UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

In re CARTER'S, INC. SECURITIES LITIGATION	))))	Civil Action No. 1:08-CV-2940-AT

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

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Labaton Sucharow LLP, Court-appointed Lead Counsel for Plymouth County Retirement System ("Lead Plaintiff")[1] and the Settlement Class, respectfully submits this memorandum of law in support of its motion, pursuant to Rule 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an order approving Lead Counsel's motion for attorneys' fees and reimbursement of litigation expenses, to be paid out of the Settlement Fund established by the proposed partial settlement (the "Settlement") of the Consolidated Action.[2]

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[1] All capitalized terms used herein, unless otherwise defined, have the same meaning as that set forth in the Stipulation and Agreement of Settlement with Company and Individual Defendants (the "Stipulation"), dated December 21, 2011. (Docket No. 111-3).

[2] Lead Counsel's motion is supported by the Declaration of Jonathan Gardner in Support of Lead Plaintiff's Motion for Final Approval of Partial Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Gardner Decl."), which is incorporated herein by reference, and the Declaration of William R. Farmer, Executive Director of Plymouth County Retirement System in Support of Lead Plaintiff's Motion for Final Approval of Partial Class Action Settlement and Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, annexed as Ex. 1 to the Gardner Decl. All exhibits referenced herein are annexed to the Gardner Decl. 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 Decl. and the second reference refers to the exhibit designation within the exhibit itself.

PRELIMINARY STATEMENT

As set forth in the Stipulation, the Settling Defendants[3] have paid $20 million in cash to secure a settlement of the claims against them in the Consolidated Action and resolve all Released Claims against the Settling Defendants and Released Defendant Parties. This substantial recovery is the result of the diligent effort, skill, and effective advocacy of Lead Counsel, with the oversight and involvement of Lead Plaintiff. The Settlement provides an immediate and substantial recovery to the Settlement Class, who faced a significant risk of a much smaller recovery or no recovery were the Consolidated Action to have continued against the Settling Defendants.[4] As detailed herein and in the Gardner Decl., Lead Counsel has vigorously pursued the investigation, development, and prosecution of the alleged claims.

In connection with the Settlement, and on behalf of all Plaintiffs' counsel who have contributed to the prosecution and settlement of the claims at issue, Lead Counsel respectfully seeks an award of attorneys' fees in the amount of 28% of the Settlement Fund, or $5,600,000, and litigation expenses of $225,693.33, which

[3] The "Settling Defendants," collectively refers to Carter's, Inc. ("Carter's" or the "Company"), Frederick J. Rowan, II ("Rowan"), Joseph Pacifico ("Pacifico"), Michael D. Casey ("Casey"), Andrew North ("North"), Charles E. Whetzel, Jr. ("Whetzel"), and Joseph M. Elles ("Elles").

[4] The Consolidated Action continues against the sole non-settling defendant, PricewaterhouseCoopers LLP ("PwC").

were reasonably and necessarily incurred during the course of the Consolidated Action, with interest earned on both amounts.

Lead Counsel has represented the Settlement Class on a purely contingent-fee basis for the past 3.5 years and has received no compensation for its work, while it has continued to incur costs. Given the result achieved, the complexity and amount of work involved, the skill required, and the risks undertaken, Lead Counsel respectfully submits that the requested award is fair and reasonable under the circumstances. Indeed, as discussed below, courts in this Circuit, recognizing the risks and effort generally expended by counsel to obtain such favorable results, have frequently awarded similar and higher fees in complicated securities cases.

Furthermore, the requested fees and expenses are supported by Lead Plaintiff, a sophisticated institutional investor that has been involved throughout the prosecution of the Consolidated Action. (Ex. 1.) Lead Plaintiff believes that the request is reasonable in light of the amount and quality of the work performed and the substantial recovery obtained. In addition, although Notices have been mailed to over 90,000 potential Settlement Class Members stating that Lead Counsel would seek fees of up to 30% of the Settlement Fund and expenses not to exceed $400,000, plus interest on such amounts, not a single Settlement Class

Member has filed an objection to these requests as of the date of this motion.[5] (Gardner Decl. ¶17, Ex. 3 ¶13.) Accordingly, it is respectfully submitted that Lead Counsel's motion should be granted in full by the Court.

OVERVIEW OF THE CONSOLIDATED ACTION

For the sake of brevity, the Court is respectfully referred to the Gardner Decl. for, *inter alia*: a detailed history of the Consolidated Action; the nature of the claims asserted; the investigation undertaken; the negotiations leading to settlement; the value of the Settlement compared to the risks of continued litigation; and a description of the services provided by Lead Counsel.

ARGUMENT

I. A REASONABLE PERCENTAGE OF THE FUND RECOVERED IS THE APPROPRIATE METHOD TO USE IN AWARDING ATTORNEYS' FEES IN THE ELEVENTH CIRCUIT

In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court reiterated established precedent that under the common fund doctrine "a reasonable fee is based on a percentage of the fund bestowed on the class." Following the Supreme Court's lead, the Eleventh Circuit, in *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991), determined that "the percentage of the fund

[5] The deadline for filing objections is May 10, 2012. Any objections that are received subsequent to this filing will be addressed in Lead Counsel's reply papers, to be filed no later than May 24, 2012.

approach is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." [6]

Courts have recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund serve to "encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore discourage future misconduct of a similar nature." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 356 (E.D.N.Y. 2010). Indeed, the Supreme Court has emphasized that private securities cases are "an essential supplement to criminal prosecutions and civil enforcement actions," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), and "'an indispensable tool with which defrauded investors can recover their losses' – a matter crucial to the integrity of domestic capital markets." *Id*. at 320 n.4.

A. The 28% Fee Request Is Fair and Reasonable

A review of common fund cases confirms that the 28% fee sought by Lead Counsel is fair and reasonable and within the range of fee awards approved by

[6] The Private Securities Litigation Reform Act of 1995 ("PSLRA") has also indicated its preference for a percentage analysis when awarding attorneys' fees in securities class actions. *See* 15 U.S.C. §77z-1(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class. . . .").

courts within the Eleventh Circuit. The Eleventh Circuit has found that "the 'majority of common fund fee awards fall between 20% to 30% of the fund,"' and has directed district courts to consider the 20% to 30% range a 'benchmark' for percentage fee awards, which "'may be adjusted in accordance with the individual circumstances of each case."' *Waters v. Int'l Precious Metals Corp*., 190 F.3d 1291, 1294 (11th Cir. 1999); *see also Faught v. American Home Shield Corp.,* 668 F.3d 1233, 1242-43 (11th Cir. 2011) (applying *Camden I* and *Waters* and affirming 25% fee, plus $1.5 million payment from defendants in consumer class action).

A review of recent fee awards in common fund securities class actions within this Circuit with settlements in the range of this one indicates that the requested 28% fee is very comparable. *See, e.g., Waters*, 190 F.3d at 1293-98 (affirming award of 33.25% of $40 million settlement fund); *In re Friedman's, Inc. Sec. Litig.*, No. 03-cv-3475, 2009 WL 1456698, at *2-4 (N.D. Ga. May 22, 2009) (awarding 30% of $14.9 million settlement fund); *In re ChoicePoint, Inc. Sec. Litig.*, Civil Action No.: 1:05-CV-00686-JTC, slip op. (N.D. Ga. July 21, 2008) (awarding 30% of settlement fund of $10 million and interest and expenses) (submitted herewith as part of compendium of unreported cases, Ex. 14); *In re AFC Enters., Inc. Sec. Litig*., No. 1:03-cv-0817, slip op. (N.D. Ga. Sept. 28, 2005) (awarding 30% of $22.2 million settlement fund, comprised of initial cash fund of

$15 million supplemented by portions of two company-owned claims eventually totaling an additional $7.2 million to plaintiffs) (*Id.*); *In re Cryolife, Inc. Sec. Litig.*, No. 02-cv-1868, slip op. (N.D. Ga. Nov. 9, 2005) (awarding 30% of $23.25 million settlement) (*Id.*); *In re Profit Recovery Group Int'l, Inc. Sec. Litig.*, No. 00-cv-1416, slip op. (N.D. Ga. May 26, 2005) (awarding 33 1/3% of $6.75 million settlement fund) (*Id.*); *In re Clarus Corp. Sec. Litig.*, No. 00-cv-2841, slip op. (N.D. Ga. Jan. 6, 2005) (awarding 33 1/3% of $4.5 million settlement fund) (*Id.*); *LaGrasta v. Wachovia Capital Markets*, LLC, No. 01-CV-251, 2006 WL 4824480 (M.D. Fla. Nov. 6, 2006) (awarding 30% of $9 million settlement fund); *AAL High Yield Bond Fund, et al. v. Ruttenberg, et al.*, No. 00-1404, slip op. (N.D. Ala. Dec. 14, 2005) (awarding 30% of $17.75 million settlement fund) (*Id.*) Thus, when compared to fees awarded in this Circuit in class action settlements of similar magnitude, Lead Counsel's fee request of 28% is reasonable.

B. A Fee Approved by Lead Plaintiff Is Entitled to a Presumption of Reasonableness

In enacting the PSLRA, Congress intended to encourage sophisticated institutional investors with substantial financial stakes in a litigation to serve as plaintiffs and play an active role in supervising and directing the litigation, including selecting and monitoring counsel. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 261-62, 282 (3d Cir. 2001). Fees negotiated between a properly selected

PSLRA lead plaintiff and its counsel should be accorded great weight. *See, e.g., Mills Corp*., 265 F.R.D. at 261 ("a fee request that has been approved and endorsed by properly-appointed lead plaintiffs . . . enjoys a presumption of reasonableness").

Here, Lead Plaintiff is a sophisticated institution with extensive experience in negotiating fees with counsel and in evaluating the results of securities class action settlements. Lead Plaintiff approves and endorses the requested fee as fair and reasonable in light of, among other things, the substantial work Lead Counsel has done in the Consolidated Action on a contingent basis, the risks of continuing the claims against the Settling Defendants and the excellent result obtained on behalf of the Settlement Class. (Ex. 1.) Accordingly, the requested fee is entitled to a presumption of reasonableness.

II. THE RELEVANT ELEVENTH CIRCUIT FACTORS CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

In *Camden I*, the Eleventh Circuit recognized that there "is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." 946 F.2d at 774. The *Camden I* court recommended that district courts consider several factors, which include:

> (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion

> of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) 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 attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (11th Cir. 1974)). *Camden I* also recognized additional factors that a court may consider in awarding a percentage fee award, including "the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel . . . and the economics involved in prosecuting a class action." *Id*. at 775. Here, an analysis of the most relevant factors confirms that the fee requested by Lead Counsel is fair and reasonable.

A. The Time and Labor Required

A review of the effort and time expended by Lead Counsel establishes that the requested fee is justified. The Gardner Decl. details the myriad undertakings by Lead Counsel to prosecute the claims against the Settling Defendants, the time and labor expended, and the diligence of those efforts. Over the course of the prosecution and settlement, Lead Counsel was also provided with the assistance of Liaison Counsel David Worley and James Evangelista, formerly of Page Perry

LLC and Evangelista & Assoc., now with Harris Penn Lowry DelCampo, LLP, as well as additional Plaintiffs' counsel and counsel for additional plaintiff Scott Mylorie, Finkelstein Thompson LLP. (Gardner Decl. ¶104, Exs. 6-10.)

The Settlement was reached at a point in which Plaintiffs' counsel had committed extensive resources to understanding the facts and challenges posed by the claims and defenses, and the factors that would impact a recovery. Although the PSLRA discovery stay has been in effect, as set forth in greater detail in the Gardner Decl., the proceedings to date have included:

- Extensive investigation, including review and analysis of: (1) filings with the Securities and Exchange Commission ("SEC"); (2) publicly available information concerning the Defendants (including newspaper articles, online publications, stock price movement data, statements at analyst conferences and Bloomberg reports); (3) securities analyst reports and advisories about Carter's; (4) Defendants' press releases and other public statements; (5) pleadings, charging instruments, and disclosures in the SEC's action against Elles; (6) materials in the criminal proceeding against Elles filed by the Department of Justice ("DOJ"); and (7) the applicable law and accounting rules governing the claims. (Gardner Decl. ¶¶56-58.)

- Contentious motion practice including: (1) investigating and drafting the Complaint, FAC and SAC; (2) researching and responding to three separate motions to dismiss the FAC filed by Defendants; and (3) preparing Lead Plaintiff's mediation statement. (*Id*. ¶¶44-49.)

- Identifying more than 160 potential witnesses, contacting 114, and interviewing approximately 68 individuals with knowledge of the relevant issues to the Consolidated Action. (*Id*. ¶57.)

- Consulting with experienced experts including a damages expert to analyze issues of loss causation and class-wide damages, and an accounting expert to analyze the Company's restatement. (*Id*. ¶58.)

- Extended negotiations including several discussions between counsel and an in-person, full-day mediation session before former United States District Court Judge Layn R. Phillips, a highly regarded and experienced mediator. (*Id*. ¶¶12, 60-62.)

The number of hours Plaintiffs' counsel expended on this litigation, more than 5,576.20 hours with a "lodestar" of $3,018,556.00 (the result of multiplying the number of hours worked by counsel's current billing rates) attests to their extensive efforts. (*See* Ex. 4 (summary table of hours and lodestars); 5-A through 10-A.) While it is not required in the Eleventh Circuit, an analysis of the requested fee under the "lodestar/multiplier" approach further supports the reasonableness of a 28% award. *See, e.g., Waters*, 190 F.3d at 1298 ("while we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison"). Here, based on the $20 million Settlement Fund, the requested 28% award results in a multiplier of 1.86.[7] Lead Counsel's work,

[7] The multiplier is calculated by dividing the $5,600,000 fee request by the $3,018,556 lodestar of Plaintiffs' counsel. It is appropriate to use counsel's current rates in order to compensate for the delay in payment and inflation. *See, e.g., Mashburn v. Nat'l Healthcare, Inc*., 684 F. Supp. 679, 700 (M.D. Ala. 1988).

As supported by Plaintiffs' counsel's sworn declarations, their rates are the same as those accepted in other securities or shareholder litigation. They are also commensurate with rates used by peer defense-side law firms litigating matters of

however, will continue beyond approval of the Settlement, with no additional compensation.

This is below the range of multipliers frequently awarded in class action settlements of similar magnitude in this and other circuits. *See, e.g., Pinto,* 513 F. Supp. 2d at 1344 (noting that lodestar multipliers "'in large and complicated class actions' range from 2.26 to 4.5"), *Ingram v. The Coca-Cola Co.,* 200 F.R.D. 685, 694-96 (N.D. Ga. 2001) (awarding fee representing a multiplier between 2.5 and 4); *Mashburn,* 684 F. Supp. at 702 ("A multiplier of approximately 3.1 in a national class action securities case is not unusual or unreasonable."). Accordingly, the time and labor required amply demonstrate the reasonableness of the attorneys' fee request and show that a substantial amount of time was required before the Settlement was reached.

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a similar magnitude. (*See* sample of defense firm billing rates gathered by Labaton Sucharow from bankruptcy court filings in 2010, Ex. 11.) *See also Blum*, 465 U.S. at 896 n.11 (explaining that courts should consider whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."); *In re Royal Ahold N.V. Sec. & ERISA Litig.,* 461 F. Supp. 2d 383, 386 n.6 (D. Md. 2006) (approving fees in securities class action and holding that rates were "within a reasonable range for the national firms that prosecuted the case"); *In re MicroStrategy, Inc. Sec. Litig*., 172 F. Supp. 2d 778, 788 (E.D. Va. 2001) (rates were "within the range of reasonableness for PSLRA cases, where the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials").

B. The Novelty and Difficulty of the Issues

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

Lead Plaintiff and Lead Counsel faced several novel and difficult issues in prosecuting the claims against the Settling Defendants, including vigorously contested motions to dismiss involving complicated facts and difficult legal issues that challenged the establishment of all of the elements of Lead Plaintiff's claims. Lead Counsel worked diligently to overcome these obstacles in order to bring together the resolution now before the Court. (Gardner Decl. ¶¶64-89.)

For instance, the Settling Defendants argued, and would have continued to argue both in dispositive motions and to a jury, that the alleged OshKosh-related misstatements were legitimate economic projections protected by the PSLRA, and that the defendants' purported knowledge of the underlying facts was irrelevant. 15 U.S.C. §78-5(c)(1); *see also Harris v. Ivax Corp*. 182 F.3d 799, 803, 806-807

(11th Cir. 1999) (defendants "may avoid liability for forward-looking statements that prove false if the statement is 'accompanied by meaningful cautionary statements'"). For example, the Settling Defendants maintained that statements in which they professed their belief that the OshKosh brand had "great potential" (*e.g.*, SAC ¶314), as well as statements in which they "projected" increases in OshKosh sales figures (*e.g.*, SAC ¶274), all concerned future economic performance, and that the accuracy of future projections can only be determined after those projections are made. Indeed, in his Dismissal Order Judge Forrester accepted the Settling Defendants' *Harris*-based arguments, but granted leave to replead. (Gardner Decl. ¶83.)

Lead Plaintiff would have continued to maintain, and work to gather evidence, in response, that: (1) the alleged misstatements related to historical or current facts, did not comprise "mixed" statements of present fact and future projection under *Harris*, and therefore were not protected as forward-looking, *see, e.g., In re Premiere Techs., Inc., Sec. Litig.*, No. 98 cv 1804, 2000 WL 33231639, *17 (N.D. Ga. December 8, 2000) ("the statutory safe harbor does not preclude liability in this case…for 'statements or omissions of historical or 'hard' facts about current or past conditions'"); and (2) because information provided by confidential witnesses demonstrates the Settling Defendants' knowledge that the

alleged misstatements were false, any cautionary language accompanying the alleged misstatements could not have been "meaningful." *See, e.g., In re SeeBeyond Techs. Corp. Sec. Litig.*, 266 F.Supp.2d 1150, 1165-66 n.8 (C.D. Cal. 2003) (the "cautionary statement cannot be evaluated without reference to the defendant's knowledge"). Despite Lead Plaintiff and Lead Counsel's extensive ongoing investigation and efforts to establish what was known about the OshKosh Fraud and when, there is, however, a real risk that the Court or a jury could find the alleged misstatements were forward-looking and accompanied by appropriate cautionary language. (Gardner Decl. ¶84.)

The Settling Defendants would also likely make several scienter-based arguments regarding the Accommodations Fraud, including that: (1) the SAC fails to plead a strong inference of scienter (and that Lead Plaintiff could not prove scienter) on the part of Casey, Rowan, and North, the only individuals who "made" any alleged misstatements; (2) under the Supreme Court's recent decision in *Janus Capital Group, Inc. v. First Deriv. Traders*, 131 S. Ct. 2296 (2011), Elles, Pacifico, and Whetzel did not "make" any alleged misstatements because none possessed "ultimate authority" over the alleged statements—thus any scienter attributable to them is irrelevant; and (3) because the SAC fails to plead a strong inference of scienter as to any Individual Defendant that "made" an alleged misstatement, and

Lead Plaintiff could not prove such scienter, scienter cannot be imputed to Carter's under Eleventh Circuit agency principles, *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008). With respect to the scienter allegations attributed to confidential witnesses, the Settling Defendants maintained that they were insufficiently particularized, because the allegations did not specify the particular dates of meetings, the amounts improperly booked, or the customers that were affected. The Settling Defendants would also likely argue that the confidential witnesses had no accounting expertise, and thus had no basis for their allegations that accommodations payments were improperly booked. Accordingly, the Settling Defendants would argue that the scienter allegations attributed to confidential witnesses should be discounted, such that scienter could not be sufficiently pled against Casey, Rowan, or North. (Gardner Decl. ¶81.)

In response, Lead Plaintiff and Lead Counsel expended considerable effort to locate and contact witnesses with information about the Accommodations Fraud, which involved complex facts spanning approximately over four years. Lead Plaintiff would have continued to maintain, and work to gather evidence, that: (1) under the doctrine of corporate scienter, the individual possessing scienter need not be the same person who "made" the misstatements; (2) Elles possessed the requisite scienter (as demonstrated by the pleadings in the SEC and DOJ

proceedings against him and would be developed during discovery),[8] which is imputable to Carter's under established agency principles; and (3) Casey, Rowan, and North were all signatories to the allegedly false financials and possessed ultimate authority over the statements therein. These arguments, however, involved novel legal issues and it is not clear how the law would have developed over the span of the litigation. There is a not-insignificant risk the Court would agree with the Settling Defendants' scienter arguments, application of *Janus* and interpretation of Eleventh Circuit agency principles. (Gardner Decl. ¶82.)

The calculation and proof of the damages suffered by the Settlement Class here also presented difficult issues that had to be navigated by Lead Counsel working with consulting experts. The Settling Defendants would likely argue in dispositive motions and at trial that: (1) there was no loss causation because Lead Plaintiff cannot establish that the Company's stock drops were causally related to the alleged misconduct, rather than the result of other unrelated Company-specific information or market and industry factors; (2) the alleged disclosures were not "corrective"; and (3) any damages are curtailed by the PSLRA's 90-day "bounce-back" cap on damages, 15 U.S.C. § 78u-4(e). For example, the Settling Defendants would maintain that the two alleged partial disclosures of the truth

[8] Pacifico was indicted after the Settlement was reached.

relating to the OshKosh Fraud were not corrective because they disclosed only revised economic forecasts, and thus did not relate to any alleged falsity regarding OshKosh's growth prospects. The Settling Defendants would also argue that because Carter's stock price was higher at the time of the first Accommodations Fraud partial disclosure than it had been for the majority of the Class Period, and "bounced back" after each subsequent disclosure, damages would be severely curtailed. Although Lead Plaintiff believes it could rebut these arguments with expert testimony, survive summary judgment, and prevail at trial, the causation issues required, and would continue to require, a considerable amount of legal and factual expertise and would be resolved through a battle between experts, the outcome of which is notoriously difficult to assess. (Gardner Decl. ¶88.)

In light of all of the above, it is submitted that the novelty and difficulty of the issues presented support the reasonableness of the requested attorneys' fee.

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

Under this factor, the Court should consider "the skill and acumen required to successfully investigate, file, litigate, and settle a complicated class action lawsuit such as this one," *David v. Am. Suzuki Motor Corp.*, No. 08-CV-22278, 2010 WL 1628362, at *8 n.15 (S.D. Fla. Apr. 15, 2010), and "the experience, reputation and ability of the attorneys" involved. *Camden I*, 946 F.2d at 772 n.3.

As the court in *Edmonds v. United States* recognized, the "prosecution and management of a complex national class action requires unique legal skills and abilities." 658 F. Supp. 1126, 1137 (D.S.C. 1987).

Those unique skills were called upon here. As noted above, this is a complex case involving difficult factual and legal issues. Given this and the presence of numerous contested issues, it took highly skilled counsel to represent the class and bring about this excellent recovery. The resume of Labaton Sucharow attests to its national reputation and experience in the area of complex securities class actions. It is submitted that the experience, reputation and ability of Lead Counsel was a factor in obtaining the result achieved here. (Ex. 5-C.)[9]

This Court should also consider the "quality of the opposition the plaintiffs' attorneys faced" in awarding Lead Counsel a fee. *See Sunbeam*, 176 F. Supp. 2d at 1334; *Ressler*, 149 F.R.D. at 654. The Settling Defendants were represented by very able and prestigious law firms, including Ropes & Gray LLP. The ability of Lead Counsel to obtain such a favorable Settlement for the Settlement Class in light of such qualified legal opposition confirms the quality of the representation.

D. The Customary and Contingent Nature of the Fee

[9] Lead Counsel also had the able assistance of David Worley and James Evangelista, as well as Finkelstein Thompson, counsel for Plaintiff Mylroie.

Customary fees in class action lawsuits of this nature are contingent because virtually no individual possesses a sufficiently large stake in the litigation to justify paying his attorneys on an hourly basis. *See Ressler*, 149 F.R.D. at 654; *see also Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988).[10] The contingent nature of Lead Counsel's fees here should be given substantial weight in assessing the request. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in determining the award of fees. *Pinto*, 513 F. Supp. 2d at 1339 ("attorneys' risk is '"perhaps the foremost" factor' in determining an appropriate fee award"); *see also Ressler*, 149 F.R.D. at 654-55; *Friedman's,* 2009 WL 1456698, at *3 ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees.").

Success in contingent litigation such as this is never guaranteed. In other cases, plaintiffs' counsel in shareholder litigation have spent years in litigation, in which they expended thousands of attorney hours and millions of dollars and received no compensation at all. Even a victory at the trial stage is not a guarantee of success. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing jury verdict of $81.3 million in securities class action against

[10] *See also* Section I.A., *supra* for a discussion of customary fees in securities class actions within the Eleventh Circuit.

accounting firm on loss causation grounds and judgment entered for defendant).[11] As noted above, the claims faced a number of hurdles that could have resulted in a lesser or no recovery. Indeed, because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result. Thus, the substantial risks of contingency justify the requested fee.

E. The Amount Involved and Results Achieved

"It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained." *Ressler*, 149 F.R.D. at 655; *see also Friedman's*, 2009 WL 1456698, at *3 (same). As noted above, the Settlement is comprised of a $20 million cash recovery for the Settlement Class, an excellent recovery given the substantial difficulties of establishing liability for securities violations and the risks that would be involved in establishing damages, or prevailing after trail on a likely appeal. It was only through the extensive efforts of Lead Counsel in preparing three detailed complaints following comprehensive investigation, vigorously opposing the Defendants' motions to dismiss and

[11] *See also Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1008 (9th Cir. 2009) (affirming dismissal of second amended complaint for failure to plead scienter); *In re JDS Uniphase Corp. Sec. Litig.*, No. 02-1486 (N.D.Cal.) (jury verdict for defendants after five years of litigation); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y. 2000) (granting defendants' motion for judgment as matter of law after verdict for plaintiffs).

developing the case through interviews and expert analysis that allowed Lead Plaintiff to achieve the Settlement.

This Settlement compares very favorably against other securities class action settlements. A recent study of such settlements by NERA Economic Consulting, a firm that frequently provides damages expertise to defendants in securities cases, reported that in 2011 the median settlement amount for securities class actions was $8.7 million and that between 1996 and 2010, since the passage of the PSLRA, median settlement amounts in securities class actions ranged from $3.7 - $11 million. (*See* Dr. Jordan Milev, Robert Patton, Svetlana Starykh, and Dr. John Montgomery, *Recent Trends in Securities Class Litigation: 2011 Year-End Review,* at 18 (NERA December 14, 2011), Ex. 12.) A recent study by Cornerstone Research further notes that the median settlement amount for all post-PSLRA securities class action settlements is $7 million. (*See* Ellen M. Ryan & Lauren E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2011 Review and Analysis*, at 11 (2012), Ex. 13.) In light of these facts, and compared with settlement amounts in similar post-PSLRA cases, the recovery here of $20 million is an excellent result.

F. Awards in Similar Cases

As discussed above, Lead Counsel's requested fee of 28% of the Settlement

Fund is well within the range of fees typically awarded in class action cases in this Circuit. *See Camden I*, 946 F.2d at 774-75 (noting a benchmark range of between 20%-30% of the common fund).

G. Reaction of the Settlement Class to Date

In further support of the reasonableness of fee request, no Settlement Class Member has, to date, filed an objection. More than 90,000 copies of the Notice were mailed to potential Settlement Class Members and the Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire*. (*See* Declaration of Claims Administrator, attached as Ex. 3 to the Gardner Decl. at ¶¶13-17.) The Notice stated that Lead Counsel would apply for fees of up to 30% of the Settlement Fund and reimbursement of expenses in an amount not to exceed $400,000 plus interest on both amounts, and that the deadline for filing objections to the fee motion is May 10, 2012. To date, not a single objection to the requested fee or expense award has been received. (Gardner Decl. ¶91.) "The lack of numerous objections is evidence that the requested fee is fair." *Friedman's,* 2009 WL 1456698, at *3; *Ressler*, 149 F.R.D. at 656 (noting that the lack of objections is "strong evidence of the propriety and acceptability" of the fee request).[12]

[12] Should any objections be filed, they will be addressed in Lead Counsel's reply papers to be filed on or before May 24, 2012.

III. REIMBURSEMENT OF LITIGATION EXPENSES

"Class counsel's reasonable and necessary out-of-pocket expenses should be reimbursed." *Carpenters Health & Welfare Fund v. Coca-Cola*, 587 F.Supp.2d 1266, 1272 (N.D.Ga. 2008); *see also Behrens*, 118 F.R.D. at 549; 1 Alba Conte, *Attorney Fee Awards*, § 2.19, at 73-74 (3d ed. 2006) ("an attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved").

Plaintiffs' counsel have incurred, without reimbursement, litigation expenses through April 13, 2012 totaling $225,693.33. (Exs. 4, 5-C through 10-C.) Each firm requesting reimbursement of expenses has submitted a declaration, attached as Exhibits 5-B though 10-B to the Gardner Decl., that itemizes the various categories of expenses incurred. Lead Counsel submits that the expenses, which include costs such as expert and consultant fees, mediation fees, electronic research, photocopying, postage, meals and transportation, were reasonably and necessarily incurred in prosecuting the claims and achieving the proposed Settlement. Approximately $120,000, or 50% of these expenses, relate to experts. Such expenses were critical to Lead Counsel's understanding of the claims and damages in the Consolidated Action and its success in achieving the proposed Settlement.

Because counsel were aware that they might not recover any of these expenses unless and until the litigation was successfully resolved, they took steps to minimize expenses whenever practical to do so. (Gardner Decl. ¶107.) The expenses for which Lead Counsel seeks reimbursement were necessary for the successful prosecution and settlement of the claims and are of the type routinely charged to clients billed by the hour. Lead Plaintiff has approved Lead Counsel's request for reimbursement of expenses. (Ex. 1.) In addition, the Notice apprised potential Settlement Class Members that Lead Counsel would seek reimbursement of expenses in an amount not to exceed $400,000. (Ex. 3-A at 2.) The requested amount of $225,693.33 is less than the amount stated in the Notice.

Because the litigation expenses incurred by Lead Counsel are of the type routinely approved in class actions and were essential to the successful prosecution and resolution of the Consolidated Action with respect to the Settling Defendants, reimbursement of the expenses should be granted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court approve as fair and reasonable Lead Counsel's motion for attorneys' fees and reimbursement of litigation expenses. A proposed order will be submitted with Lead Counsel's reply papers, after the deadline for objecting has passed.

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