UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GRADY SCOTT WESTON, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. RCS CAPITAL CORPORATION, RCAP HOLDINGS, LLC, RCAP EQUITY, LLC, NICHOLAS S. SCHORSCH, BRIAN S. BLOCK, EDWARD MICHAEL WEIL, WILLIAM M. KAHANE, BRIAN D. JONES, PETER M. BUDKO, MARK AUERBACH, JEFFREY BROWN, C. THOMAS MCMILLEN, and HOWELL WOOD Defendants.	Civ. No. 1:14-CV-10136-GBD

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

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. A REASONABLE PERCENTAGE-OF-THE-FUND RECOVERED IS THE APPROPRIATE METHOD FOR AWARDING ATTORNEYS' FEES IN COMMON FUND CASES 2

II. A FEE OF 30% IS FAIR, REASONABLE AND CONSISTENT WITH FEES AWARDED IN SIMILAR CASES 4

III. OTHER FACTORS CONSIDERED WITHIN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS REASONABLE 7

A. The Time and Labor Expended by Counsel 7

B. The Risks of the Litigation 9

1. Risks Concerning Liability 10

2. Risks Concerning Loss Causation and Damages 13

3. The Contingent Nature of Lead Counsel's Representation 15

C. The Magnitude and Complexity of the Litigation 16

D. The Quality of Representation 17

E. Public Policy Considerations 18

F. The Requested Attorneys' Fees in Relation to the Settlement 19

G. The Requested Attorneys' Fees are Also Reasonable Under the Lodestar Cross-Check 20

H. The Settlement Class's Reaction to the Fee and Expense Request 21

IV. THE FEE WAS NEGOTIATED WITH LEAD PLAINTIFFS 22

V. PLAINTIFFS' COUNSEL'S EXPENSES WERE REASONABLY INCURRED AND NECESSARY TO THE PROSECUTION OF THIS ACTION 22

VI. LEAD PLAINTIFFS' REIMBURSEMENT PURSUANT TO PSLRA 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

In re Am. Bank Note Holographics, Inc. Sec. Litig,
127 F. Supp. 2d 418 (S.D.N.Y. 2001).....15

Anixter v. Home-Stake Prod. Co.,
77 F.3d 1215 (10th Cir. 1996) 16

In re Apple Comput. Sec. Litig.,
No. C-84-20148, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991).....16

Basic Inc. v. Levinson,
485 U.S. 224 (1988).....18

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299 (1985).....18

Bentley v. Legent Corp.,
849 F. Supp. 429 (E.D. Va. 1994), *aff'd*, *Herman v. Legent Corp*.,
50 F.3d 6 (4th Cir. 1995) 16

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980).....2

Central States and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care L.L.C.,
504 F.3d 229 (2d Cir. 2007).....5

The City of Providence v. Aeropostale, Inc.,
No. 11-cv-7132 (CM), 2014 WL 1883494 (S.D.N.Y. May 9, 2014) *aff'd*,
Arbuthnot v. Pierson, No. 14-2135, slip op. (2d Cir. June 10, 2015).....3, 4, 13

In re E.W. Blanch Holdings, Inc. Sec. Litig.,
No. 01-258, 2003 WL 23335319 (D. Minn. June 16, 2003).....6

In re Flag Telecom Holdings Ltd. Sec. Litig.,
No. 02-CV-3400 (CM) (PED), 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010).....15, 17, 18, 20

Fogarazzo v. Lehman Bros Inc.,
No. 03-5194, 2011 WL 671745 (S.D.N.Y. Feb. 23, 2011).....16

In re Global Crossing Sec. & ERISA Litig.,
225 F.R.D. 436 (S.D.N.Y. 2004) 22

Goldberger v. Integrated Res., Inc.,
209 F.3d 43 (2d Cir. 2000)..... *passim*

In re Heritage Bond Litig.,
No. 02–ML–1475 DT, 2005 WL 1594403 (C.D. Cal. June 10, 2005).....6

Hicks v. Morgan Stanley,
No. 01-cv-10071 (RJH), 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005).....3, 23

In re IMAX Sec. Litig.,
No. 06 Civ. 6128 (NRB), 2012 WL 3133476 (S.D.N.Y. Aug. 1, 2012) 4

In re JDS Uniphase Corp. Sec. Litig.,
No. CO2-1486 CW, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) 16

Landy v. Amsterdam,
815 F.2d 925 (3d Cir. 1987).....16

Maley v. Del Global Techs. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002).....19

In re Marsh & McLennan Cos., Inc. Sec. Litig.,
No. 04 Civ. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009).....19, 22, 24

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010) 5

In re Med. X-Ray Film Antitrust Litig.,
No. 93-5904, 1998 WL 661515 (E.D.N.Y. Aug. 7, 1998) 19

In re Merrill Lynch & Co. Inc., Research Reports Sec. Litig.,
No. 02 MDL 1484, 2007 WL 313474 (S.D.N.Y. Feb. 1, 2007).....17

Missouri v. Jenkins,
491 U.S. 274 (1989).....20, 21

Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar,
No. 06 Civ. 4270 (PAC), 2009 WL 5851465 (S.D.N.Y. Mar. 31, 2009).....5

Robbins v. Koger Props., Inc.,
116 F.3d 1441 (11th Cir. 1997) 16

In re Sadia S.A. Sec. Litig.,
No. 08 Civ. 9528 (SAS), 2011 WL 6825235 (S.D.N.Y. Dec. 28, 2011).....5

Savoie v. Merchs. Bank,
166 F.3d 456 (2d Cir. 1999).....3

Shapiro v. J.P. Morgan Chase & Co
No. 11-8331, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014).....19

Stefaniak v. HSBC Bank USA N.A.,
No. 05-720, 2008 WL 7630102 (W.D.N.Y. June 28, 2008).....6

Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,
No. 01-CV-11814 (MP), 2004 WL 1087261 (S.D.N.Y. May 14, 2004).....9, 18

In re Telik Inc. Sec. Litig.,
576 F. Supp. 2d 570 (S.D.N.Y. 2008).....9, 20

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007).....18

Varljen v. H.J. Meyers & Co.,
No. 97 CIV 6742 (DLC), 2000 WL 1683656 (S.D.N.Y. Nov. 8, 2000) 23

Walmart Stores Inc. v. Visa USA Inc.,
396 F. 3d 96 (2d Cir. 2005).....21

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005).....18, 22

Statutes

15 U.S.C. §78u-4(a)(4) 23

Other Authorities

Fed. R. Civ. P. 23(h) 1

Labaton Sucharow LLP and Scott+Scott, Attorneys at Law LLP, Court-appointed Lead Counsel for Oklahoma Police Pension Fund and Retirement System and City of Providence, Rhode Island (collectively, "Lead Plaintiffs")[1] in this securities class action, respectfully submit this memorandum of law in support of their motion, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for: (i) an award of attorneys' fees; (ii) payment of litigation expenses incurred in prosecuting the Action; and (iii) payments to Lead Plaintiffs, pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

PRELIMINARY STATEMENT

After more than two years of litigation, including ancillary litigation related to the voluntary petition of RCS Capital Corporation ("RCAP" or the "Company") for relief under Chapter 11 of the Bankruptcy Code, Lead Counsel have successfully negotiated a very favorable settlement of this class action with RCAP, RCAP Holdings, LLC ("RCAP Holdings"), RCAP Equity, LLC ("RCAP Equity"), Nicholas S. Schorsch, Brian S. Block, Edward M. Weil, Jr., William M. Kahane, Brian D. Jones, Peter M. Budko, Mark Auerbach, Jeffrey Brown, C. Thomas McMillen and Howell Wood (collectively, "Defendants") in the amount of $31,000,000 in cash. The proposed Settlement represents a substantial recovery for the Settlement Class of approximately 10% of maximum provable damages, assuming a jury found Defendants liable, which is an excellent result that will bring to a close contentious and challenging litigation.

For their substantial efforts in achieving this result, Lead Counsel seek a fee of 30% of the Settlement Fund. Lead Counsel also seek payment of $174,333.68 in litigation expenses incurred in prosecuting the Action and $5,000 to each of the Lead Plaintiffs, pursuant to the PSLRA.

[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation and Agreement of Settlement, dated June 2, 2017 (the "Stipulation"), filed with the Court on June 2, 2017. ECF No. 134-1.

As set forth in detail in the accompanying Joint Declaration of Deborah Clark-Weintraub and Ira Schochet (the "Joint Declaration" or "Joint Decl."),[2] the recovery obtained for the Settlement Class was achieved through the skill, experience, and effective advocacy of Lead Counsel. Lead Counsel's efforts to date have been without compensation of any kind and the fee has been wholly contingent upon the result achieved. It is respectfully submitted that the attorneys' fee request is fair and reasonable when one considers, among other things: (i) the excellent result achieved for the Settlement Class; (ii) the unique risks and challenges faced by counsel during the litigation; (iii) that Lead Plaintiffs, sophisticated institutional investors, have endorsed the fee request; and (iv) the amount of fees awarded by courts within the Second Circuit and this district in comparable cases.

For the reasons set forth herein and in the Joint Declaration, Lead Counsel respectfully submit that the attorneys' fees requested are fair and reasonable under the particular circumstances now before this Court, and that the expenses requested, including reimbursement to the Lead Plaintiffs, are reasonable in amount and should be approved.

ARGUMENT

I. A REASONABLE PERCENTAGE-OF-THE-FUND RECOVERED IS THE APPROPRIATE METHOD FOR AWARDING ATTORNEYS' FEES IN COMMON FUND CASES

As the Court is aware, attorneys who achieve a benefit for class members in the form of a "common fund" are entitled to be compensated for their services from that settlement fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a

[2] The Joint Declaration describes the history of the litigation, the claims asserted in the Action, the investigation undertaken, and the risks of the litigation, among other things. All exhibits referenced herein are annexed to the Joint Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference refers to the designation of the entire exhibit and the second alphabetical reference refers to the exhibit designation within the exhibit.

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"). *See also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). The purpose of the common fund doctrine is to fairly and adequately compensate counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation on their behalf. *See Goldberger*, 209 F.3d at 47.

Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See, e.g.*, *Hicks v. Morgan Stanley*, No. 01-cv-10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."); *City of Providence v. Aeropostale, Inc*., No. 11-cv-7132 (CM), 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) *aff'd*, *Arbuthnot v. Pierson,* No. 14-2135, slip op. (2d Cir. June 10, 2015) ("[A]wards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature."). Courts in this Circuit have consistently adhered to these teachings. *See infra,* §III.E.

The Second Circuit has authorized district courts to employ the percentage-of-the-fund method when awarding fees in common fund cases. *See Goldberger,* 209 F.3d at 47 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used). In expressly approving the percentage method, the Second Circuit recognized that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger,* 209 F.3d at 48, 49; *Savoie v. Merchs. Bank,*

166 F.3d 456, 460 (2d Cir. 1999) ("percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases").

Indeed, "[t]he trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121 (2d Cir. 2005) (internal quotation omitted); *see also City of Providence,* 2014 WL 1883494, at *11 (same); *In re IMAX Sec. Litig.,* No. 06 Civ. 6128 (NRB), 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) ("'the percentage method continues to be the trend of district courts in the [Second] Circuit'").[3]

Given the Second Circuit's explicit approval of the percentage method in *Goldberger*, and the trend among the district courts in this Circuit, Lead Counsel respectfully submits that the Court should award the requested attorneys' fees based on a percentage of the fund.

II. A FEE OF 30% IS FAIR, REASONABLE AND CONSISTENT WITH FEES AWARDED IN SIMILAR CASES

This Court, like others within the Second Circuit, has previously awarded fees of 30% or more in securities class actions. *See, e.g., Perry v. Duoyuan Printing, Inc.*, No. 10 CIV 7235 (GBD), slip op. at 2 (S.D.N.Y. Nov. 27, 2013) (awarding 33 1/3% fee in $4.3 million settlement where case settled during pendency of motion to dismiss) (Ex. 12);[4] *Provo v. China Organic Agriculture, et al.*, No. 08-cv-10810, slip op. at 6 (S.D.N.Y. Dec. 7, 2010) (awarding 33 1/3% of $600,000 settlement where the case settled before the motion to dismiss) (Ex. 12); *Hoi Ming Michael Ho v. Duoyuan Global Water*, No. 10-cv-07233 (GBD), slip op. at 8 (S.D.N.Y. Feb. 5, 2014) (awarding 33 1/3% of $5.15 million settlement where the case settled after the motion to

[3] Citations are omitted and emphasis is added, unless otherwise noted.
[4] Exhibit 12 is a compendium of unreported cases.

dismiss but before formal discovery began) (Ex. 12); *Perry v. Duoyuan Printing, Inc.*, No. 10 CIV 7235 (GBD), slip op. at 2 (S.D.N.Y. June 16, 2015) (awarding 33 1/3% fee of $1.9 million settlement where case settled during fact discovery) (Ex. 12); *In re Celestica Inc. Sec. Litig.*, No. 07-cv-00312-GBD, slip op. at 2 (S.D.N.Y. July 28, 2015) (awarding 30% fee of $30 million settlement) (Ex. 12); *In re Winstar Commc'ns Sec. Litig.*, No. 01 Civ. 3014 (GBD), slip op. at 2 (S.D.N.Y. Nov. 13, 2013) (awarding a fee of 33 1/3% of the $10 million settlement) (Ex. 12).

On a percentage basis, a 30% award is also very comparable to fee awards in settlements with recoveries similar to the $31 million Settlement Amount here. For instance, in *Central States and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007), the Second Circuit affirmed the district court's award of a 30% fee based on a $42.5 million settlement, noting that the "District Court applied the *Goldberger* test and made specific and detailed findings from the record, as well as from its own familiarity with the case, including the fact that counsel expended substantial time and effort in the litigation, that the case was litigated on a purely contingent basis." *See also In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377 (SAS), slip op. at 7 (S.D.N.Y. June 11, 2012) (awarding 30% of $77.1 million fund) (Ex. 12); *Celestica*, No. 07-cv-00312-GBD, slip op. at 2 (awarding 30% fee of $30 million settlement) (Ex. 12); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (awarding 33.3% of $35 million ERISA class action settlement); *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement).

A survey of other cases finds similar awards. *See, e.g.*, *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of

the Settlement Fund is typical in class action settlements in the Second Circuit"); *Stefaniak v. HSBC Bank USA, N.A.*, No. 05-720, 2008 WL 7630102, at *3 (W.D.N.Y. June 28, 2008) (awarding 33% of fund, finding it "typical in class action settlements in the Second Circuit"); *Maley v. Del Global Techs. Corp.,* 186 F. Supp. 2d 358, 368 (S.D.N.Y. 2002) (awarding 33 1/3% of $11.5 settlement and citing cases that also awarded over 30% including *In re Apac Teleservs., Inc. Sec. Litig*., No. 97-Civ. 9145 (S.D.N.Y. June 29, 2001) where the court awarded 33 1/13% of $21 million settlement and *Newman v. Caribiner Int'l Inc*., No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) where the court awarded 33 1/3% of $15 million settlement).

An examination of fee decisions in securities class actions with similarly sized settlements in other federal jurisdictions also shows that an award of 30% would be comparable. *See, e.g., In re Regions Morgan Keegan Closed-End Fund Litig.,* No. 07-cv-02830-SHM-dkv, slip op. at 21 (W.D. Tenn. Aug. 5, 2013) (awarding 30% of $62 million settlement) (Ex. 12); *South Ferry LP #2 v. Killinger*, No. C04-1599-JCC, slip op. at 9 (W.D. Wash. June 5, 2012) (awarding 29% of $41.5 million settlement) (Ex. 12); *Central Laborers' Pension Fund v. Sirva*, No. 04 C-7644, slip op. at 10 (N.D. Ill. Oct. 31, 2007) (awarding 29.85% of $53.3 million settlement) (Ex. 12); *In re McLeodUSA Inc. Sec. Litig*., No. C02-0001-MWB, slip op. at 5 (N.D. Iowa Jan. 5, 2007) (awarding 30% of $30 million settlement) (Ex. 12); *In re Heritage Bond Litig.*, No. 02–ML–1475 DT (RCx), 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005) (awarding 33 1/3% of $27.78 million settlement); *In re E.W. Blanch Holdings, Inc. Sec. Litig*., No. 01-258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33 1/3% of $20 million settlement). Accordingly, the 30% fee requested here is consistent with fees awarded in similar cases and would be reasonable.

III. OTHER FACTORS CONSIDERED WITHIN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS REASONABLE

The Second Circuit in *Goldberger* has explained that whether a court uses the percentage method or the lodestar approach, it should continue to consider the traditional criteria that reflect a reasonable fee in common fund cases, including: (i) the time and labor expended by counsel; (ii) the risks of the litigation; (iii) the magnitude and complexity of the litigation; (iv) the requested fee in relation to the settlement; (v) the quality of representation; and (vi) public policy considerations. *Goldberger*, 209 F.3d at 50. An analysis of these factors demonstrates that the requested fee would be fair and reasonable under the circumstances before this Court.

A. The Time and Labor Expended by Counsel

Lead Counsel and bankruptcy counsel, Lowenstein Sandler LLP, (collectively "Plaintiffs' Counsel") have expended substantial time and effort pursuing the claims on behalf of the Settlement Class. *See generally* Joint Decl. and Exs. 5 – A, 6 – A, and 7 – A. Since the inception of the Action, they have devoted more than 5,700 hours to this Action with a lodestar value of $4,149,852.50. Joint Decl. ¶ 74; Ex. 9 (Summary Table of Lodestars and Expenses).

The Settlement follows more than two years of litigation that included, *inter alia*:

- A thorough investigation of the claims and defenses that are the subject of the Action, which was ongoing throughout the Action as events, including RCAP's bankruptcy and the criminal indictment of certain Defendants, broke rapidly. This investigation involved, among other things, analyzing and continually incorporating information from: (i) United States Securities and Exchange Commission ("SEC") filings by RCAP, American Realty Capital Properties, Inc., and their affiliates; (ii) the sworn/verified allegations in *McAlister v. American Realty Capital Properties, Inc., et al*., Index No. 162499/2014 (Sup. Ct. N.Y. Cty.); (iii) other court filings related to RCAP and ARCP and the issues and events in question, including (a) the amended pleadings and other filings in *In re American Realty Capital Properties, Inc. Litigation*, Civil Action No. 1:15-mc-00040-AKH (S.D.N.Y); (b) the complaint filed in *RCS Creditor Trust v. Schorsch, et al*., Case No. 2017-0178 (Del. Ch.); (c) filings in the Bankruptcy Action; and (d) filings in actions and other proceedings brought by the United States Department of Justice ("DOJ") and SEC; (iv) securities analysts' reports and advisories about the Company

and ARCP; (v) press releases, investor presentations, and other public statements issued by the Company, ARCP, and their affiliates; (vi) transcripts of RCAP and ARCP conference calls; and (vii) media reports about RCAP, ARCP, and their affiliates (*see generally* Joint Decl.);

- Lead Counsel's identification of approximately 58 former employees of the Company and other persons with relevant knowledge and interviews with 13 of them (three of whom have provided information as confidential witnesses) (*id.* ¶ 12);

- Drafting a comprehensive Complaint, robust enough to satisfy the rigorous pleading standards of the PSLRA (*id.* ¶¶ 13-17);

- Responding to three complex motions to dismiss the Complaint and participating in an all-day oral argument with respect to the myriad issues presented in those motions (*id.* ¶¶ 18-20, 28);

- Navigating the bankruptcy proceeding to protect the class's interests, including by challenging the scope of the automatic bankruptcy stay, seeking revisions of RCAP's disclosure statement and plan of reorganization, seeking to preserve access to D&O liability insurance, and filing a reservation of rights and proofs of claim in the bankruptcy proceeding (*id.* ¶¶ 21-27);

- Consulting with experts (*id.* ¶¶ 43-50); and

- Exchanging detailed mediation statements in preparation for a mediation session, mediating the dispute with Defendants which included an in-person mediation as well as four months of hard-fought follow-up negotiations in which the central issues in the case were effectively litigated, and ultimately negotiating the terms of the Settlement (*id.* ¶¶ 31-34).

The legal work on the Action will not end with the Court's approval of the proposed Settlement. Additional hours and resources necessarily will be expended assisting members of the Settlement Class with their Proof of Claim and Release forms, shepherding the claims process, responding to Settlement Class Member inquiries, and moving for a distribution order. The time and effort devoted to this case by Plaintiffs' Counsel to obtain this $31 million Settlement confirm that the 30% fee request is reasonable.

B. The Risks of the Litigation

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004). "Courts have repeatedly recognized that 'the risk of litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award plaintiffs' counsel in class actions." *In re Telik Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008). For this reason, the Second Circuit has said that "[t]he level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of the multiplier." *McDaniel v. County of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010) (quoting *Goldberger*, 209 F.3d at 54).

While Lead Plaintiffs remain confident in their ability to prove their claims and to effectively rebut Defendants' defenses to survive the motions to dismiss and beyond, they recognize that proving liability was far from certain. For the reasons discussed below, there was a palpable risk that the case would not get past Defendants' motions to dismiss. Indeed, an empirical report published by NERA Economic Consulting surveying cases in 2016 found that with respect to motions to dismiss filed in securities class action cases, 44% were granted in full, 30% were granted in part, and only 25% were denied in full. *See* Svetlana Starykh and Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, at 21 (NERA Jan. 23, 2017), Ex. 11.

Although Lead Counsel succeeded in developing a compelling case that was sufficient to cause Defendants to settle substantially higher than is the norm, there remained significant uncertainties and obstacles to proving liability and damages. The primary risks are discussed below. For a more detailed discussion, the Court is respectfully referred to the Joint Declaration, at paragraphs 35 through 52, and the Memorandum of Law in Support of Lead Plaintiffs' Motion

for Approval of Proposed Class Action Settlement and Plan of Allocation ("Approval Brief"), at Sections I.C. 4-5 & 7.

1. Risks Concerning Liability

To succeed on their claims at trial, Lead Plaintiffs must establish that Defendants made misstatements or omissions of material fact, either with scienter in the case of the Exchange Act claims or without in the case of the Securities Act claims, in connection with the purchase of common stock and that the class suffered losses as a result of Defendants' misstatements and omissions. As set forth in the Joint Declaration, Defendants strongly disputed the existence of falsity, materiality, scienter and loss causation, and presented arguments and defenses that required considerable legal skill to rebut. *See* Joint Decl. ¶¶ 35-50.

Defendants' principal factual argument was that there was an insufficient nexus between the allegedly criminal accounting manipulations at ARCP that were disclosed in October 2014, which resulted in several criminal investigations and criminal proceedings, including the recent conviction of Defendant Block, and the allegedly materially false and misleading misstatements and omissions that Defendants made concerning the business prospects of RCAP. Defendants argued that ARCP and RCAP are separate businesses with different management teams and distinct financial results. In short, Defendants' primary defense was that Lead Plaintiffs were impermissibly imputing an alleged fraud at one company (ARCP) to an entirely separate company with different investors (RCAP) – when the latter company had not restated its financial results and was not the subject of any investigations related to the ARCP fraud. *See Id*. ¶¶ 36-37.

Lead Plaintiffs had the burden of explaining this complex and novel fraud to a jury, which involved a tangled web of corporate structures and complex business practices, including traded and non-traded real estate investment trusts ("REITs"), retail broker-dealers, a wholesale

broker-dealer, and an investment banking and advisory business. Three companies stood at the center of this web of Schorsch-managed and controlled entities: (1) AR Capital, LLC ("AR Capital"), a sponsor of non-traded REITs created and managed by Schorsch insiders; (2) RCAP, whose main businesses were selling ownership interests in AR Capital's non-traded REITs and "advising" them, usually in connection with transactions with other Schorsch-related entities; and (3) ARCP, a publicly traded REIT that provided liquidity events for – or purchased – AR Capital's non-traded REITs and had, at certain times, retained RCAP to advise it in connection with such transactions. The crux of the alleged fraud involved the actual strength and prospects of RCAP's business, which depended on the other Schorsch-controlled entities for its revenue, and all of which were closely identified as belonging to the same complex of entities, at a time when RCAP's leading executives were perpetrating an accounting fraud at one of those closely related entities. *Id.* ¶¶ 14-16, 39. Lead Counsel faced myriad challenges in clearly persuading a jury of these connections with respect to each element of Lead Plaintiffs' claims.

For instance, with respect to establishing materially false statements or omissions, Defendants argued that only one of the alleged misstatements mentions ARCP. As to the remaining alleged misstatements, Defendants argued that they are generally optimistic statements about RCAP's outlook; inactionable puffery or forward-looking statements that contained "cautionary language" in the offering materials; and statements concerning RCAP's historical performance. In response, Lead Plaintiffs contended that Defendants' statements as to RCAP's present financial strength and future prospects did not have to mention ARCP to render them misleading. Given both the close association of all Schorsch-related entities – a particularly important fact to the essential network of retail brokers who purchased REITs from RCAP's wholesale channel that were managed by AR Capital – and the significant business

RCAP conducted with the other Schorsch-related entities, there was a substantial undisclosed risk that RCAP's business could be destroyed upon disclosure of the fraud, a risk distinctly at odds with Defendants' glowing and optimistic statements. Indeed, when investors learned of the accounting fraud at ARCP, it was RCAP, not ARCP, which was driven into bankruptcy. *Id.* ¶¶ 38-39.

In view of the forgoing, Lead Counsel contended that Defendants' statements, including that RCAP's business was "a freight train that isn't going to slow for probably a decade" and that touted RCAP's "pipeline of activity" from other Schorsch-controlled entities, were materially false and misleading. *Id.* ¶ 40. However, there were significant risks that a jury would not find Plaintiffs' theory as credible as Defendants' counterarguments.

With respect to scienter, Defendants argued that Lead Plaintiffs' allegations are based on an accounting fraud at ARCP, and therefore Lead Plaintiffs could not prove an intent to deceive RCAP investors. In support, Defendants relied on the Second Circuit's holding that "the facts alleged must support an inference of an intent to defraud the plaintiffs rather than some other group." *ECA, Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co*., 553 F.3d 187, 198 (2d Cir. 2009). Lead Counsel disputed this contention and the relevance of the *ECA* precedent, given that the allegedly false and misleading statements were indisputably made to class members. Although Lead Counsel were confident that they would be able to gather sufficient evidence to establish scienter, they also knew that their work would involve unique challenges, given, among other things, the interplay between the fraud at ARCP and its alleged carryover impact at RCAP. Joint Decl. ¶ 42.

Another offshoot of the complexity of the alleged fraud was the fact that Defendants Schorsch and Block were only alleged to have directly made certain of the misstatements—*i.e.*,

misstatements appearing in the Company's 2013 Form 10-K (Complaint ¶¶ 85-93) that they each signed (Complaint ¶ 86), and oral misstatements during the February 12 and May 1, 2014 earnings conference calls that Schorsch made (Complaint ¶¶ 78, 95, 98-100, 102-03). Thus, with respect to the other alleged misstatements, primarily press releases, conference calls and other SEC filings that the individuals did not sign, Defendants argued that Lead Counsel would have needed to overcome *Janus Capital Grp, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), in which the Supreme Court held that Section 10(b) liability runs only as to the "maker" of a statement, throughout the course of the litigation. To do so, Lead Counsel would have needed to prove that Schorsch and Block were directly involved in creating the alleged misstatements, such that they should be found to be speakers, which Defendants would strenuously contest. For example, Block asserted at the motion to dismiss stage, and likely would continue to argue at summary judgment and trial, that he "had no management role at the Company during the class period." (ECF No. at 3). Thus, *Janus* presented a significant hurdle to establishing liability for certain of the statements. Joint Decl. ¶ 41.

2. Risks Concerning Loss Causation and Damages

Whether Lead Plaintiffs could prove loss causation and damages was also unsettled and this area would require a significant amount of effort on the part of Lead Counsel. Regarding damages, "[p]roof of damages in complex class actions is always complex and difficult and often subject to expert testimony." *City of Providence*, 2014 WL 1883494, at *15. Here, Lead Plaintiffs' consulting damages expert has estimated maximum class-wide aggregate damages of approximately $313 million, if all six allegedly corrective disclosures were established at trial. This includes maximum recoverable damages of approximately $311.5 million in connection with the Exchange Act claims and approximately $1.5 million in incremental Securities Act damages. *See* Declaration of Chad Coffman, CFA, Ex. 3 ¶¶ 7, 33; Joint Decl. ¶ 43. However, as explained below, Defendants would

likely make several arguments that, if accepted, would have substantially reduced the damages recoverable by Settlement Class Members.

As an initial matter, there was a significant risk that Defendants would continue to advance their argument that all of the disclosures after the October 29, 2014 disclosure of the accounting fraud at ARCP were not "corrective" because, at that point, the truth about the alleged fraud had been fully disclosed. In other words, that the truth was fully revealed on the first corrective disclosure, which would eliminate the five subsequent alleged corrective disclosures. As explained in the Coffman Declaration, in the event that Defendants were successful in arguing that all of the alleged corrective disclosures after October 29, 2014 should be excluded – based on their claim that the truth was fully disclosed as of that date – class-wide aggregate damages would be just $85.3 million. *See* Ex. 3 ¶¶ 8, 33; Joint Decl. ¶¶ 44, 48.

Defendants would also likely argue that some or all of the alleged corrective disclosures were unrelated to Defendants' alleged misstatements. Defendants would argue that of the six events alleged to be corrective disclosures, three do not even mention RCAP and the other alleged corrective disclosures did not correct any of the alleged misstatements. Joint Decl. ¶ 45. Lead Plaintiffs believed that they had compelling responses to such arguments. Among those were that: (1) the disclosures concerning Schorsch and Block's accounting manipulations at ARCP revealed a serious threat to the prospects for RCAP's wholesale broker-dealer and investment banking business that was known to Defendants but concealed by their earlier positive statements about these business segments and (2) the remaining disclosures of adverse events were as a result of the public revelation of that accounting scandal. *Id*. ¶ 46.

Given these competing views of the claims, there are a number of possible intermediate damages outcomes between $85.3 million and maximum damages of $313 million, if, in addition to

the first corrective disclosure, one or more, but not all, of the remaining five corrective disclosures are ultimately included. For example, if, in addition to the first corrective disclosure, the only other corrective disclosure included in the case is the corrective disclosure of November 10, 2014, then class-wide aggregate damages would be approximately $106.3 million. There are many other potential outcomes in which the class-wide aggregate damages would be below the maximum $313 million. *See* Ex. 3 ¶¶ 8-9, 33; Joint Decl. ¶ 49.

Lead Plaintiffs thus faced the significant possibility that the Court, at summary judgment or in a post-trial motion, or the jury could agree with Defendants' experts who would argue that that damages were significantly lower than what Lead Plaintiffs' expert maintained. The damage assessments of the Parties' trial experts would continue to be a "battle of experts" requiring significant work on the part of Lead Counsel and uncertainty for the class. *See, e.g., In re Flag Telecom Holdings Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *18 (S.D.N.Y. Nov. 8, 2010) (burden in proving the extent of the class's damages weighed in favor of approving fee request).

3. The Contingent Nature of Lead Counsel's Representation

Lead Counsel undertook this Action on an entirely contingent fee basis, assuming a substantial risk that the litigation would yield no or potentially little recovery and leave them uncompensated for their significant investment of time and expenses. Courts within the Second Circuit have consistently recognized that this risk is an important factor favoring an award of attorneys' fees. *See, e.g.*, *In re Am. Bank Note Holographics, Inc. Sec. Litig*, 127 F. Supp. 2d 418, 433(S.D.N.Y. 2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award").

Unlike counsel for defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel have not been compensated for any time or

expenses since this case began, and would have received no compensation or expenses had this case not achieved a recovery for the class. From the outset, Lead Counsel understood that they were embarking on a complex, expensive, and lengthy endeavor with no guarantee of ever being compensated for the enormous investment of time and money the case would require. In undertaking that responsibility, Lead Counsel were obligated to ensure that sufficient attorney and professional resources were dedicated to the prosecution of the Action and that funds were available to compensate staff and to pay for the costs entailed. Indeed, there have been many class actions in which plaintiffs' counsel took on the risk of pursuing claims on a contingent basis, expended thousands of hours and hundreds of thousands of dollars in expenses and time and received nothing for their efforts.[5] Indeed, this case could have been dismissed like so many others on Defendants' motions to dismiss, resulting in absolutely no recovery for the class or Lead Counsel. Accordingly, the contingency risk in this case strongly supports the requested attorneys' fee.

C. The Magnitude and Complexity of the Litigation

The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel. The complex and multifaceted subject matters involved in a securities class action such as this one amply support the fee request. *See Fogarazzo v. Lehman Bros. Inc.*, No. 03-5194, 2011 WL 671745, at *3 (S.D.N.Y.

[5] *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversal of jury verdict of $81 million against accounting firm after a 19-day trial); *Bentley v. Legent Corp.*, 849 F. Supp. 429 (E.D. Va. 1994), *aff'd*, *Herman v. Legent Corp.*, 50 F.3d 6 (4th Cir. 1995) (directed verdict after plaintiffs' presentation of its case to the jury); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendants after five years of litigation;); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict following two decades of litigation); *In re Apple Comput. Sec. Litig.*, No. C-84-20148, 1991 WL 238298, at *1-2 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *In re JDS Uniphase Corp. Sec. Litig.*, No. CO2-1486 CW, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict after four weeks of trial).

Feb. 23, 2011) ("courts have recognized that, in general, securities actions are highly complex"); *In re Merrill Lynch & Co. Inc., Research Reports Sec. Litig*., No. 02 MDL 1484, 2007 WL 313474, at *14 (S.D.N.Y. Feb. 1, 2007) ("[S]ecurities class litigation "is notably difficult and notoriously uncertain.'").

As described in greater detail in the Joint Declaration, the Action involved difficult, hotly disputed, and novel issues. Violations of the Securities Exchange Act of 1934 and the Securities Act of 1933 raise a panoply of facts. The claims against Defendants here arise from, in sum, a tangled web of corporate structures and complex business practices involving publicly-traded and non-traded REITs, retail broker-dealers, wholesale broker-dealers, and investment banking and advisory businesses. *See, e.g*., Joint Decl. ¶¶ 14-16. At every turn, the Action raised issues that required sophisticated analysis. Moreover, to reach a litigated conclusion, the Court would need to decide a contested motion for class certification, summary judgment motions, numerous *in limine* motions, oversee a complex trial, and decide likely post-trial motions.

Accordingly, the difficult nature of the issues encountered and magnitude of the case, as well as the effort that was expended over the past two years, strongly support the requested fee.

D. The Quality of Representation

The quality of the representation of plaintiffs' counsel is an important factor that supports the reasonableness of the fee request. *See Flag Telecom,* 2010 WL 4537550, at *28. Labaton Sucharow and Scott+Scott are nationally known as a leaders in the field of securities class action litigation and have substantial experience litigating securities class actions in courts throughout the country with success. *See* Joint Decl. ¶ 75; Ex. 5 – C, Ex. 6 - C. This favorable Settlement is attributable in substantial part to the diligence, hard work, and skill of counsel, who developed, litigated, and successfully negotiated the settlement of this Action.

The quality of opposing counsel is also important in evaluating the quality of counsel's work. *See Flag Telecom*, 2010 WL 4537550, at *28; *Teachers Ret. Sys*., 2004 WL 1087261, at *7. Indeed, Defendants' Counsel, Paul Weiss, Winston & Strawn LLP, and Steptoe & Johnson LLP, are long-time leaders among national litigation firms, with well-noted expertise in corporate litigation practices. *See, e.g., In re WorldCom Sec. Inc. Litig.,* 388 F. Supp. 2d 319, 358 (S.D.N.Y. 2005) (stating defense counsel, including Paul, Weiss, acted as "formidable opposing counsel" and were "some of the best defense firms in the country").

E. Public Policy Considerations

The federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits such as this one. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). The Supreme Court has emphasized that private securities actions 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); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).

Courts in the Second Circuit have held that public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation. *Flag Telecom*, 2010 WL 4537550, at *29. Specifically, "[i]n order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives." *In re WorldCom, Inc. Sec. Litig*., 388 F. Supp. 2d at 359. Indeed, Judge McMahon recently noted the importance of "private enforcement actions and

the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis" in *Shapiro v. J.P. Morgan Chase & Co*:

> [C]lass actions serve as private enforcement tools when . . . regulatory entities fail to adequately protect investors . . . . [P]laintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences . . . . [A]warding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

No. 11-8331, 2014 WL 1224666, at *24 (S.D.N.Y. Mar. 24, 2014) (citing, *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 515-16 (S.D.N.Y. 2009)); *see also Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *In re Med. X-Ray Film Antitrust Litig.*, No. 93-5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998) ("an adequate award furthers the public policy of encouraging private lawsuits…."). Public policy therefore supports awarding Lead Counsel's attorneys' fee request.

F. The Requested Attorneys' Fees in Relation to the Settlement

"In determining whether the Fee Application is reasonable in relation to the settlement amount, the Court compares the Fee Application to fees awarded in similar securities class-action settlements of comparable value." *In re Marsh & McLennan Co. Sec. Litig.*, No. 04-8144, 2009 WL 5178546, at *19 (S.D.N.Y. Dec. 23, 2009); *see also In re Veeco Instruments Inc. Sec. Litig.,* No. 05-1695, 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007) (noting that the fee awarded is "consistent with fees awarded in a similar class actions settlements of comparable value") (citation omitted). As discussed above, the compensation requested here is within the range of percentage fee awards given in comparable securities class action cases within the Second Circuit and in other district courts throughout the country. *See* § II. *supra*.

G. The Requested Attorneys' Fees are Also Reasonable Under the Lodestar Cross-Check

To ensure the reasonableness of a fee awarded under the percentage method, the Second Circuit encourages a "crosscheck" against counsel's lodestar. *Goldberger*, 209 F.3d at 50. Under the lodestar method, a court must engage in a two-step analysis: first, to determine the lodestar, the court multiplies the number of hours each attorney spent on the case by each attorney's reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work. *See, e.g., Flag Telecom*, 2010 WL 4537550, at *26 ("Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the engagements, the skill of the attorneys, and other factors"). Performing the lodestar cross-check here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Plaintiffs' Counsel have spent more than 5,798.5 hours in the prosecution of this case. *See* Joint Decl. ¶ 74; Exs. 5 – A, 6 – A, 7 – A and Ex. 9 (Summary Table of Lodestars and Expenses). This represents time spent on the Action by partners, of counsel, associates, paralegals, investigators, and professional analysts. *Id*.

The resulting lodestar at Plaintiffs' Counsel's current rates is $4,149,852.50. The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). The hourly rates of Plaintiffs' Counsel here range from $725 to $985 for partners, $585 to $710 for of-counsel, and $395 to $725 for other attorneys. *See* Joint Decl. ¶ 73. "In determining the propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have continually held that the standard is the rate charged in the community where the

services were performed for the type of services performed by counsel." *Telik,* 576 F. Supp. 2d at 589. In fact, "perhaps the best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that *defend* class actions on a regular basis." *Id*. Defense firm rates gathered and analyzed by Labaton Sucharow from bankruptcy court filings nationwide in 2016, in many cases, exceeded these rates. *See* Joint Decl. ¶ 73; Ex. 8.

Thus, the amount of attorneys' fees requested by Lead Counsel, $9,300,000, represents a multiplier of 2.2 of Plaintiffs' Counsel's lodestar. Within the Second Circuit, lodestar multiples between 1 and 5 are commonly awarded. *See, e.g., Walmart Stores Inc. v. Visa USA Inc.*, 396 F. 3d 96, 123 (2d Cir. 2005) (upholding a multiplier of 3.5 as reasonable on appeal); *In re Comverse Tech, Inc. Sec. Litig*., No. 06-1825, 2010 WL 2653354, at *5 (S.D.N.Y. June 24, 2010) (approving a 2.78 multiplier in case involving a $165 million settlement).

Plaintiffs' Counsel invested substantial time and effort prosecuting this Action to a successful completion. The requested fee, therefore, is reasonable, whether calculated as a percentage-of-the-fund or in relation to Plaintiffs' Counsel's lodestar.

H. The Settlement Class's Reaction to the Fee and Expense Request

In accordance with this Court's Preliminary Approval Order, 15,114 copies of the Notice were mailed to potential Settlement Class Members. *See* Declaration of Adam D. Walter Regarding: (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; (C) Report on Requests for Exclusion and Objections; and (D) Volume of Claims Received to Date, ¶¶ 2-9, Ex. 4. The Notice informed Members of the Settlement Class that Lead Counsel would make an application not to exceed 30% of the Settlement Fund (which includes interest) and litigation expenses not to exceed $425,000, plus interest at the same rate as is earned by the Settlement Fund. The time to object to the fee request expires on August 29, 2017. To date, not

a single objection to the fee and expense request has been received.[6]

IV. THE FEE WAS NEGOTIATED WITH LEAD PLAINTIFFS

Lead Plaintiffs are sophisticated institutional investors that manage hundreds of millions of dollars in assets for their beneficiaries. Lead Plaintiffs were substantially involved throughout the prosecution of the Action. They have evaluated the Fee and Expense Application and believe that it is fair and reasonable and warrants approval by the Court. *See* Exs. 1 & 2.

"[P]ublic policy considerations support fee awards where, as here, large public pension funds, serving as lead plaintiffs, conscientiously supervised the work of lead counsel, and gave their endorsement to lead counsel's fee request." *Marsh & McLennan,* 2009 WL 5178546, at *16; *see also WorldCom*, 388 F. Supp. 2d at 356 ("When class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight."). Accordingly, Lead Plaintiffs' endorsement of the fee and expense request supports its approval.

V. PLAINTIFFS' COUNSEL'S EXPENSES WERE REASONABLY INCURRED AND NECESSARY TO THE PROSECUTION OF THIS ACTION

Lead Counsel also respectfully request $174,333.68 in expenses incurred in the Action. These expenses are set forth in the individual firm declarations submitted herewith, *see* Exs. 5 - B, 6 - B, 7 - B, and are of the type approved by courts. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which 'the paying, arms' length market' reimburses attorneys . . . [and] For this reason, they are properly chargeable to the Settlement

[6] Lead Counsel will address any objections to the fee and expense request in their reply papers, which will be filed with the Court by September 21, 2017.

fund.").

The most significant expenses were the costs of consulting experts and mediation fees, which totaled $120,640.16, or approximately 70% of Plaintiffs' Counsel's expenses. Lead Plaintiffs worked with consulting experts in the fields of damages, the REIT industry, and to develop the proposed Plan of Allocation. Mr. Meyer's work was critical to achieving the proposed Settlement. *See* Joint Decl. ¶¶ 32-34, 86. The remaining expenses are attributable to such things as the costs of computerized research, duplicating documents, travel, process service and filing fees, transcripts, and other incidental expenses. *Id*. ¶ 87.

The Notice advised potential Class Members that Lead Counsel would seek payment of litigation expenses not to exceed $425,000. Ex. 4 – A at 2. The expenses sought here are well below this "cap" and should be awarded. Additionally, not a single objection to the expense request has been received to date.

VI. LEAD PLAINTIFFS' REIMBURSEMENT PURSUANT TO PSLRA

Finally, Lead Counsel seek a modest award of $5,000 for Lead Plaintiffs Oklahoma and $5,000 for Providence, pursuant to the PSLRA, which provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4). The Notice advised that the $425,000 expense cap may include an application by Lead Plaintiffs for reimbursement and, to date, no one has objected to the request. *See* Ex. 4 – A at 2.

Courts "award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." *Morgan Stanley*, 2005 WL 2757792, at *10; *see also Varljen v. H.J. Meyers & Co.*, No. 97 CIV 6742 (DLC), 2000 WL 1683656, at *6 n.2 (S.D.N.Y. Nov. 8, 2000) (reimbursement

of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel"). Here, both Lead Plaintiffs were dedicated to the prosecution of this case and provided valuable oversight to Lead Counsel for more than two years. *Id*.

Numerous cases have approved payments to compensate lead plaintiffs for the time and effort devoted by them. *See, e.g., In re Satyam Computer Servs. Ltd. Sec. Litig*., No. 09-MD-2027-BSJ, slip op. at 3-4 (S.D.N.Y. Sept. 13, 2011) (awarding a combined $193,111 to four institutional lead plaintiffs) (Ex. 12); *Marsh & McLennan,* 2009 WL 5178546, at *21 (awarding a combined $214,657 to two institutional lead plaintiffs); *Winstar*, No. 01 Civ. 3014 (GBD), slip op. at 2 (awarding $60,000 to lead plaintiffs) (Ex. 12).

Accordingly, Lead Counsel respectfully request that the Court approve Lead Plaintiffs' requests.

CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully request the Court award attorneys' fees of 30% of the Settlement Fund, payment of litigation expenses in the amount of $174,333.68, plus accrued interest at the same rate as is earned by the Settlement Fund, and payment of $5,000 to each of the Lead Plaintiffs pursuant to the PSLRA. A proposed order will be submitted with Lead Counsel's reply papers after the deadline for objections has passed.

DATED: August 14, 2017

Respectfully submitted,

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Lead Counsel for Lead Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2017, I caused the foregoing Memorandum of Law in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Payment of Litigation Expenses to be served electronically on all ECF Participants.

/s/ Ira A. Schochet
Ira A. Schochet