IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE REGIONS MORGAN KEEGAN SECURITIES, DERIVATIVE & ERISA LITIGATION This Document Relates to: *In re Regions Morgan Keegan Closed-End Fund Litigation,* No. 07-cv-02830-SHM-dkv	No. 09-md-02009-SHM

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

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Preliminary Statement

Labaton Sucharow LLP, Court-appointed Lead Counsel for Lead Plaintiffs Lion Fund, L.P., Dr. J. Samir Sulieman, and Larry Lattimore and the Class,[1] respectfully submits this memorandum of law in support of its motion on behalf of itself and the law firms of Branstetter, Stranch & Jennings, PLLC, Court-appointed Liaison Counsel for Lead Plaintiffs, and Pearson, Simon, Warshaw & Penny, LLP, additional counsel for Plaintiffs (collectively, "Plaintiffs' counsel"), pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an award of attorneys' fees and payment of expenses incurred in connection with the prosecution and proposed Settlement of this securities class action.

Through the efforts of Plaintiffs' counsel, the Morgan Keegan Defendants and Defendants Regions Financial Corporation together have agreed to pay Sixty-Two Million Dollars in cash ($62,000,000.00) on behalf of all Defendants for the benefit of the Class. The creation of this Settlement Fund, which has been fully funded and accruing interest since January 30, 2013, is attributable to Plaintiffs' counsel's dedicated and efficient litigation efforts since this Court approved Lead Plaintiffs' selection of Lead Counsel in December 2010.

As compensation for Plaintiffs' counsel's efforts culminating in the establishment of a substantial common fund, Lead Counsel respectfully requests that the Court award an attorneys' fee equal to thirty percent (30%) of the Settlement Fund, or $18,600,000.00, including interest on such fee at the same rate and for the same period as earned by the Settlement Fund, and order payment of Plaintiffs' counsel's expenses in the amount of $380,744.14.

As discussed below, the requested attorneys' fee falls comfortably within the range of fees that is customarily sought by, and awarded to, experienced counsel in similar contingent-fee

[1] Capitalized terms not otherwise defined herein have the meanings set forth and defined in the Stipulation and Agreement of Settlement, dated October 12, 2012 (ECF No. 260, the "Settlement Agreement").

litigation in this Circuit and elsewhere. The requested fee is also reasonable under other pertinent factors assessed by courts in this Circuit, including the value of the benefit conferred on the Class, the substantial work of Plaintiffs' counsel, the value of the services on an hourly basis, the contingent nature of the representation, the public interest in encouraging meritorious private securities litigations, the complexity of the factual and legal issues, and the professional skill and standing of class counsel.

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

This motion, and the reasonableness of the requested fee, is also supported by separate declarations respectfully submitted by Professor Brian T. Fitzpatrick of Vanderbilt University, a distinguished scholar who has published extensively concerning attorneys' fees in securities and other class action litigation, and three experienced attorneys in private practice in Tennessee, George E. Barrett, Esq., Van Turner, Esq., and John L. Ryder, Esq. *See* Exs. 10-13.[2]

ARGUMENT

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

A. The Common Fund Doctrine and the Percentage-of-Fund Method of Awarding Attorneys' Fees in Common Fund Cases

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a

[2] Citations to "Ex. ___" refer to exhibits annexed to the accompanying Declaration of David J. Goldsmith in Support of Plaintiffs' Motion for Final Approval of Proposed Settlement and Plan of Allocation of Net Settlement Fund and for Final Class Certification and Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses (the "Counsel Declaration" or "Counsel Decl.").

reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.*

Reasonableness is the ultimate standard for setting fees in a common fund case such as this. "In this circuit, we require only that awards of attorney's fees by federal courts in common fund cases be reasonable under the circumstances." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). Several factors affect the reasonableness of an award: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *See Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009).

Under the percentage-of-fund method, the court determines a percentage of the settlement to award class counsel. *See In re Telectronics Pacing Sys. Inc. Accufix Atrial "J" Leads Prods. Liab. Litig.*, 137 F. Supp. 2d 1029, 1041 (S.D. Ohio 2001). The percentage-of-fund method "more accurately reflects the results achieved," and "has a number of advantages: it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation." *Rawlings*, 9 F.3d at 516; *see also In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 381 (S.D. Ohio 2006) ("The percentage of the fund . . . method . . . most closely approximates how lawyers are paid in the private market and incentivizes lawyers to maximize the Class recovery, but in an efficient manner.").

In this Circuit, the ease of application and benefits of the percentage-of-fund method make it "the current prevailing method in securities class actions." *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007); *see also Rawlings*, 9 F.3d at 515 (noting "trend towards adoption of a percentage of the fund method"); *Bower v. MetLife, Inc.*, No. 09-cv-351, 2012 U.S. Dist. LEXIS 149117, at *22 (S.D. Ohio Oct. 17, 2012) (agreeing that "the preferred method is to award a reasonable percentage of the fund"); *New England Health Care Emps.' Pension Fund v. Fruit of the Loom, Inc*., 234 F.R.D. 627, 633 (W.D. Ky. 2006) (noting that courts in the Sixth Circuit have expressed a preference for the percentage of the fund method); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) (noting the trend of applying the percentage of the fund method); *Manners v. American Gen. Life Ins. Co*., No. 98-0266, 1999 U.S. Dist. LEXIS 22880, at *86 (M.D. Tenn. Aug. 11, 1999) (calling the percentage of the fund method the "preferred approach").[3]

The Supreme Court has suggested that the percentage-of-fund method is part and parcel of a common fund award. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation."). Moreover, the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), which governs this action, contemplates that courts will award fees based on a percentage of the fund. *See* 15 U.S.C. § 78u-

[3] District courts in this Circuit also have discretion to calculate fee awards in common fund cases using the "lodestar/multiplier approach." *Cardizem*, 218 F.R.D. at 532 (citing *Rawlings*, 9 F.3d at 516-17). The lodestar method "necessitates that the court calculate the reasonable number of hours submitted multiplied by the attorneys' reasonable hourly rates," *Telectronics*, 137 F. Supp. 2d at 1041, and has been aptly described as "too time-consuming of scarce judicial resources" for requiring district courts to "pore over time sheets." *Rawlings*, 9 F.3d at 516-17. Courts have thus re-embraced the percentage-of-fund method after "a period of experimentation with the lodestar method." *Manual for Complex Litigation (Fourth)* § 14.121, at 187 (2004). The lodestar method is now used to award fees in only a small number of class actions, usually when the settlement calls for substantial non-monetary relief and only rarely in PSLRA actions such as this. Lead Counsel has provided complete lodestar information to the Court nonetheless and pursuant to the Court's request.

4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."); *see also Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 643 (5th Cir.) ("Part of the reason behind the near-universal adoption of the percentage method in securities cases is that the PSLRA contemplates such a calculation."), *cert. denied*, 133 S. Ct. 317 (2012). Accordingly, Plaintiffs' counsel submit that the Court should fix a reasonable attorneys' fee based on a percentage of the $62 million Settlement Fund.

B. The Requested Fee Falls Within the Range of Percentage Fees Considered Reasonable and Fair by Courts in the Sixth Circuit

"Using the percentage approach, courts in this jurisdiction and beyond have regularly determined that 30% fee awards are reasonable." *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 528 (E.D. Ky. 2010), *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011); *see also In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 U.S. Dist. LEXIS 150427, at *76 (E.D. Mich. Dec. 13, 2011) ("[T]he requested award of close to 30% appears to be a fairly well-accepted ratio in cases of this type and generally in complex class actions.").[4] Further, "[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:6 at 551 (4th ed. 2002); *accord Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000).

[4] Courts in this Circuit routinely cite 20 percent to 50 percent as a reasonable range for attorneys' fees in common fund cases. *e.g.*, *Connectivity Sys. Inc. v. National City Bank*, No. 2:08-cv-1119, 2011 U.S. Dist. LEXIS 7829, at *33 (S.D. Ohio Jan. 26, 2011); *Broadwing*, 252 F.R.D. at 380; *Fruit of the Loom*, 234 F.R.D. at 633; *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 910 (S.D. Ohio 2001); *Telectronics*, 137 F. Supp. 2d at 1046; *Manners*, 1999 U.S. Dist. LEXIS 22880, at *88; *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. 1055, 1996 U.S. Dist. LEXIS 20440, at *50 (E.D. Mich. Dec. 20, 1996); *Wise v. Popoff*, 835 F. Supp. 977, 980 (E.D. Mich. 1993).

As such, the fee requested here "fall[s] well within the mainstream of fee awards." Declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl."), Ex. 10, at ¶ 13. Professor Fitzpatrick is a full Professor of Law at Vanderbilt University, whose teaching and research focus on class action litigation. *Id*. ¶¶ 1-2. Professor Fitzpatrick graduated first in his class from Harvard Law School and served as a law clerk to Judge Diarmuid O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit and Associate Justice Antonin Scalia of the Supreme Court of the United States. *Id*. ¶ 1. He has published a number of law journal articles on class action litigation, and is widely cited by courts, scholars, and popular media outlets. *Id*. ¶ 2. In December 2010, he published a significant article in the *Journal of Empirical Legal Studies* titled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010) ("Empirical Study"). This work is believed to be the most comprehensive examination of federal class action settlements and attorneys' fees ever published. *Id*. ¶ 3.

Professor Fitzpatrick has reviewed relevant materials in this case and has opined that the requested fee is within the range of reasonableness. *Id*. ¶ 4. Such fee, he offers, "is in line with percentages awarded by other courts in the Sixth Circuit and across the nation." *Id*. ¶ 12. For the years 2006 and 2007, the subject of the Empirical Study, there were 25 cases in the Sixth Circuit in which courts used the percentage of the fund method to award attorneys' fees. *Id*. ¶ 13. The average fee awarded was 26.1 percent, with a median of 28 percent. Fully 40 percent of these fee awards amounts to 30 percent or more of the common fund. *Id*.

Experienced attorneys in private practice in Memphis and Nashville also attest to the reasonableness of the requested fee. George E. Barrett, Esq. is the founding partner of Barrett, Johnston, LLC, in Nashville, and has practiced law since 1957. Declaration of George E. Barrett ("Barrett Decl."), Ex. 11, at ¶ 1. Mr. Barrett has significant experience in complex securities

litigation, and his firm was responsible for what were then two of the largest securities class action settlements in the Sixth Circuit: the $172.5 million settlement in *In re Dollar General Corporation Securities Litigation*, No. 01-0388 (M.D. Tenn.), and the $107 million settlement in *In re Prison Realty Securities Litigation*, No. 99-0452 (M.D. Tenn.). *Id*. ¶¶ 4-5. Having reviewed relevant materials from this case, *id*. ¶ 3, Mr. Barrett is of the view that the fee requested is reasonable and indeed "well within the range of prior percentage awards made by courts in this District and Circuit." *Id*. ¶¶ 9, 12.

Van Turner, Esq. and John L. Ryder, Esq. both practice law in Memphis. Declaration of Van Turner ("Turner Decl."), Ex. 12, at ¶ 1; Declaration of John L. Ryder ("Ryder Decl."), Ex. 13, at ¶ 1. Both Mr. Turner and Mr. Ryder are familiar with the contingency fees and hourly rates customarily charged in complex litigation like this action. *See* Turner Decl. ¶ 2; Ryder Decl. ¶ 4. Mr. Turner is of the view that the fee requested "is within the range considered reasonable and fair in the Sixth Circuit," and notes that it is below the standard one-third contingency fee in complex litigation. Turner Decl. ¶ 11. Mr. Turner and Mr. Ryder agree that the hours recorded and rates used by Plaintiffs' counsel in the lodestar cross-check are reasonable. *Id*. ¶ 13; Ryder Decl. ¶¶ 5-9.

C. The Requested Fee Is Reasonable as Assessed Under the Factors Applicable in the Sixth Circuit

1. The Value of the Benefit Conferred on the Class

"The primary factor in determining a reasonable fee is the result achieved on behalf of the class." *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 503 (E.D. Mich. 2008). The Settlement provides the Class with a gross $62 million recovery, and was secured despite the many risks and complexities discussed herein and in Plaintiffs' concurrently filed brief for final approval of the Settlement. As discussed in detail in that brief, the Settlement

represents a substantial and indeed robust percentage of the maximum potential recovery at trial, particularly given the risks and costs of continued litigation. These percentages, ranging from 18.3 percent to 37.2 percent, compare favorably with other court-approved settlements in PSLRA cases in this and other Circuits.

Given the loss causation and damages issues raised by the global credit crisis, the notable defenses, and the potential difficulties collecting a judgment under certain scenarios, "the risk and complexities presented by this case suggest that the recovery here is an especially good value for the class." Fitzpatrick Decl. ¶ 14; *see also Fruit of the Loom*, 234 F.R.D. at 634 ("Significantly, but for the efforts of Class representatives and Class counsel, there likely would have been no claim and no recovery."). This factor supports the requested fee.

2. The Value of the Services on an Hourly Basis

"In this Circuit, the lodestar figure is used to confirm the reasonableness of the percentage of the fund award." *Broadwing*, 252 F.R.D. at 381. This is the so-called "lodestar cross-check." *Cardinal*, 528 F. Supp. 2d at 764. Courts should not place undue emphasis on the lodestar, however, because it "can serve to cap the amount of compensation class counsel can receive from a settlement and thereby blunt their incentives to achieve the largest possible award for the class." Fitzpatrick Decl., Ex. 10, at ¶ 15 & n.3 (opining that courts should not consider the lodestar at all when calculating fees as a percentage of the fund).

In contrast to a full lodestar analysis, a cross-check does not call for exhaustive scrutiny of the hours recorded by counsel. *See Cardinal*, 528 F. Supp. 2d at 767. The Sixth Circuit endorses using a lodestar multiplier, which "can serve as a means to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved." *Rawlings*, 9 F.3d at 516. Thus, "the cross-check requires the Court to

calculate the lodestar multiplier in the case and ensure that the fee award is still roughly aligned with the amount of work the attorneys contributed." *Cardinal*, 528 F. Supp. 2d at 764.

Courts performing a lodestar cross-check generally accept that a percentage-of-fund fee in a case like this will be a multiple of the total lodestar. In fact, "[m]ost courts agree that the typical lodestar multiplier in large post-PSLRA securities class actions ranges from 1.3 to 4.5." *Id.* at 767. The court in *Cardinal* actually exceeded this range, finding a multiplier of ***six*** reasonable because of the "outstanding settlement" and the "noticeable skill of counsel." *Id*. at 768. Courts accept a similar range of multipliers in class actions generally:

> Courts regularly apply these multipliers within a normal range of between two and five to account for factors such as the complexity of the case, the risks involved, the size of the recovery, counsels' continuing obligations to the class, and the range of multipliers awarded in similar cases.

Bailey v. AK Steel Corp., No. 06-cv-468, 2008 U.S. Dist. LEXIS 18838, at *7 (S.D. Ohio. Feb. 28, 2008) (approving 3.04 multiplier); *see also Manners*, 1999 U.S. Dist. LEXIS 22880, at *93 ("[A] multiplier of 3.8 is fully warranted. This multiplier is well within the range of multipliers for similar litigations, which have ranged from 1-4 and have reached as high as 10.").

The lodestar cross-check confirms the reasonableness of the requested fee. Collectively, Plaintiffs' counsel making this fee request (Labaton Sucharow, Branstetter Stranch, and Pearson Simon) devoted 12,910.2 hours of attorney and professional time to the case through February 28, 2013, representing $5,980,680.50 in fees at current hourly rates.[5] Counsel Decl. ¶ 47, Ex. 9. The requested fee of $18.6 million yields a lodestar multiplier of 3.1. This multiplier is within the mainstream of Sixth Circuit awards in Professor Fitzpatrick's Empirical Study. Fitzpatrick

[5] The Supreme Court has indicated that the use of current rather than historical rates is appropriate in examining the lodestar because current rates more adequately compensate for inflation and loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1984). Courts in this Circuit also have stated that it is proper to compensate counsel for delay by using current hourly rates in examining lodestar. *See Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005); *Broadwing*, 252 F.R.D. at 381.

Decl. ¶ 15. The fact that Plaintiffs' counsel achieved an excellent result in a relatively expeditious manner, avoiding the unnecessary expenditure of judicial and private resources, tends to support the lodestar enhancement represented by the fee request. *See In re Fidelity/Micron Sec. Litig.*, No. 95-12676-RGS, 1998 U.S. Dist. LEXIS 21698, at *14 n.11 (D. Mass. June 5, 1998) (though action settled before discovery and requested fee would result in multiplier, "counsel should not be unduly penalized for promptly resolving litigation that could easily have been protracted"), *vacated on other grounds*, 167 F.3d 735 (1st Cir. 1999).[6] Plaintiffs' counsel respectfully submit that the excellent results achieved, the specialized knowledge and skill required of Plaintiffs' counsel, and the risk of non-payment all justify the requested multiplier. This factor supports the requested fee.

3. The Contingent Nature of the Representation

"This factor accounts for the substantial risk an attorney takes when he or she devotes substantial time and energy to a class action despite the fact that it will be uncompensated if the case does not settle and is dismissed." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 796 (N.D. Ohio 2010). In the class action context, "within the set of colorable legal claims, a higher risk of loss does argue for a higher fee." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011); *cf. Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 438 (6th Cir. 1999) (holding, in the statutory fee-shifting context, that contingent-fee representation may warrant higher hourly rates). "[F]ailure to make any provision for risk of loss may result in systematic undercompensation of plaintiffs' counsel in a class action case, where as we have said the only

[6] *See also In re Sequoia Sys., Inc. Sec. Litig.*, No. 92-11431-WD, 1993 WL 616694, at *1 (D. Mass. Sept. 10, 1993) (remarking during settlement hearing that "prompt resolution [of the action] is a time value to the members of the class themselves. And I would not want to put myself in the position of in some way providing a disincentive to prompt resolution of the case simply because there were to be early on greater disparity between the Lodestar figure and the percentage figure involved in this case.").

fee that counsel can obtain is, in the nature of the case, a contingent one." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992).

Plaintiffs' counsel accepted this matter on a wholly contingent basis and have received no compensation to date. The firms have worked thousands of hours and advanced hundreds of thousands of dollars representing the interests of Lead Plaintiffs and the Class. They have always faced the risk of losing and getting nothing in return. As discussed in detail in Plaintiffs' concurrently filed brief for final approval of the Settlement, Defendants have substantial defenses on liability and damages issues that potential could prevail on summary judgment, at trial or on appeal. Many thousands of hours of work "would have been for naught if [Lead Plaintiffs] lost at any stage of the litigation." *Lonardo*, 706 F. Supp. 2d at 796. This factor supports the requested fee.

4. Society's Stake in Rewarding Attorneys

"The securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (citations omitted). The Supreme Court "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions" brought by government agencies. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

Courts should reward attorneys who bring successful securities class actions because they provide effective enforcement. "Rewarding attorneys in securities class actions is important because absent class actions, most individual claimants would lack the resources to litigate a case of this magnitude, and individual recoveries are often too small to justify the burden and expense of litigation." *Cardinal*, 528 F. Supp. 2d at 765 (citing *Telectronics*, 137 F. Supp. 2d at 1043);

see also Cardizem, 218 F.R.D. at 534 ("Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions . . . benefits society.").

In this case, the work of Plaintiffs' counsel led to significant benefits for the Class. The Class includes tens of thousands of investors from across the country. This Settlement will provide certain cash recovery to thousands whose investment losses did not justify individual action. Securing this relief has other, far-reaching benefits. It contributes to the confidence in securities markets and helps deter future misconduct. Reaching the Settlement required a great amount of attorney and professional time, out-of-pocket-expenses, and dedication over a period of years.

Plaintiffs' counsel respectfully submit that the Court should encourage this kind of legal representation by awarding the requested fee. *See* Fitzpatrick Decl. ¶ 16 ("In my opinion, the fee requested by class counsel here is not only reasonable to the class and fair to class counsel, but it may help further the social good of appropriately incentivizing lawyers to invest in similar cases in the future."). This factor supports the requested fee.

5. The Complexity of the Litigation

This case is undeniably complex, and would not be "easy" to take through discovery, summary judgment and trial. As discussed in detail in Plaintiffs' brief for final approval of the Settlement, the wide array of facts surrounding the Funds' disclosures amid significant shifts in the economy and credit markets raise sharply disputed issues concerning, among many other things, whether the Funds' myriad disclosures over time were materially misleading, whether Kelsoe "made" any of these alleged misstatements for purposes of securities fraud liability, whether Kelsoe's alleged "price adjustments" were good-faith business judgments or intentional misconduct with an intent to defraud, whether the Funds had a culpable state of mind in making the challenged statements, and whether RFC or the Morgan Keegan Defendants were controlling

persons of the Funds. The causation and damages issues here also are vigorously disputed and center on complex issues of causation that are notably magnified in the context of the closed-end fund shares at issue here. Plaintiffs' counsel respectfully submit that the requested fee is warranted by the substantial settlement obtained despite the complexities and difficulties presented by the litigation.

6. The Professional Skill and Standing of Counsel on Both Sides

Lead Counsel submits that it, and all Plaintiffs' counsel, have demonstrated skill in representing the Class during this litigation and achieving the Settlement. As reflected in the firm resumes submitted to the Court, *see* Counsel Decl. Exs. 6-C; 7-C; and 8-C, counsel possess significant experience and expertise in this practice area, and brought such acumen successfully to bear in prosecuting this action and securing the Settlement.

Defendants (the corporate defendants in particular) were ably represented here by major law firms—including Tennessee's largest firm—with established securities litigation practices, and mounted an aggressive and vigorous defense and stood firm during the settlement negotiations. "The quality of opposing counsel also is important to evaluate. . . . The ability of Co-Lead Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested." *Delphi*, 248 F.R.D. at 504; *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("Securities Lead Counsel obtained the Settlement in the face of vigorous opposition by defendants who were represented by some of the nation's leading law firms."); *see also* Fitzpatrick Decl. ¶ 14. Moreover, "it is reasonable for Lead Counsel and the other plaintiffs' firms to be as well paid as their adversaries who did not work on a contingency basis." *In re Charter Commc'ns, Inc. Sec.*

Litig., No. MDL 1506, 2005 WL 4045741, at *17 (E.D. Mo. June 30, 2005). This factor, and all of the pertinent factors discussed above, support the requested attorneys' fee.[7]

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

"Under the common fund doctrine, 'class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses.'" *Fruit of the Loom*, 234 F.R.D. at 634-35 (quoting *Cardizem*, 218 F.R.D. at 535); *see also Delphi*, 248 F.R.D. at 504; 1 Alba Conte, *Attorney Fee Awards* § 2.19 (3d ed. 2004) (common fund doctrine "authorizes reimbursement of full reasonable litigation expenses as costs of the suit").

Lead Counsel and the other Plaintiffs' counsel have incurred a total of $380,744.14 in unreimbursed expenses. Counsel Decl. ¶ 52, Ex. 9. Plaintiffs' counsel's individual declarations itemize the various categories of expenses incurred, such as expert fees, computer research, duplicating, mediation fees, and travel expenses. *See* Ex. 6-B; Ex. 7-B; Ex. 8-B. The largest expense by far was the fees and costs charged by Chad W. Coffman, CFA of Global Economics Group, Lead Plaintiffs' consulting expert on causation and damages issues, which totaled approximately $252,000. As noted in the Counsel Declaration, Lead Counsel retained Mr. Coffman to opine and assist in such areas as the efficiency of the market for shares of the Funds, loss causation, damages, and the Plan of Allocation. Counsel Decl. ¶¶ 54-55. Plaintiffs' counsel received crucial advice and assistance from Mr. Coffman throughout the course of the action.

[7] The reaction of the Class to the requested fee award may also shed light on its reasonableness. *Delphi*, 248 F.R.D. at 504. Class members have until March 22, 2013 to object to the requested fee and expenses. Plaintiffs' counsel will file a brief no later than April 2, 2013, responding to any timely objections received. *See* Preliminary Approval Order ¶¶ 14, 19 (ECF No. 284).

Mr. Coffman's expertise enabled counsel to fully frame the issues, gather relevant evidence, make a realistic assessment of provable damages, and structure a resolution of claims.

The Notice advised Class Members that Lead Counsel would seek reimbursement of expenses of up to $550,000. Ex. 2-A. The expenses sought here are well below this "cap." In sum, Plaintiffs' counsel respectfully submit that the expenses incurred were reasonable and necessarily incurred in connection with prosecuting this action and achieving the proposed Settlement for the benefit of the Class.

Conclusion

For the foregoing reasons, Lead Counsel, on behalf of all Plaintiffs' counsel, respectfully requests that the Court award attorneys' fees in the amount of $18,600,000, plus accrued interest, and order payment of litigation expenses in the amount of $380,744.14.

Dated: March 8, 2013

Respectfully submitted,

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