UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIRTUS INVESTMENT PARTNERS, INC. SECURITIES LITIGATION	Case No. 15-cv-1249 (WHP)

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

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Court-appointed Class Counsel, Labaton Sucharow LLP ("Labaton") and Bernstein Litowitz Berger & Grossmann LLP ("BLB&G"; with Labaton, "Class Counsel"), respectfully submit this memorandum of law in support of their motion for an award of attorneys' fees in the amount of 25% of the Settlement Fund. Class Counsel also seek payment of $898,497.96 in Litigation Expenses that Class Counsel reasonably incurred in prosecuting the Action, as well as $5,648.73 in reimbursement to Class Representative directly related to its representation of the Class, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").[1]

PRELIMINARY STATEMENT

The proposed Settlement, if approved by the Court, will resolve this case in its entirety in exchange for a $22 million cash payment pursuant to the Stipulation. The Settlement brings to a close, with a very favorable result, three years of hard-fought litigation, including significant motion practice, certification of a litigation class, the completion of fact and expert discovery, trial preparation, and robust arm's-length negotiations between counsel. The Settlement will provide meaningful compensation to the Class while avoiding further delay and the significant risks of continued litigation.

The benefits of the Settlement are clear when weighed against the risks that the Class might recover less (or nothing) if litigation continued. Defendants had substantial defenses to

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[1] Class Counsel are simultaneously submitting the Joint Declaration of Michael H. Rogers and John C. Browne in Support of (I) Class Representative's Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Joint Declaration") (cited as "¶"). Capitalized terms have the meanings ascribed to them in the Joint Declaration or the Stipulation of Settlement (ECF No. 143-1) (the "Stipulation").

All exhibits referenced herein are attached 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 Joint Declaration and the second reference is to the exhibit designation within the exhibit itself.

liability, including challenges to falsity, scienter, materiality and loss causation. In particular, Defendants advanced vigorous challenges to loss causation in their motion for summary judgment. While Class Representative believes it had compelling counterarguments, there is a substantial risk that Defendants' motion for summary judgment might result in the elimination of a significant portion—or even all—of the Class's damages. Even if Defendants' motion for summary judgment was unsuccessful, Defendants would have continued to press these arguments in *Daubert* motions, at trial, and through appeals.

In addition to these challenging loss causation issues, Class Representative faced ongoing challenges in its ability to establish the materiality of the alleged misstatements, as well as scienter. Finally, if Class Representative succeeded in establishing both Defendants' liability and loss causation at trial, Defendants intended to pursue appeals of certain of the Court's earlier decisions, which would have further delayed and threatened any recovery. The Settlement eliminates these risks while providing a good recovery to the Class.

In the face of these risks—as well as the fully contingent nature of the case—Class Counsel devoted substantial resources to prosecuting this Action against highly skilled opposing counsel. Among other work detailed in the Joint Declaration, Class Counsel: (i) conducted a robust investigation and filed a detailed amended complaint, which involved 60 interviews with former Virtus employees and other potential witnesses, consulting with an expert concerning loss causation, damages, and market efficiency, and reviewing the voluminous public record; (ii) defeated Defendants' motion to dismiss the Complaint, which included participating in oral argument before the Court; (iii) completed fact and expert discovery, which involved the production of more than five million pages of documents, 21 depositions, five expert reports for ATRS, and four expert reports for Defendants; (iv) successfully moved for class certification; (v)

filed and argued an opposition to Defendants' summary judgment motion; (vi) exchanged mediation submissions and participated in a full-day mediation session with the direct involvement of representatives from the Parties and under the auspices of experienced and highly respected mediator from the Judicial Mediation and Arbitration Services ("JAMS"), Jed D. Melnick, Esq. (the "Mediator"); and (vii) at various times throughout the case, engaged in ongoing, arms-length negotiations directly with defense counsel, which ultimately led to this Settlement.

Against this backdrop, Class Counsel request a fee of 25% of the Settlement Fund, which represents a negative lodestar "multiplier" of less than 0.49, and payment of Class Counsel's reasonable expenses in the amount of $898,497.96. As demonstrated below, the request is well within the range of attorneys' fees typically awarded in securities class actions of this size, and is well supported by both case law and the facts of this case.

For the foregoing reasons, Class Counsel respectfully submit that their efforts and the results achieved in this Action justify the requested fees and expenses.

ARGUMENT

I. THE REQUESTED FEE IS REASONABLE AND SHOULD BE APPROVED

The Supreme Court has emphasized that private securities actions are "an essential supplement to criminal prosecutions and [SEC] civil enforcement actions." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action"). Compensating counsel for bringing these actions is important because "[s]uch 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 v. Morgan Stanley*, No 01-cv-10071, 2005

WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). In the Second Circuit, courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method." *McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010).

In this case, the requested fee award—25% of the Settlement Fund, translating to a lodestar "multiplier" of less than 0.49—is well supported under both the "percentage" and "lodestar" methods.

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

Class Counsel respectfully submit that the Court should award a fee based on a percentage of the common fund obtained. The Second Circuit has approved the percentage method, recognizing that the "trend in this Circuit is toward the percentage method" and that method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also*, *Goldberger v. Integrated Res, Inc.*, 209 F.3d 43, 48-50 (2d Cir. 2000) (either percentage of fund method or lodestar method may be used to determine fees, but "lodestar method proved vexing" and results in "inevitable waste of judicial resources"); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) ("percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 & n.7 (S.D.N.Y. 2008) ("[T]here is a strong consensus – both in this Circuit and across the country – in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery.").

The 25% fee requested by Class Counsel in this case is easily within the range of percentage fees awarded in the Second Circuit—including in this Court in particular—in

comparable actions achieving significant recoveries. *E.g.*, *In re Sinohub Sec. Litig.*, Case No. 1:12-cv-08478-WHP, slip op. (S.D.N.Y. Nov. 13, 2015) (awarding 25% in attorneys' fees of a $600,000 settlement) (Ex. 4)[2] (Pauley, J.); *In re NQ Mobile, Inc. Sec. Litig*., Case No. 1:13-cv-07608-WHP, slip op. (S.D.N.Y. Mar. 11, 2016) (awarding 30% in attorneys' fees of a $60.5 million settlement) (Pauley, J.) (Ex. 4); *In re Agria Corp. Sec. Litig*, Case No. 1:08-cv-03536-WHP, slip op. (S.D.N.Y. June 7, 2011) (awarding 25% in attorneys' fees of a $3.7 million settlement) (Pauley, J.) (Ex. 4); *see also Arkansas Teacher Ret. Sys. v. Bankrate, Inc.*, No. 13-cv-07183 (JSR), slip op. at 2 (S.D.N.Y. Nov. 25, 2014), ECF No. 87 (awarding 25% of $18 million settlement fund) (Ex. 4); *In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, MDL No. 12-2389, 2015 WL 6971424 (S.D.N.Y. Nov. 9, 2015) (awarding 33% of $26.5 million settlement); *In re L.G. Philips LCD Co. Sec. Litig.*, No. 1:07-cv-00909-RJS, slip op. at 1 (S.D.N.Y. Mar. 17, 2011), ECF No. 82 (awarding 30% of $18 million settlement fund) (Ex. 4); *Citiline Holdings, Inc. v. iStar Fin., Inc.*, No. 1:08-cv-03612-RJS, slip op. at 1 (S.D.N.Y. Apr. 5, 2013), ECF No. 127 (awarding 30% of $29 million settlement fund) (Ex. 4); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (awarding 25% of $21 million settlement fund); *In re NYSE Specialists Sec. Litig.*, No. 03-cv-8264, slip op. at ¶19 (S.D.N.Y. June 10, 2013) (awarding approximately 41% of $18.5 million settlement) (Ex. 4); *In re Salomon Analyst Metromedia Litig*., No 02-7966, slip op. at 1 (S.D.N.Y. Feb. 27, 2009) (27% fee of $35 million settlement) (Ex. 4); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (awarding 33.3% of $35 million ERISA class action settlement); *City of Austin Police Ret. Sys. v. Kinross Gold Corp*., No. 12-cv-01203-VEC, 2015 U.S. Dist. LEXIS 181932 (S.D.N.Y. Oct. 15, 2015)

[2] All unreported slip opinions are submitted herewith in a compendium of cases, which is Exhibit 4 to the Joint Declaration.

(awarding 30% of $33 million settlement); *In re Celestica Inc. Sec. Litig.*, No. 07-cv-00312-GBD, slip op. at 2 (S.D.N.Y. July 28, 2015) (awarding 30% fee of $30 million settlement) (Ex. 4); *In re OSG Sec. Litig.*, No. 12-cv-07948-SAS, slip op. at 1 (S.D.N.Y. Dec. 2, 2015) (awarding 30% of $31.6 million) (Ex. 4); *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement).[3]

B. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, the Second Circuit encourages district courts to "cross-check" the proposed award against counsel's lodestar. *Wal–Mart*, 396 F.3d at 123 (quoting *Goldberger*, 209 F.3d at 50); *see also In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005) ("Typically, courts utilize the percentage method and then 'cross-check' the adequacy of the resulting fee by applying the lodestar method.").

Here, Class Counsel spent more than 23,451 hours of attorney and other professional support time prosecuting the Action from inception until just weeks before trial. *See* Ex. 5 (Summary Table of Class Counsel's Lodestars and Expenses), 5A-A & 5B-A. Class Counsel's lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their hourly rates, is $11,311,736.50. *Id.* The requested fee of 25% of the Settlement Amount therefore represents a fractional "multiplier" of less than 0.49 of the total lodestar, *i.e.* is only 49% of the

[3] The requested 25% fee award also compares favorably to similarly sized or larger securities class action settlements in other federal jurisdictions. *See, e.g., In re Regions Morgan Keegan Closed-End Fund Litig.*, No. 07-cv-02830-SHM-dkv, slip op. at 21 (W.D. Tenn. Aug. 5, 2013) (awarding 30% of $62 million settlement) (Ex. 4); *South Ferry LP #2 v. Killinger*, No. C04-1599-JCC, slip op. at 9 (W.D. Wash. June 5, 2012) (awarding 29% of $41.5 million settlement) (Ex. 4); *Central Laborers' Pension Fund v. Sirva*, No. 04 C-7644, slip op. at 10 (N.D. Ill. Oct. 31, 2007) (awarding 29.85% of $53.3 million settlement) (Ex. 4); *In re McLeodUSA Inc. Sec. Litig.*, No. C02-0001-MWB, slip op. at 5 (N.D. Iowa Jan. 5, 2007) (awarding 30% of $30 million settlement) (Ex. 4).

value of Class Counsel's time. This "multiplier" is significantly below multipliers commonly awarded in securities class actions and other complex litigations, as courts within and outside of this District regularly award lodestar multipliers greater than 2 in complex contingent litigation. *See, e.g.*, *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347, 353 (S.D.N.Y. 2014) (awarding 25% of $45.9 million settlement, equating to multiplier of 5.2); *Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable); *In re Deutsche Telekom*, No. 00-cv-9475, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (awarding 25% of $120 million settlement; a 3.96 multiplier); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011), ECF No. 117 (awarding fee equal to a 4.7 multiplier) (attached hereto as Ex. 4); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier, "well within the range awarded by courts in this Circuit"); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (awarding 25% of $126.6 million settlement; a 6.96 multiplier); *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (awarding fee equal to a 4.7 multiplier).

A negative "multiplier" is additional evidence that the requested fee is reasonable. *See*, *e.g.*, *In re Bear Stearns Cos. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (Sweet, J.) (approving fee with a negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee"); *In re Marsh & McLennan, Co. Sec. Litig.,* No. 04-8144, 2009 WL 5178546, at *20 (S.D.N.Y. Dec. 23, 2009) (reasoning that where the multiplier is negative, the lodestar cross-check "unquestionably supports the requested percentage fee award.")

Fees representing multiples *above* the lodestar are awarded to reflect the contingency fee risk and other relevant factors. *See In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("[A] positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors[.]"); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar[.]").

Class Counsel's lodestar is based on counsel's current hourly rates, which are comparable to those in the legal community for similar services by attorneys of reasonably comparable skill, experience and reputation.[4] Class Counsel's rates here range from $850 to $1,250 for partners, $700 for of-counsel, $375 to $650 for associates, $390 to $435 for staff attorneys, $235 to $335 for paralegals/managing clerk, and $290 to $520 for investigators/litigation support staff, with an overall blended hourly rate of approximately $482.[5] *See* Exs. 5A - B & 5B - B; Joint Decl. ¶153. The rates for the eight Staff Attorneys ranged from $390 to $435, with an overall blended hourly rate of approximately $403. Joint Decl. n 9.

Courts in this District, including this Court, have ruled that similar rates are fair and reasonable market rates for complex litigations. *See, e.g.*, *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2015 WL 4560206, at *3-*4 (S.D.N.Y. July 7, 2015)

[4] 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).

[5] The partner who billed $1,250 per hour is BLB&G's founding partner, Max Berger, who has more than 40 years of experience in securities class actions. His modest 60 hours of time related directly to the mediation and negotiations that made the Settlement possible.

(hourly rates ranging from $250 to $950 were reasonable); *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517, 528 (S.D.N.Y. 2015) (awarding fee that "result[ed] in a blended hourly rate of $514.29").

For all the foregoing reasons, the lodestar "cross-check" amply supports the reasonableness of the requested fee.

1. Class Counsel's lodestar calculation comports with the Court's preferences.

In preparing this application, as they did in connection with Class Representative's motion for preliminary approval, Class Counsel reviewed similar fee applications that previously have been before the Court. In that regard, Class Counsel note that their time spent litigating this Action, including their approach to case management, fundamentally aligns with the preferences the Court has expressed in prior cases. Far from generating a windfall, as was the situation in certain other cases before the Court, the lodestar shows that the requested fees are below what would compensate counsel for the benefits conferred upon the Class.

As an initial matter, Class Counsel note that the Court, in other fee applications, has expressed concerns about partner-heavy staffing. *See Dial Corp. v. News Corp.*, 317 F.R.D. 426, 434-35 (S.D.N.Y. 2016) (reducing fee where time was "heavily weighted towards partners"); *Pennsylvania Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 25 (S.D.N.Y. 2016) (reducing fee due in part to "the predominance of partner-level work on the substantive aspects of the litigation").

Here, Class Counsel carefully and efficiently staffed the Action from the beginning, and litigated this Action with just four main partners and, indeed, only one partner from each firm (Michael Rogers from Labaton and John Browne from BLB&G) primarily conducted the litigation. *Compare* Exs. 5A-A & 5B-A, *with In re Renaissance Holdings Ltd. Sec. Litig.*, No.

05-cv-6764, 2008 WL 236684, at *4 (S.D.N.Y. Jan. 18, 2018) (Pauley, J.) (12 partners spent time on matter that settled after filing second amended complaint), *and Bank of Am. Corp.*, ECF No. 372 at 9 (noting 16 partners submitted time on matter—more partners than currently at the firm). The result of this careful staffing by Class Counsel was that associates with lower hourly rates managed the case on a day-to-day basis, as opposed to more expensive partners. *Compare* Ex. 5A-A & 5B-A, *with In re Platinum and Palladium*, 2015 WL 4560206, at *3-4 (reducing fee where "nearly half of all time spent on this litigation" was billed by five partners with the highest hourly rates).

Second, although we note that the Court has in certain cases questioned whether staff attorney time should be treated as an expense, rather than as part of counsel's lodestar (*see Dial Corp.*, 317 F.R.D. at *438), in this case even deleting ***all*** staff attorney time from the lodestar would result in a total lodestar of approximately $6.2 million and a resulting fee request still resulting in a ***negative*** lodestar multiplier of 0.88, which is eminently reasonable. In such circumstances, seeking to expense the staff attorney time would likely decrease the recovery to the Class and increase the recovery to Class Counsel. Additionally, the Staff Attorneys assisting Class Counsel on this matter are skilled attorneys who made meaningful, substantive contributions, beyond solely conducting document review, including preparing deposition materials (and, in one instance, second-chairing depositions), drafting portions of Class Representative's opposition to Defendants' motion for summary judgment, and also assisting in trial preparation. Joint Decl. ¶¶ 52-61, 66, 159. Their involvement is very different from that in *Bank of Am. Corp.*[6] Moreover, the staff attorney time should be included in lodestar for the same

[6] Class Counsel also notes that the Staff Attorneys who worked on this matter generally have lower hourly rates than Class Counsel's associates. Exs. 5A-A & 5B-A.

reason courts in this District have routinely ruled that time spent by paralegals and law clerks is properly included in lodestar calculations—because the work done "was directly related to the prosecution of the class claims." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989).

Accordingly, Class Counsel submit that the full amount of staff attorney time here should be properly included with Class Counsel's time and lodestar. *See, e.g.*, *In re CitiGroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394-96 (S.D.N.Y. 2013) (rejecting the argument that contract attorney labor should be treated as an expense).

* * *

In sum, Class Counsel's requested fee award is easily within the range of what courts regularly award in comparable class actions, whether calculated as a percentage of the fund or in relation to Class Counsel's lodestar.

II. THE REQUESTED FEE IS FAIR AND REASONABLE

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case, whether under the percentage common fund approach or the lodestar multiplier approach:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50. As discussed below, these factors and the analyses above demonstrate that Class Counsel's requested fee is reasonable.

A. Class Counsel Have Devoted Significant Time and Labor to the Action

The substantial time and effort expended by Class Counsel in prosecuting the Action and achieving the Settlement support the requested fee. As set forth in greater detail in the Joint Declaration, Class Counsel, among other things:

- conducted a comprehensive investigation of the claims and potential claims against Virtus and the other Defendants, including consulting with a highly-regarded expert, and conducting 60 interviews of potential witnesses (including former Virtus (¶¶ 24-27);
- researched and drafted a detailed amended complaint (*Id.*);
- successfully opposed Defendants' motion to dismiss, including by participating in oral argument before the Court (¶¶ 28-39);
- completed fact and expert discovery, which included the analysis of more than five million pages of documents produced by Defendants and third parties, consultation with an expert; 16 fact depositions of Virtus's senior executives, employees, and ATRS; and five expert depositions (¶¶ 43-75, 87-92); and
- successfully moved for class certification, including by participating in oral argument before the Court (¶¶ 76-86);
- opposed Defendants' motion for summary judgment, including by participating in oral argument before the Court and making additional submissions to the Court after argument in light of new authority (¶¶ 93-98, 102-104); and
- engaged in extensive settlement negotiations with Defendants' Counsel, including the exchange of mediation submissions and an all-day mediation session (¶¶99-101, 107).

As noted above and discussed further in the Joint Declaration, Class Counsel expended more than 23,451 hours prosecuting this Action with a lodestar value of over $11,311,736.50.[7]

[7] The fact that this case proceeded through discovery, class certification, and summary judgment to settle just weeks before trial supports the requested fee and further distinguishes this application from others previously before this Court. *See, e.g.*, *RenaissanceRe Holdings Ltd.*, 2008 WL 236684, at *4 (fee reduction appropriate where case settled after filing of second amended complaint and no formal discovery was conducted).

See Ex. 5. At all times, Class Counsel took care to staff the matter efficiently and avoided unnecessary duplication of effort.

B. The Magnitude and Complexity of the Action Support the Requested Fee

The magnitude and complexity of the Action also support the requested fee. Courts routinely recognize that securities class action litigation is "notably difficult and notoriously uncertain." *FLAG Telecom*, 2010 WL 4537550, at *27 (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)). This case was no different.

As noted above and discussed in the Joint Declaration, this Action proved the axiom, raising particularly thorny questions concerning—among other things—loss causation and materiality. Prosecuting the Class's claims required skill and perseverance, including the marshalling of extensive expert evidence.

Accordingly, the magnitude and complexity of the Action supports the conclusion that the requested fee is fair and reasonable.

C. The Risks of the Litigation Support the Requested Fee

The risks associated with this contingency fee case also support the requested fee. "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Comverse*, 2010 WL 2653354, at *5; *see also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take [contingent-fee] risk into account in determining the appropriate fee.").

The fact that Class Representative prevailed, in part, against Defendants' motion to dismiss and achieved class certification did not guarantee victory. Class Representative still faced the substantial burdens of summary-judgment, *Daubert* motions, trial, and likely appeals – a process that could possibly extend for years and might lead to a smaller recovery, or no recovery at all. Indeed, in recent years, even securities class actions that survive pleading-stage

motions to dismiss have faced increasing risk of failure at class certification, *Daubert* motions, summary judgment, trial, and appeals.

In this case, while Class Counsel believe that Class Representative's claims are strong, substantial risks remained that could have compromised Class Representative's ability to succeed at trial and obtain a substantial judgment for the Class. The Parties were deeply divided on virtually every issue in the litigation, and there was no guarantee Class Representative's position would prevail. If Defendants had succeeded on any of their defenses, Class Representative and the Class would have recovered nothing or, at best, far less than the Settlement Amount.

In the face of the many uncertainties, Class Counsel undertook this case on a wholly contingent basis, knowing that the litigation would require the devotion of a substantial amount of time and expense with no guarantee of compensation. ¶¶ 116-120. Class Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *Marsh ERISA*, 265 F.R.D. at 148 ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

D. The Quality of Class Counsel's Representation Supports the Requested Fee

The quality of the representation by Class Counsel is another important factor that supports the reasonableness of the requested fee. Class Counsel submit that the quality of their representation is best evidenced by the quality of the result achieved. *See, e.g.*, *In re Veeco Instruments Inc. Sec. Litig.*, MDL No. 05-1695, 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004).

The result obtained for the Class in this case is very favorable, particularly when viewed in light of the serious risks of continued litigation. If the Class Representative was able to prevail on all of its arguments, and with every assumption resolved in the Class's favor, which was not likely, the Settlement represents a recovery of 8% of the Class's *maximum* recoverable damages, which are estimated to be approximately $275 million based on five alleged corrective events. ¶ 123. However, as discussed above, Defendants advanced very compelling attacks on loss causation, creating a serious risk that the Class's recovery would be dramatically reduced or eliminated altogether. In Class Counsel's judgment, these arguments created a significant risk that the Class ultimately could be left to recover (at best) only on the decline following Virtus's disclosure at the end of the Class Period that it was under investigation by the SEC. *See In re Bayer AG Sec. Litig.*, No. 03-cv-1546, 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008) (Pauley, J.) (noting the "difficulty of establishing loss causation [] and the difficulty in proving that Defendants acted with scienter, militate in favor of fee awards."). In this scenario, maximum recoverable damages would be approximately $67 million and the Settlement represents a substantial portion—almost 33%—of such damages. Joint Decl. ¶¶ 124-127.

The quality of Class Counsel's representation is further demonstrated by the fact that this substantial recovery was obtained after opposing nearly three years of an aggressive and highly-skilled defense by Simpson Thatcher & Bartlett LLP, widely recognized as one of the premier defense firms in securities litigation. Courts recognize that the strength of Class Counsel's opposition should be considered in assessing Class Counsel's performance. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (among factors supporting 30% fee award was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'n Corp. Sec. and Deriv. Litig.*, MDL No. 03-1529, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact

that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work."), *aff'd*, 272 F. App'x 9 (2d Cir. 2008).[8]

E. The Requested Fee in Relation to the Settlement

Courts interpret this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3. As discussed in detail in Section I, *supra*, the requested fee is well within the range of percentage fees that this Court and other courts have awarded in comparable cases and accordingly, the fee requested is reasonable in relation to the Settlement.

F. Public Policy Considerations Support the Requested Fee

A strong public policy favors rewarding firms for bringing successful securities litigation. *See FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and

[8] Class Counsel also note that the recovery achieved here of $22 million exceeds the $16.5 million settlement that the SEC achieved against Virtus (and the SEC did not have to establish loss causation). Similarly, the related *Youngers v. Virtus Investment Partners, Inc. et al.*, Case No. 1:15-cv-08262-WHP (S.D.N.Y.) case was dismissed without any class-wide recovery after this Court denied class certification in that matter.

experienced trial counsel, the remuneration should be both fair and rewarding.") This factor supports Class Counsel's fee and expense application.

III. THE REACTION OF THE SETTLEMENT CLASS TO DATE SUPPORTS THE REQUESTED FEE

The reaction of the Settlement Class to date also supports the fee request. First, through September 18, 2018, the Claims Administrator has mailed 143,299 copies of the Settlement Notice to potential Settlement Class Members and nominees informing them, among other things, that Class Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund and up to $1.2 million in expenses. *See* Declaration of Tara Donohue Regarding (A) Mailing of Settlement Notice and Claim Form and (B) Publication of Summary Settlement Notice (the "Donohue Declaration" or "Donohue Decl."), dated September 19, 2018, Ex. 3 ¶ 6 and Ex. A thereto. While the time to object to the Fee and Expense Application does not expire until October 3, 2018, to date no objections have been received. Class Counsel will address any that are submitted in their reply papers, which will be filed on or before October 17, 2018.

IV. THE FEE REQUEST IS SUPPORTED BY CLASS REPRESENTATIVE

The requested fee of 25% is made with the full support of the Class Representative. *See* Declaration of Rod Graves, Deputy Director of Arkansas Teacher Retirement System, dated September 19, 2018, submitted herewith as Ex. 1, at ¶¶ 10-11. ATRS is the type of sophisticated and financially interested investor that Congress envisioned in enacting the PSLRA. Accordingly, Class Representative's endorsement of the fee supports its approval. *See Veeco*, 2007 WL 4115808, at *8 ("Public policy considerations support the award in this case because the Lead Plaintiff . . . – a large public pension fund – conscientiously supervised the work of lead counsel and has approved the fee request[.]").

V. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Class Counsel's fee application includes a request for payment of Class Counsel's Litigation Expenses, which were reasonably incurred and necessary to prosecute the Action. As set forth in detail in the Joint Declaration, Class Counsel incurred $898,497.96 in Litigation Expenses. *See* Ex. 5. This amount is below the $1.2 million that the Settlement Notice informed potential Settlement Class Members that Class Counsel may apply for, and which—to date—there has been no objection to.

Moreover, the amount of Litigation Expenses is modest given the fact that the case had proceeded to just weeks before trial when the Parties agreed in principal to settle. Consequentially, Class Counsel had incurred considerable expenses related to, among other things, expert fees, online research, court reporting and transcripts, document hosting, photocopying, and travel costs. A complete breakdown by category of the expenses incurred by Class Counsel is set forth in Exhibit 6 to the Joint Declaration. These expense items are billed separately by Class Counsel, and such charges are not duplicated in the firm's hourly rates. These expenses are properly recoverable by counsel. *See In re China Sunergy Sec. Litig.*, No. 07-cv-7895, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'").

One of the largest expenses relates to the retention of Class Representative's expert, Chad Coffman, and his firm Global Economics Group, in the amount of $341,500.55, or 38% of the total Litigation Expenses. ¶ 172. The size of these fees relate to the considerable contribution to the prosecution of this Action made by Mr. Coffman and his team, including the preparation of five expert reports concerning market efficiency, loss causation, and damages; sitting for two

depositions; consulting on Class Representative's class certification and summary judgment arguments; and developing the proposed Plan of Allocation.

Costs related to discovery also comprise a sizable amount of the Litigation Expenses, totaling $416,067.10, or 46% of all expenses. Ex. 6. These costs include, among other things, $79,195.13 in court reporting fees related to the depositions taken by Class Counsel, as well as $336,871.97 in litigation support vendor fees to host and review the five million pages of documents produced in this litigation. Ex. 6. Class Counsel actively worked to minimize these costs when possible. For example, Class Counsel took into careful consideration the utility of any witness that would require significant travel and have capped these costs. Joint Decl. ¶¶175.

Overall, the expenses sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour.

VI. CLASS REPRESENTATIVE SHOULD BE AWARDED ITS REQUESTED REIMBURSEMENT UNDER 15 U.S.C. §78u-4(a)(4)

Class Counsel also seek reimbursement of $5,648.73 to the Class Representative, ATRS, directly related to it representation of the Class. *See* Declaration of Rod Graves, Ex. 1. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4). Here, as described more fully in the declaration of Rod Graves in support of the Motions, filed herewith, Class Representative has been fully committed to pursuing the Class's claims—and taken an active role in so doing—since ATRS became involved in the litigation. As just one example, George Hopkins, ATRS's executive director, personally attended the Parties' Mediation session, during which he actively participated. Graves Decl. ¶ 8.

These efforts required Mr. Hopkins and other employees of the Class Representative, such as Mr. Graves who was deposed, to dedicate time and resources they otherwise would have devoted to their regular duties. The requested payment is based on the number of hours that Class Representative's employees, committed to these activities. *See In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig.*, 772 F.3d 125, 132-134 (2d Cir. 2014) (affirming over $450,000 award to representative plaintiffs for time spent by their employees); *FLAG Telecom*, 2010 WL 4537550, at *31 (award of $100,000 to lead plaintiff for time spent on the litigation).

CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court award attorneys' fees in the amount of 25% of the Settlement Fund, which includes accrued interest; $898,497.96 in Litigation Expenses incurred by Class Counsel; and $5,648.73 in reimbursement to Class Representative. A proposed order will be submitted with Class Counsel's reply papers, after the deadline for objecting has passed.

Dated: September 19, 2018

Respectfully submitted,

/s/ Michael H. Rogers

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Class Counsel and Co-Lead Counsel for Class Representative Arkansas Teacher Retirement System

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018 I caused the foregoing Memorandum of Law in Support of Class Counsel's Motion for An Award of Attorneys' Fees and Payment of Litigation Expenses to be served electronically through the Court's ECF system upon all registered ECF participants.

/s/Michael H. Rogers
Michael H. Rogers