UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FIFTH STREET FINANCE CORP. SECURITIES LITIGATION	:	**Case No. 15-cv-7759 (LAK)**
This Matter Relates To:	:	
All Actions	:	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Docketed Cases

Rules

Other Authorities

Court-appointed Lead Counsel, Labaton Sucharow LLP, respectfully submits this memorandum in support of its motion, pursuant to Federal Rule of Civil Procedure 23(h) and 54(d), for an award of attorneys' fees and payment of expenses that were reasonably and necessarily incurred in the prosecution of this Action.[1]

PRELIMINARY STATEMENT

Through its diligent and efficient efforts, Lead Counsel has successfully recovered $14,050,000 in cash for the benefit of the Class in the above-captioned securities fraud class action (the "Action"). The Settlement recovers a significant amount of the Class' estimated damages, about 15% to 20% of Lead Plaintiff's expert's maximum estimate of damages, and significantly more if Defendants' counter-arguments were credited by a jury.[2] This is an excellent result when compared to the risk of non-recovery that permeated the litigation given the Supreme Court's decision in *Omnicare*[3] and the competing claims on limited sources of recovery Defendants faced in the related FSAM Class Action and the FSC Derivative Actions.

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[1] Lead Counsel is simultaneously filing herewith the Declaration of Ira A. Schochet in Support of Lead Plaintiff's Motion for 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, dated January 12, 2017, ("Schochet Declaration" or "Schochet Decl."). The Court is respectfully referred to the Schochet Declaration for a full discussion of the factual background and procedural history of the Action, the litigation efforts of Lead Counsel, and the challenges it faced.

All exhibits referenced herein are annexed to the Schochet Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Schochet Declaration, and the second reference is to the exhibit designation within the exhibit itself.

All capitalized terms not defined herein have the same meanings set forth in the Stipulation of Settlement, dated as of July 27, 2016 (the "Settlement Agreement"), which was previously filed with the Court. ECF No. 93-1.

[2] The Court is referred to paragraphs 4, 15, and 83-89 of the Schochet Declaration for a full discussion of estimated damages and the recovery here.

[3] *Omnicare v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318 (2015).

For its efforts, Lead Counsel, on behalf of itself and Robbins, Geller, Rudman & Dowd LLP (collectively "Plaintiff's Counsel"), requests (i) a fee award in the amount of $2,464,316, and (ii) payment of Plaintiff's Counsel's litigation expenses in the amount of $245,122.80. The requested fee is equal to Plaintiff's Counsel's aggregate lodestar, with no multiplier. Lead Counsel's request has the full support of Court-appointed Lead Plaintiff Oklahoma Police Pension and Retirement System, which is precisely the type of fiduciary envisioned by the Private Securities Litigation Reform Act of 1995 ("PSLRA").[4]

As explained herein, we respectfully submit that the fee request is supported both by precedent and the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), given counsel's substantial but targeted efforts, the high quality of representation, and the excellent result obtained, and should be approved.

ARGUMENT

I. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE

Under long-standing precedent, attorneys who achieve a benefit for class members in the form of a "common fund" are entitled to request reasonable compensation for their contingent services. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Courts have long recognized that, "[t]o make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *Hicks v. Morgan Stanley*, No. 01-cv-10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (Holwell, J.); *see also City of Providence v. Aeropostale, Inc.*, No. 11-cv-7132 (CM), 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) (McMahon, J.) ("[A]wards of fair attorneys' fees from a common fund should also

[4] *See* Declaration of Oklahoma Police Pension and Retirement System in Support of Approval of Proposed Class Action Settlement and Request for Attorneys' Fees and Expenses, dated December 29, 2016 (Ex. 1).

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."). Class actions "could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks*, 2005 WL 2757792, at *9. We respectfully submit that the requested attorneys' fees are eminently reasonable and adhere to these core principles.

A. Assessment of Plaintiff's Counsel's Lodestar

Lead Counsel is familiar with this Court's preference for using the lodestar method over the percentage of recovery method to review and analyze fee requests in class actions.[5] Pursuant to the lodestar method, after an analysis of a proffered lodestar, a positive multiplier may be awarded to account for the contingency fee risk incurred by counsel and other relevant factors, including the quality of the representation. *See, e.g., In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517, 521 (S.D.N.Y. 2015) (Kaplan, J.) *aff'd*, *Devalerio v. Olinski*, No. 15-1310, 2016 WL 7323980 (2d Cir. Dec. 16, 2016). A court may "'increase the lodestar by applying a multiplier based on factors such as 'the risk of the litigation and the performance of the attorneys' – that is, the six case-specific factors delineated by the Second Circuit in *Goldberger v. Integrated Resources*. . . .'"); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02–cv–3400 (CM), 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) ("Under the lodestar

[5] A lodestar calculation consists of the number of hours expended on the case by each attorney or professional, multiplied by that person's current hourly rate, and then the aggregation of all the amounts to calculate the total lodestar. "[T]he use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12–cv–8557 (CM), 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) (citing *Missouri v. Jenkins*, 491 U.S., 274, 283-84 (1989)); *see also Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (similar); *In re Telik Inc., Sec. Litig.*, 576 F. Supp. 2d 570, 589 n.10 (S.D.N.Y. 2008) (similar).

method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the engagements, the skill of the attorneys, and other factors").

In this case, Plaintiff's Counsel devoted 4,763 hours of time for an aggregate lodestar of $2,464,316 and is respectfully requesting approval of a fee of $2,464,316 reflecting no multiplier.[6] Lead Counsel is not seeking a multiple in consideration of the fact that the Parties focused on potential and then actual settlement discussions early on in the case. Lead Counsel contends that the full requested fee is warranted for several reasons.

First is the significant amount of effort Lead Counsel undertook in procuring and then engaging in a substantial amount of informal discovery, significantly more than is typical during the Private Litigation Reform Act stay of all discovery, and the use of that discovery to formulate the strongest possible arguments to counter Defendants' detailed presentation of their defenses, in order to withstand negotiating pressure to settle for anything less than a maximum recovery of damages. The proof is in the pudding: Notwithstanding that this is a very complex case involving novel valuation issues, and one in which Defendants had numerous strong legal and factual arguments to counter Lead Plaintiff's claims, as summarized in the Schochet Declaration, Lead Counsel nonetheless obtained a settlement for the Class representing a much higher than usual percentage of either likely or maximum damages, in the face of numerous other claimants and a limited aggregate amount of applicable insurance coverage. This result attests to the work and skill Lead Counsel employed in this case—it did not use the likelihood of settlement to just sit back and accept what Defendants would have preferred to resolve the action.

[6] More specifically, Labaton Sucharow devoted 3,771.3 hours with a lodestar value of $2,070,671.50, and Robbins Geller devoted 991.75 hours with a lodestar value of $393,644.75. *See* Exhibit 9 (Summary Table).

Second, Lead Counsel took a pragmatic and efficient approach to litigating this case. Efforts were targeted on evaluating whether a negotiated resolution at an early stage would be appropriate, negotiating for the maximum amount of informal discovery, and then using that discovery to negotiate a fair and reasonable settlement at mediation. These tasks were carried out on a very expedited basis and with a focus on avoiding duplication and waste. As explained more fully in Section II.B.1 below, Lead Counsel maintained a relatively small team of core professionals who were principally responsible for the day-to-day prosecution of this Action. *See* Schochet Decl. ¶¶ 15, 121-22, Exs. 7 - A, 9-10. The hours recorded by staff attorneys who were principally responsible for document review represent just approximately 20% of total lodestar, which is a relatively low proportion in this type of litigation.[7] The evaluation process did not drag on in order to buttress billable hours, instead it was all completed within just three months. *See* Schochet Decl. ¶ 128.

Third, we respectfully submit that Plaintiff's Counsel's billing rates are reasonable when compared against prevailing rates of law firms on both sides of the "v" that specialize in complex litigation. *See Telik,* 576 F. Supp. 2d at 589 (explaining that "[p]erhaps the best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that defend class actions on a regular basis"). Here, the hourly billing rates of Plaintiff's Counsel range from $645 to $985[8] for partners and $335 to $725 for other attorneys. *See* Exs. 7–A and 8-A. Schochet Decl. ¶ 125. Indeed, defense-firm billing rates, including those of the firms representing Defendants in this Action, analyzed and

[7] Staff attorneys focused on document review were each employees of Lead Counsel and all but two remain employees. (An associate employed by Robbins Geller also participated in the document review, in addition to other work he performed at the start of the case.) Schochet Decl. ¶ 114, Ex. 8 - A.

[8] Only one senior partner, with more than 40 years of experience, has a rate of $985. *See* Exs. 7 - A, 8 - A.

gathered by Lead Counsel from bankruptcy-court filings nationwide in 2016 in many cases exceeded these rates. *See* Ex. 11. Further, if Plaintiff's Counsel's hourly rates are assessed in the aggregate, they result in a reasonable blended rate of $517.39, which is comparable to the $514.29 blended hourly rate that this Court approved in *IndyMac* after reducing the fee request in that case. *IndyMac*, 94 F. Supp. 3d at 528. With respect to billing rates that are charged for staff attorneys who were principally responsible for document review, the rates for such attorneys range from $335 to $435, resulting in a blended hourly rate of $381.38. *See* Exs. 7-A and 8-A. This is comparable to the $378.02 blended hourly rate for document review attorneys that this Court approved in *In re Bank of New York Mellon Corp. Forex Trans. Litig.,* No. 12-md-2335-LAK (S.D.N.Y. Sept. 24, 2015). *See* Schochet Decl. Ex. 14,[9] (ECF No. 637, order approving requested fees and expenses) and Ex. 17 (ECF No. 622 (excerpt of joint declaration submitted by plaintiff's counsel in support of requested fees and expenses, setting forth hourly rates for document review attorneys).

Fourth, as further detailed below, courts measure risk in a contingent fee request at the beginning of the case and, in this case, as set forth in the Schochet Declaration, the risk from the beginning of dismissal or no recovery at all was significant.

To put Lead Counsel's fee request further into context, a request equal to only lodestar is contrary to the norm in contingent cases and in contrast to fees that have historically been awarded by courts in similarly complex cases, including other securities class actions, which are in the main based on multiples of lodestar.[10] Indeed, this point is shown by two frequently cited

[9] All unreported docketed orders are submitted as part of a compendium of cases, which is annexed as Exhibit 14 to the Schochet Declaration.

[10] *See, e.g., In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (Weinstein, J.) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." (citations omitted)); *IndyMac,* 94 F. Supp. 3d at 528

empirical analyses. In a study by Professors Eisenberg and Miller of attorneys' fees awarded in class action settlements from 1993 to 2008, they found that the average multiplier in securities class actions was 1.75 and the average within the Second Circuit was 1.58. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (2010), Ex. 15. Similarly, in a study by Professor Fitzpatrick of every federal class action settlement in 2006 and 2007, he found that the average multiplier was 1.65. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 834 (2010), Ex. 16.

For these reasons, and the additional ones discussed below, we respectfully submit that a fee of $2,464,316 would be fair and reasonable under the circumstances now before the Court.

B. The Second Circuit's Standards Set Forth in *Goldberger* Strongly Support Lead Counsel's Request as Fair and Reasonable

The Second Circuit has explained that regardless of whether a court analyzes a request for attorneys' fees under the lodestar or percentage method, it should consider the traditional criteria that reflect a reasonable fee in common fund cases, including: (i) the time and labor expended by counsel; (ii) the magnitude and complexity of the action; (iii) the risks of the litigation; (iv) the quality of representation; (v) the requested fee in relation to the settlement; and (vi) public policy considerations. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Each of these factors lends strong support to the reasonableness of Lead Counsel's request for attorneys' fees here.

(awarding blended multiplier of 1.33); *Freedman v. Weatherford Int'l Ltd.,* No. 12-2121 (LAK), 2015 WL 7454142, at *1 (S.D.N.Y. Nov. 23, 2015) (Kaplan, J.) (awarding multiplier of 1.35); Pretrial Order No. 35, *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (upholding multiplier of 3.5 as reasonable).

1. The Time and Labor Expended

As mentioned above, Plaintiff's Counsel have expended substantial time and effort pursuing the claims on behalf of the Class. *See generally* Schochet Decl. ¶¶ 21-52, 109-29, and Exs. 7 – A & B, 8 – A & B, 9, 10. Specifically, Plaintiff's Counsel, *inter alia*:

- Conducted a thorough pre-filing investigation into the claims of the Class, including the identification of more than fifty-potential witnesses (former employees of Fifth Street) and interviews with eleven of them (*e.g.*, Schochet Decl. ¶¶ 15, 21, 109-11, 123);
    - (the approximate lodestar for this work was $307,750, *see* Ex. 7 - B & 8 - B)
- Drafted a comprehensive Consolidated Amended Class Action Complaint (the "Complaint") (*e.g.*, Schochet Decl. ¶¶ 21-27, 109-11, 123);
    - (the approximate lodestar for this work was $258,906, *see* Ex. 7 - B & 8 - B)
- Engaged in motion practice concerning Oklahoma Police's appointment as lead plaintiff and Defendants' motion to dismiss (*e.g.*, Schochet Decl. ¶ 18);
    - (the approximate lodestar for this work was $164,606, *see* Ex. 7 - B & 8 - B)
- Closely consulted with a forensic accounting expert and a damages/causation expert (*e.g.*, Schochet Decl. ¶¶ 7, 11, 13, 21, 34, 40, 123, 143);
    - (the approximate lodestar for this work was $65,314, *see* Ex. 7 - B & 8 - B)
- Conducted extensive discovery on an expedited basis to first determine whether settlement discussions would be appropriate, and at what value, and then to confirm that a settlement at the value agreed to would be fair, reasonable, and adequate, including the analysis of more than 2.4 million pages of documents during a one month period and five separate day-long interviews of five senior executives and directors of FSC and FSAM (*e.g.*, Schochet Decl. ¶¶ 33-52, 127-28);
    - (the approximate lodestar for this phase was $784,317, *see* Ex. 7 - B & 8 - B)
- Engaged in a rigorous pre-mediation and mediation process before retired California Superior Court Judge Daniel Weinstein ("Judge Weinstein" or the "Mediator") and his staff that spanned five days over the course of a month, in addition to tireless negotiations about the scope of discovery (*e.g.*, Schochet Decl. ¶¶ 33-45, 127); and
    - (the approximate lodestar for this phase was $279,421, *see* Ex. 7 - B & 8 - B)
- Negotiated and documented the final settlement terms for presentation to the Court (*e.g.*, Schochet Decl. ¶¶ 41-42, 129).

- (the approximate lodestar for this phase was $371,962, *see* Ex. 7 - B & 8 - B)[11]

This focused litigation effort culminated in 4,763 hours of billable time that Plaintiff's Counsel devoted for the benefit of the Class. *See* Schochet Decl., Ex. 9. Almost half of the lodestar constitutes time of a core team of day-to-day litigators at Labaton Sucharow (specifically, Messrs. Bernstein, Schochet, Rhodes and Gottlieb), rather than lawyers dedicated to document review. Schochet Decl. ¶¶ 121-22, Ex. 7 - A. This small group of four lawyers constitutes approximately $1,090,000 in lodestar or 44% of Plaintiff's Counsel's lodestar. Schochet Decl. ¶ 121. Staff attorneys who reviewed documents amounted to approximately $489,000 in lodestar or 20% of total lodestar. Schochet Decl. ¶ 112, Ex. 7 - A. A summary of the work performed by the Labaton Sucharow professionals who were primarily responsible for the litigation efforts in this Action is attached to the Schochet Declaration as Exhibit 10.

The legal work in the Action will not end with the Court's approval of the proposed Settlement. Additional hours and resources necessarily will be expended assisting members of the Class with their Proof of Claim forms, shepherding the claims process, responding to Class Member inquiries, and moving the Court for a distribution order. Counsel do not include this time in their lodestars.

In sum, it is respectfully submitted that the time and effort devoted to this case by Plaintiff's Counsel to obtain this Settlement confirm that the fee request is reasonable.

2. The Magnitude and Complexity of the Litigation

The complexity of this litigation also supports the reasonableness of the attorneys' fees requested by Lead Counsel. *See Fogarazzo v. Lehman Bros., Inc.*, No. 03-cv-5194(SAS), 2011

[11] Of this time, 356.6 hours ($227,959.50 in lodestar) were spent on settlement related tasks after the Settlement Agreement was executed, such as preparing the motion for authorization to send notice, working with the Claims Administrator on the notice program, and preparing the approval papers. This category does not contain any time spent on fee related matters.

WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) (Scheindlin, J.) ("courts have recognized that, in general, securities actions are highly complex"); *In re Merrill Lynch & Co. Inc., Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *14 (S.D.N.Y. Feb. 1, 2007) (Keenan, J.) ("Securities class litigation is notably difficult and notoriously uncertain.") (citation omitted).

As detailed in the Schochet Declaration, the Action alleges violations of the Securities Exchange Act of 1934 (the "Exchange Act"), raising a panoply of claims against Defendants arising from, in sum, the complex practice of fair value determinations for illiquid non-investment grade assets, income recognition, and the appropriateness of dividend projections. In particular, the Complaint alleges that during the Class Period, Defendants misrepresented: (i) the fair value of FSC's investment portfolio generally and the fair value of its investments in four companies specifically; (ii) the extent to which FSC had covered, and would be able to cover, its dividend projection, which it increased by 10% to $.0917 per share for September through November 2014 early in the Class Period; (iii) the financial health and delinquency (or non-accrual) status of its investments; and (iv) financial metrics, such as interest income, net interest income, net assets resulting from operations, and earnings per share. The core allegation is that FSC inflated its net assets resulting from operations by deferring write-downs of the fair value of its investments in the four companies, as well as placing those investments on non-accrual status, until after the FSAM IPO. *E.g.*, Schochet Decl. ¶¶ 21-26. At every turn, the Action raised issues that required sophisticated analysis.

Although Lead Counsel believes that Lead Plaintiff has a strong case of liability, the claims against Defendants presented significant challenges in the face of tenacious opposition. To survive the motion to dismiss, Lead Plaintiff would have had to persuade the Court that the

Complaint: (i) sufficiently alleged falsity, notwithstanding *Omnicare,* parsing through each alleged misstatement and its objective bases; (ii) raised a strong inference of scienter as to the alleged misstatements and each Defendant; (iii) adequately pled reliance notwithstanding arguments that each alleged fact purportedly challenging FSC's valuations, projections, and other judgments came from FSC's own financial disclosures, thus the "truth" was already known to the market and reflected in the stock price; and (iv) adequately pled loss causation. *See also*, Section I.B.3., below.

Beyond simply the complexity of the valuation issues at the core of the Action, to prevail at trial, Lead Plaintiff would have needed to marshal factual and expert evidence to overcome Defendants' primary contention that the critical accounting issues (*e.g.,* valuation of FSC's assets at fair value and interest recognition determinations) required judgment and thus constituted inactionable statements of opinion, not facts. According to Defendants, Lead Plaintiff would have had to prove that either Defendants truly did not believe that FSC's valuations of its investments were true, or that that the valuations were not the result of a meaningful inquiry or assessment by Defendants. *E.g.*, Schochet Decl. ¶ 60-64. All elements of liability were vigorously disputed by Defendants. *See also*, Section I.B.3., below.

Notably, Lead Counsel and the Class received no help from the Government or an outside examiner in investigating and evaluating the claims in this case. Lead Counsel worked to develop a full factual record in the absence of any roadmap, as a pending SEC investigation into the events underlying the allegations (initiated after the filing of the Action) has provided no pleadings or testimony to assist the Class. *See, e.g., In re Lehman Bros. Sec. & ERISA Litig.,* No. 09-MD-2017-LAK, slip op. at 2 (S.D.N.Y. June 29, 2012) (Kaplan, J.), ECF No. 970 (Schochet Decl. Ex. 14) (considering plaintiff's use of, and reliance on, an examiner's report prepared by

the bankruptcy trustee in connection with weighing "the amount of compensation appropriately paid to plaintiff's counsel, particularly any amount above the lodestar"); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02–cv–3400 (CM)(PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (noting lack of prior governmental action against defendant on which Class Counsel could "piggy back" in considering fee request).

Accordingly, the *sui generis* and difficult nature of the issues encountered, as well as the effort that was expended over the past year, strongly support the requested attorneys' fee.

3. The Risk of Litigation Support the Fee Request

"Courts have repeatedly recognized that 'the risk of litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award plaintiffs' counsel in class actions." *Telik*, 576 F. Supp. 2d at 592. For this reason, the Second Circuit has said that "[t]he level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of the multiplier." *McDaniel v. County of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010) (quoting *Goldberger*, 209 F.3d at 54). Further, this Court has explained that, "the Second Circuit has stated clearly that 'litigation risk must be measured as of when the case is filed.'" *Freedman v. Weatherford Int'l Ltd.*, No. 12 CIV. 2121 (LAK), 2015 WL 7454142, at *1 (S.D.N.Y. Nov. 23, 2015) (Kaplan, J.) (citations omitted).

Lead Counsel is aware that the Court has stated in the past that the risk of non-recovery in securities class actions that survive dispositive motions is low because they practically always settle. *See IndyMac*, 2015 WL 1315147, at *4. Here, however, for the reasons discussed below, there was a palpable risk that the case would not get past Defendants' motion to dismiss. Such risks are on top of the already daunting challenges plaintiffs in securities fraud actions generally face. Indeed, an empirical report published by NERA Economic Consulting surveying cases in 2015 found that with respect to motions to dismiss filed in securities class action cases, 54%

were granted in full and 20% were granted in part. *See* Svetlana Starykh and Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, at 19 (NERA Jan. 25, 2016), Ex. 5. On top of those grim statistics is the fact that here there was no third-party investigation to assist with the development of the claims — the SEC investigation was not disclosed until after the filing of the Complaint and it has provided no pleadings or testimony to assist the Class. *See, e.g., In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 399–400 (S.D.N.Y. 2013) (Stein, J.) ("[Because] the factors that traditionally render securities cases most likely to survive a motion to dismiss and, in turn, to settle—such as prior government investigations—are absent here…[t]his factor also militates in favor of a substantial award.") (citations omitted). Moreover, if this case did survive the motion to dismiss challenge, there was a strong chance that a jury would either not find that the alleged misstatements were false or would fail to find that the Defendants acted with scienter.

(a) Specific Risks in this Action

Although Lead Counsel succeeded in developing a compelling case that was sufficient to cause Defendants to settle substantially higher than is the norm, there remained significant uncertainties and obstacles to proving liability and damages. The primary risks are discussed below. For a more detailed discussion, the Court is respectfully referred to the Schochet Declaration, at paragraphs 56 through 93, and the Memorandum of Law in Support of Lead Plaintiff's Motion for Approval of Proposed Class Action Settlement and Plan of Allocation ("Approval Brief"), at Sections I.C.4. & I.C.5.

One of the hurdles from the outset of the case was the challenge of establishing falsity under *Omnicare,* which also pervaded Defendants' defenses on scienter (discussed below). As this Court recently wrote, "*Omnicare* makes just as clear that it is substantially more difficult for a securities plaintiff to allege adequately (or, ultimately, to prove) that such a statement [of

opinion] is false than it is to allege adequately (or prove) that a statement of pure fact is false." *City of Westland v. MetLife, Inc.,* 129 F. Supp. 3d 48, 68-69 (S.D.N.Y. 2015) (Kaplan, J.) ("*Metlife*"). Relying on *Omnicare*, and *MetLife*, Defendants argued in the motion to dismiss, and would have likely argued at summary judgment and trial, that because FSC's investment assets were illiquid non-investment-grade assets that lacked ascertainable market values, the alleged misstatements based on those values reflected subjective, good faith judgments, opinions, and estimates that were fundamentally incapable of being false or misleading. Therefore, according to Defendants, the Class would have had to satisfy *Omnicare* and prove that Defendants truly did not believe that FSC's disclosed valuations of its investment assets were true, or show that Defendants had not conducted an adequate investigation. Lead Plaintiff would have had to battle this contention with respect to each of the alleged underlying misstatements. Schochet Decl. ¶¶ 60-63. In response, Lead Counsel developed counter-arguments to Defendants' anticipated *Omnicare* challenges, mainly rooted on the alleged absence of a meaningful inquiry into the accuracy of their statements. Schochet Decl. ¶¶ 64-67. But from the initiation of this case, the risk of dismissal on this basis was very real, and undiminished as the litigation continued.

If this case ultimately proceeded to trial, there was also substantial risk that the complexity of the fair value and non-accrual determinations that are at the heart of the claims would have posed a barrier to proving scienter. Defendants would have contended that the valuation issues were subject to different interpretations and extremely intricate, and, assuming that they got it wrong, they did so without any nefarious intent. The jury would have experienced the complexity first-hand and easily could have been sympathetic to the Individual Defendants. There was also no evidence of insider trading with respect to FSC securities. While Lead Counsel believed it could develop motive evidence based on the FSAM IPO, from which

certain of the Individual Defendants substantially profited, Defendants were prepared to argue, among other things, that the motive allegations were too tangential. Schochet Decl. ¶¶ 77-78.

The Class also faced significant risks at summary judgment and trial concerning the inter-related issues of loss causation and disaggregation of damages. For instance, Defendants would have strenuously contested Lead Plaintiff's ability to establish damages as a result of a two-day disclosure window on February 9-10, 2015, likely arguing that because no new information was revealed on February 10, 2015, the decline in the price of FSC stock on that day was caused by unrelated factors rather than by a continued reaction from the prior day's disclosures. *See, e.g., In re Moody's Corp. Sec. Litig.*, 07 Civ. 8375 GBD, 2013 WL 4516788, at *12 (S.D.N.Y. Aug. 23, 2013) (Daniels, J.) (holding that "plaintiffs must disaggregate at least some portion of the declines in share prices from losses resulting from other, non-fraud-related events"). They likely further would have argued that even the disclosure on February 9 could not have caused the alleged losses because the elements of the allegedly concealed risk were previously reported each quarter in FSC's public filings, long before the price drop. Defendants would likely also have maintained that the only arguably new information disclosed on February 9, 2015 related to the suspension and cut of FSC's dividend, which would require substantial disaggregation to establish and, if that could be done, a substantial reduction in damages. Schochet Decl. ¶ 87.

These risks existed from the outset of the case and amply support the fee request.

4. Quality of Representation

The quality of counsel's representation is another important factor that supports the reasonableness of the requested fee. *See Flag Telecom*, 2010 WL 4537550, at *28. Lead Counsel is a nationally recognized leader in the field of securities class action litigation and has substantial experience litigating and trying securities class actions in courts throughout the country. Schochet Decl. ¶ 136, Ex. 7 - C. The partners who were principally responsible for

prosecuting this case relied upon their skill to develop and implement sophisticated strategies (as set forth above) to overcome myriad obstacles raised by Defendants throughout the litigation and settlement process.

It took a great deal of skill to achieve a settlement at this level in this particular case. Specifically, this Action required a mastery of highly complex and nuanced valuation principles, the ability to develop convincing legal theories, and the skill to respond to a host of sophisticated arguments. The statistics discussed above reflect the effort of Counsel (*i.e.*, 4,763 hours, five mediation sessions, 2.4 million pages of documents reviewed in one month). But perhaps more important was the critical strategic decision to take a pragmatic and forceful approach when the prospect arose of a resolution at an early stage of the litigation, one focused on maximizing the resources that would be available to the Class and to enable Counsel to sufficiently judge the adequacy of any proposed settlement. At such time, Lead Counsel skillfully and resolutely sought and achieved a means by which it could be provided with a significant amount of the discovery it would otherwise have only obtained during formal discovery after the motion to dismiss was decided. Using that information, and consulting with accomplished experts, Lead Plaintiff was able to press its arguments on the strength of its claims during mediation—before the mediator and representatives of the Defendants and their carriers—to ultimately achieve a recovery representing a very significant percentage of the Class' total damages, as well as a substantial portion of the remaining insurance proceeds. *E.g.*, Schochet Decl. ¶¶ 32-55, 112-18 127-28.

In doing so, Lead Counsel consistently refused to accept offers that it believed failed to meet that high standard. Indeed, even after three full days of mediation, Lead Counsel had sufficient confidence in Lead Plaintiff's allegations and arguments to end the session without

agreement, notwithstanding the significant risks of continued litigation detailed above, insisting upon a greater recovery. This perseverance, backed up by Lead Counsel's legal work up to that point, was rewarded after the mediation by a means of a mediator's proposal of the substantial amount both sides later agreed to. Schochet Decl. ¶¶ 40-41.

In further evaluating the quality of counsel's work, the quality of opposing counsel is also important. *See Flag Telecom*, 2010 WL 4537550, at *28. Indeed, Defendants' counsel, Proskauer Rose and O'Melveny & Myers, are long-time leaders among national litigation firms, with well-noted expertise in corporate litigation practices. The reputation and skill of both firms are well-known by this Court, as are that of the defense attorney with whom Lead Counsel had the most contact, Ralph Ferrara of Proskauer, a leader of the defense bar in this area of the law. Schochet Decl. ¶¶ 136-38.

Based on his central role as the mediator of the parties' intensive settlement discussion, Judge Weinstein observed that the "mediation and efforts that led to the Stipulations of Settlement… demonstrate that these proposed settlements are the result of vigorous, arm's-length negotiations by experienced, competent counsel, who were well prepared and well versed in the strengths and weaknesses of their respective positions and on the applicable law." *See* Declaration of Hon. Daniel H. Weinstein (Ret.) in Support of Proposed Settlements of Fifth Street Securities Litigation, dated December 29, 2016, ¶ 25, submitted herewith as Ex. 2.

5. The Requested Fee in Relation to the Settlement Amount

"In determining whether the Fee Application is reasonable in relation to the settlement amount, the Court compares the Fee Application to fees awarded in similar securities class-action settlements of comparable value." *In re Marsh & McLennan, Co. Sec. Litig*. No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *19 (S.D.N.Y. Dec. 23, 2009).

As discussed above, Lead Counsel is mindful that this Court has expressed concerns about the determination of attorneys' fees based on the percentage-of-recovery method. If the Court is inclined to compare Lead Counsel's request in relation to the Settlement, it would amount to 17.5%, which we respectfully submit is well within the range of reasonableness.

The empirical studies cited above support this proposition. Professors Eisenberg and Miller found that the average fee in securities settlements during the period 1993 – 2008 was 23% and the median was 25%. *See* Ex. 15 at 262. For settlements of between $14.3 million and $22.8 million, the average fee was 22.7% and the median was 23.5%, with a standard deviation of 7.5. *Id*. at 265. Similarly, Professor Fitzpatrick found that the average fee award in securities settlements in 2006-2007 was 24.7% and the median was 25%. *See* Ex. 16 at 835.

Additionally, a recent analysis by NERA Economic Consulting of securities class action settlements found that during 2011-2015, the median attorneys' fee was 27.5% for settlements were between $10 million and $25 million. *See* Svetlana Starykh and Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, at 36 (NERA Jan. 25, 2016), Ex. 5.

A survey of case law within this district finds awards with respect to similarly sized settlements well above the one sought here. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 358, 368 (S.D.N.Y. 2002) (awarding 33 1/3% of $11.5 settlement and citing cases that also awarded over 30% including *In re Apac Teleservs., Inc. Sec. Litig*., No. 97-Civ. 9145 (S.D.N.Y. June 29, 2001) where the court awarded 33 1/13% of $21 million settlement and *Newman v. Caribiner Int'l Inc*., No. 99 Civ. 2271 (S.D.N.Y. Oct. 25, 2001) where the court awarded 33 1/3% of $15 million settlement); *Schnall v. Annuity & Life Re (Holdings), Ltd*., No. 02 CV 2133 (EBB), slip op. at 8-9 (D. Conn. Jan. 21, 2005) (awarding 33-1/3% of $16.5 million fund)

(Schochet Decl. Ex. 14); *In re Giant Interactive Grp., Inc. Sec. Litig*., 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (Engelmayer, J.) (awarding 33% of $13 million settlement); *In re Sadia S.A. Sec. Litig*., No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (Scheindlin, J.) (awarding 30% of $27 million settlement); *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *1, 11 (S.D.N.Y. Jan. 31, 2007) (Leisure, J.) (awarding 30% of $15.175 million fund); *In re LaBranche Sec. Litig*, No. 03-CV-8201(RWS), slip op. at 1 (S.D.N.Y. Jan. 22, 2009) (Sweet, J.) (awarding 30% of $13 million fund) (Schochet Decl. Ex. 14); *In re Ashanti Goldfields Sec. Litig*., No. CV 00-717, 2005 WL 3050284, at * 6 (E.D.N.Y. Nov. 15, 2005) (Trager, J.) (27.5% fee of $15 million settlement); *In re Salomon Analyst Metromedia Litig.*, No 02-7966, slip op. at 1 (S.D.N.Y. Feb. 27, 2009) (Lynch, J.) (27% fee of $35 million settlement) (Schochet Decl. Ex. 14); *In re Arakis Energy Corp. Sec. Litig*., No. 95 Civ. 3431, 2001 WL 1590512, at *10-15 (E.D.N.Y. Oct. 31, 2001) (Ross, J.) (25% fee of $24 million settlement); *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462, 469 (S.D.N.Y. 2004) (Chin, J.) (25% fee of $20 million settlement); *Construction Laborers Pension Trust of Greater St. Louis, et al. v. Autoliv, Inc., et al*., No. 13-02546-JPO, slip op. at 1 (S.D.N.Y. Oct. 29, 2014) (Oetken, J.) (awarding 20% fee of $22.5 million settlement) (Schochet Decl. Ex. 14).

Accordingly, it is respectfully submitted that the requested fee would be a reasonable portion of the Settlement Amount.

6. Public Policy Considerations

The federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, it is respectfully submitted that courts should encourage private lawsuits such as this one. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). For this reason, the Supreme Court has emphasized that private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'"

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).

Courts within the Second Circuit have held that "public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *Flag Telecom*, 2010 WL 4537550, at *29. Specifically, "[i]n order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (Cote, J.).

This Court has echoed the supplemental deterrent effect of private securities class actions: "one of the strong arguments for the private securities system continuing if not entirely in the form it is today is the fact that it is a means of securities law enforcement independent of the political fortunes in Washington and the SEC's budget." *See* Ex. 18, Transcript, *In re Lehman Brothers*, No. 09-md-2017 (S.D.N.Y. Apr. 16, 2014), ECF No. 1402, at 38:2-10; *see also* Schochet Decl. ¶ 135.

It is respectfully submitted that lawsuits such as this one can only be maintained if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation for such services where successful results are achieved. Public policy therefore supports awarding Lead Counsel's attorneys' fee request.

7. The Reaction of the Class

In accordance with this Court's Notice Order, 43,177 copies of the Notice Packet were sent to potential Class Members. *See* Declaration of Adam D. Walter Regarding: (A) Mailing of the Cover Letter, Individual Notice and Claim Form; (B) Issuance of the Publication Notice; and

(C) Report on Requests for Exclusion and Objections Received to Date, submitted herewith as Ex. 6 ¶ 9.

The Notice informed the Class that Lead Counsel would make an application not to exceed 25% of the Settlement Fund and seek payment of litigation expenses not to exceed $500,000. Ex. 6 - A at 1. To date, not a single objection to the fee and expense request has been received. Pursuant to the Notice, the time to object to Lead Counsel's fee request expires on January 26, 2017, and Lead Counsel will address any objections received in its reply papers, which are due by February 9, 2017.

II. PLAINTIFF'S COUNSEL'S LITIGATION EXPENSES WERE REASONABLY INCURRED AND NECESSARY FOR THE PROSECUTION OF THIS ACTION

Lead Counsel also requests payment of $245,122.80 for expenses that were reasonably incurred in prosecuting this Action. These expenses are set forth in the individual firm declarations submitted herewith, *see* Exs. 7 ¶ 7 and 8 ¶8, and are of the type that are typically approved by courts. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (Lynch, J.) ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which 'the paying, arms' length market' reimburses attorneys . . . [and] [f]or this reason, they are properly chargeable to the Settlement fund.") (citation omitted).

One of the most significant expenses was the cost of experts, which totaled $164,017.60, or 67% of Plaintiff's Counsel's expenses. As detailed in the Schochet Declaration, FSC's valuation issues were key to establishing the claims and extremely complex and intricate, requiring significant expert analysis from the outset of drafting the Complaint to ultimately reaching a settlement at an appropriate value. Moreover, rigorous analyses of potential damages were also required in order for the mediation process to be productive. This expertise allowed

Lead Counsel to fully frame the issues, gather relevant evidence, make a realistic assessment of provable damages, and structure resolution of the claims. *See e.g.*, Schochet Decl. ¶¶ 22-28, 50, 52, 58-59, 83-89, 143.

Another key expense was the fee associated with mediation (here $42,028.37). As detailed in the Schochet Declaration, the extensive work performed by Judge Weinstein over the course of three formal days of mediation, and equally so both before and after those sessions, was crucial to the resolution of the Action. *See e.g.*, Schochet Decl. ¶¶ 34-35, 39-41,143.

The remainder of the requested expenses, which total $39,076.83, are of the type commonly awarded by courts within this district: the costs of online databases used for factual, financial and legal research; filing and service fees; long-distance telephone, duplicating; costs related to electronic discovery; and work-related transportation. Schochet Decl. ¶ 144, Ex. 7 ¶ 7, 8 ¶ 8.

The Notice advised potential Class Members that Lead Counsel would seek payment of expenses not to exceed $500,000. *See* Ex. 6 - A at 1. Lead Counsel's request for payment is below this "cap." Additionally, there have not been any objections to date relating to Lead Counsel's expense request.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court grant its motion for an award of attorneys' fees and payment of litigation expenses. A proposed order will be submitted with Lead Counsel's reply papers after the deadline for objections has passed.

Dated: January 12, 2017

Respectfully submitted,

LABATON SUCHAROW LLP

/s/ *Ira A. Schochet*
Joel H. Bernstein (JB-0763)
Ira A. Schochet (IS-2187)
Nicole M. Zeiss (NZ-3894)
Eric D. Gottlieb (EG-1988)
140 Broadway
New York, New York 10005
Telephone: 212-907-0700
Facsimile: 212-818-0477
jbernstein@labaton.com
ischochet@labaton.com
nzeiss@labaton.com
egottlieb@labaton.com

Counsel for Court-Appointed Lead Plaintiff Oklahoma Police Pension and Retirement System

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017 the foregoing was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Ira A. Schochet
Ira A. Schochet