**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF NEW YORK**

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| THE CITY OF PROVIDENCE, Individually and on Behalf of All Others Similarly Situated, | ) | No. 11-CV-7132 (CM)(GWG) |
| Plaintiff, | ) | CLASS ACTION |
| vs. | ) | |
| AÉROPOSTALE, INC., THOMAS P. JOHNSON and MARC D. MILLER, | ) | |
| Defendants. | ) | |

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

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## Docketed Cases



## Statutes & Rules

Labaton Sucharow LLP, Court-appointed Lead Counsel for the City of Providence ("Providence" or "Lead Plaintiff")[1] in this securities class action, respectfully submits this memorandum of law in support of its motion, on behalf of all plaintiffs' counsel that contributed to the prosecution of the Action, 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 (ii) payment of the expenses of Lead Plaintiff, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").

## PRELIMINARY STATEMENT

Lead Counsel negotiated a settlement of this class action with Aéropostale, Inc. ("Aéropostale" or the "Company"), Thomas P. Johnson, and Marc D. Miller (the "Individual Defendants" and collectively, together with Aéropostale, "Defendants") in the amount of $15,000,000, which will be distributed to eligible Class Members.

As explained in the contemporaneously filed submissions, this Settlement is an excellent result for the Class. For its efforts in achieving this result, Lead Counsel seeks a percentage fee of 33% of the Settlement Fund (or $4,950,000), payment of $455,506.85 in expenses incurred in prosecuting this Action, and $11,235.04 to reimburse Providence for the time it spent representing the Class in the litigation. The substantial and certain recovery obtained for the Class — an all cash recovery of $15,000,000 — 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.[2] To

[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation and Agreement of Settlement dated January 29, 2014 (the "Stipulation"), filed with the Court on January 29, 2014. ECF No. 54-1.

[2] Submitted herewith in support of approval of the proposed Settlement is Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement

date, there have been no objections to the fee or expenses requests.

The requested fee is consistent with fees awarded in similar actions in this Circuit and uses the appropriate method of compensating counsel. The amount requested is especially warranted in light of the substantial recovery obtained for the Class and the significant obstacles presented in the prosecution and settlement of this Action against Defendants. The requested fee has also been approved by Providence. *See* Declaration of Jeffrey Padwa, City Solicitor for the City of Providence, Ex. 2 ¶6.

As detailed below and in the Gardner Declaration, the fee requested is fair and reasonable under applicable standards. The Action involves complex legal issues. Following a detailed investigation that included, among other things, the interviews of 40 former Aéropostale employees and other persons with relevant knowledge after locating over a hundred potential witnesses, review of Aéropostale's public statements as well as other publicly available material about Aéropostale and the retail industry, and consultation with several experts, Lead Plaintiff filed an Amended Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint"). ECF No. 21. The Complaint generally alleges, among other things, that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule

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Proceeds (the "Settlement Brief") and the Declaration of Jonathan Gardner in Support of (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (B) Lead Counsel's Motion for Attorneys' Fees and Payment of Expenses (the "Gardner Declaration" or "Gardner Decl."), which more fully describes the history of the litigation, the claims asserted, the investigation undertaken, the negotiation and substance of the Settlement, the substantial risks of the litigation, and the reasonableness of the fee request. Also submitted herewith are declarations of Lead Counsel and the firms that worked at the direction of Lead Counsel (collectively, "Plaintiffs' Counsel"), which set forth the time spent and expenses incurred in prosecuting the Action. *See* Exs. ___ through ___ to Gardner Decl. All exhibits referenced herein are attached to the Gardner 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 attached to the Gardner Declaration and the second reference refers to the exhibit designation within the exhibit itself.

10b-5 promulgated thereunder, by making alleged misstatements and omissions during the Class Period relating to Aéropostale's quarterly earnings guidance and inventory management. The Complaint further alleges that Lead Plaintiff and other Class Members purchased or acquired publicly traded common stock of Aéropostale during the Class Period at artificially inflated prices and were damaged thereby.

Since defeating Defendants' motion to dismiss, Lead Counsel secured a stipulation of class certification after filing a comprehensive motion for class certification. Thereafter, Providence and its investment advisors produced over 20,000 pages of documents and Defendants took the deposition of Providence as well as two representatives of its investment advisor. Lead Counsel collected and reviewed over 1.3 million pages of documents from Defendants and third parties; engaged in numerous meet and confer sessions to ensure the production of all relevant material; completed five weeks of depositions, including those of twelve current or former employees of Aéropostale; and was working with its liability and damages experts on their reports at the time the Settlement was reached.

Lead Counsel respectfully submits that the Settlement is attributable to its creative and diligent services, as well as its reputation as a firm who is unwavering in its dedication to the interests of the Class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In a case asserting claims based on complex legal and factual issues which were opposed by highly skilled and experienced defense counsel, Lead Counsel succeeded in securing a very good result for the Class under difficult and challenging circumstances.

For the reasons set forth herein and in the Gardner Declaration, Lead Counsel respectfully submits that the attorneys' fees and expenses requested are fair and reasonable under the applicable legal standards and in light of the contingency risk undertaken, and therefore

should be awarded by the Court. Moreover, the expenses requested are reasonable in amount and were necessarily incurred for the successful prosecution of the Action. Finally, the modest award requested by the Lead Plaintiff reflecting compensation for lost wages and expenses incurred during the prosecution of this Action, is reasonable and should be awarded.

## ARGUMENT

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

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 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); *In re Beacon Assocs. Litig.*, No. 09 Civ. 777(CM), 2013 WL 2450960, at *4 (S.D.N.Y. May 9, 2013 ) (McMahon, J.). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *See Goldberger*, 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (McMahon, J).

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."); *Maley v. Del Global Techs. Corp.,* 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (McMahon, J.) ("courts recognize that such awards serve the dual purposes of encouraging representatives to seek redress for injuries caused to public investors and discouraging future misconduct of a similar nature") (citation omitted). Courts in this Circuit have consistently adhered to these teachings. *See, e.g., In re Top Tankers, Inc. Sec. Litig.,* No. 06 Civ. 13761 (CM), 2008 WL 2944620, at *12 (S.D.N.Y. July 31, 2008) (McMahon, J.) ("It is well established that where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to 'a reasonable fee - set by the court - to be taken from the fund.'") (citations omitted).

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); *Veeco,* 2007 WL 4115808, at *2. 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) (stating that "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").

The trend among district courts in the Second Circuit is to award fees using the percentage method. *See, e.g., Beacon*, 2013 WL 2450960, at *5 ("the trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional 'lodestar' calculation as a method of testing the fairness of a proposed settlement"); *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 th[e Second] Circuit'") (citation omitted); *see also Veeco,* 2007 WL 4115808, at *3; *Hicks*, 2005 WL 2757792, at *22.

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

## II. A FEE OF 33% IS FAIR, REASONABLE AND CONSISTENT WITH FEES AWARDED IN SIMILAR CASES

On a percentage basis, the 33% award falls within the range of other percentage fee awards within the Second Circuit in comparable settlements. This Court has held that "[i]n this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund." *Beacon*, 2013 WL 2450960, at *5.

Courts in this District regularly approve attorneys' fees in the amount requested here. *See Fogarazzo v. Lehman Bros. Inc.*, No. 03 Civ. 5194(SAS), 2011 WL 671745, at *4 (S.D.N.Y. Feb. 23, 2011) (awarding 33.3% of $6.75 million settlement); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2001) (awarding 33% of $13 million settlement); *In re Van Der Moolen Holding N.V. Sec. Litig.*, No. 1:03-CV-8284 (RWS), slip op. at 2 (S.D.N.Y. Dec. 6, 2006) (awarding 33 1/3% of $8 million settlement) (Ex. 9); *Maley*, 186 F. Supp. 2d at 368 (awarding 33 1/3% of $11.5 million settlement and citing two cases which awarded 33 1/3% of the settlement amount: *In re Apac Teleservs., Inc. Sec. Litig.*, No. 97 Civ. 9145, at 2 (S.D.N.Y. June 29, 2001), awarding 33 1/3% of $21 million settlement, and *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001), awarding 33 1/3% of $15 million settlement); *see also 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."); *Khait v. Whirlpool Corp*., No. 06-6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement).

An examination of fee decisions in securities class actions with comparable settlements in other federal jurisdictions also shows that an award of 33% is reasonable and should be approved. *See, e.g., In re Heritage Bond Litig.*, No. 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 Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 498 (E.D. Pa. 2003) (awarding 33 1/3% of $7 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); *In re Green Tree Fin. Corp. Stock Litig./Options Litig.*, Nos. 97-2666 and 97-2679, slip op. at 9 (D. Minn. Dec. 18, 2003) (awarding 33 1/3% of $12.45 million settlement) (Ex. 9).

## III. THE RELEVANT FACTORS CONFIRM THAT THE REQUESTED FEE IS REASONABLE

The Second Circuit in *Goldberger* 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 is fair and reasonable.

**A. The Time and Labor Expended by Counsel**

Plaintiffs' Counsel have expended substantial time and effort pursuing the Action on behalf of the Class. *See generally* Gardner Decl. and Exs. 4 through 6. Since its inception, Plaintiffs' Counsel have devoted more than 14,000 hours to this Action with a lodestar value of $7,047,145. *See also* Ex. 7. The Settlement follows two years of litigation that included, *inter alia*:

- Preparation of the filing of the Complaint after an extensive pre-filing investigation without the benefit of any discovery or previous government investigation that included, *inter alia*: (i) review and analysis of documents filed publicly by Aéropostale with the SEC; (ii) review and analysis of press releases, news articles, and other public statements issued by or concerning Aéropostale; (iii) review and analysis of research reports issued by financial analysts concerning Aéropostale's securities and business; (iv) locating over a hundred potential witnesses and interviewing 40 former Aéropostale employees—a number of whose accounts were included in the Complaint as confidential witness ("CW") accounts; (v) review and analysis of news articles, media reports, and other publications concerning the retail industry; and (vi) consultation with experts in the retail industry and damages experts (Gardner Decl. ¶¶6, 19-20);

- Responding and defeating Defendants' complex motion to dismiss (*id* ¶26-33);

- Fact discovery that involved, *inter alia*: (i) numerous meet and confer sessions to ensure the production of all relevant material; (ii) the review of more than 1.3 million pages of documents produced by Defendants and third parties; (iii) a motion to compel; (iv) preparing and taking a 30(b) deposition as well as 12 depositions of Aéropostale executives and other key personnel; (v) preparing to take additional Company depositions; and (vi) serving 16 subpoenas and reviewing hundreds of thousands of documents and data from non-parties (*id* ¶¶36-55. 59-66);

- Research and preparation of a motion for class certification (*id* ¶¶67-68);

- Class discovery that involved, *inter alia*: (i) responding to Defendants' document requests and subpoenas, which entailed working with Lead Plaintiff and its investment advisors and custodians to ensure that all responsive documents were searched and reviewed; (ii) defending the deposition of Lead Plaintiff; and (iii) preparing for and participating in the depositions of Lead Plaintiff's investment managers (*id* ¶¶56-58, 69-72);

- Negotiation of a stipulation with Defendants regarding class certification (*id* ¶73);
- Consultation with experts on loss causation, damages, accounting, and retail industry issues (*id* ¶¶74-75); and
- Exchange of detailed mediation statements in preparation for a mediation session, preparation and participation in the mediation session, and ultimately negotiation of the terms of the Settlement (*id* ¶¶93-95).

The legal work on this 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 Class with their Proof of Claim and Release forms, shepherding the claims process, responding to Class Member inquiries, and moving for a distribution order. The time and effort devoted to this case by Plaintiffs' Counsel to obtain this $15 million Settlement confirm that the 33% fee request is reasonable.

**B. The Risks of the Litigation**

**1. The Contingent Nature of Lead Counsel's Representation**

The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

*Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974); *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") (citation omitted); *In re Prudential Sec. Ltd P'ships Litig.*, 985 F. Supp. 410, 417 (S.D.N.Y. 1997)

("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.").

Lead Counsel undertook this Action on a wholly contingent-fee basis, investing a substantial amount of time and money to prosecute the Action without a guarantee of compensation or even the recovery of expenses. Unlike counsel for Defendants, who is paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expenses since this case began, and would have received no compensation or expenses had this case not been successful. From the outset, Lead Counsel understood that it was embarking on a complex, expensive, and lengthy litigation 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 was obligated to ensure that sufficient attorney and paraprofessional resources were dedicated to the prosecution of the Action and that funds were available to compensate staff and to pay for the considerable costs which a case such as this entails. Because of the nature of a contingent practice where cases are predominantly complex lasting several years, not only do contingent litigation firms have to pay regular overhead, but they also must advance the expenses of the litigation. Under these circumstances, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. *See* Gardner Decl. ¶¶112-13.

**2. Risks Concerning Liability**

"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). Indeed, the "Second Circuit has identified 'the risk of success as perhaps the foremost factor to be considered in determining [a reasonable award of attorneys' fees.]'" *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04

Civ. 8144 (CM), 2009 WL 5178546, at *18 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.) (citing *Goldberger*, 209 F.3d at 54). While Lead Plaintiff remains confident in its ability to prove its claims and to effectively rebut Defendants' defenses, it recognizes that proving liability was far from certain. Although the Court sustained Lead Plaintiff's claims at the motion to dismiss stage, it faced substantial risks if the Action continued. To succeed on its claims, Lead Plaintiff must establish that Defendants made misstatements or omissions of material fact with scienter in connection with the purchase of Aéropostale common stock and that the Class suffered losses as a result of the revelation of truth regarding Defendants' misstatements and omissions.

As set forth in the Gardner Declaration and in the Settlement Brief, Defendants countered the existence of scienter, falsity, materiality, and loss causation, and presented arguments and defenses that required considerable legal skill to rebut. *See* Gardner Decl. ¶¶76-92; Settlement Brief §I.C.4. For example, since the beginning of the Action, Defendants have argued that Lead Plaintiff has not satisfied its scienter burden and they would continue to argue that Lead Plaintiff would not be able to prove scienter. Specifically, a central theme to the defense was that no one benefited from the alleged fraud; rather, because the Individual Defendants' bonus compensation was tied to achieving the announced projections, they stood to lose hundreds of thousands of dollars by knowingly setting the projections at unattainably high levels. In further support of its position, Defendants argued that Aéropostale had repurchased $100 million of Company stock at the beginning of the Class Period because it believed that the stock was undervalued. *See* Gardner Decl. ¶¶84-86.

Defendants would also continue to argue that their Class Period statements were not false and misleading because the market was already aware of the factors that caused the Company's earnings miss, including, *inter alia*: (i) a slow, bifurcated economic recovery had helped more

well-off customers but had not yet reached the Company's customer base, therefore, its core customer base was spending less at Aéropostale; (ii) aggressive promotional activity by its competitors harmed Aéropostale's position in the teen retail sector; and (iii) merchandising decisions, including failing to predict what fashion would appeal to a fickle teen customer had negatively affected sales and margins. *Id*. ¶¶79-82.

Additionally, Defendants would have also continued to argue that Lead Plaintiff would not be able to prove loss causation, arguing that the stock price drops following announcements of the Company's first and second quarter 2011 results were attributable to market forces and other macroeconomic considerations, not the correction of an alleged misstatement or omission. *Id*. ¶87.

Lead Counsel was able to rebut these arguments, and others, in connection with the Defendants' motion to dismiss, however Defendants would never concede their liability and would likely continue to press these defenses and others at summary judgment and trial.

**3. Risks Concerning Damages**

Whether Lead Plaintiff could prove damages was also unsettled and would continue to require a significant amount of effort on the part of Lead Counsel. "Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony." *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.). Lead Plaintiff's expert estimated that, depending on consideration of different alleged corrective disclosures, aggregate damages ranged between $72 million (if 100% of the two alleged corrective disclosures pertaining only to 1Q2011 are considered) and $163 million (if 100% of the four alleged corrective disclosures pertaining to both 1Q2011 and 2Q2011 are considered). *See* Gardner Decl. ¶8. In order for the Class to recover damages at the maximum level estimated by Lead Plaintiff's damages expert,

they would need to prevail on each and every one of the claims alleged and establish loss causation related to the four alleged disclosures. The damage assessments of the Parties' trial experts would be sure to vary substantially, and expert discovery and trial would become a "battle of experts" requiring significant work on the part of Lead Counsel. *See, e.g., In re Flag Telecom Holdings Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *28 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (burden in proving the extent of the class's damages weighed in favor of approving fee request).

**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. *See Chatelain v. Prudential-Bache Sec. Inc.*, 805 F. Supp. 209, 216 (S.D.N.Y. 1992). Indeed, the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request. *See Fogarazzo*, 2011 WL 671745, at *3 ("courts have recognized that, in general, securities actions are highly complex"). As described in greater detail in the Gardner Declaration, this Action involved difficult, complex, hotly disputed, and expert-intensive issues related to the retail industry, inventory accounting, and loss causation. Further, there was no road-map for Lead Counsel to follow in this Action as no governmental agency investigated or brought action against Defendants. *See, e.g., Flag Telecom*, 2010 WL 4537550, at *27 (noting lack of prior governmental action against defendant on which lead counsel could "piggy back" in considering fee request); *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998) (noting that "class counsel did not have the benefit of a prior government litigation or investigation" in approving requested fee). Thus, Lead Counsel were left to investigate and develop sufficient facts (without formal discovery) so as to overcome Defendants' motion to dismiss governed by the heightened pleading standards of the PSLRA.

In connection with formal discovery, Lead Counsel undertook to review and analyze over 1.3 million pages of documents, which included complex accounting work papers and intricate and voluminous inventory and sales reports. Counsel prepared for and took 12 fact depositions of executives of the Company. Lead Counsel also prepared an extensive motion for class certification and engaged in class discovery, which resulted in the Defendants stipulating to class certification.

Accordingly, the magnitude and complexity of the Action and the difficulty of the legal and factual issues involved support the requested fee.

**D. The Quality of Representation**

The quality of the representation and the standing of Lead Counsel are important factors that support the reasonableness of the requested fee. *See Flag Telecom,* 2010 WL 4537550, at *28. It took a great deal of skill to achieve a settlement at this level in this particular case. Specifically, this Action required investigation and mastery of nuanced factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses.

Lead Counsel is nationally known as a leader in the fields of class actions and complex litigation, and has had substantial experience litigating securities class actions in courts throughout the country with success. *See* Gardner Decl. ¶124; Ex. 4 - A. As a firm with experienced securities class action litigators, Lead Counsel has not only had to use its knowledge, skill and efficiency from past experiences, but has also developed expertise in the unique issues presented here to overcome significant obstacles in the past two years of this litigation. Gardner Decl. ¶¶117-18. This favorable Settlement is attributable to the diligence, determination, hard work, and reputation of Lead Counsel, who developed, litigated, and successfully negotiated the settlement of this Action, an immediate cash recovery in a very challenging case.

The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work. *See Flag Telecom*, 2010 WL 4537550, at *28; *Teachers Ret. Sys*., 2004 WL 1087261, at *20. Indeed, Defendants' Counsel, Weil, Gotshal & Manges LLP, is a long-time leader among national litigation firms, with well-noted expertise in corporate litigation practices. The highly skilled attorneys at Weil Gotshal zealously fought Lead Plaintiff's claims at every turn, but notwithstanding this formidable opposition, Lead Counsel was able to develop Lead Plaintiff's case so as to resolve the litigation on terms favorably to the Class.

**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. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). The Supreme Court has emphasized that private securities actions such as this 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) (citation omitted); *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 319, 359 (S.D.N.Y. 2005). The significant expense combined with the high degree of uncertainty of ultimate success means that contingent fees are virtually the only means of

recovery in such cases. Indeed, this Court 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*:

> [C]lass actions serve as private enforcement tools when . . . regulatory entities fail to adequately protect investors . . . plaintiffs' 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 . . . awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

2014 WL 1224666, at *24 (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."); *Med. X-Ray Film Antitrust Litig.*, 1998 WL 661515, at *23 (E.D.N.Y. Aug. 7, 1998) ("an adequate award furthers the public policy of encouraging private lawsuits"); *Chatelain*, 805 F. Supp. at 216 ("an adequate award furthers the public policy of encouraging private lawsuits in pursuance of the remedial federal securities laws"); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 750-51 (S.D.N.Y. 1985) (observing that "[f]air awards in cases such as this encourage and support other prosecutions, and thereby forward the cause of securities law enforcement and compliance"), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

Lawsuits such as this one can only be maintained if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation for such services where successful results are achieved. Public policy therefore supports awarding Lead Counsel's reasonable 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." *Marsh & McLennan*, 2009 WL 5178546, at *19; *see also Veeco*, 2007 WL 4115808, at *7 (noting that the fee awarded is "consistent with fees awarded in a [] similar class actions settlements of comparable value"). As discussed above, the compensation requested here is within the range of percentage fee awards given in comparable cases within the Second Circuit and in other district courts throughout the country. *See* §II herein.

### 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." *Beacon*, 2013 WL 2450960, at *15. "Where the lodestar is 'used as a mere cross-check, the hours document by counsel need not be exhaustively scrutinized by the district court.'" *Veeco,* 2007 WL 4115808, at *8 (quoting *Goldberger*, 209 F.3d at 50).

Under the lodestar method, the 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 *25-26. Performing the lodestar cross-check here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Plaintiffs' Counsel have spent, in the aggregate, 14,119 hours in the prosecution of this case. *See* Gardner Decl. ¶¶112, 122; Exs. 4 - B, 5 - B, 6 - B, and 7 (summary table of lodestars and expenses). This represents time spent on the Action by partners, of counsel, associates, staff attorneys, paralegals, investigators, and professional analysts. *Id*. The resulting lodestar at

Plaintiffs' Counsel's billing rates is $7,047,145. 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); *New York State Ass'n for Retarded Children Inc. v. Carey*, 711 F.2d 1136, 1153 (2d Cir. 1983) (use of current rates appropriate where services were provided within two or three years of application). Here, Plaintiffs' Counsel have applied either current rates or 2013 rates. *See* Exs. 4 ¶5, 5 ¶5, 6 ¶5.

The hourly billing rates of Plaintiffs' Counsel here range from $640 to $875 for partners, $550 to $725 for of counsels, and $335 to $665 for other attorneys. *See* Gardner Decl. ¶121. "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 billing rates gathered and analyzed by Lead Counsel from bankruptcy court filings in 2013, in many cases, exceeded these rates. *See* Gardner Decl. ¶121; Ex. 8. Similarly, the *National Law Journal's* annual survey of law firm billing rates in 2013 shows that ***average*** partner billing rates among the Nation's largest defense firms ranged from $930 to $1,055 per hour and average associate billing rates ranged from $590 to $670 per hour. Gardner Decl. ¶121.

Thus, the amount of attorneys' fees requested by Lead Counsel, 33% of the Settlement Fund, or $4,950,000, plus interest, represents a negative multiplier of 0.70 of Plaintiffs' Counsel's lodestar. Such a multiplier is well below the parameters used throughout district courts in the Second Circuit and is additional evidence that the requested fee is reasonable. *See*,

*e.g.*, *In re Bear Stearns Cos. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (approving requested fee with a negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee") (citation omitted). Indeed, in the Second Circuit or district courts 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 Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d at 589 (McMahon, J.) (awarding a multiple of 1.6 as well within the range of reasonableness and noting that lodestar multiples of over 4 are awarded by this Court).

With respect to the hours worked, Lead Counsel submits that the substantial time devoted to litigating the claims against Defendants reflects the tremendous effort needed to prosecute those claims and to bring them to a favorable resolution. As summarized above (*see* § III.A) and set forth in detail in the Gardner Declaration (*see* ¶¶19-74), substantial effort went into investigating the claims against Defendants; drafting the Complaint; responding to the motion to dismiss; meeting and conferring on the scope of document production; reviewing and analyzing the 1.3 million document production; preparing for and taking depositions; obtaining a class certification order; responding to Defendants' document requests; and consulting with various experts, among many other things. In this case, there were no related governmental investigations or proceedings that aided Plaintiffs' Counsel and the development of the claims was solely the result of Plaintiffs' Counsel's extensive work.

As explained in the Gardner Declaration, Plaintiffs' Counsel devoted time to reviewing Defendants' document production and preparing for depositions. The document review work was largely done by staff attorneys with significant experience reviewing electronic productions in securities cases. Many of the attorneys working on the document production also assisted

with other areas of claim development, such as preparing for depositions, among many other projects. This work was carefully monitored to maintain efficiencies. *See* Gardner Decl. ¶¶45-50. With respect to Plaintiffs' Counsel's lodestar, approximately 32% of the lodestar is attributable to staff attorney work. If half of this work were to be removed from the lodestar calculation, Plaintiffs' Counsel will still have an aggregate lodestar of $5,936,899, with a negative multiplier of 0.83. If all of this work were to be removed, the resulting multiplier would still be a very modest 1.03.

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

**H. The Class's Reaction to the Fee Request**

In accordance with this Court's Preliminary Approval Order, 39,429 copies of the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice") were sent to potential Members of the Class. *See* Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice ¶10, submitted herewith as Ex. 3. The Notice informed Members of the Class that Lead Counsel would make an application up to 33% of the Settlement Fund plus litigation expenses not to exceed $650,000, plus interest on such amounts. The time to object to the fee request expires on April 18, 2014. To date, not a single objection to the fee and expense request has been received.[3] This fact strongly evidences that the fee request is fair and reasonable.

[3] Lead Counsel will address any objections to the fee and expense request in its reply papers which will be filed with the Court by May 2, 2014.

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

Plaintiffs' Counsel also respectfully request $455,506.85 in expenses incurred in prosecuting this Action. Plaintiffs' Counsel's individual declarations attest to the accuracy of these expenses, which are properly recovered by counsel. *See* Gardner Decl. ¶129; Exs. 4 through 6; *see also In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (court may compensate class counsel for reasonable expenses necessary to the representation of the class). Much of Plaintiffs' Counsel's expenses were for professional services rendered by Lead Plaintiff's experts and consultants, and expenses relating to discovery taken in the case. Gardner Decl. ¶¶131-33; Exs. 4 ¶8 – C, 5 ¶8, 6 ¶8. The remaining expenses are attributable to such things as travel for depositions and for mediation, the costs of computerized research, duplicating documents, and other incidental expenses. *Id*. ¶134. These expenses were critical to Lead Plaintiff's success in achieving the proposed Settlement. *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] [F]or this reason, they are properly chargeable to the Settlement fund.") (citation omitted). Not a single objection to the expense request has been received to date. Accordingly, Lead Counsel respectfully request payment for these expenses, plus interest earned on such amounts at the same rate as that earned by the Settlement Fund.

## V. LEAD PLAINTIFF IS ENTITLED TO REIMBURSEMENT OF REASONABLE COSTS AND EXPENSES, INCLUDING LOST WAGES

Finally, Lead Counsel seeks an expense award of $11,235.04 for Lead Plaintiff for its lost wages and expenses, pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. §78u-

4(a)(4). The Notice disseminated to the Class stated that Lead Plaintiff may seek reimbursement of up to $15,000 from the Settlement Fund as compensation for the time and expense it incurred. *See* Ex. 3 - A at 2. Lead Plaintiff's actual lost wages and expenses are below that amount and there has been no objection to their payment.

This is not a case where the Lead Plaintiff had little or no involvement. Rather, Lead Plaintiff spent more than 150 hours actively and effectively fulfilling its obligations as a representative of the Class, complying with all reasonable demands placed upon it during the prosecution and settlement of this Action, and provided valuable assistance to Lead Counsel for over two years. *See* Declaration of Jeffrey M. Padwa, City Solicitor for Providence, attached as Ex. 2 to Gardner Decl. The discovery obligations imposed on Lead Plaintiff here were significant. Defendants directed extensive document requests for both electronic and hard copy materials at Lead Plaintiff that required collection and production, which also necessitated a considerable amount of Lead Plaintiff's employees' time. *See* Gardner Decl. ¶¶56-57, 69; Ex. 2 ¶¶4, 8, 10. Defendants also took the deposition of Lead Plaintiff, and had noticed additional depositions of individual Board of Trustee members. *See* Gardner Decl. ¶¶70-71; Ex. 2 ¶4. Lead Plaintiff reviewed pleadings and motions, reviewed other court filings, communicated regularly with Lead Counsel, and was continuously involved in the litigation process. *See* Ex. 2 ¶¶4, 8, 10. Further, Lead Plaintiff, through the City Solicitor, personally attended the mediation session with Judge Weinstein. *Id*. ¶8.

Courts "routinely 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 2757793, at *10; *see also Varljen v. H.J. Meyers & Co.*,

No. 97 CIV 6742 (DLC), 2000 WL 1683656, at *4 (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"). Accordingly, Lead Counsel respectfully requests that the Court reimburse Lead Plaintiff for its reasonable lost wages and expenses, incurred in fulfilling its duty to ably represent the interests of the Class and achieve the substantial result reflected in the Settlement.

## CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully requests the Court award attorneys' fees of 33% of the Settlement Fund; payment of litigation expenses in the amount of $455,506.85, plus accrued interest; and reimbursement of Lead Plaintiff's expenses in the amount of $11,235.04. A proposed order will be submitted with Lead Counsel's reply papers after the deadlines for objections has passed.

Dated: April 4, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 4, 2014, I caused the foregoing MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR APPROVAL OF ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES to be served electronically on all parties listed on the attached Electronic Mail Notice List.

*s/ Jonathan Gardner*
JONATHAN GARDNER