UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CITY OF ST. CLAIR SHORES GENERAL EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. LENDER PROCESSING SERVICES, INC., *et al.*, Defendants.	No. 3:10-cv-01073-TJC-JBT

LEAD PLAINTIFF'S COUNSEL'S MODIFIED MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES AND LEAD PLAINTIFF EXPENSES AND INCORPORATED MEMORANDUM OF LAW

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MOTION

Labaton Sucharow LLP ("Lead Counsel") and Robbins Geller Rudman & Dowd LLP ("Liaison Counsel") (collectively, "Lead Plaintiff's Counsel") negotiated a settlement with Defendants of $14,000,000 in cash (the "Settlement").[1] The Settling Parties modified the original Settlement by setting aside up to $900,000 of the $14 million Settlement Amount (the "Opt-Out Set Aside") for LPS[2] to pay and/or defend a claim asserted by a large investor that timely and validly excluded seven of its funds from the Settlement Class (the "Opt-Outs") and filed a securities fraud lawsuit against Defendants (the "Opt-Out Action").

For their efforts in achieving the Settlement, as amended, Lead Plaintiff's Counsel seek a percentage fee of 25% of $13,100,000 (the Settlement Amount minus the maximum Opt-Out Set-Aside amount), 25% of any funds remaining in the Opt-Out Set-Aside after the payment to LPS as contemplated by the Amendment, plus interest on such fees at the same rate as earned by the Settlement Fund, and reimbursement of litigation expenses of

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[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation and Agreement of Settlement (the "Stipulation"), dated January 28, 2013, and filed May 6, 2013 (ECF No. 93-1) and the First Amendment to Stipulation and Agreement of Settlement (the "Amendment"), dated and filed October 22, 2013 (ECF No. 106-1).

[2] As a result of a merger transaction, on January 3, 2014 the entity known as Lender Processing Services, Inc. ("LPS") became Black Knight InfoServ, LLC ("BKIL"). All references to LPS in this motion and memorandum; Lead Plaintiff's Motion for Final Approval of Class Action Settlement, as Amended, and Plan of Allocation of Settlement Proceeds and Incorporated Memorandum of Law; and the Declaration of Jonathan Gardner in Support of Motions for Final Approval of (I) Proposed Class Action Settlement, as Amended, and Plan of Allocation and (II) Lead Plaintiff's Counsel's Modified Motion for Attorneys' Fees and Reimbursement of Litigation Expenses, are intended, with respect to any period of time following January 3, 2014, to refer to BKIL. Lead Plaintiff's Counsel have conferred with Defendants' Counsel and it is the understanding and intention of the Settling Parties that all references to LPS in the Stipulation and Amendment shall refer, with respect to any period of time following January 3, 2014, to BKIL.

$125,888.01 incurred in prosecuting the Action.[3] The substantial and certain recovery obtained for the Settlement Class was achieved through the skill, experience, and effective advocacy of Lead Plaintiff's Counsel. Lead Plaintiff's Counsel's efforts to date have been without compensation of any kind and the fee has been wholly contingent upon the result achieved.[4]

Lead Plaintiff's Counsel now respectfully move the Court for an order approving Lead Plaintiff's Counsel's modified application for attorneys' fees and reimbursement of litigation expenses including Lead Plaintiff's application for reimbursement of its reasonable costs and expenses related to the representation of the proposed Settlement Class.

MEMORANDUM OF LAW

I. PRELIMINARY STATEMENT

As set forth below, the requested attorneys' fee is consistent with fees awarded in similar actions in this Circuit and uses the appropriate method for compensating counsel in

[3] The attorneys' fees requested by Lead Plaintiff's Counsel have been reduced as a result of the Amendment. Lead Plaintiff's Counsel originally requested 25% of $14 million.

[4] Submitted herewith in support of approval of the proposed Settlement, as amended, is Lead Plaintiff's Motion for Final Approval of Class Action Settlement, as Amended, and Plan of Allocation of Settlement Proceeds and Incorporated Memorandum of Law (the "Final Approval Memorandum") and the Declaration of Jonathan Gardner in Support of Motions for Final Approval of (I) Proposed Class Action Settlement, as Amended, Plan of Allocation and (II) Lead Plaintiff's Counsel's Modified Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Gardner Declaration" or "Gardner Decl."), which more fully describes the history of the Action, the claims asserted, the investigation undertaken, the negotiation and substance of the settlement, the substantial risks of the Action, and the reasonableness of the fee request.

Also submitted herewith are declarations from Lead Plaintiff's Counsel setting forth the time spent and expenses incurred in prosecuting the Action. *See* Exs. 3 and 4 to the Gardner Declaration. All exhibits referenced herein are annexed to the Gardner Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Gardner Declaration and the second reference is to the exhibit designation within the exhibit itself.

complex contingent cases. The amount requested is warranted in light of the substantial recovery obtained for the Settlement Class and the significant obstacles presented in the prosecution and settlement of the Action. Lead Plaintiff Baltimore County Employees' Retirement System ("Lead Plaintiff" or "Baltimore") has also approved the requested fee, something envisioned by Congress when it enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *See* 15 U.S.C. §78u-4; Declaration of Michael E. Field, County Attorney of Baltimore County Employees' Retirement System, In Support of (I) Lead Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement, as Amended, and Plan of Allocation and (II) Lead Counsel's Motion for Attorneys' Fees and Payment of Litigation Expenses ("Field Declaration"), Ex. 2 ¶¶2, 6. Congress believed that court-appointed lead plaintiffs, who have a significant financial stake in the outcome of the case, would be in a better position to select counsel and to assess the reasonableness of attorneys' fees.

Moreover, as detailed below and in the Gardner Declaration, the requested fee is fair and reasonable under applicable standards. The Action involves complex legal issues, including the disclosure obligations under the Securities Exchange Act of 1934 (the "Exchange Act"), is subject to the provisions of the PSLRA, and presented associated risks and difficulties. The effect of the PSLRA has been to make it harder for investors to successfully prosecute securities class actions. As former United States Supreme Court Justice Sandra Day O'Connor noted in *Alaska Elec. Pension Fund v. Flowserve Corp*., 572 F.3d 221, 235 (5th Cir. 2009),[5] "[t]o be successful, a securities class-action plaintiff must

[5] Internal citations are omitted, and emphasis is added, unless otherwise noted.

thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action."

Lead Plaintiff's Counsel firmly believe that the Settlement, as amended, is the result of their creative and diligent services, as well as their reputations for zealously prosecuting meritorious claims through trial and subsequent appeals. In a case asserting claims based on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Lead Plaintiff's Counsel succeeded in securing a very good result for the Settlement Class under difficult and challenging circumstances. As a result, Lead Plaintiff's Counsel submit that the requested fee is fair and reasonable and should be awarded by the Court.

In accordance with this Court's Preliminary Approval Order of the original Settlement, 67,471 copies of the Notice were sent to potential Members of the Settlement Class and a Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire*. *See* ECF No. 105 ¶¶2-3; ECF No. 101-2 ¶12. The Notice informed Members of the Settlement Class that Lead Plaintiff's Counsel would make an application for fees in an amount not to exceed 30% of the Settlement Fund, which includes interest, and for an award of expenses not to exceed $200,000 plus accrued interest on such amount. *See* ECF No. 101-2 at Exhibit A. The deadline for filing objections to the original fee and expense request was October 4, 2013 and no objections to Lead Plaintiff's Counsel's request were received.

Likewise, to date, there have been no objections to Lead Plaintiff's Counsel's modified fee request.[6] Pursuant to the Court's Order Granting Preliminary Approval to First Amendment to Stipulation of Settlement and Directing Dissemination of Supplemental Notice to Settlement Class ("Second Preliminary Approval Order," ECF No. 111), 71,361 copies of the Supplemental Notice were sent to potential Settlement Class Members and nominees. *See* Ex. 1 ¶¶5-8. The Supplemental Notice informed Settlement Class Members that Lead Plaintiff's Counsel would seek an award of 25% of $13,100,000, 25% of any funds remaining in the Opt-Out Set-Aside after payment to LPS as contemplated in the Amendment, and reimbursement of litigation expenses not to exceed $196,000. *See* Ex. 1-A at 2.

For the reasons set forth herein and in the Gardner Declaration, Lead Plaintiff's Counsel respectfully submit that the attorneys' fees and expenses requested are fair and reasonable under the applicable legal standards and in light of the risks undertaken, and should be awarded by the Court. Finally, Lead Plaintiff's request for $3,629.54 in expenses reasonably incurred, including lost wages, is reasonable and should be awarded.

II. ARGUMENT

A. A Reasonable Percentage of the Fund Recovered Is the Appropriate Method for Awarding Attorneys' Fees in the Eleventh Circuit

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.*

[6] The deadline for filing objections is January 31, 2014. Should any be received, they will be addressed in Lead Plaintiff's Counsel's reply papers that will be filed with the Court on or before February 14, 2014.

Van Gemert, 444 U.S. 472, 478 (1980) ("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"). *See also Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991).

For their efforts in creating a common fund for the benefit of the Settlement Class, Lead Plaintiff's Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. In recent years, the percentage method of awarding fees has become widely accepted, if not the prevailing method, for awarding fees in common fund cases throughout the United States. A percentage fee award is appropriate because it encourages counsel to obtain the maximum recovery for the class at the earliest possible stage of the litigation and, hence, most fairly correlates plaintiffs' counsel's compensation to the benefit achieved for the class. This rule, known as the common fund doctrine, is established law. *See, e.g., Trs. v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885). In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court recognized that under the "common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class." The percentage-of-recovery method is the only method expressly approved by the Supreme Court in common fund cases.

Indeed, the Eleventh Circuit has ruled that the percentage method is mandatory in common fund cases. *See Camden*, 946 F.2d at 774-75 ("the percentage of the fund approach is the better reasoned in a common fund case. . . [h]enceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund

established for the benefit of the class."). Likewise, supporting authority for the percentage method in federal courts throughout the United States is overwhelming.[7]

There is no "hard and fast" rule dictating what constitutes a reasonable percentage of the recovery to award "because the amount of any fee must be determined upon the facts of each case." *Camden*, 946 F.2d at 775.[8] In *Camden*, the court noted that:

> In an effort to provide appellate courts a record for review of attorneys' fee awards, district courts are beginning to view the median of this 20% to 30% range [range of majority of awards in common fund cases], *i.e.*, 25%, as a "bench mark" percentage fee award which may be adjusted in accordance with the individual circumstances of each case . . . .

Id. at 775. Given the complexity of the issues at the heart of this Action, including the multiple corrective disclosures alleged and whether those disclosures sufficiently relate to the alleged misrepresentations, as well as uncertainty concerning whether knowledge of the alleged fraud by the Individual Defendants could be established, Lead Plaintiff's entitlement to recovery was correspondingly in doubt. Indeed, there is considerable dispute between the Settling Parties over scienter and loss causation, including whether the market was aware, prior to the alleged corrective disclosures, of problems with LPS's attorney network and

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[7] *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 301 (1st Cir. 1995); *Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Florin v. NationsBank of Georgia*, 34 F.3d 560, 566 (7th Cir. 1994); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994). Moreover, the PSLRA, which governs this Action, contemplates that courts will award fees based on a percentage of the fund. *See* 15 U.S.C. §78u-4(a)(60) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

[8] In this regard, the Eleventh Circuit expressly noted than "an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded." *Id.* at 774-75.

whether information regarding the document execution practices at an LPS subsidiary was material. *See* Gardner Decl. ¶¶48-52. In contrast, the proposed Settlement, as amended, achieves the certainty of a substantial distribution to the Settlement Class. Therefore, a fee of 25% - the benchmark for percentage recoveries in common fund cases - is clearly reasonable and within the range of percentages awarded in similar cases.

B. The Requested Fee Is Reasonable Under the Applicable Factors

The Eleventh Circuit recommends that district courts consider several factors to determine what constitutes a reasonable percentage award. *See Camden*, 946 F.2d at 773, 775.[9] These factors include: (i) the time and labor required; (ii) the novelty and the difficulty of the questions; (iii) the skill requisite to perform the legal service properly; (iv) the preclusion of other employment by the attorney due to the acceptance of the case; (v) the customary fee; (vi) whether the fee is fixed or contingent; (vii) time limitations imposed by the client or the circumstances;[10] (viii) the amount involved and the results obtained; (ix) the experience, reputation, and ability of the attorneys; (x) the "undesirability" of the case; (xi) the nature and length of the professional relationship with the client;[11] and (xii) awards in similar cases. The *Camden* court also recognized several additional factors that a court may consider in awarding a percentage fee award:

> Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the

[9] The court in *Camden* adopted the factors identified in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 718-19 (5th Cir. 1974).

[10] This factor is not applicable to the circumstances of this case.

[11] Labaton Sucharow has had experience representing Baltimore for nine years and in a number of matters in which Baltimore has served, and sought to serve, as a representative plaintiff and class representative. *See* Gardner Decl. ¶87.

> settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action. In most instances, there will also be additional factors unique to a particular case which will be relevant to the district court's consideration.

Camden, 946 F.2d at 775. While each of the above factors may be an appropriate consideration, the factors that will impact upon the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary. An analysis of the relevant factors confirms that the fee requested by Lead Plaintiff's Counsel is reasonable and should be approved by the Court.

1. The Time and Labor Required

Lead Plaintiff's Counsel have devoted a significant amount of time and resources to the research, investigation, and prosecution of this Action. The Settlement, as amended, was reached at a time when Lead Plaintiff's Counsel and Lead Plaintiff were fully cognizant of the strengths and weaknesses of the case, and the risks of continued litigation.

As set forth in greater detail in the Gardner Declaration, during the course of the Action, Lead Plaintiff's Counsel dedicated the needed resources to: (i) reviewing and analyzing documents filed publicly by the Company with the U.S. Securities and Exchange Commission ("SEC"); (ii) reviewing publicly available information, including press releases, news articles and other public statements issued by or concerning the Company and Defendants; (iii) researching reports issued by financial analysts concerning the Company; (iv) reviewing publicly available information concerning investigations conducted by the U.S. Department of Justice, U.S. Attorney General and the Attorneys General of multiple states; (v) reviewing pleadings filed in other pending litigation naming certain Defendants

herein as defendants or nominal defendants; (vi) researching the applicable law governing the claims and potential defenses; (vii) identifying 915 potential witnesses, contacting 182, and interviewing approximately 71 former LPS employees and other persons with relevant knowledge of the issues raised in this Action; (viii) preparing three fact-intensive amended class action complaints; (ix) successfully opposing Defendant's motion to dismiss the Amended Class Action Complaint (the "AC") with regard to the falsity of the alleged misstatements and loss causation; (x) consulting with experts on valuation, damages, and causation issues; and (xii) conducting confirmatory discovery including reviewing documents produced by LPS and interviewing two LPS personnel with extensive knowledge about the issues raised in the Action. *See* Gardner Decl. ¶13. Additionally, the Settling Parties ultimately entered into settlement negotiations, which were protracted and arm's-length, and included an in-person mediation session before Jed Melnick, Esq. of JAMS. *Id*. ¶¶14, 40.

Moreover, the Amendment to the Settlement was reached only after extensive negotiations between the Settling Parties to ensure that Settlement Class Members would recover no less than they would have recovered under the Settlement had the Opt-Outs participated in the Settlement. *See id*. ¶13.

Lead Plaintiff's Counsel expended over 5,701.90 hours with a resulting lodestar of $2,993,854.00, at counsel's 2013 billing rates, in the investigation and prosecution of the Action.[12] *See* Exs. 3-A, 4-A, and 5. Thus, the requested fee of 25% of $13.1 million, or

[12] The Supreme Court has indicated that the use of current rather than historical rates is appropriate in examining the lodestar because current rates more adequately compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1984). Courts in this

$3,275,000, represents a multiplier of less than 1.1.[13] While not required in the Eleventh Circuit, an analysis of the requested fee under the "lodestar/multiplier" approach further supports the reasonableness of the a 25% fee. *See, e.g.*, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-98 (11th Cir. 1999) ("while we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison"). The multiplier requested here is below the range of multipliers frequently awarded in class action settlements of similar magnitude in courts within the Eleventh Circuit. *See, e.g.*, *Pinto v. Princess Cruise Lines Ltd.,* 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) (noting that lodestar multipliers "'in large and complicated class actions' range from 2.26 to 4.5"); *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694-96 (N.D. Ga. 2001) (awarding fee representing a multiplier between 2.5 and 4); *Mashburn v. Nat'l Healthcare, Inc.,* 684 F. Supp. 679, 702 (M.D. Ala. 1988) ("A multiplier of approximately 3.1 in a national class action securities case is not unusual or unreasonable.").

Accordingly, the time and labor expended justify the fee requested.

Circuit also have stated that it is appropriate to use counsel's current rates in order to compensate for the delay in payment and inflation. *See, e.g., Mashburn v. Nat'l Healthcare, Inc*., 684 F. Supp. 679, 700 (M.D. Ala. 1988).

As supported by Lead Plaintiff's Counsel's sworn declarations, their rates are the same as those used in other securities or shareholder litigation. *See* Ex. 3 ¶4; Ex. 4 ¶4. They are also commensurate with rates used by peer defense-side law firms litigating matters of a similar magnitude. *See* sample of defense firm billing rates compiled by Labaton Sucharow from bankruptcy court filings in 2012, Ex. 8. *See also Blum*, 465 U.S. at 895 n.11 (explaining that courts should consider whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."); *In re MicroStrategy, Inc. Sec. Litig*., 172 F. Supp. 2d 778, 788 (E.D. Va. 2001) (finding rates were "within the range of reasonableness for PSLRA cases, where the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials").

[13] The multiplier is calculated by dividing the $3,275,000 fee request by the $2,993,854.00 lodestar of Lead Plaintiff's Counsel.

2. The Novelty and Difficulty of the Questions Involved

Lead Plaintiff faced all the "multi-faceted and complex legal questions endemic" to cases based on alleged violations of federal securities law. *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001) (same). Moreover, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Sterling Fin. Corp. Sec. Class Action*, No. 07-2171, 2009 WL 2914363, at *4 (E.D. Pa. Sept. 10, 2009). This Action was no exception.

The Action involved complex issues of law and fact that presented considerable risks to Lead Plaintiff's case. When Lead Plaintiff's Counsel undertook this representation there was no assurance that the Action would survive Defendants' attacks on the pleadings, motion for summary judgment, trial, and/or appeal. For example, Lead Plaintiff's Counsel addressed difficult issues in opposing Defendants' three motions to dismiss, including issues related to loss causation; whether Defendants' statements were false and misleading; and whether Defendants acted with the requisite scienter. Indeed, Defendants' motion to dismiss the Complaint on scienter grounds was pending at the time the Settlement was reached, and there was a risk that Lead Plaintiff's claims would not have survived the motion. Even had Lead Plaintiff survived Defendants' motion to dismiss, these issues would likely continue to be raised by Defendants at summary judgment and at trial. *See* Gardner Decl. ¶48.

With respect to the false and misleading statements, Defendants would likely continue to maintain that Lead Plaintiff could not establish that Defendants failed to fully and accurately report its revenues, citing the lack of a restatement of the Company's financial statements during the Class Period. *Id*. ¶49. With regard to scienter, Defendants would

continue to assert that Lead Plaintiff could not establish that the Individual Defendants were aware of the fraudulent document execution practices or the Company's improper business model, especially in light of the fact that none of the Individual Defendants were indicted or charged with respect to the Company's alleged practices, even following extensive federal and state investigations. *Id*. ¶50. Indeed, Defendants would undoubtedly cite to Lorraine Brown's (the President of DocX) plea allocution where she testified that she hid the fraudulent documentation execution practices at DocX from LPS's senior executives. *Id*.

With regard to loss causation, Defendants would likely continue to argue that the multiple corrective disclosures alleged in the Complaint do not sufficiently relate to the alleged misrepresentations. Defendants would also continue to argue that the market was aware, prior to the alleged corrective disclosures, of issues with LPS's attorney network and will no doubt dispute that the market considered information regarding the document execution practices at an LPS subsidiary material. *Id*. ¶¶51-52. Although Lead Plaintiff believes it could rebut these arguments with expert testimony, survive summary judgment, and prevail at trial, the causation issues required, and would continue to require, a considerable amount of legal and factual expertise and would be resolved through a battle between experts, the outcome of which is notoriously difficult to assess. *See, e.g.*, *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) ("In the 'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury.").

Accordingly, this factor also supports the reasonableness of the requested fee.

3. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation, and Ability of the Attorneys

The quality of the representation by Lead Plaintiff's Counsel and the standing of Lead Plaintiff's Counsel are important factors that support the reasonableness of the requested fee. *See Ressler*, 149 F.R.D. at 654; *see also David v. Am. Suzuki Motor Corp*., No. 08-CV-22278, 2010 WL 1628362, at *8 n. 15 (S.D. Fla. Apr. 15, 2010) (a court should consider "the skill and acumen required to successfully investigate, file, litigate, and settle a complicated class action lawsuit such as this one").

The quality of Lead Plaintiff's Counsel's work on this case, in addition to being aggressively diligent, was substantively excellent. From the outset, Lead Plaintiff's Counsel marshaled considerable resources and devoted significant time in the research and investigation of facts to support a pleading that could survive a motion to dismiss and position the litigation for class certification. Theories of damages were complex and Lead Plaintiff's Counsel devoted extensive time and analysis to working with experts to formulate a class-wide method of calculating damages. *See* Gardner Decl. ¶79.

The recovery obtained for the Settlement Class is the direct result of the significant efforts of highly-skilled and specialized attorneys who possess substantial experience in the prosecution of complex securities class actions. *See Id*. ¶80; Exs. 3-C and 4-F. The Settlement, as amended, represents a favorable recovery for the Settlement Class, one that is attributable to the diligence, determination, hard work, and reputation of Lead Plaintiff's Counsel.

The quality of opposing counsel is also important in evaluating the quality of Lead Plaintiff's Counsel's work. *See, e.g., Sunbeam*, 176 F. Supp. 2d at 1334; *Ressler*, 149 F.R.D. at 654. Defendants were represented by experienced and highly-skilled lawyers from Cooley, LLP and Bedell, Dittmar, DeVault, Pillans & Coxe, PA, well-respected firms. All defense counsel have well-deserved reputations for vigorous advocacy in the defense of complex civil cases such as this. The ability of Lead Plaintiff's Counsel to obtain a favorable settlement in the face of such legal opposition confirms the quality of Lead Plaintiff's Counsel's representation.

4. The Preclusion of Other Employment

When Lead Plaintiff's Counsel undertook to represent Lead Plaintiff in this matter, it was with the expectation that a significant amount of time and effort in its prosecution, and large sums in out-of-pocket expenses, would be required. The time spent by Lead Plaintiff's Counsel on this case was at the expense of the time that they could have devoted to other matters.

5. The Customary and Contingent Nature of the Fee

The "customary fee" in a class action lawsuit of this nature is a contingency fee because virtually no individual possesses a sufficiently large stake in the litigation to justify paying his attorneys on an hourly basis. *See Ressler*, 149 F.R.D. at 654; *see also Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988).

The Court should give substantial weight to the contingent nature of Lead Plaintiff's Counsel's fees when assessing the fee request. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Courts have

consistently recognized that the risk of receiving little or no recovery is a major factor in determining the award of fees, and that skilled counsel should be encouraged to undertake this risk. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1364 (S.D. Fla. 2011) ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."); *Pinto*, 513 F. Supp. 2d at 1339 ("attorneys' risk is 'perhaps the foremost factor' in determining an appropriate fee award"); *Behrens*, 118 F.R.D. at 548 (S.D. Fla. 1988) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees").

Indeed, the common fund approach is also grounded on a policy of encouraging counsel to act as "private attorneys general" to vindicate the rights of class members, most of whom have small individual claims:

> [C]ourts also have acknowledged the economic reality that in order to encourage 'private attorney general' class actions brought to enforce . . . laws on behalf of persons with small individual losses, a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid.

Mashburn 684 F. Supp. at 687.

Lead Plaintiff's Counsel know from experience that, despite the most vigorous and competent efforts, success in contingent litigation such as this is never guaranteed. In similar cases, plaintiffs' counsel have suffered major defeats after years of litigation, trial, and appeals in which they expended millions of dollars in time and received no compensation at all. Even a victory at the trial stage is not a guarantee of success. A good example is *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997), in which the Eleventh Circuit reversed an $81.3 million jury verdict won by plaintiffs in a securities class action after

almost seven years of litigation and rendered judgment for the defendant. The Court of Appeals ruled for the first time in this Circuit that plaintiffs could not establish loss causation by showing the price of the security was inflated by the misrepresentations. *Id.* at 1448-449. Thus, the *Robbins* case demonstrates how after years of hard-fought litigation, apparent success can be reversed or dramatically altered on appeal.

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable and difficult effort. The contingent nature of Lead Plaintiff's Counsel's representation strongly favors the requested percentage.

6. The Results Obtained

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Ressler*, 149 F.R.D. at 655 ("It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained."). The Settlement, as amended, is an excellent result for the Settlement Class in light of the risks and obstacles to recovery presented in this case, and the difficulty of establishing liability and damages at trial if Lead Plaintiff would have ultimately been successful in moving past the dismissal stage, certifying a class, and prevailing at the summary judgment stage.

Furthermore, as set forth in the Gardner Declaration, if less than $900,000 of the Opt-Out Set-Aside is used by LPS to resolve the Opt-Out Action, the amount remaining will be available for distribution to the Settlement Class. The Amendment will preserve the

Settlement and the Settlement Class's recovery. If the Opt-Outs had not opted-out of the Settlement, their significant losses would have diluted the recovery of other Settlement Class Members. Had the Opt-Outs stayed in the Settlement Class and filed claims, Lead Plaintiff and Lead Plaintiff's Counsel believe the Net Settlement Fund would have been reduced by at least $900,000 in order to pay claims associated with the Opt-Outs. Thus, under the Amendment, Settlement Class Members will recover no less than they would have recovered under the original Settlement had the Opt-Outs participated and received at least $900,000 in payment of their claims. *See* Gardner Decl. ¶57.

The Settlement, as amended, is estimated to provide a recovery of approximately 5.25% of the maximum aggregate damages estimated by Lead Plaintiff's consulting damages expert, assuming full recovery of the stock drops following each of the alleged corrective disclosures. *See id*. ¶56. This recovery is well within the range of reasonable settlements. *See* Final Approval Memorandum §III.C.2.

Instead of facing additional years of uncertain, costly and time-consuming litigation, including potential appeals, the Settlement, as amended, will provide Settlement Class Members a benefit now without the risk of no recovery if the Action were to continue.

7. The "Undesirability" of the Case

This was a complex case that presented difficult issues, and the risk of no recovery was high. When Lead Plaintiff's Counsel undertook representation of Lead Plaintiff and the class in this matter, it was with the knowledge that they would have to spend substantial time and money and face significant risks without any assurance of compensation. The risks Lead Plaintiff's Counsel faced must be assessed as they existed at the time counsel undertook the

case and not in light of the settlement ultimately achieved. *See, e.g., In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1364 (undesirability and relevant risks to be judged as of the time the suit was commenced). The "undesirability" of the Action supports the requested percentage.

8. Awards in Similar Cases

Lead Plaintiff's Counsel are requesting a fee of 25% of $13.1 million (plus 25% of any funds remaining in the Opt-Out Set-Aside after LPS resolves the Opt-Out Action) which is well within the range of, and less than percentages awarded in similar cases within the Eleventh Circuit. *See, e.g., Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-98 (11th Cir. 1999) (*affirming* award of 33 1/3% of $40 million settlement); *Reina v. Tropical Sportswear Int'l Corp.*, No. 8:03-CV-1958-T-23TGW, slip op. at 10 (M.D. Fla. July 11, 2006) (awarding 30% of $8 million settlement) (submitted herewith as part of compendium of unpublished opinions, Ex. 9); *In re Cryo-Cell Int'l Sec. Litig.*, No. 8:03-CV-1011-T-17 EAJ, slip op. at 9 (M.D. Fla. Feb. 25, 2005) (awarding 30% of $7 million settlement) (Ex. 9); *LaGrasta v. Wachovia Capital Markets, LLC*, No. 01-CV-251, 2006 WL 4824480 (M.D. Fla. Nov. 6, 2006) (awarding 30% of $9 million settlement); *In re Carter's Inc. Sec. Litig.*, No. 1:08-CV-2940-AT, slip op. at 2 (N.D. Ga. May 31, 2012) (awarding 28% of $20 million settlement) (Ex. 9); *In re Friedman's Inc. Sec. Litig.*, No. 03-cv-3475, 2009 WL 1456698, at *2-4 (N.D. Ga. May 22, 2009) (awarding 30% of $14.9 million settlement); *In re ChoicePoint Inc. Sec. Litig.*, No. 1:05-CV-00686-JTC, slip op. at 1 (N.D. Ga. July 21, 2008) (awarding 30% of $10 million settlement) (Ex. 9); *AAL High Yield Bond Fund, et al. v.*

Ruttenberg, et al., No. 00-1404, slip op. at 2-3 (N.D. Ala. Dec. 14, 2005) (awarding 30% of $17.75 million settlement) (Ex. 9).

Thus, it is respectfully submitted that Lead Plaintiff's Counsel's fee request of 25% is reasonable.

III. IMPORTANT PUBLIC POLICY CONSIDERATIONS SUPPORT THE REQUESTED AWARD OF FEES

Public policy considerations support the requested fee award, as courts recognize that compensating attorneys in these cases is important. The federal securities laws are remedial in nature and, in order to effectuate their purpose of protecting investors, private lawsuits are to be encouraged. *See Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). The competing public policy considerations in this case are "the encouragement of counsel to accept worthy engagements and the discouragement of excessive lawyer compensation" at the class's expense. *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02-5575, 2006 U.S. Dist. LEXIS 78101, at *51 (S.D.N.Y. Sept. 28, 2006). Reasonable fee awards in such cases "encourage and support other prosecutions, and thereby forward the cause of securities law enforcement and compliance." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 750-51 (S.D.N.Y. 1985). Here, Lead Plaintiff's Counsel shouldered all of the risk of committing substantial resources to the litigation of this Action, and of working long hours in a heavily contested matter, notwithstanding significant uncertainty as to whether the Action would ultimately succeed. Thus, important public policy considerations will be promoted by the award of the reasonable fees requested herein.

IV. LEAD PLAINTIFF'S COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Litigation expenses should be reimbursed if they are "reasonable and necessary to obtain the settlement." *Ressler*, 149 F.R.D. at 657; *see also Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983) ("all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case" may be recovered); *Behrens*, 118 F.R.D. at 549 ("plaintiff's counsel is entitled to be reimbursed from the class fund for the reasonable expenses incurred in this action"); 1 Alba Conte, *Attorney Fee Awards*, 2.19, at 73-74 (3d ed. 2006) ("an attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved").

Lead Plaintiff's Counsel have incurred expenses totaling $125,888.01 in connection with the prosecution and resolution of the Action. *See* Gardner Decl. ¶¶90-94. This figure includes amounts incurred to pay fees of consulting experts, outside investigators, copying, telephone, computer-assisted research, court fees, travel, mailing and fax costs, and other customary expenditures. The expenses incurred were reasonable and necessary to successfully prosecute this Action. The original Notice informed potential Settlement Class Members that Lead Plaintiff's Counsel would seek reimbursement of expenses not to exceed $200,000 (and no objections to that request were received) and the Supplemental Notice informed Settlement Class Members that Lead Plaintiff's Counsel would seek reimbursement of expenses in an amount not to exceed $196,000. *See* Gardner Decl. ¶97. To date, there have been no objections to Lead Plaintiff's Counsel's modified request for expenses.

Because the litigation expenses incurred by Lead Plaintiff's Counsel are of the type routinely approved in class actions and were essential to the successful prosecution and resolution of the Action, the Court should grant reimbursement.

V. LEAD PLAINTIFF IS ENTITLED TO REIMBURSEMENT OF EXPENSES

Finally, Lead Plaintiff, Baltimore, requests reimbursements of its reasonable costs and expenses, including lost wages, relating to the time it dedicated to the Action, in the amount of $3,629.54. *See* Ex. 2 ¶¶8-10. Under the PSLRA, the Court may award "reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class." *See* 15 U.S.C. §78u-4(a)(4). Lead Plaintiff requests payment of $3,629.54 for the time it spent representing the Settlement Class. *See* Ex. 2 ¶¶8-10; Gardner Decl. ¶¶95-96. This is time that Lead Plaintiff was not able to dedicate to conducting Baltimore usual business. In its capacity as Lead Plaintiff, Baltimore devoted approximately 42 hours to the prosecution of this litigation. *See* Ex. 2 ¶10. As Lead Plaintiff, Baltimore, among other things: (i) communicated regularly with Lead Counsel about the strategy for prosecution the Action; (ii) reviewed pleadings and briefs submitted in this matter; (iii) requested and evaluated regular status reports from Lead Counsel; (iv) prepared for and traveled to New York to attend the January 9, 2013 mediation; and (v) consulted with Lead Counsel concerning the settlement process, including evaluating the appropriate amount to resolve the litigation on behalf of the class and approving the settlement for $14 million in cash as well as approving the Amendment. *Id*. ¶4.

Reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel." *Varljen v. H.J Meyers &*

Co., No. 97 CIV. 6742 (DLC), 2000 U.S. Dist. LEXIS 16205, at *14 n.2 (S.D.N.Y. Nov. 8, 2000). Moreover, 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 & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *30 (S.D.N.Y. Oct. 24, 2005); *see also Eastwood Enterprises, LLC, v. Wellcare Health Plans, Inc., et al.*, No. 07-1940, slip op. at 3 (M.D. Fla. May 4, 2011) (awarding a combined $35,600.25 to institutional lead plaintiffs) (Ex. 9); *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 institutional lead plaintiffs) (Ex. 9); *In re Marsh & McLennan Co. Inc. Sec. Litig.*, No. 04-cv-08144, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding a combined $214,657 to institutional lead plaintiffs); *In re General Motors Corp. Sec. & Derivative Litig.*, No. 06-md-1749, slip op. at 3 (E.D. Mich. Jan. 6, 2009) (awarding $184,205 to institutional representatives and $1,000 to each named plaintiff) (Ex. 9).

VI. CONCLUSION

For all the reasons discussed herein, and in the Gardner Declaration, Lead Plaintiff's Counsel respectfully request that the Court approve the modified fee and expense request and award Lead Plaintiff's Counsel 25% of $13.1 million (plus 25% of any amount remaining in the Opt-Out Set-Aside following LPS's resolution of the Opt-Out Action), expenses in the amount of $125,888.01, plus accrued interest, and approve reimbursement to Lead Plaintiff

in the amount of $3,629.54. A proposed order will be submitted with Lead Plaintiff's Counsel's reply papers, after the deadline for objecting has passed.

Dated: January 17, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 17, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all counsel of record.

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