personal or professional activities, and they are "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *In re Marsh & McLennan Cos. Sec. Litig*., 2009 WL 5178546, at *21 (S.D.N.Y. 2009); *see also Hale*, 2018 WL 6606079, at *15 (awarding $25,000 to each of the three plaintiffs for, among other things, their work "reviewing pleadings, responding to discovery requests, producing documents, sitting for depositions, preparing for trial, remaining in contact with Class Counsel, and overseeing the litigation.").

Awards of $15,000 for each Plaintiff are well within the ranges that are typically awarded in comparable cases. *See Will*, 2010 WL 4818174, at *4 (awarding $25,000 to each of three named plaintiffs); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (upholding award of $25,000 to class representative); *Heekin*, 2012 WL 5878032, at *1 ($25,000 awards to two representatives); *Spano*, 2016 WL 3791123, at *4 ($25,000 awards to three representatives and $10,000 each to two others); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) ($25,000 awards to six class representatives and $10,000 to an additional named plaintiff).

Accordingly, Lead Counsel respectfully requests that the Court grant the requested awards. *See Bell*, 2019 WL 4193376, at *6 ("Without [Plaintiffs'] commitment to pursuing these claims, the successful recovery for the Class would not have been possible.").

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully request that the Court grant the fee and expense application.

Dated: July 30, 2020

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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a copy of this document was served on all counsel of record by operation of the Court's electronic filing system.

s/ Kara M. Wolke

Kara M. Wolke