UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE AMERICAN TOWER CORPORATION SECURITIES LITIGATION	No. 06-CV-10933 (MLW)

LEAD COUNSEL FOR LEAD PLAINTIFF'S
MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR AN
AWARD OF ATTORNEY'S FEES AND REIMBURSEMENT OF EXPENSES

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Preliminary Statement

Labaton Sucharow LLP ("Labaton Sucharow" or "Lead Counsel"), Court-appointed Lead Counsel for Lead Plaintiff Steamship Trade Association-International Longshoremen's Association Pension Fund ("STA-ILA" or "Lead Plaintiff") and the Class (collectively, "Plaintiffs"), respectfully submits this memorandum of law in support of its petition on behalf of all Plaintiffs' counsel, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an award of attorney's fees and reimbursement of expenses in connection with the proposed Settlement of this securities class action.

Through the efforts of Plaintiffs' counsel, American Tower Corporation ("AMT") and the other named Defendants have agreed to pay fourteen million dollars in cash ($14,000,000.00) for the benefit of the Class. The creation of this Settlement Fund, which has been fully funded and accruing interest since April 15, 2008, is attributable to Plaintiffs' counsel's dedicated and efficient litigation efforts since this Court approved STA-ILA's selection of Lead Counsel in December 2006.

As compensation for Plaintiffs' counsel's efforts culminating in the establishment of a substantial common fund, Lead Counsel respectfully requests that the Court award an attorney's fee equal to twenty-five percent (25%) of the Settlement Fund, or $3,500,000.00, including interest on such fee at the same rate and for the same period as earned by the Settlement Fund, and order reimbursement of Plaintiffs' counsel's expenses, including notice and settlement administration expenses incurred to date, in the amount of $323,385.70.

As discussed below, the requested attorney's fee falls comfortably within the range of fees that is customarily sought by, and awarded to, experienced counsel in similar contingent-fee litigation in this Circuit and elsewhere, and is considered reasonable under a comprehensive empirical study on class action fee awards that courts have cited favorably under similar circumstances. The requested fee is also reasonable under other pertinent factors assessed by courts in this Circuit, including the risk of nonpayment, the time and labor required, the novelty and difficulty of the factual and legal issues, the amount involved and the results obtained, and the experience and skill of class counsel.

The reasonableness of the requested fee is further supported by comparing it to Plaintiffs' counsel's lodestar. This lodestar "cross-check" yields a multiplier that is appropriate in view of the risks undertaken by Plaintiffs' counsel in pursuing the claims asserted, the quantum of work performed, and the results achieved for the benefit of the Class.

ARGUMENT

I. THE REQUESTED ATTORNEY'S FEE IS REASONABLE AND SHOULD BE AWARDED FROM THE SETTLEMENT FUND

A. The Common Fund Doctrine

For more than a century, the Supreme Court has recognized the "common fund" exception to the general rule that a litigant bears his or her own attorney's fees. Trustees v. Greenough, 105 U.S. 527 (1881). The Court explained the rationale for the common fund principle in Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980):

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole . . . . Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) ("By assessing attorneys' fees and litigation expenses against a common fund, the court spreads these costs proportionately among those benefitted by the suit.") (citing Boeing, 444 U.S. at 478).

The common fund doctrine prevents unjust enrichment while encouraging counsel to protect the rights of persons having relatively small claims. The Supreme 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 brought, respectively, by the Department of Justice and the Securities and Exchange Commission[.]" Tellabs v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007) (citing cases); see also J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (private actions provide "a most effective weapon in the enforcement" of the federal securities laws and are "a necessary supplement to [SEC] action"); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980) (class actions have important role of "vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost").

B. The First Circuit Has Indicated a Preference for the Percentage-of-Fund Method in Awarding Attorney's Fees in Common Fund Cases

Courts generally favor awarding fees from a common fund based upon the percentage-of-the-fund method. See Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) (stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class").

The First Circuit held in In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litigation, 56 F.3d 295 (1st Cir. 1995), that district courts retain discretion in common fund cases to calculate counsel fees either on a percentage-of-fund, or "POF," basis or by using the lodestar method.[1] The court stated, however, that use of the lodestar method in common fund cases "breaks from precedent," id. at 305, and that "[o]ur decision is driven by our recognition that use of the POF method in common fund cases is the prevailing praxis and by the distinct

[1] As the First Circuit observed in Thirteen Appeals, where attorney's fees are sought based on a fee-shifting statute rather than the creation of a common fund, the lodestar method remains relatively "entrenched." 56 F.3d at 305 ("When statutory exceptions [to the American Rule] pertain, we have directed district courts, for the most part, to compute fees by using the time-and-rate-based lodestar method.") (citing cases).

advantages that the POF method can bring to bear in such cases."[2] Id. at 307; see also Nilsen v. York County, 400 F. Supp. 2d 266, 270-71 (D. Me. 2005) ("As between the two methods, the First Circuit has noted that the percentage-of-funds method is the prevailing practice, and that it may have distinct advantages over the lodestar approach.").

Among the advantages recognized by the First Circuit was the fact that the percentage-of-fund method is less burdensome to administer than the lodestar method, which "forc[es] the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended." Thirteen Appeals, 56 F.3d at 307. Rather, the court stated, "the POF method permits the judge to focus on 'a showing that the fund conferring a benefit on the class resulted from' the lawyers' efforts." Id. (quoting Camden I, 946 F.2d at 774). The First Circuit also acknowledged that the "shift in focus lessens the possibility of collateral disputes that might transform the fee proceeding into a second major litigation." Id.; see also In re Relafen Antitrust Litig., 231 F.R.D. 52, 77-78 (D. Mass. 2005) (concluding, based on Thirteen Appeals, that percentage method is most appropriate in common fund case where pool of money is to be divided among class members).

The First Circuit noted additionally that the percentage-of-fund approach promotes more efficient use of attorney time because it is result-oriented. In contrast, the lodestar method, which is linked to time spent in obtaining a result, creates a disincentive for early settlement of cases and rewards unproductive behavior. Thirteen Appeals, 56 F.3d at 307 ("For another thing, using the POF method in a common fund case enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency."). Finally, the Court of Appeals made the related

[2] The First Circuit noted in Thirteen Appeals that the Eleventh and District of Columbia Circuits expressly require the use of the percentage-of-the-fund method in all common fund cases. 56 F.3d at 307; see Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 771 (11th Cir. 1991); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271-72 (D.C. Cir. 1993). No Court of Appeals has mandated the use of the lodestar method to the exclusion of the percentage-of-fund method.

point that the percentage method better reflects the market value of counsel's services than the lodestar approach:

> [B]ecause the POF technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. We think that Judge Posner captured the essence of this point when he wrote that "the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character." [T]he market pays for the result achieved.

Id. (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)); see also Tyco, 535 F. Supp. 2d at 265 ("The POF method is appropriate in common fund cases because it 'rewards counsel for success and penalizes it [counsel] for failure.'") (quoting In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995)); In re Sequoia Sys., Inc. Sec. Litig., No. 92-11431-WD, 1993 WL 616694, at *2 (D. Mass. Sept. 10, 1993) (percentage fee awards "ensure that those who are engaged in the plaintiff's side of securities litigation are not unduly discouraged from prompt resolution of these cases and full pursuit of the claims of plaintiffs who, absent such counsel, would be unlikely to have any vindication of the rights that they have in this setting.").

C. The Requested Attorney's Fee Is Reasonable as Assessed Under the Applicable *Johnson* Factors

Although the First Circuit has not specifically determined what approach district courts must follow in evaluating whether a given percentage fee is reasonable, "[t]he majority of Circuits review percentage-of-funds fee awards by using multifactor tests in which the district courts must examine and set forth findings on each factor." Nilsen, 400 F. Supp. 2d at 273. The First Circuit has "embraced," if not formally adopted, the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), "for use in sculpting fee awards."[3] Coutin v. Young & Rubicam

[3] The Second, Third, and Sixth Circuits require multifactor analyses, with some variation in the actual factors, in assessing the reasonableness of a percentage-based fee. See Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516-17 (6th Cir. 1993). The Fourth, Tenth, and Eleventh Circuits have explicitly adopted the twelve Johnson factors. See In re MRRM, P.A., 404 F.3d 863, 867-68 (4th Cir. 2005); Brown v. Phillips Petroleum Co., 838

Puerto Rico, Inc., 124 F.3d 331, 337 n.3 (1st Cir. 1997) (citing Johnson, 488 F.2d at 717-19 and Segal v. Gilbert Color Sys., Inc., 746 F.2d 78, 86 (1st Cir. 1984)). The Johnson factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney(s) due to acceptance of the case; (5) the customary fee; (6) the nature of the fee (fixed or contingent); (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney(s); (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) the size of awards in similar cases.

Id. Each of these factors supports a 25 percent attorney's fee.[4]

1. The Customary Fee and the Size of Awards in Similar Cases

A reasonable percentage fee generally should emulate what counsel would receive had they been bargaining for services in the marketplace. See Missouri v. Jenkins, 491 U.S. 274, 285 (1989); Thirteen Appeals, 56 F.3d at 307 (percentage-of-fund method "better approximates the workings of the marketplace" than lodestar method). If this were a non-representative litigation, the customary fee arrangement would similarly be contingent, on a percentage basis, and in the range of 25 percent (or more) of the recovery. See Blum, 465 U.S. at 903 n.* ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."); see also Nilsen, 400 F. Supp. 2d at 282-83 (applying "market-mimicking" approach, which seeks to emulate market price for legal services in light of risk of nonpayment and normal level of compensation in the market, and awarding fee of 25% of $3.3 million common fund in civil rights action).

F.2d 451, 454-55 (10th Cir. 1988); Camden I, 946 F.2d at 775; but see Tyco, 535 F. Supp. 2d at 266 ("draw[ing] loosely" on five of the factors employed by the Second and Third Circuits that the court deemed most relevant).

[4] Because factors 4, 7, 10, and 11 are inapplicable or are of minimal relevance to this petition, and do not weigh against the requested fee, they are not discussed here. Further, the pertinent factors are discussed out of Johnson's sequence and, rather, in rough order of significance. See In re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litig., 364 F. Supp. 2d 980, 993 (D. Minn. 2005) ("Plainly, not all of the individual Johnson factors will apply in every case, so the court has wide discretion as to which factors to apply and the relative weight to assign to each.").

A 25 percent fee falls comfortably within the range of fees regularly awarded by district courts within this Circuit. "Courts in the First Circuit have recognized that fee awards in common fund cases typically range from 20 to 30 percent." In re Lupron Mktg. & Sales Practices Litig., No. 01-CV-10861 RGS, 2005 WL 2006833, at *5 (D. Mass. Aug. 17, 2005) (citing, inter alia, In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 216 n.45 (D. Me. 2003); Conley v. Sears, Roebuck & Co., 222 B.R. 181, 187 (D. Mass. 1998); and In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 109 (D.R.I. 1996)). See also Mazola v. May Dep't Stores Co., No. 97 CV 10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) ("The normal percentage awarded by federal courts is 20-30% of the value of the settlement, with 25% being a 'benchmark.' [D]istrict court cases . . . show that, in this circuit, percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions.") (citing cases; record citation omitted); In re StockerYale, Inc. Sec. Litig., No. 05 CV 177-SM, 2007 WL 4589772, at *6 (D.N.H. Dec. 18, 2007) (awarding 33% of $3.4 million common fund); Gorsey v. I. M. Simon & Co., No. 86-1875-Z, 1991 WL 181439, at *2 (D. Mass. Sept. 4, 1991) (awarding 25% fee, reduced from requested 41% fee, of $850,000 settlement).[5] Indeed, in Nilsen, as noted above, Judge Hornby thoroughly considered the various methods for fixing a reasonable fee in a class action and finally

[5] Further, several judges of this Court have issued unpublished orders awarding attorney's fees of 30 percent or more in securities class actions. See In re Eaton Vance Corp. Sec. Litig., No. 01 CV 10911 EFH (D. Mass. Apr. 26, 2006) (30%); Deckler v. Ionics, Inc., No. 03-CV-10393-WGY (D. Mass. Apr. 4, 2005) (30%); In re Segue Software, Inc. Sec. Litig., No. 99-10891-RGS (D. Mass. July 31, 2001) (33%); Chalverus v. Pegasystems, Inc., No. 97-12570-WGY (D. Mass. Dec. 19, 2000) (33%); In re V-Mark Software, Inc. Sec. Litig., No. 05-12249-EFH (D. Mass. Nov. 24, 1998) (33-1/3%); In re Zoll Med. Corp. Sec. Litig., No. 94-11579-NG (D. Mass. Oct. 5, 1998) (33-1/3%); Friedberg v. Discreet Logic Inc., No. 96-11232-EFH (D. Mass. Nov. 25, 1997) (30%); Abato v. Marcam Corp., No. 94-11625-WGY (D. Mass. July 29, 1996) (33-1/3%); In re Cambridge Biotech Corp. Sec. Litig., No. 93-12486-REK (D. Mass. Apr. 4, 1996) (30% of cash and stock); In re Copley Pharm., Inc. Sec. Litig., No 94-11897 (WGY) (D. Mass. Feb. 8, 1996) (33-1/3%) (annexed collectively to accompanying Declaration of David J. Goldsmith in Support of Lead Counsel's Petition for an Award of Attorney's Fees and Reimbursement of Expenses ("Goldsmith Decl.") as Exhibit F).

settled on 25 percent, partly in the "hope that it will generate better evidence of the attorney fee market in future cases and more rational and predictable awards." 400 F. Supp. 2d at 283.[6]

A recent and well-regarded empirical study of attorney's fees in class actions nationwide also supports the requested fee. Professors Theodore Eisenberg and Geoffrey P. Miller studied two comprehensive sets of class action decisions between 1993 and 2002 and concluded that client recovery is overwhelmingly the most important determinant of the fee award. Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 J. EMPIRICAL LEGAL STUD. 27 (2004) (hereinafter "Eisenberg and Miller") (annexed to Goldsmith Declaration as Exhibit E).

Eisenberg and Miller used the data to develop an innovative "lookup table" by which courts can easily and effectively evaluate the reasonableness of a fee request by comparing the request with average awards in cases of similar magnitude. See id. at 72-73 & table 7. The "lookup table" sets forth, in ten deciles, recovery ranges, mean and median fee percents, and standard deviation fee percentages. Id. at 73 (table 7). Eisenberg and Miller suggest that fee requests falling within one standard deviation of the mean should be viewed as presumptively reasonable. Fee requests falling within one and two standard deviations above the mean should be viewed as potentially reasonable but in need of affirmative justification, and fee requests falling more than two standard deviations above the mean should be viewed as presumptively unreasonable. Id. at 74.

For one of the two datasets, the lookup table indicates that for settlements between $9.7 million and $15 million, the mean percentage fee is 28 percent with a standard deviation of 6.1

[6] Consistent with this, the Court of Appeals for the Ninth Circuit (where more securities class action filings are filed than any other circuit) has expressly adopted a "benchmark" attorney's fee of 25 percent in common fund cases. This percentage is considered presumptively reasonable and will be awarded unless specific circumstances demand an adjustment. See, e.g., Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1048-50 (9th Cir. 2002). The Eighth Circuit and the District of Columbia Circuit have not specifically adopted this approach, but have pointed to benchmark percentage ranges to justify the reasonableness of fee awards. See Petrovic v. Amoco Oil Corp., 200 F.3d 1140, 1157 (8th Cir. 1999) (24% fee found reasonable); Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n, 3 F.3d 1568, 1575 (D.C. Cir. 1993) (fee found reasonable in part because it "falls well within the [20%-30%] range usually awarded in common fund cases").

percent. Id. at 73 (table 7.B). A fee equal to 25 percent of the $14 million recovery is well-within one standard deviation of, and is indeed below, this mean. For the other dataset, the mean percentage fee at the $14 million recovery level is 22.7 percent with a standard deviation of 8.4 percent. Id. at 73 (table 7.A). This is comparable to, and well-within one standard deviation of, the requested 25 percent fee. Eisenberg and Miller further found that the median fee in all securities class actions is exactly 25 percent. Id. at 50. Under Eisenberg and Miller's methodology, therefore, the requested fee is presumptively reasonable and should be awarded in the absence of contrary information.

Eisenberg and Miller has been favorably cited by district courts evaluating the reasonableness of attorney's fee requests. For example, in Hicks v. Morgan Stanley & Co., No. 01 Civ. 10071 (RJH), 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005), a securities class action, the court approved a $10 million settlement and granted Labaton Sucharow, as co-lead counsel, the requested fee of 30 percent. The court specifically noted Eisenberg and Miller's finding that the mean percent fee for settlements between $9.7 million and $15 million was a comparable 28 percent. Id. at *9. The court also stated that "[a] settlement amount of $10 million does not raise the windfall issue in the same way as would a $100 million settlement, and a 30% fee does not produce such a windfall." Id. (citing Eisenberg and Miller).

In In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litigation, 447 F. Supp. 2d 612 (E.D. La. 2006), the court approved an $11.1 million settlement, and determined a reasonable fee by deciding upon a "benchmark" percentage, then assessing the Johnson factors to consider whether the percentage should be adjusted upward, and finally checking the fee against counsel's lodestar. See id. at 628-33. In computing a "benchmark" percentage, the court relied exclusively on Eisenberg and Miller. The court noted that for recoveries between $9.7 million and $15 million, the mean fee percentages in the two datasets are 27.3 percent (for nonsecurities cases) and 22.7 percent. Id. at 630. Based on this data, the court determined to use "an initial benchmark of 25%, which is roughly the average of the mean fee percentages of the two data sets for settlements of this size." Id. The court further observed that 25 percent is also the "typical benchmark" cited in the Manual for Complex Litigation. Id. (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121). After considering the Johnson factors and conducting a lodestar cross-check, the court awarded a (larger) 29 percent fee, noting that "[t]his percentage is still within one standard deviation of the mean fee awards for cases of this size (the range of reasonableness suggested by Eisenberg and Miller)," and that two of the Johnson factors supported an increase in the fee award. Id. at 632.

Last, in Relafen, 231 F.R.D. 52, Judge Young awarded a fee of 33-1/3 percent of a $75 million settlement in an antitrust class action. One objecting class member argued that under Eisenberg and Miller's methodology, class counsel's fee should be no more than the 23.9 percent mean at the corresponding level of recovery. Id. at 80. Judge Young characterized Eisenberg and Miller as "thorough and objective," but overruled the objection and awarded a fee ***greater*** than Eisenberg and Miller's "mean" percent fee. Id. Although Judge Young declined to adopt Eisenberg and Miller's methodology as "the be all and end all of analysis," the court observed that a 33-1/3 percent fee remained supportable under their approach. Id. at 81 & n.22 ("[T]he court notes the amount requested here falls just outside of one standard deviation.").

In sum, Lead Counsel submits that the requested 25 percent fee is in line with attorney's fee awards commonly made in class action settlements in this and other Circuits, and falls well within the range of percentage fees typically awarded in litigation of this kind. Accordingly, this factor amply supports the fee requested.

2. The Contingent Nature of the Fee and the Risk of Nonpayment

"Many cases recognize that the risk assumed by an attorney is 'perhaps the foremost factor' in determining an appropriate fee award." Lupron, 2005 WL 2006833, at *4 (quoting Goldberger, 209 F.3d at 54). This risk encompasses not only the risk of zero payment, but also the risk of underpayment. See In re Continental Ill. Sec. Litig., 962 F.2d 566, 569-70 (7th Cir. 1992).

The contingency risk here was real from the outset and supports the requested fee. Plaintiffs' counsel undertook this action on a strictly contingent-fee basis, and invested a substantial amount of time and money to prosecute the action with no guarantee of compensation or recovery of costs. There was a substantial risk of nonpayment throughout this litigation. As noted herein, the merits of the claims involve complex issues concerning intent to defraud and loss causation that have been sharply disputed from the inception of the case and, assuming that this action proceeded beyond the pleading stage, would have been disputed on summary judgment and at trial in the absence of the Settlement. See Relafen, 231 F.R.D. at 80 (adopting counsel's argument that "Class Counsel alone bore the risk of the case being dismissed at the pretrial stage, of not prevailing at trial, or even losing on appeal"). And even though Plaintiffs' case on liability became stronger as the litigation proceeded, proving damages remained a significant, constant risk given the movement of AMT's stock price during (and after) the Class Period and the relative degree of the stock's reaction to relevant disclosures. See Lupron, 2005 WL 2006833, at *4 ("History is replete with cases in which plaintiffs prevailed at trial on issues of liability, but recovered little or nothing by way of damages.") (citing instances). Notwithstanding the risk of nonpayment, Lead Counsel committed substantial financial resources and labor to the prosecution of this case and achieved a compromise on favorable terms.

It is also worthwhile to note that "[t]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill." <u>In re Gulf Oil/Cities Servs. Tender Offer Litig.</u>, 142 F.R.D. 588, 597 (S.D.N.Y. 1992) (finding 30% fee "eminently reasonable"). Although this action was spurred at least in part by the May 2006 report of the Center for Financial Research & Analysis, Inc. (the "CFRA Report") that spotlighted AMT and other companies as being "at risk" of having engaged in stock option backdating, the inquiries by the SEC and the Department of Justice that followed have not, to Plaintiffs' knowledge, resulted in any enforcement actions, consent orders, or public findings to date. The findings of AMT's Special Committee avoided a clear statement of intentional or highly reckless misconduct, and did not name any of the current or former AMT executives who were involved in the stock option backdating. Moreover, the Report of the Special Litigation Committee of AMT's Board of Directors (the "SLC Report"), which contains important facts and explanation concerning the stock option backdating, was not issued until July 2007, more than a year after this action was commenced, and was never intended to be shared with Plaintiffs in this action. In sum, Lead Counsel bore substantial risks in bringing this litigation, which was by no means a "sure thing," on a contingent-fee basis. These risks support the requested attorney's fee.

3. The Time and Labor Required

The proposed Settlement is the product of considerable time and labor expended by Plaintiffs' counsel, and particularly Lead Counsel. Prior to seeking appointment as lead counsel for Lead Plaintiff, and in connection with filing the Consolidated Amended Complaint, Lead Counsel conducted an extensive investigation into the facts and law underlying the issues in this case. This investigation included a review of the AMT's SEC filings and other public disclosures and pertinent media reports; interviews of dozens of former AMT employees; an in-depth analysis of the pricing and timing of AMT's stock option grants; a preliminary damages and loss causation analysis; and analysis of decisions in other stock options backdating cases and published opinions of this Court in securities cases.

Subsequently, Plaintiffs drafted a lengthy brief in opposition to Defendants' motion to dismiss on issues of scienter, materiality, loss causation, damages (including the operation of the PSLRA's "90-day bounce-back" provision) and controlling person liability. Before the scheduled argument on the motion and prior to the mediation before Judge Eugene F. Lynch, Plaintiffs filed a request for judicial notice of the public version of the SLC Report. In connection with the mediation, Plaintiffs prepared a comprehensive mediation statement and submitted a detailed damages analysis prepared by a consulting expert. Lead Counsel made a presentation to Judge Lynch at the start of the mediation, and participated in lengthy arm's-length negotiations with Defendants. Promptly after the mediation ended without an accord, Plaintiffs drafted a proposed Second Amended Complaint ("SAC") with detailed allegations drawn from the public version of the SLC Report and including a revised and narrowed loss causation theory, and moved for leave to amend on grounds that the SLC Report constituted important newly discovered facts and that litigating a motion to dismiss on the amended pleading would ensure that the Court would have to hear argument and rule on only one motion addressed to the pleadings. Plaintiffs' reply brief on the motion to amend responded to Defendants' arguments challenging the substance of the SAC's amended allegations of scienter and loss causation. <u>See</u> <u>Glassman v. Computervision Corp.</u>, 90 F.3d 617, 623 (1st Cir. 1996) ("There is no practical difference, in terms of review, between a denial of a motion to amend based on futility and the grant of a motion to dismiss for failure to state a claim.").

While the motion to amend was being briefed, the parties agreed to resume settlement discussions facilitated by the mediator. An agreement-in-principle was finally reached on December 10, 2007, based on Judge Lynch's recommendation that the parties agree to settle for $14 million. During the process of negotiating the terms of a formal Settlement Agreement and related documents with Defendants, Lead Plaintiff conducted confirmatory discovery sufficient to satisfy itself that the Settlement is fair, reasonable, and adequate and in the best interests of the Class. In

December 2007, the parties negotiated the scope of Lead Plaintiff's confirmatory discovery requests and agreed that such discovery would include interviews of outside counsel for both the Special Litigation Committee (the "SLC") and the Special Committee, and a review of the "core" non-privileged documents relied upon by the SLC and the Special Committee in conducting their respective investigations of AMT's historical stock option practices and rendering their findings.

The interviews covered a broad range of topics relating to the SLC's and Special Committee's investigations, including the methodology of the investigations; the types of evidence gathered, reviewed and relied upon by the SLC and Special Committee; the maintenance of such evidence; the specific findings and recommendations rendered by both Committees; and the specific documentary evidence supporting their findings and recommendations.

Lead Counsel reviewed and analyzed approximately 5,000 pages of documents produced by the SLC. The documents were organized chronologically from 1998 through 2005, and consisted of various types of documentary evidence detailing AMT's historical stock option grants, including e-mails, internal memoranda, minutes of meetings of the full Board of Directors and the Compensation Committee, unanimous written consents, option agreements, selected excerpts from a former employee's daily notebook, and spreadsheets from Equity Edge, the software AMT used to track its stock option grants. These documents generally enabled Lead Plaintiff to understand AMT's options granting process and specifically detailed the approval process surrounding the backdated option grants. Information gleaned from these documents provided Lead Plaintiff with a well-informed opinion as to the merits of the claims and the potential risks Lead Plaintiff would face in establishing liability at trial.

The number of hours spent by Plaintiffs' counsel, which were spent efficiently and without duplication of effort, also reflects the substantial efforts entailed in bringing this action to a successful conclusion. Plaintiffs' counsel spent 2,844 hours litigating this action and achieving the

Settlement, resulting in a combined lodestar of $1,260,143.50. See Lodestar and Expenses Summary, Goldsmith Decl. Ex. A, based on individual Firm Affidavits annexed as Exhibits B, C and D; see also StockerYale, 2007 WL 4589772, at *7 (awarding 33-1/3% fee where, among other things, counsel logged 1,239 hours).

Owing to the deadlines set in the Court's Preliminary Approval Order, this lodestar does not include the time counsel will spend preparing Plaintiffs' submissions in support of final approval of the Settlement and Plan of Allocation of the Net Settlement Fund and in opposition to any objections that may be filed. Further, if the Court approves the Settlement, it will be necessary for Lead Counsel to devote additional hours to oversight of the settlement administration and distribution process and filing a motion to authorize distribution of the Net Settlement Fund, for which counsel will not receive any additional compensation. Lead Counsel submits that the time and effort put in by Plaintiffs' counsel amply support the requested attorney's fee.

4. The Novelty and Difficulty of the Questions

Securities class actions are well-recognized for their complexity and difficulty. See In re Sumitomo Copper Litig., 189 F.R.D. 274, 281 (S.D.N.Y. 1999) ("[F]ederal courts . . . have long recognized that [securities class action] litigation is notably difficult and notoriously uncertain."); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[C]lass action suits . . . have a well deserved reputation as being most complex.").

This case was unquestionably complex. Lead Plaintiff bore the burden to prove that Defendants made materially false and misleading statements concerning AMT's financial results and accounting for stock option grants intentionally or with reckless disregard for the truth. Recklessness has been defined as "a highly unreasonable omission, involving not merely simple, or even inexcusable, negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious the actor must have been aware of it." Greebel v. FTP Software, Inc., 194 F.3d 185, 198 (1st Cir. 1999). After the commencement of this action, the Supreme Court held that Defendants' explanations regarding scienter must be taken into account at the pleading stage as well as at trial: "A plaintiff alleging fraud in a § 10(b) action . . . must plead facts rendering an inference of scienter *at least as likely* as any plausible opposing inference. At trial, she must then prove her case by a 'preponderance of the evidence.' Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter." Tellabs, 127 S. Ct. at 2513.

The array of facts surrounding AMT's challenged stock option grants raise sharply disputed issues concerning, among other things, whether AMT's former management acted with an intent to defraud or engaged in deliberate wrongdoing; whether the alleged options backdating was the result of inactionable negligence or mistakes, or was carried out in good faith; whether AMT's top management (which changed during the Class Period) was or should have been aware of the accounting and financial reporting ramifications of "in-the-money" stock options; and whether the errors in these financial statements would have been material to a reasonable investor. "[T]he proof of scienter in fraud cases is often a matter of inference from circumstantial evidence," and is generally subject to multiple interpretations. Reisman v. KPMG Peat Marwick LLP, 965 F. Supp. 165, 172 (D. Mass. 1997) (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983)); see also In re Stone & Webster, Inc. Sec. Litig., 253 F. Supp. 2d 102, 129 n.12 (D. Mass. 2003) ("Absent a signed confession, detailing each defendant's state of mind, it is difficult to imagine what form such 'direct' evidence might take.").

The damages issues here also are vigorously disputed and center on complex issues of loss causation that have been the subject of significant renewed debate since the Supreme Court's decision in Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005). In their opposition to Plaintiffs' motion for leave to file the SAC, Defendants challenged Plaintiffs' proposed allegations that AMT's disclosure of its establishment of the Special Committee and the SEC's inquiry, and the first public disclosure of the CFRA Report, were "corrective disclosures" that caused a statistically significant decline in AMT's stock price. The observations of the court in Tyco are apt here: "[T]he still-developing law of loss causation in securities cases created significant risk and uncertainty for plaintiffs. According to plaintiffs' theory, the misstatements by [defendants] proximately caused investors' losses, as shown by drops in Tyco's stock prices following the . . . corrective disclosures. None of those disclosures, however, involved a specific admission of fraud . . . . Instead, the disclosures mostly related to the integrity of Tyco's management." Tyco, 535 F. Supp. 2d at 260. The general upward trend in AMT's stock price during the Class Period, its arguably muted reactions in dollar terms to the corrective disclosures, and the increases in the stock price in response to certain relevant post-Class Period disclosures, add further complexity (and risk) to Plaintiffs' damages theories.

Although Plaintiffs believe this Court likely would have granted leave to file the SAC and subsequently denied Defendants' renewed motion to dismiss, ultimate resolution of the loss causation and damages issues would depend almost entirely upon expert testimony, leading unavoidably to a "battle of the experts" and the accompanying risk of limited or zero recovery. See id. at 260-61 ("Proving loss causation [at trial] would be complex and difficult. Moreover, even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages. If, faced with conflicting expert testimony, the jury chose to embrace the most conservative estimate of damages, then the ultimate award might turn out to be less than the proposed settlement."). In sum, the complexity and difficulty of establishing liability and damages in this action support the reasonableness of the requested 25 percent fee.

5. The Amount Involved and the Results Obtained

The Settlement provides the Class with a gross $14 million recovery, and was secured despite the many risks and complexities discussed above. Plaintiffs' damages consultant has estimated that the Class, assuming a jury finding of liability on all of Plaintiffs' claims, suffered recoverable damages of approximately $92.1 million. On a summary judgment motion and at trial, Defendants would contend that any declines in AMT common stock on May 19 and 22, 2006 were immaterial and illusory, and were not caused by Defendants' misstatements concerning AMT's financial results and its stock option grants and accounting. Accordingly, Defendants would no doubt proffer a damages estimate far lower than $14 million, if not actually zero.

The $14 million Settlement represents 15.2 percent of Plaintiffs' estimated classwide damages. This compares favorably, particularly in light of the risks and costs of continued litigation, to "the average 5.5%-6.2% of estimated losses recovered in securities fraud class action settlements since 1995." <u>In re Charter Commc'ns, Inc. Sec. Litig.</u>, No. MDL 1506, 2005 WL 4045741, at *6 (E.D. Mo. June 30, 2005) (citing <u>In re Rite Aid Co. Sec. Litig.</u>, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001)); <u>see</u> <u>also</u> <u>In re Cendant Corp. Litig.</u>, 264 F.3d 201, 242 n.22 (3d Cir. 2001) (noting that approved settlement recoveries in securities class actions typically range from 1.6% to 14% of claimed damages). Lead Counsel submits that given these factors, the Settlement is an excellent result and the requested attorney's fee is reasonable.

6. The Skill Required to Perform the Legal Services Properly and the Ability of the Attorneys

Last, Lead Counsel submits that it, and all Plaintiffs' counsel, have demonstrated skill in representing the Class during this litigation and achieving the Settlement. As reflected in the firm resumes previously submitted to the Court, counsel possess significant experience and expertise in this practice area, and brought such acumen successfully to bear in prosecuting this action and securing the Settlement. See Relafen, 231 F.R.D. at 80 (acknowledging quality representation and efforts of class counsel).

Defendants, ably represented here by two major law firms with established securities litigation practices, mounted an aggressive and vigorous defense and stood firm during the settlement negotiations. See Xcel, 364 F. Supp. 2d at 995 ("Defendants' attorneys . . . consistently put plaintiffs' counsel through the paces. All counsel consistently demonstrated considerable skill and cooperation to bring this matter to an amicable conclusion."); In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("Securities Lead Counsel obtained the Settlement in the face of vigorous opposition by defendants who were represented by some of the nation's leading law firms."). Moreover, "it is reasonable for Lead Counsel and the other plaintiffs' firms to be as well paid as their adversaries who did not work on a contingency basis." Charter, 2005 WL 4045741, at *17. This factor, and indeed all of the pertinent Johnson factors discussed above, support the requested attorney's fee.[7]

D. The Requested Attorney's Fee Is Reasonable When Cross-Checked Against Plaintiffs' Counsel's Lodestar

This Court is not required to cross-check the requested 25 percent fee against Plaintiffs' counsel's lodestar in determining whether the fee is reasonable. See Relafen, 231 F.R.D. at 81 (citing Thirteen Appeals, 56 F.3d at 307). When a lodestar is used for a cross-check, however, the focus is not on the "necessity and reasonableness of every hour" of the lodestar, but rather on the broader question of whether the requested fee appropriately reflects the degree of time and effort expended by counsel. Tyco, 535 F. Supp. 2d at 270 (quoting Thirteen Appeals, 56 F.3d at 307); see also In re

[7] The reaction of the Class to the requested fee, while not one of the formal Johnson factors, is also relevant. See Relafen, 231 F.R.D. at 79-80 ("examin[ing] and carefully consider[ing] each of the objections" to the requested fee); Tyco, 535 F. Supp. 2d at 269 (considering number and merits of objections to fee request). Under the Court's February 28, 2008 Preliminary Approval Order, Class members have until May 28, 2008 to submit objections, and Plaintiffs will file responses to any objections on June 4, 2008. As of the date hereof, no objections to the Settlement, Plan of Allocation or requested attorney's fees and expenses have been filed with the Court or received by Plaintiffs' counsel. One opt-out, by a class member who purchased 100 shares, has been received to date.

Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean counting."). The Supreme Court has indicated that the use of current, rather than historical, billing rates is appropriate in examining the lodestar because current rates more adequately compensate for inflation and loss of use of funds. See Jenkins, 491 U.S. at 283-84.

Here, Plaintiffs' counsel collectively devoted 2,844 hours to the prosecution and settlement of this litigation as of the date hereof, resulting in a total lodestar of $1,260,143.50. See Master Chart and Firm Affidavits, Goldsmith Decl. Exs. A-D. This lodestar yields a multiplier of 2.78. Given the number of hours invested by counsel at competitive rates, the risks undertaken and the results achieved, this multiplier is reasonable and in the range of multipliers found reasonable for "cross-check" purposes in common fund cases in this Circuit. See Tyco, 535 F. Supp. 2d at 271 (finding multiplier of 2.697, on fee of 14.5% of $3.2 billion settlement, "relatively low" and "appropriately compensates counsel for the risk that they assumed in litigating the case"); Relafen, 231 F.R.D. at 82 (finding multiplier of 2.02 on fee of 33-1/3% "appropriate" without extended discussion); Mazola, 1999 WL 1261312, at *3 (awarding 20 percent fee that yielded a multiplier of "less than 3"); Conley, 222 B.R. at 182 (awarding fee representing 20-25% of value added to settlement by debtor's counsel, yielding multiplier of 8.9); see also Wildman v. Lerner Stores Corp., 771 F.2d 605, 613 (1st Cir. 1985) (noting distinction between multipliers awarded in statutory fee-shifting versus common fund cases: "While multiples of 2, 3, 4 and 4.5 have occasionally been given, these multipliers occur primarily in protracted multidistrict antitrust and securities cases involving recoveries of ten million dollars or more.").

Courts in other Circuits are generally in accord. See, e.g., Rite Aid, 396 F.3d at 298-99, 303-04 (no abuse of discretion where district court approved fees with "fairly common" lodestar multiplier of 4.07, despite objection that multiplier could not exceed 3) (cited in Relafen, 231 F.R.D.

at 82); Kurzweil v. Philip Morris Cos., No. 94 Civ. 2373 (MBM), 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999) (awarding 30% fee, equaling 2.46 multiplier, and noting that "multipliers of between 3 and 4.5 have been common in federal securities cases") (Mukasey, J.).

Lead Counsel has achieved an excellent result for the Class in an efficient and expeditious manner, and have avoided unnecessary expenditure of judicial and private resources. Lead Counsel's focused litigation strategy and prompt, successful resolution of the action tends to support the lodestar enhancement represented by the requested fee. See In re Fidelity/Micron Sec. Litig., No. Civ. 95-12676-RGS, 1998 WL 313735, at *4 n.11 (D. Mass. June 5, 1998) (while action settled before discovery and requested fee would result in multiplier, "counsel should not be unduly penalized for promptly resolving litigation that could easily have been protracted"), vacated on other grounds, 167 F.3d 735 (1st Cir. 1999). Further, as Judge Woodlock remarked during the fairness hearing held in the Sequoia Systems securities litigation:

> [T]he Lodestar figure here is one that might otherwise give me pause but for the evaluation that I've made of this case and the quality of the counsel involved in this case and the speed with which [this] relatively complex litigation has been resolved. I think that is a function of the quality of the counsel involved, their ability to get to the core of the case, the jugular of the case promptly, and effect a prompt resolution. ***That prompt resolution is a time value to the members of the class themselves.*** And I would not want to put myself in the position of in some way providing a disincentive to prompt resolution of the case simply because there were to be early on greater disparity between the Lodestar figure and the percentage figure involved in the case.

Sequoia Sys., 1993 WL 616694, at *1 (emphasis added).

In sum, Lead Counsel respectfully submits that the enhancement of Plaintiffs' counsel's lodestar represented by a 25 percent fee is well-supported by the results obtained and fees awarded in comparable cases, and should be approved.

II. THE EXPENSES INCURRED BY PLAINTIFFS' COUNSEL ARE REASONABLE AND SHOULD BE REIMBURSED FROM THE SETTLEMENT FUND

In addition to an award of attorney's fees, counsel who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund. See In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 737 (1st Cir. 1999) ("[L]aw firms are not eleemosynary institutions, and lawyers whose efforts succeed in creating a common fund are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax.").

Here, Lead Counsel, on behalf of all Plaintiffs' counsel, respectfully seek reimbursement of litigation and claims and settlement administration expenses in the amount of $323,385.70. The affidavits of Plaintiffs' counsel, annexed to the Goldsmith Declaration as Exhibits B, C and D, provide itemized schedules of the expenses incurred. The principal expenses incurred in the course of prosecuting this action and achieving this Settlement include amounts paid and owing to Plaintiffs' consulting experts and amounts owing to Strategic Claims Services, LLC ("SCS") for the dissemination of notice to the Class and settlement and claims administration.

The professional fees and costs charged by Plaintiffs' consulting experts are also supported by the Affidavits of Howard Mulcahey and Paul Mulholland, annexed to the Goldsmith Declaration as Exhibits G and H. The fees and costs incurred by SCS for settlement and claims administration are also supported by Exhibit I. Together, these expense categories account for nearly 90 percent of the total expense request. A master chart of the total expenses for each of Plaintiffs' counsel is set forth in Exhibit A.

Lead Counsel submits that the expenses were reasonably and necessarily incurred in prosecuting this action, achieving the proposed Settlement, disseminating notice to the Class and administering the settlement to date, and should be reimbursed from the Settlement Fund.

Conclusion

For the foregoing reasons, Lead Counsel for Lead Plaintiff Steamship Trade Association-International Longshoremen's Association Pension Fund, on behalf of all Plaintiffs' counsel, respectfully requests that this Court award attorney's fees in the amount of $3,500,000.00, plus accrued interest, and order reimbursement of expenses in the amount of $323,385.70.

Dated: April 30, 2008

Respectfully submitted,

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