UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

In re MASSEY ENERGY CO. SECURITIES LITIGATION	Civil Action No. 5:10-cv-00689-ICB
	CLASS ACTION
This Document Relates To:	The Honorable Irene C. Berger
ALL ACTIONS.	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

DOCKETED CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Co-Lead Counsel, Labaton Sucharow LLP and Robbins Geller Rudman & Dowd LLP (collectively, "Co-Lead Counsel") in this securities class action respectfully submit this memorandum of law in support of: (i) their motion, on behalf of themselves and Liaison Counsel James F. Humphreys & Associates L.C. (collectively "Plaintiffs' Counsel") for an award of attorneys' fees and payment of litigation expenses; and (ii) the application of Lead Plaintiff, the Commonwealth of Massachusetts Pension Reserve Investment Trust ("Lead Plaintiff" or "Massachusetts PRIT") Fund for reimbursement of its reasonable costs and expenses (including lost wages) related to the time and resources it committed to prosecute the Action, pursuant to the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §78u-4(a)(4).[1]

The substantial and certain recovery obtained for the Settlement Class – an all-cash recovery of $265 million – was achieved through the skill, experience, and effective advocacy of Co-Lead Counsel. Their efforts to date have been without compensation of any kind and the fee has been wholly contingent upon the result achieved. If approved, the Settlement will be the ***second*** largest all cash settlement in a securities class action within the Fourth Circuit and the ***largest*** within the District.[2] For this work, Co-Lead Counsel respectfully seek an award of attorneys' fees in the

---

[1] Capitalized terms not otherwise defined herein have the meanings set forth and defined in the Stipulation and Agreement of Settlement, dated as of February 5, 2014 (ECF No. 181-1, the "Stipulation").

[2] *See* Joint Declaration of Joel H. Bernstein and Jack Reise, dated April 30, 2014 ("Joint Declaration" or "Joint Decl.") ¶8, which more fully describes the history of the litigation, the claims asserted, the investigation undertaken, the negotiation and substance of the Settlement, the substantial risks of the litigation, and the reasonableness of the fee request. Annexed thereto as Exs. 7 - 9 are declarations from Plaintiffs' Counsel setting forth the time and expenses incurred in prosecuting the litigation. All exhibits referenced herein are annexed to the Joint 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 declaration and the second reference is to the internal exhibit designation.

amount of $31,838,168, which is approximately 12% of $264,407,450 (the $265 million Settlement Fund less the litigation expenses which Plaintiffs' Counsel seek herein), and payment of $592,549.85 in litigation expenses reasonably incurred in the course of pursuing the claims against Defendants. Lead Plaintiff, supported by the Declaration of Christopher J. Supple, dated April 29, 2014, Ex. 2, respectfully seeks payment of an award, pursuant to the PSLRA, of $33,889.18 in reimbursement of lost wages, as a result of the time expended in representing the proposed Settlement Class.

The requested fee is consistent with and, in fact, considerably lower than, fees awarded in district courts within the Fourth Circuit and courts throughout the country with recoveries of this magnitude. The amount requested is especially warranted in the light of the complexity of the Action and the size of the recovery as compared to the potential recoverable damages if this case had proceeded to trial. Members of the Settlement Class appear to agree that the Settlement is an excellent one, under any measure, and that the fee is reasonable. In accordance with this Court's Order preliminarily approving settlement, 217,446 copies of the Notice were sent to potential members of the Settlement Class and a Summary Notice was published in *The Wall Street Journal* and over the PR Newswire. To Co-Lead Counsel's knowledge, no Settlement Class Member has objected to the fee and expense request. In today's era of increased shareholder activism, "such a low level of objection is a 'rare phenomenon.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (citation omitted).

For the reasons set forth herein and in the Joint Declaration, Co-Lead Counsel respectfully submit that the attorneys' fees and expenses requested are fair and reasonable under the applicable legal standards and therefore should be awarded by the Court.

ARGUMENT

I. CO-LEAD COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

A. Percentage of the Fund Recovered Is the Appropriate Method for Awarding Attorneys' Fees in Common Fund Cases

For their efforts in creating a common fund for the benefit of the Settlement Class, Co-Lead Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. In recent years, the percentage method of awarding fees has become the prevailing method for awarding fees in common fund cases throughout the United States. *See, e.g.*, *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 WL 2285972, at *3 (S.D. W. Va. May 23, 2013) ("Awarding attorney fees as a percentage of the benefit to the class is the preferable and prevailing method of determining fee awards in class actions that establish common funds for the benefit of the class."). A percentage fee award is appropriate because it encourages counsel to obtain the maximum recovery for the class at the earliest possible stage of the litigation and, hence, most fairly correlates plaintiffs' counsel's compensation to the benefit achieved for the class.

Although the Fourth Circuit has not definitively addressed the issue of which method to apply in the evaluation of attorneys' fees in common fund cases, many district courts in the Fourth Circuit prefer the use of the percentage of the fund method and have used the percentage of the fund method with increasing frequency. *See, e.g.*, *Deem*, 2013 WL 2285972, at *4-5; *Jones v. Dominion Res. Servs. Inc.*, 601 F. Supp. 2d 756, 758 (S.D. W. Va. 2009) (percentage method is "overwhelmingly" preferred); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009) ("other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating fees in common fund cases").

Percentage-of-recovery fees also have the salutory effect of conserving judicial resources. Percentage fees are simple to calculate, are not subject to manipulation, and do not require the court

to "second guess" each and every decision made by counsel during the course of a complex case. *See Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995) ("the percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases").

B. Fee was Negotiated with Lead Plaintiff

Lead Plaintiff is a sophisticated institutional investor and has been a staunch advocate and fiduciary of the proposed class. It is a pooled investment fund established by the Massachusetts Legislature with a mandate to invest Massachusetts' and local participating retirement systems' pension assets. *See* Ex. 2 ¶2. Lead Plaintiff has been closely involved in the prosecution of the Action and has directly participated in all material decisions concerning the case at every stage of its litigation, *i.e*. from inception through settlement negotiations. *See generally* Exs. 2 & 6. In keeping with this advocacy, the amount of the fee request was the subject of informed negotiation between Labaton Sucharow, on behalf of Co-Lead Counsel, and Lead Plaintiff prior to the Settlement being reached, Ex. 2 ¶7, and the request is fully consistent with this fee agreement, Ex. 6 ¶6.

In evaluating a fee request, if the fees sought are based on a pre-existing agreement negotiated between a sophisticated institutional investor serving as lead plaintiff and plaintiff's counsel, it is appropriate for the court to give that agreement great weight. *See In re Bear Stearns Cos., Inc. Sec., Derivative, and ERISA Litig.*, 909 F. Supp. 2d 259, 272 (S.D.N.Y. 2012) ("When class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight.") (citation omitted); *see also Mills*, 265 F.R.D. at 261 ("a PSLRA case in which a fee request has been approved and endorsed by properly-appointed lead plaintiffs . . . . enjoys a presumption of reasonableness").

C. Criteria Followed by District Courts Within the Fourth Circuit

Co-Lead Counsel request fees representing approximately 12% of the Settlement Fund. This request is fair and reasonable under the relevant standards. In determining the reasonableness of the percentage fee award sought by counsel in a class action, the Fourth Circuit and district courts within that circuit have variously applied factors articulated in other circuits. In particular, they have applied all or some of the factors the Third Circuit listed in *In re Cendant Corporation Prides Litigation*, 243 F.3d 722, 733 (3d Cir. 2001),[3] or those the Fifth Circuit set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[4] The relevant factors considered below are: (1) the amount involved and the results obtained; (2) the time and labor involved; (3) the novelty and difficulty of the questions raised; (4) the skill, efficiency, and reputation of counsel; (5) whether the fee is fixed or contingent; and (6) awards in similar cases. *See, e.g.*, *Muhammad v. Nat'l City Mortg. Inc.*, No. 2:07-0423, 2008 WL 5377783, at *8 (S.D. W. Va. Dec. 19, 2008). "[T]here is no specific formula for analyzing these factors" and "in certain

---

[3] These factors include: (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) awards in similar cases. *Id.*; *see Deem*, 2013 WL 2285972, at *5 (applying a version of the *Cendant* factors); *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 471 (S.D. W. Va. 2010) (same).

[4] These factors include: (1) the time and labor expended; (2) novelty and difficulty of the questions raised; (3) skill required to properly perform the legal services; (4) attorneys' opportunity costs in pressing the litigation; (5) customary fee for like work; (6) attorney's expectations at the outset of litigation; (7) time limitations imposed by the client or circumstances; (8) amount in controversy and results obtained; (9) experience, reputation, and ability of the attorney; (10) undesirability of the case within the legal community in which the suit arose; (11) nature and length of the professional relationship between the attorney and client; and (12) fee awards in similar cases. *Id.*; *see Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (adopting the *Johnson* factors); *see also In re MicroStrategy Inc. Sec. Litig*, 172 F. Supp. 2d 778, 786 (E.D. Va. 2001) (listing the twelve *Barber* factors as the "factors to be considered in determining a reasonable attorneys' fee in common fund cases"); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006) (applying *Barber* factors).

cases, one factor may outweigh the rest." *Id.* (internal quotation omitted). As described below, an analysis of the applicable factors supports the requested fee.

1. The Amount Involved and the Results Obtained

Courts have consistently recognized that the result achieved is one of the most important factors to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *McKnight v. Circuit City Stores Inc*., 14 F. App'x. 147, 149 (4th Cir. 2001) ("the most critical factor in calculating a reasonable fee award is the degree of success obtained"); *Jones*, 601 F. Supp. 2d at 761 ("The result achieved by the attorneys for the class is often cited as one of the most significant factors in determining the reasonableness of a fee award."); *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 465 (S.D. W. Va. 2010) (same); *see also Mills*, 265 F.R.D. at 261 ("a central advantage of the percentage of the fund method is that it looks to the results actually obtained by Lead Counsel rather than just the number of hours they expended, which should be an important point in awarding fees").

Co-Lead Counsel have created an extraordinary benefit for the Settlement Class. The proposed Settlement Amount of $265 million is the largest securities class action settlement in this District and the second largest all cash settlement in the Fourth Circuit. Joint Decl. ¶8. As discussed in the Joint Declaration, the Settlement represents 47% of the potential recoverable damages according to Lead Plaintiff's damages expert's analyses. *Id* ¶. The percentage of potential damages recovered here is far in excess of the typical recoveries in securities class action settlements. *See, e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (approving $125 million settlement that was "between approximately 3% and 7% of estimated damages [and] within the range of reasonableness for recovery in the settlement of large securities class actions"); *In re Interpublic Sec. Litig*., No. 02 Civ. 6527 (DLC), 2004 WL 2397190, at *8 (S.D.N.Y. Oct. 26, 2004) ($96 million settlement fund reflecting "ten to twenty percent" of

estimated damages "sits comfortably within the range of reasonableness"); *see also* Settlement Brief §I.A.2(a).

The Settlement is a tremendous result that was achieved, in substantial part, because of the skill and tenacity of Co-Lead Counsel in prosecuting this litigation on behalf of the Settlement Class. There is no question that Co-Lead Counsel overcame difficult obstacles and took significant risks in obtaining this favorable result, which supports approval of the fee request.

2. The Time and Labor Involved

As detailed in the Joint Declaration and the individual firm declarations submitted therewith (Exs. 7 - 9), Co-Lead Counsel have marshaled considerable resources and time in the research, investigation, and prosecution of this litigation on behalf of the Settlement Class. *See MicroStrategy*, 172 F. Supp. 2d at 788 ("A review of the tasks undertaken by lead and affiliated counsel as reported in the fee petition reflects what was observed in the briefs and arguments: All issues were thoroughly investigated, comprehensively researched, and ably presented.").

Since their appointment by the Court, Co-Lead Counsel devoted significant resources to prepare a detailed Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint"), prepare responses to multiple motions to dismiss, successfully pursue a partial lifting of the PSLRA discovery stay, conduct discovery, continue its investigation, consult with experts and engage in a protracted negotiation process with Defendants. *See generally* Joint Decl. The Settlement was only reached after Co-Lead Counsel, *inter alia*, engaged in the review and analysis of: (i) more than 100,000 pages of documents Massey produced pursuant to the September 28, 2011 Order partially granting Plaintiffs' motion for partial lifting of the PSLRA stay; (ii) testimony concerning Massey before various U.S. Senate and House of Representatives Committees; (iii) information and data published by the U.S. Mine Safety and Health Administration ("MSHA"); (iv) testimony given to MSHA and the West Virginia Office of Miners Health, Safety and Training

("WVOMHST") in the context of said entities' investigations regarding Massey and the UBB; (v) final investigatory reports issued by MSHA, WVOMHST, the West Virginia Governor's Independent Investigation Panel ("GIIP"), and Massey regarding the UBB explosion; (vi) Co-Lead Counsel's internal investigation, which involved the identification of more than 100 potential witnesses, contact of approximately 50 witnesses, and interviews with approximately two dozen former Massey employees and other persons with relevant knowledge; (vii) the applicable law governing the claims and potential defenses; (viii) consultations with experts on mine safety, valuation, damages, and causation issues; and (ix) pleadings and materials, including criminal informations and an indictment, filed in other pending actions that name Massey, other Defendants in the Action, or certain other Massey employees as defendants or nominal defendants. Joint Decl. ¶¶11, 32-40, 44-51. In total, Co-Lead Counsel and Liaison Counsel have spent more than 21,800 hours working on this case. Exs. 7 - B, 8 - B, 9 - B, 10. The substantial time devoted to litigating reflects the dedicated effort needed to prosecute the claims and bring them to a favorable resolution.

While the time and labor required to successfully prosecute this litigation and obtain the outstanding Settlement for the benefit of the Settlement Class justifies the requested fee, courts have found this factor to be of less importance in a common fund case, such as this case. For example, the Tenth Circuit in *Brown v. Phillips Petroleum Company* found:

> Although the *Johnson* factors are relevant in determining a reasonable fee in a common fund case, the inherent differences between statutory fee and common fund cases could justify a trial judge's decision to assign different relative weights to those factors in the two types of cases. For example, the first factor – time and labor required – is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis. In a common fund case, however, although time and labor required are appropriate considerations, the ninth *Johnson* factor – the amount involved and the results obtained – may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class.

838 F.2d 451, 456 n.5 (10th Cir. 1988). Here, Co-Lead Counsel were aggressive, efficient, and

highly successful. As a result, this factor strongly supports approval of the requested fee.

3. The Novelty and Difficulty of the Questions Raised

Courts have long recognized that the novelty and difficulty of the issues in a securities case are significant factors in making a fee award. *See Mills*, 265 F.R.D. at 263 ("The very nature of a securities fraud case demands a difficult level of proof to establish liability. Elements such as scienter, reliance, and materiality of representation are notoriously difficult to establish."). Indeed, while securities cases have always been complex and difficult to prosecute, the PSLRA has only increased the difficulty in successfully prosecuting a securities class action. *See Johnson*, 488 F.2d at 718. *See also In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").

As discussed in detail in the Joint Declaration, the facts at issue in the Action were novel and presented significant challenges that needed to be navigated by Co-Lead Counsel. Among other things, Co-Lead Counsel needed to master the highly scientific and technical nature of the alleged fraud, become familiar with the coal mining industry, and contend with expert-intensive issues related to mine safety, the causes of mine explosions, market analysis and valuations of mining companies, loss causation and damages, and regulatory practices. Joint Decl. ¶¶60-82, 89.

Indeed, throughout the litigation, Defendants strenuously countered: (i) whether they made any material misstatements or omissions; (ii) whether they acted with scienter; (iii) the cause of the explosion; (iv) the amount by which Massey's common stock was allegedly artificially inflated (if at all) during the Class Period; (v) the extent to which the various matters that Plaintiffs alleged were false and misleading influenced (if at all) the trading price of Massey's shares during the Class Period; (vi) the extent to which the various matters that Plaintiffs alleged were omitted, and/or false and misleading were publicly known to the market prior to the alleged disclosure dates; (vii) the extent to which confounding news contributed (if at all) to the price declines on the alleged

disclosures; (viii) whether any purchasers/acquirers of Massey's common stock suffered damages as a result of the alleged misstatements and omissions in Massey's public statements; and (ix) the extent of such damages, assuming they exist. Joint Decl. ¶¶60-82. As noted above, overcoming certain of these defenses at the motion to dismiss stage required considerable skill and prevailing on these defenses at summary judgment and at trial would prove to be a heavy burden for Plaintiffs. *See, e.g., In re MicroStrategy Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 666 (E.D. Va. 2001) ("plaintiffs' risk of establishing liability are significant where fraud is alleged") (internal quotation omitted).

Principally, Plaintiffs faced significant legal and factual challenges in proving loss causation and damages, even once liability were established. Defendants repeatedly argued throughout the litigation that Plaintiffs' damages were overstated. Co-Lead Counsel had to counter, and would continue to face at summary judgment or trial, Defendants' argument that none of the alleged corrective disclosures cured any material misrepresentations because the market was already aware of Massey's poor safety reputation; that damages resulting from certain allegedly corrective disclosures were not the result of a statistically significant stock price reactions; that the stock price declines after the UBB explosion were not the materialization of any undisclosed safety problems at Massey (based upon the results of a well-financed investigation and analysis that Massey had commissioned). Joint Decl. ¶¶61-68. Damages issues "would have become a battle of experts at trial, with no guarantee of the outcome in the eyes of the jury." *Mills*, 265 F.R.D. at 256.

Additionally, given that ANR, Massey's successor that will fund this Settlement, operates in a business sector (coal production), that has been subjected to significant constraints in recent years because of, among other things, declining coal prices, increased government regulation, and increased environmental concerns, Co-Lead Counsel had to navigate a complex financial landscape during settlement discussions in order to determine the best way to structure a settlement.

4. The Skill, Efficiency, and Reputation of Counsel

The skill, efficiency, and reputation of counsel are important factors that supports the reasonableness of the requested fee. *See Mills*, 265 F.R.D. at 262 (approving the requested fee after finding "Lead Counsel to be very experienced and skilled in the field of securities litigation and achieved here a very favorable result for the Class"). Co-Lead Counsel are well regarded nationally based on their decades of experience in prosecuting and trying complex class actions. Joint Decl. ¶¶118-19; Exs. 7 - A; 8 - A. As the court recognized in *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987), the "prosecution and management of a complex national class action requires unique legal skills and abilities." Co-Lead Counsel's efforts in efficiently bringing this litigation against Defendants to a successful conclusion are the best indicator of the experience and ability of the attorneys involved. That Co-Lead Counsel have managed the litigation in a disciplined and pragmatic fashion confirms that this litigation was ably prosecuted for the benefit of the Settlement Class. Among other things, Co-Lead Counsel's expertise was instrumental in not only defeating Defendants' motions to dismiss the Complaint but also in rebuffing Defendants' repeated attempts to block discovery of key material concerning the safety of Massey mines that had previously been produced to others, and in developing the case so that it was ripe for settlement. In short, the result achieved is the clearest reflection of counsel's skill and expertise. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 261 (D. Del. 2002) (class counsel "showed their effectiveness in the case at bar through the favorable cash settlement they were able to obtain"), *aff'd*, 391 F.3d 516 (3d Cir. 2004).

The quality of opposing counsel can also be important in evaluating the quality of plaintiffs' counsel's work. *See Mills*, 265 F.R.D. at 262. (noting that the quality of lead counsel supports the fee request where lead counsel were up against "experienced and sophisticated defense attorneys"). Here, Defendants are represented by highly skilled and capable counsel from Cleary Gottlieb Steen

& Hamilton LLP; Cravath, Swaine & Moore LLP; Zuckerman Spaeder LLP, Flaherty Sensabaugh & Bonasso PLLC; and Tiffey Law Practice, PLLC, law firms with a national reputation for vigorous advocacy in the defense of complex class actions such as this. Joint Decl. ¶121. The ability of Co-Lead Counsel to obtain such a favorable settlement for the Settlement Class in the face of such formidable opposition confirms the superior quality of their representation.

5. Whether the Fee Is Contingent or Fixed

Co-Lead Counsel undertook the case on a contingent fee basis, assuming a risk that the litigation would yield no recovery and leave them uncompensated. Unlike counsel for Defendants who are paid an hourly rate and paid for their expenses on a regular basis, Co-Lead Counsel have not been compensated for their time or expense in representing the Settlement Class.

A determination of a fair fee must include consideration of the contingent nature of the fee. It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994), *aff'd* in part, *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306 (9th Cir. 1994).

Courts within the Fourth Circuit have consistently recognized that the risk of receiving little or no recovery is a major factor in considering attorneys' fees. *See Jones*, 601 F. Supp. 2d at 762 ("Certainly, attorneys undertaking class actions bear substantial risks that the litigation will not result in payment. The attorneys risk defeat at several stages of litigation; class certification, dispositive motions, and finally, trial.").

From the outset of this Action, Co-Lead Counsel understood that they were embarking on a complex and expensive litigation with no guarantee of being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable costs that a case such as this requires. Co-Lead Counsel received no compensation during the course of the Action and advanced or incurred more than $592,000 in expenses in prosecuting this Action for the benefit of the Settlement Class. Joint Decl. ¶108-11; Exs. 7 ¶¶8-11 & Ex. C thereto, 8 ¶¶6-8, 9 ¶8, 10.

Indeed, the risk of no recovery in complex cases of this type is very real. The dismissals and reversals are legion. Some recent examples involving Co-Lead Counsel highlight this point. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming judgment for defendants as a matter of law following jury verdict partially in plaintiffs' favor). While the Ninth Circuit ultimately reversed the decision, the court in *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, 2010 WL 5927988 (9th Cir. June 23, 2010), on a motion for judgment as a matter of law, overturned a jury verdict of $277 million in favor of shareholders based on insufficient evidence presented at trial to establish loss causation.

Thus, the contingent nature of the litigation supports the requested fee.

6. Awards in Similar Cases

"Courts look to fees awards in analogous cases to determine the reasonableness of the percentage requested." *Mills*, 265 F.R.D. at 263-64. "[T]he reasonableness inquiry is necessarily case-specific, and thus the percentage actually awarded varies from case to case." *Id.* In this regard, the *Mills* court observed that "though varied, it is worth noting as a starting point that percentage awards are often between 25% and 30% of the Fund." *Id.*

A 12% attorneys' fee is well ***below*** the typical range of fee awards in securities class actions and other common fund cases with comparable recoveries in the Fourth Circuit. *See, e.g.*, *Mills*, 265 F.R.D. at 263-64 (awarding 18% of $202.75 million settlement); *MicroStrategy*, 172 F. Supp. 2d at 790 (awarding 18% of settlement valued at $152.5 million to $192.5 million); *In re Computer Sciences Corp. Sec. Litig*., 11-cv-0610, slip op. at 2 (E.D. Va. Sept. 20, 2013) (awarding 19.5% of $97.5 million settlement) (submitted herewith in compendium of unpublished opinions, Ex. 12).[5]

An examination of fee decisions in securities class actions with comparable settlements across the country also shows that an award of 12% is substantially below the range of fee awards. *See, e.g., Pub. Emps. Ret. Sys. of Miss. v. Merrill Lynch & Co. Inc*., No. 08-cv-10841, slip op. at 2 (S.D.N.Y. May 8, 2012) (awarding 17% of $315 million settlement) (Ex. 12); *In re Comverse Tech. Inc. Sec. Litig.*, No. 06 CV 1825, 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding 25% of $225 million settlement); *In re Gen. Motors Corp. Sec. and Derivative Litig*., No. 06-md-1759, slip op. at 2 (E.D. Mich. Jan. 6, 2009) (awarding 15% of $303 million settlement) (Ex. 12); *In re CMS Energy Sec. Litig.*, No. 02-cv-72004 (GCS), 2007 U.S. Dist. LEXIS 96786, at *14-15 (E.D. Mich. Sept. 6, 2007) (awarding 22.5% of $200 million settlement); *In re DaimlerChrylser AG Sec. Litig*., No. 00-0993, slip op. at 1-2 (D. Del. Feb. 5, 2004) (awarding 22.5% of $300 million settlement) (Ex. 12); *In re Oxford Health Plans, Inc. Sec. Litig*., No. MDL 1222, 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement); *In re 3Com Corp. Sec. Litig*., No. C-97-21083, slip op. at 12 (N.D. Cal. Mar. 9, 2001) (awarding 18% of $259 million settlement) (Ex. 12).

---

[5] Even in *Royal Ahold*, which settled for $1.1 billion and is the largest securities class action settlement in the Fourth Circuit, the court awarded an attorneys' fee of 12% of the settlement fund. 461 F. Supp. 2d at 387.

Accordingly, it is respectfully submitted that the attorneys' fee requested here is eminently reasonable.

D. Reaction of the Settlement Class to Date

Pursuant to the Court's Preliminary Approval Order, to date, 217,446 copies of the Notice were mailed to potential Settlement Class Members and nominees advising them that Co-Lead Counsel would apply for a fee award of 12.2% of the Settlement Fund and payment of litigation expenses of no more than $950,000 (sums greater than that actually requested) and that Settlement Class Members could object to the fee application. Joint Decl. ¶90-92, 122; Ex. 5 - A at 2, 6. Despite the extensive notice program, to date no Settlement Class Member has objected to the fee and expense application. (One presumptively invalid exclusion request submitted by a non-class member found the fee request "outrageous," without providing any explanation. Ex. 5 - D.) The deadline to object to Co-Lead Counsel's fee and expense request is May 14, 2014. Should any objections to the fee and expense request be received, Co-Lead Counsel will address any such objections in their reply papers, which will be filed with the Court on May 28, 2014.

E. Public Policy Considerations Also Support the Requested Fee Award

The federal securities laws are remedial in nature and, in order to effectuate their purpose of protecting investors' private lawsuits, are to be encouraged. *See Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985). The Supreme Court has emphasized that private securities actions such as this provide "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Id.* at 310 (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). "The public benefits when capable and seasoned counsel undertake private

action to enforce the securities laws." *Mills*, 265 F.R.D. at 246 (citing *MicroStrategy*, 172 F. Supp. 2d at 787-88). As set forth by the Court in *MicroStrategy*:

> [T]he process of setting a proper fee in a PSLRA case must include an incentive component to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class in a securities fraud case. The percentage method aids in meeting this objective as it is based on the contingent fee concept and PSLRA cases are essentially contingent fee cases; there is no fee unless there is a recovery and the fee awarded must bear a reasonable relation to the size of the recovery.

172 F. Supp. 2d at 788. If the vigorous prosecution of representing plaintiffs in a class action is to be carried out, courts must award fees that adequately compensate plaintiffs' counsel. *See, e.g., Jones*, 601 F. Supp. 2d at 765 ("public policy generally favors attorneys' fees that will induce attorneys to act and protect individuals who may not be able to act for themselves but also will not create an incentive to bring unmeritorious actions."). Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from securities fraud. Accordingly, an award of the fee requested herein would be fully consistent with important public policy considerations.

F. The Requested Fee Is also Reasonable under a Lodestar Cross-Check

Some district courts within the Fourth Circuit apply a lodestar cross-check. *See, e.g., Jones*, 601 F. Supp. 2d at 765; *Mills*, 265 F.R.D. at 261; *Royal Ahold*, 461 F. Supp. 2d at 385. The lodestar is calculated by "multiplying the number of hours reasonably worked by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." *Mills*, 265 F.R.D. at 264. The hourly billing rates used by Co-Lead Counsel are commensurate with rates used by attorneys nationwide litigating matters of a similar magnitude. *See* Joint Decl. ¶116. *Cf. MicroStrategy*, 172 F. Supp. at 788 ("[T]he range generally corresponds to the rates charged by the group of experienced securities class action counsel in cases brought in this and other districts. These rates are also not inconsistent with the rates charged by

lawyers in . . . law firms that typically represent defendants in securities class actions.").

Here, the total lodestar of Co-Lead Counsel and Liaison Counsel related to the prosecution of the Action, derived by multiplying their hours by each firms' current hourly rates,[6] is $11,085,145.50. *See* Ex. 10. This represents more than 21,800 hours spent by attorneys, paralegals, investigators, and professional analysts furthering the prosecution of the claims. *See* Exs. 7 - 10. Co-Lead Counsel's request for a fee of $31,838,168 amounts to a lodestar multiplier of less than 2.9, which supports the overall reasonableness of the fee request.

Such a multiplier is within the parameters used throughout the Fourth Circuit and around the country and is additional evidence that the requested attorneys' fee is reasonable. *See, e.g.*, *Jones*, 601 F. Supp. 2d at 766 (awarding multiplier between 3.4 and 4.5 and noting that "courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee); *Mills*, 265 F.R.D. at 265 (noting that lodestar multipliers between 2 and 4.5 are reasonable); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (upholding a multiplier of 3.5 as reasonable on appeal); *In re Aetna Inc. Sec. Litig.*, No. CIV A. MDL 1219, 2001 WL 20928, at *15 (E.D. Pa. Jan. 4, 2001) ("Multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.") (citation omitted); *In re NASDAQ Market–Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) ("multipliers of between 3 and 4.5 have become common"). Thus, the lodestar "cross-check" fully supports the requested fee.

---

[6] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).

II. PLAINTIFFS' COUNSEL SHOULD BE PAID FOR LITIGATION EXPENSES REASONABLY INCURRED

Payment of reasonable costs and expenses to counsel who create a common fund is both necessary and routine. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001); *Strang*, 890 F. Supp. at 503. Payment of expenses like those requested here is regularly permitted. These expenses are set forth in the declarations from counsel submitted to the Court herewith as Exhibits 7 through 9 and are of the type generally approved by courts for reimbursement. *See MicroStrategy*, 172 F. Supp. 2d at 791 ("There is no doubt that costs, if reasonable in nature and amount, may appropriately be reimbursed from the common fund."). Plaintiffs' Counsel's declarations itemize the various categories of expenses incurred (*see* Exs. 7 ¶¶8-11 & Ex. C thereto, 8 ¶¶6-8, 9 ¶8) and state that these expenses were reasonable and necessary to prosecuting the claims and achieving the Settlement.

Plaintiffs' Counsel, in the prosecution of this complex case, incurred expenses of $592,549.85. Ex 10 . Much of this expense is attributable to professional services rendered by Lead Plaintiff's experts and consultants, who allowed Co-Lead Counsel to fully frame the issues, gather relevant evidence, make a realistic assessment of liability and provable damages, and structure resolution of claims. *See, e.g., Jones*, 601 F. Supp. 2d at 767 (approving costs incurred by experts and consultants who "were necessary to the thorough development and effective settlement of the Class Claims, especially in light of the complicated subject matter").

Co-Lead Counsel were also required to travel to different states in connection with this case and seek reimbursement for the costs of this travel. For instance, counsel traveled to West Virginia on several occasions to attend court proceedings and interview witnesses, and Boston to meet with Lead Plaintiff and/or hold settlement negotiations. *See, e.g., Mills*, 265 F.R.D. at 265 ("traveling to depositions, reviewing documents provided by class counsel, and attending mediation sessions and

court hearings" are the type of expenses expected or previously approved by other courts). Courts also routinely approve reimbursement for the expenses associated with mediation. *See, e.g., id.* As detailed in the Joint Declaration, the work performed by Professor Green was crucial to the resolution of the Action.

In sum, Co-Lead Counsel respectfully submit that the expenses incurred were reasonable and necessarily incurred in connection with prosecuting the Action and achieving the proposed Settlement for the benefit of the Settlement Class.

III. LEAD PLAINTIFF IS ENTITLED TO REIMBURSEMENT OF REASONABLE COSTS AND EXPENSES PURSUANT TO THE PSLRA

The PSLRA, 15 U.S.C. §78u-4(a)(4), limits a class representative's recovery to an amount "equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class," but also provides that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." Congress specifically acknowledged the importance of awarding appropriate reimbursement to class representatives. *See* H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995) ("The Conference Committee recognized that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the court discretion to award fees."). *See also In Re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (recognizing the important public policy role of lead plaintiffs).

Here, as explained in the Supple Declaration, Lead Plaintiff is seeking reimbursement of $33,889.18 in lost wages related to the Massachusetts Pension Reserves Investment Management ("PRIM") Board's very active participation in and oversight of this Action. Ex. 2 ¶¶5-7, 9-10. This request is based on 214 hours that PRIM personnel devoted to the litigation, at rates ranging from

$147.47 to $237.77/hour derived from total compensation divided by hours worked, assuming a standard work week. *Id*. ¶10.

Numerous cases have approved reasonable payments to compensate class representatives for their time and effort, including Massachusetts PRIT. *See, e.g.*, *In re Schering-Plough Corp. / Enhance Sec. Litig.*, No. 08-397 (DMC) (JAD), 2013 WL 5505744, at *38 (D.N.J. Oct. 1, 2013) (awarding Massachusetts PRIT $35,772.26); *Computer Sciences Corp.*, 11-cv-0610, slip op. at 2 (awarding institutional plaintiff $60,905) (Ex. 12); *Gen. Motors*, No. 06-md-1749, slip op. at 3 (awarding lead plaintiffs $184,205) (Ex. 12); *Mills*, 265 F.R.D. at 265 (awarding lead plaintiffs $42,419.50); *In re Am. Int'l Grp. Sec. Litig.*, No. 04-8141, 2012 WL 345509, at *6 (S.D.N.Y. Feb. 2, 2012) (awarding $71,910 to institutional lead plaintiffs); *In re Marsh & McLennan Co. Sec. Litig.*, No. 04-8144, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding a combined $214,657 to two institutional lead plaintiffs).

Here, Lead Plaintiff has devoted at least 214 hours to the litigation, which included time spent on, among other things: (i) carefully reviewing and commenting on all the substantive filings made in the case; (ii) corresponding and attending in-person and telephonic meetings with Co-Lead Counsel about the status and strategy of the case; and (iii) preparing for, attending and participating in, mediation sessions and other settlement negotiations. Ex. 2 ¶6, 10. Co-Lead Counsel and Lead Plaintiff therefore respectfully submit that the $33,889.18 sought is eminently reasonable and should be granted.

CONCLUSION

For all of the foregoing reasons, Co-Lead Counsel respectfully request the Court to award attorneys' fees in the amount of $31,838,168; expenses in the amount of $592,549.85, plus interest at the same rate as earned by the Settlement Fund; and an expense award for the Lead Plaintiff in the amount of $33,889.18.

Dated: April 30, 2014

By: */s/ Joel H. Bernstein*

Joel H. Bernstein
Christopher J. Keller
Ira A. Schochet
Irina Vasilchenko
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700
(212) 818-0477 (facsimile)

Counsel for Lead Plaintiff Commonwealth of Massachusetts Pension Reserves Investment Trust and Co-Lead Counsel for the Settlement Class

Paul J. Geller
Jack Reise
Dennis J. Herman
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
(561) 750-3000
(561) 750-3364 (facsimile)

Counsel for Plaintiff David Wagner and Co-Lead Counsel for the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

- **Jonathan L. Anderson**
  jlanderson@jacksonkelly.com,ecooper@jacksonkelly.com
- **Eric J. Belfi**
  ebelfi@labaton.com
- **Joel H. Bernstein**
  jbernstein@labaton.com,rviczian@labaton.com,cboria@labaton.com,nzeiss@labaton.com,electroniccasefiling@labaton.com,ewierzbowski@labaton.com,fmann@labaton.com,sauer@labaton.com
- **Stephen L. Brodsky**
  sbrodsky@zsz.com
- **Ricklin Brown**
  rbrown@baileyglasser.com,missyddennis@gmail.com,jmarks@baileyglasser.com,mdennis@baileyglasser.com,mchapman@baileyglasser.com
- **John F. Dascoli**
  johnfdascoli@hotmail.com,Pamdc519@aol.com
- **Eric R. Delinsky**
  edelinsky@zuckerman.com
- **Alan I. Ellman**
  aellman@labaton.com
- **AL Emch**
  aemch@jacksonkelly.com,adsmith@jacksonkelly.com,jcrawford@jacksonkelly.com
- **Thomas V. Flaherty**
  tflaherty@fsblaw.com,cmontague@fsblaw.com
- **Paul Jeffrey Geller**
  pgeller@rgrdlaw.com,e_file_fl@rgrdlaw.com

- **Brian A. Glasser**
  bglasser@baileyglasser.com,missyddennis@gmail.com,mchapman@baileyglasser.com, pwilson@baileyglasser.com,mhatcher@baileyglasser.com,mdennis@baileyglasser.com, lsadler@baileyglasser.com,ttanner@baileyglasser.com

- **Stuart W. Gold**
  sgold@cravath.com

- **David J. Goldsmith**
  dgoldsmith@labaton.com,electroniccasefiling@labaton.com

- **Tammy R. Harvey**
  tharvey@fsblaw.com,cmontague@fsblaw.com

- **Dennis J. Herman**
  DennisH@rgrdlaw.com

- **Steven N. Herman**
  sherman@zuckerman.com

- **Victor L. Hou**
  vhou@cgsh.com

- **Christopher J. Keller**
  ckeller@labaton.com

- **Laurie L. Largent**
  LLargent@rgrdlaw.com, triciam@rgrdlaw.com

Manual Notice List

The following is the list of attorneys who are not on the list to receive e-mail notices for this case.

Nicole Zeiss
Labaton Sucharow
140 Broadway
New York, NY 10005

By: */s/* Joel H. Bernstein
Joel H. Bernstein