**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

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| PUBLIC PENSION FUND GROUP, et al. | : | No.: 4:08-CV-1859 (CEJ) |
| v. | : | |
| KV PHARMACEUTICAL COMPANY, et al. | : | |

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

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## PRELIMINARY STATEMENT

Labaton Sucharow LLP, Court-appointed Lead Counsel for the Norfolk County Retirement System ("Norfolk County") and the State-Boston Retirement System ("State-Boston") (collectively, "Lead Plaintiffs")[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 in the amount of 30% of the Settlement Fund; and (ii) payment of $488,531.75 in litigation expenses incurred in prosecuting the Action, to be paid out of the Settlement Fund.

Lead Counsel has succeeded in obtaining a substantial recovery for the Class in the total amount of $12.8 million. The Settlement, if approved by the Court, will resolve claims that were the subject of more than four years of litigation. The Settlement is the result of Lead Counsel's diligent effort, skill, and effective advocacy and provides a very favorable result in light of the genuine possibility of a much smaller recovery, or no recovery at all, given, among other things, the Company's bankruptcy and reorganization, the Defendants' limited financial resources, as well as the complex legal issues that led to this Court's initial dismissal of the Complaint.

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[1] Unless otherwise defined herein, all capitalized terms shall have the meanings set forth and defined in the Stipulation and Agreement of Settlement dated as of December 20, 2013 (the "Stipulation") attached as Ex. 1 to the Declaration of Javier Bleichmar in Support of Lead Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses ("Bleichmar Decl." or "Bleichmar Declaration"), filed concurrently herewith. All exhibits referenced herein are attached to the Bleichmar 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 Bleichmar Declaration and the second reference refers to the exhibit designation within the exhibit itself.

The Bleichmar Declaration is an integral part of this submission and the Court is respectfully referred to the Bleichmar Declaration for a detailed description of, *inter alia*, the procedural history of the Action; a summary of the allegations and claims; the prosecutorial efforts; the events that led to the Settlement; the value of the Settlement as compared to the risks and uncertainties of continued litigation; and other matters.

Given the favorable recovery obtained, the complex nature of the issues relating to the pharmaceutical industry, the quantity of work involved, the skill and expertise required, the substantial risks that counsel undertook in this Action, and comparable fee awards, Lead Counsel submits that the requested fees and expenses are fair and reasonable.

## ARGUMENT

### I. LEAD COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

#### A. Lead Counsel Is Entitled to Attorneys' Fees from the Common Fund

The Supreme Court has long recognized 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to prevent unjust enrichment of persons who benefit from a lawsuit without bearing its cost. *See Boeing*, 444 U.S. at 478; *Mills*, 396 U.S. at 392; *In re Charter Commc'ns, Inc. Sec. Litig.*, No. MDL 1506, 4:02-CV-1186 CAS, 2005 WL 4045741, at *13 (E.D. Mo. June 30, 2005).

Courts acknowledge that, in addition to providing fair compensation, awards of attorneys' fees in successful cases should 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 Charter Commc'ns*, 2005 WL 4045741, at **18-19. Indeed, the Supreme Court has emphasized that private securities actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement

to [SEC] action'").[2]

**B. The Percentage-of-Recovery Method Is Well-Established**

Although there are two methods that are appropriate for calculating a reasonable fee in a class action within the Eighth Circuit, the lodestar and the percentage-of-recovery method, the Supreme Court has suggested that in the case of a common fund, the attorneys' fee should be determined on a percentage basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (recognizing that "[U]nder the 'common fund doctrine' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . ."). While Lead Counsel's fee request is also reasonable when cross-checked with Lead Counsel's lodestar,[3] *see* Section I.E. below, the Eighth Circuit has expressly approved the percentage method in common fund cases and described its use as "well established." *See In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) ("[w]e have approved the percentage-of-recovery methodology to evaluate attorneys' fees in a common-fund settlement such as this"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement"); *see also In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) ("In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established'").

District courts within the Eighth Circuit have repeatedly recognized the advantages of the percentage method, over the alternative lodestar approach, because it aligns the interests of counsel and the class in achieving the maximum recovery possible and encourages class counsel

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[2] All internal citations are omitted from quotation unless otherwise noted.

[3] "To arrive at the lodestar, the hours expended are typically multiplied by each attorneys' respective hourly rate." *Charter Commc'ns*, 2005 WL 4045741, at *17.

to litigate the case in as efficient a manner as possible. *See, e.g.*, *Xcel*, 364 F. Supp. 2d at 991-92 ("There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method"); *Charter Commc'ns*, 2005 WL 4045741, at *13 (the percentage "approach most closely aligns the interests of the lawyers with the class"). In addition, the percentage method is consistent with arrangements in the private marketplace for contingency cases, in which individual clients typically agree to a fee based on the amount recovered. *See id*.; *see also Blum*, 465 U.S. at 903.[4]

**C. The Attorneys' Fee Request is Supported by the Applicable Factors**

The determination of the amount of an attorneys' fee to be awarded from a common fund is committed to the sound discretion of the district court. *See Petrovic*, 200 F.3d at 1156; *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010). The Eighth Circuit has not established factors that a district court must consider when calculating the reasonable percentage to award. As a result, district courts within the Eighth Circuit have considered various factors set forth by other circuits. *See, e.g.*, *Xcel*, 364 F. Supp. 2d at 992-93 (considering seven of the 12 factors set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 719-20 (5th Cir. 1974)). Consideration of the following seven factors, which have been applied by various district courts within the Eighth Circuit, confirms the reasonableness of the requested fee award:

> (1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel were exposed; (3) the difficulty and novelty of the legal and factual issues in the case, including whether plaintiffs were assisted by a relevant governmental investigation; (4) the skill of the lawyers, both plaintiffs and defendants; (5) the time and labor

[4] The Private Securities Litigation Reform Act of 1995 ("PSLRA") also contemplates that courts will award fees based on a percentage of the fund. *See* 15 U.S.C. §78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court 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.").

involved; (6) the reaction of the class; and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

*In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009); *Xcel*, 364 F. Supp. 2d at 993 (applying the above seven factors and noting that "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"). Courts also consider the public policy considerations in support of payment of reasonable attorneys' fees. *See Charter Commc'ns*, 2005 WL 4045741, at *18.

**1. The Benefit Conferred to the Class**

"The benefit conferred to the class and the result achieved is accorded particular weight...."[5] *Xcel*, 364 F. Supp. 2d at 994. *See also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"). The $12.8 million Settlement is an excellent recovery. According to a recent study, the Settlement is significantly greater than the median settlement amount of reported securities cases in 2013, which was $9.1 million. *See* Dr. Renzo Comolli and Svetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2013 Full Year Review" (NERA Jan. 21, 2014), Ex. 14 at 28. Moreover, the Settlement is more than the median settlement amounts of securities settlements since the passage of the PSLRA, which have ranged from $3.7 million in 1996 to $9.1 million in 2013 (with a peak of $12.3 million in 2012). *See id.*

The Settlement is also particularly favorable in light of the substantial and genuine risk of recovering nothing had the Action not settled given the Company's bankruptcy and

[5] One additional advantage of the percentage method is that it uses the amount of the benefit to the Class as the starting point for the analysis of attorneys' fees and, thus, directly incorporates this factor into its calculation of the fees. *See* Fed. R. Civ. P. 23(h) advisory committee note to 2003 Amendment (in a "percentage approach to fee measurement, results achieved is the basic starting point").

reorganization, wasting insurance policies, and the limited financial resources of the Individual Defendant. Bleichmar Decl. ¶¶ 39-42; *see also* Section 1.C.2. below. It was only through Lead Counsel's efforts in preparing a thorough amended complaint following a comprehensive investigation, vigorously opposing Defendants' motions to dismiss, successfully appealing the decision granting Defendants' motion to dismiss, lifting the bankruptcy stay as to the Individual Defendant and maneuvering through the bankruptcy proceeding, that Lead Counsel were able to achieve the Settlement for the Class. Bleichmar Decl. ¶¶ 75-76. Therefore, Lead Counsel submits that the results achieved support the requested fee.

**2. The Risks of the Litigation Support the Requested Fee**

"The results achieved in light of the risks undertaken is an important factor in computing the attorneys' fee award." *Charter Commc'ns*, 2005 WL 4045741, at *15. The contingency risk here was very significant and fully supports the requested fee. *See Xcel*, 364 F. Supp. 2d at 994 n.6 ("the risk of receiving little or no recovery is a major factor in awarding attorney fees").

This case was risky from its inception, given the crumbling state of the Company's operations when the case was filed. As set forth in the Bleichmar Declaration, the case was further complicated by the Company's eventual bankruptcy and reorganization, which eliminated the Company as a source of recovery but also significantly impacted the course of proceedings. Lead Counsel undertook this Action on a strictly contingent-fee basis and has received no compensation in more than four years. Counsel prosecuted the claims with no guarantee of compensation or recovery of any litigation expenses. *See In re BankAm. Corp. Sec. Litig.*, 228 F. Supp. 2d 1061, 1065 (E.D. Mo. 2002) ("counsel for both classes undertook this complex litigation on a contingent basis and advanced considerable funds with no assurance of a recovery"); *Xcel*, 364 F. Supp. 2d at 994 ("The risk of no recovery in complex cases of this sort is not merely hypothetical. Precedent is replete with situations in which attorneys representing a

class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.").

While Lead Counsel believes that the claims of Lead Plaintiffs and the Class have merit, this case presented substantial litigation risks and uncertainties that needed to be overcome before counsel could expect any payment and that required counsel's diligent advocacy. *See Xcel*, 364 F. Supp. 2d at 995 (noting that the obstacles plaintiffs faced related to proving the materially of the allegedly false and misleading statements, scienter, and damages support the reasonableness of the fee award). First, Lead Plaintiffs faced challenges in establishing that statements concerning the Company's compliance with regulatory requirements were materially false and misleading. For example, the Defendants would likely present evidence at summary judgment or at trial of the "unimportance" of Forms 483 in general, that a Form 483 is an "inspectional observation" and does not represent a final FDA determination, and that the items highlighted in the Forms 483 were minor deviations from cGMP that would not put the Company out of material compliance. Defendants would also highlight that after each and every Form 483 was received by the Company, the U.S. Food and Drug Administration (FDA) notified KV that its inspection was "closed" and the Defendants would argue that inspections were only closed when a final decision was made not to take further administrative action. *See* Bleichmar Decl. ¶¶ 43-45. These issues were far from settled, as evidenced by the Court's initial dismissal of the case at the motion to dismiss stage.

Second, Lead Plaintiffs would also have the burden of establishing that Defendants acted with scienter. Proving Defendants' intent to mislead is often challenging in securities cases. Here, Defendants would have likely presented evidence of the "marginal importance" of the Forms 483 "observations" and the fact that the FDA did not escalate its enforcement for years,

which could have raised ambiguities concerning Defendants' knowledge. Additionally, although the FDA filed a Complaint for Permanent Injunction in March 2009 against Defendants, and others, that ended in a consent decree, it could be argued that the decree expressly stated that neither Hermelin nor KV admitted or denied any allegations. With respect to Hermelin's guilty plea in connection with standing in the position of a responsible corporate officer under the applicable provisions of the Food, Drug, and Cosmetic Act in connection with the introduction of a misbranded drug, he would likely vigorously distance these acts from the alleged securities fraud. Additionally, the U.S. Securities and Exchange Commission never formally investigated the allegations of securities fraud raised in this case or brought a proceeding against the Defendants. *See* Bleichmar Decl. ¶¶ 46-47.

Finally, Lead Counsel grappled with the challenges of pleading and establishing loss causation. As discussed in the Bleichmar Decl. ¶¶ 48-50, Defendants have argued that the Class's damages were not caused by the alleged fraud but instead by previously reported conditions or the economic losses that inevitably arise from product recalls and the suspension of production, as well as the economic downturn that devastated stock prices during the same time period. *Id*. ¶ 49. While Lead Counsel has marshaled responses to these defenses, either the Court at summary judgment or a jury might have found them compelling, particularly when advocated by thoughtful expert witnesses. *See, e.g.*, *Charter Commc'ns, Inc. Sec. Litig.*, 2005 WL 4045741, at *16 (risks faced in proving loss causation, among other risks, supported approval of requested attorneys' fees). Accordingly, this factor supports the requested fee.

**3. <u>The Difficulty, Novelty and Complexity of the Action Support the Fee</u>**

Courts have long recognized that shareholder class actions are notoriously complex and difficult to prosecute, requiring knowledgeable and skilled counsel. *See, e.g.*, *Charter*

*Commc'ns*, 2005 WL 4045741, at *16 ("Securities fraud class actions are by their nature, complex and difficult to prove.").

As noted above and in the Bleichmar Declaration, this litigation raised a number of complex factual and legal questions that required extensive efforts by Lead Counsel, notwithstanding the FDA and criminal proceedings brought against Defendants. Given the technical and scientific subject matter involved in Lead Plaintiffs' claims, Lead Counsel had to develop a sophisticated understanding of the FDA regulatory process and cGMP requirements. Additionally, faced with the dismissal of the Action, Lead Counsel were required to contend with difficult and intricate legal and factual issues regarding the falsity and materiality of the alleged statements and omissions before the Court of Appeals. Lead Counsel were also called upon to navigate dense bankruptcy proceedings and to protect the interests of the Class outside the usual scope of a securities class action. Accordingly, the novelty and complexity of the Action and the difficulty of the legal and factual issues involved support the requested fee.

**4. The Skill of the Lawyers Involved and the Quality of Counsel's Representation Support the Fee**

The experience, reputation, and skill of counsel is another important factor that supports the reasonableness of the requested fee. *See Xcel*, 364 F. Supp. 2d at 995 (noting that plaintiffs' counsel have "significant experience in representing shareholders and shareholder classes in federal securities actions around the country" and "demonstrated considerable skill and cooperation" in resolving the matter). Here, Labaton Sucharow is among the nation's most experienced law firms in the area of securities class action litigation and has a long and successful track record in such cases. Bleichmar Decl. ¶ 81; Ex. 7 - A. Lead Counsel's skill and expertise were called upon throughout the course of the litigation. For example, given the dismissal of the Action for failure to allege false and misleading statements or omissions, but for

the appeal to the Court of Appeals, the Action would likely be over and the Class would have recovered nothing.

The quality of the opposition faced by Lead Counsel should also be taken into consideration. *See Charter Commc'ns*, 2005 WL 4045741, at *17 (noting that the "quality and vigor of opposing counsel is important in evaluating the services rendered by Lead Counsel"); *Yarrington*, 697 F. Supp. 2d at 1063 (fact that defendant's attorneys "consist of multiple well-respected and capable defense firms" which "consistently challenged Plaintiffs' throughout the litigation" supported class counsel's request for fees). Here, Defendants and Former Defendants are represented by Gibson Dunn & Crutcher LLP, Steptoe & Johnson, and Reeg Lawyers, well-known and respected law firms with attorneys who vigorously represented the interests of their clients and brought to bear a sophisticated and impressive defense. Notwithstanding this formidable opposition, Lead Counsel's ability to present a strong case and demonstrate a willingness to continue to vigorously prosecute the Action enabled them to achieve a very favorable Settlement for the benefit of the Class.

**5. Time and Labor Expended by Counsel Support the Fee**

As detailed in the Bleichmar Declaration and the individual firm declarations submitted therewith (Exs. 7 - 10), plaintiffs' counsel have devoted substantial time and effort to the Action. Collectively, plaintiffs' counsel have expended more than 4,200 hours prosecuting this Action. *See also* Section I.E., below. Since the initiation of the Action, counsel's efforts have included: (a) conducting a thorough factual investigation into Defendants' and Former Defendants' conduct, by reviewing and analyzing (i) publicly available information concerning Defendants and Former Defendants; (ii) research reports issued by financial analysts concerning KV; (iii) information concerning investigations conducted by the FDA and the DOJ; (v) pleadings filed in other pending litigation naming certain parties herein as defendants or nominal defendants; and

(vi) the applicable law governing the claims and potential defenses; (b) working with consultants and experts on pharmaceutical manufacturing practices and FDA regulatory practices, bankruptcy, damages, and causation issues; (c) briefing Defendants' motions to dismiss the Complaint; (d) successfully appealing the Court's dismissal of the Action; (e) successfully lifting the bankruptcy stay as to the Individual Defendant and navigating through the bankruptcy proceeding; and (f) completing the review of approximately 150,000 pages of core documents produced by KV. *See generally* Bleichmar Decl.

A substantial amount of time was also required to negotiate the Settlement, particularly given the bankruptcy proceedings and the various considerations about KV's ability to participate in a settlement. Discussions spanned approximately two years and were stalled at several junctures. The parties engaged in one formal mediation session before a highly experienced mediator in 2011, which was preceded by the exchange of detailed mediation statements, then continued discussions at different points until a settlement was ultimately reached in 2013. *See* Bleichmar Decl. ¶¶ 34-37. If the Court approves the Settlement, Lead Counsel will also devote additional time to settlement administration and the distribution process, without seeking any additional compensation.

Accordingly, the significant amount of time and effort devoted to this case by plaintiffs' counsel confirm that the fee request here is reasonable.

**6. Reaction of the Class to Date Supports the Fee**

"The court considers both the number and quality of objections when determining how a class has reacted to an attorney fee request." *Xcel*, 364 F. Supp. 2d at 996. Pursuant to the Preliminary Approval Order, more than 49,000 copies of the Notice and Proof of Claim form have been mailed to Class Members. *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, dated March 18, 2014 ("Mailing Decl."), Ex. 5. The Notice advised Class Members that Lead Counsel would seek an award of attorneys' fees not to exceed 30% of the Settlement Fund. *See* Ex. 5 - A at 2, 6. The Notice also advised Class Members of the procedures and deadlines for objecting to Lead Counsel's fee and expense request. *Id*. at 7. Although the deadline to object to the request is not until April 2, 2014, to date no objections have been received. After the deadline has passed, Lead Counsel will address any objections in its reply papers, which will be filed with the Court by April 16, 2014.

**7. A Comparison of Similar Cases Supports the Fee**

A reasonable fee award generally should emulate what counsel would receive had they bargained in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). If this action were a non-class contingency case, the customary fee arrangement likely would be on a percentage basis and in the range of 30% to 33% of the recovery. *See Blum*, 465 U.S. at 904 ("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.")

Courts also look to fee awards in analogous cases to determine the reasonableness of the percentage requested. The 30% fee requested here falls within the range of fees regularly awarded within the Eighth Circuit in securities class actions and other common fund class actions with comparable recoveries. *See Yarrington*, 697 F. Supp. 2d at 1065 (finding "that an attorney fee award of 33% is certainly within the range established by other cases in this District" and awarding 33% of $16.5 million settlement); *see, also, U.S. Bancorp*, 291 F.3d at 1038 (affirming award of 36% of $3.5 million settlement); *W. Wash. Laborers-Emp'rs Pension Trust v. Panera Bread Co et al.*, 4:08-cv-00120-ERW, slip op. at 1 (E.D. Mo. June 22, 2011) (awarding 30% of $5.75 million settlement) (submitted herewith as part of compendium of unpublished opinions, Ex. 13); *Paul Luman v. Paul G. Anderson*, No. 4:08-cv-00514-C-W-HFS,

slip op. at 1 (W.D. Mo. July 23, 2013) (awarding 30% of $4.25 million settlement) (Ex. 13); *Nelson v. Wal-Mart Stores, Inc*. Nos. 2:04CV000171 WRW, 2:05CV00134 WRW, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (awarding 33 1/3% of $17.5 million settlement); *In re McLeodUSA Inc. Sec. Litig*., No. 02cv0001, slip op. at 5 (N.D. Iowa Jan. 5, 2007) (awarding 30% of $30 million settlement) (Ex. 13); *Carlson v. C.H. Robinson Worldwide, Inc*., No. CIV 02-3780 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (awarding 35.5% of $15 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. 13); *In re E.W. Blanch Holdings, Inc. Sec. Litig*., No. 01-258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33.3% of $20 million settlement). Accordingly, it is respectfully submitted that the attorneys' fee requested here is comparable to fees awarded by courts in the Eighth Circuit.

**8. Public Policy Considerations Support the Fee**

A strong public policy rationale exists for rewarding firms for bringing successful securities litigation, in order to encourage talented counsel to bring these actions and help deter future wrongdoing. *See Charter Commc'ns*, 2005 WL 4045741, at *19 ("public policy favors the granting of [attorneys'] fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions"). Accordingly, public policy favors granting Lead Counsel's fee and expense application here.

**D. The Requested Fee Was Approved by Lead Plaintiffs**

In enacting the PSLRA, Congress intended to encourage sophisticated institutional investors with substantial financial stakes in a litigation to serve as plaintiffs and to 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). "[A] PSLRA case in

which a fee request has been approved and endorsed by properly-appointed lead plaintiffs . . . enjoys a presumption of reasonableness." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 26, n.16 (E.D. Va. 2009).

Here, Lead Plaintiffs, two sophisticated institutional investors with substantial investments, have considered and approved the requested fee based on, among other things, the amount of work performed, the risks faced in prosecuting the litigation, and the recovery obtained, and believe it to be fair and reasonable. *See* Ex. 2 ¶ 6; Ex. 3 ¶ 6. Accordingly, the endorsement of the fee by Lead Plaintiffs as fair and reasonable supports approval of the fee.

**E. The Lodestar "Cross-Check" Supports the Fee Request**

The Eighth Circuit has held that a review of counsel's lodestar may be used to cross-check the reasonableness of a fee requested under the percentage method. *See Petrovic*, 200 F.3d at 1157; *Charter Commc'ns*, 2005 WL 4045741, at *17. Here, plaintiffs' counsel spent an aggregate of more than 4,200 hours on the prosecution and resolution of the Action. *See* Bleichmar Decl. ¶ 80; Exs. 7 – B, 8 – B, 9 – B, 10 – B, 11. The total lodestar amount for plaintiffs' counsel, derived by multiplying their hours by each firm's current hourly rates, is $2,346,367.25.[6] *Id.*

With respect to billing rates, the hourly billing rates of plaintiff' counsel here range from $260 to $975 for partners, $620 to $750 for of counsel, and $410 to $690 for other attorneys. *Id.* Defense firm billing rates gathered and analyzed by Lead Counsel from bankruptcy court filings in 2013, in many cases, exceeded these rates. *See* Bleichmar Decl. ¶ 79, Ex. 12. Similarly, the *National Law Journal's* annual survey of law firm billing rates in 2013 shows that average

[6] The Supreme Court and courts in the Eighth Circuit have held that the use of current rates is proper to account for the delay in receiving payment, inflationary losses, and the loss of interest. *See Jenkins*, 491 U.S. at 283-84; *Charter Commc'ns*, 2005 WL 4045741, at *17.

partner billing rates among the Nation's largest firms ranged from $930 to $1,055 per hour and average associate billing rates ranged from $590 to $670 per hour. Bleichmar Decl. ¶ 79.[7]

Accordingly, the requested 30% fee represents a multiplier of 1.6.[8] Such a multiplier is well within the parameters used throughout district courts in the Eighth Circuit and is additional evidence that the requested fee is reasonable. *See, e.g.*, *Charter Commc'ns*, 2005 WL 4045741, at *22 (finding 5.61 multiplier to be "within the range of multipliers awarded in comparable complex cases"); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 862 (E.D. Mo. 2005) ("In shareholder litigation, courts typically apply a multiplier of 3 to 5 to compensate counsel for the risk of contingent representation."); *Yarrington*, 697 F. Supp. 2d at 1065 (awarding fee representing a 2.26 multiplier); *Xcel*, 364 F. Supp. 2d at 999 (awarding fee representing a 4.7 multiplier).

## II. LEAD COUNSEL SHOULD BE PAID FOR LITIGATION EXPENSES REASONABLY INCURRED IN CONNECTION WITH THIS ACTION

In addition to a reasonable attorneys' fee, Lead Counsel respectfully seeks payment in the amount of $488,531.75, plus accrued interest, for litigation expenses reasonably incurred in connection with prosecuting the claims against Defendants and Former Defendants. Ex. 11. These expenses are set forth in the individual firm declarations submitted herewith, *see* Exs. 7 ¶¶ 8-10; Ex. 8 ¶¶ 8-9; Ex. 9 ¶¶ 8-9; Ex. 10 ¶¶ 8-9, and are of the type generally approved by courts for reimbursements. *See Charter Commc'ns*, 2005 WL 4045741, at *24 (approving expenses related to experts, document production, travel, and mediation).

The expenses for which Lead Counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These

[7] With respect to defense counsel in this Action, Gibson Dunn's average partner billing rate in 2013 was reported by the *National Law Journal* to be $980 per hour and its average associate billing rate to be $590. Bleichmar Decl. ¶ 79.

[8] The multiplier is calculated by dividing the $3,840,000 fee request by the $2,346,367.25 lodestar.

expenses include, among others, court fees, expert fees, computerized legal and factual research, mediation costs, travel expenses, duplicating, long distance telephone and facsimile charges, postage and delivery expenses, and filing fees. *Id*. The most significant expense was the cost of consulting experts, which totaled $423,488.77. *See* Ex. 7 - C. Lead Counsel retained experts to opine and assist in areas including, FDA regulatory practices and pharmaceutical manufacturing practices, damages, loss causation, bankruptcy related matters, and in connection with a plan of allocation. Reimbursement of these expenses is fair and reasonable. *See, e.g.*, *Charter Commc'ns*, 2005 WL 4045741, at *24; *Xcel*, 364 F. Supp. 2d at 999-1000.

The Notice informed potential Class Members that Lead Counsel would apply for reimbursement of litigation expenses in an amount not to exceed $750,000. *See* Ex. 5 - A at 2, 6. The expenses sought are well below the amount listed in the Notice.

## CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees of 30% of the Settlement Fund and $488,531.75, plus accrued interest, in expenses. A proposed order will be submitted with Lead Counsel's reply papers, after the deadline for objections to the fee and expense request has passed.

Dated: March 19, 2014

Respectfully submitted,

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*Liaison Counsel On Behalf of Lead Plaintiffs*

**CERTIFICATE OF SERVICE**

I certify that a true copy of the following was served electronically via the CM/ECF system on all counsel of record on this 19th day of March 2014.

Respectfully submitted,

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