UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

FADI DAHHAN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. OVASCIENCE, INC., et al., Defendants.	No. 1:17-cv-10511-IT CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES, CHARGES AND COSTS

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Court-appointed Lead Counsel, Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), respectfully submits this memorandum of law in support of its application, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for (i) an award of attorneys' fees of 33-1/3% of the $15,000,000.00 Settlement Amount; (ii) an award of $813,208.13 for litigation expenses incurred in prosecuting this action; and (iii) payment of $10,000.00 to Lead Plaintiff Freedman Family Investments LLC ("Lead Plaintiff") pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").[1]

I. PRELIMINARY STATEMENT

Lead Counsel negotiated this $15,000,000.00 settlement with Defendants, which will be distributed to eligible Class Members after deduction of Court-approved fees and expenses. This substantial and certain recovery obtained for the Class was achieved through the efforts, skill, experience, and effective advocacy of Lead Counsel over the last four-plus years. As explained in contemporaneously filed submissions,[2] the efforts of counsel included:

- Conducting a comprehensive investigation of the events underlying the claims alleged in the Litigation, including, *inter alia*, a review of publicly available information regarding the Defendants;
- Researching the applicable law with respect to Lead Plaintiff's claims and Defendants' anticipated defenses;
- Drafting complaints for violations of the federal securities laws;

[1] This motion is also made on behalf of Local Counsel Law Office of Alan L. Kovacs and additional counsel Criden & Love, P.A.

[2] Submitted herewith in support of approval of the proposed Settlement are: (i) the Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation ("Final Approval Brief"); and (ii) the Declaration of Stephen R. Astley in Support of: (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses, Charges and Costs ("Astley Decl."), along with its exhibits thereto. Unless otherwise defined herein, all capitalized terms are defined in the Stipulation and Agreement of Settlement dated March 4, 2022 (the "Stipulation") (ECF 174), or in the Astley Decl.

- Opposing Defendants' motion to dismiss;
- Requesting, negotiating for and reviewing millions of pages of non-public documents, responding to Defendants' discovery requests and litigating motions to compel discovery;
- Obtaining class certification;
- Consulting with a market efficiency, loss causation, and damages expert;
- Preparing detailed mediation statements, and participating in a formal arm's-length mediation process before two highly experienced mediators; and
- Negotiating and documenting the Settlement.

Astley Decl., ¶¶4, 14-39.

Plaintiff's Counsel's efforts to date have been without compensation of any kind for their successful prosecution of this case, which required them to devote over 18,500 hours of billable time, and risk more than $813,000 in litigation expenses. The recovery of any fees or expenses has been wholly contingent upon the result achieved. Thus, in accordance with fees awarded in similar actions in this Circuit and throughout the country, Lead Counsel seeks a percentage fee of 33-1/3% of the Settlement Fund (or $5,000,000.00). As discussed herein and in the Astley Decl., the method of compensating counsel and the amount requested are justified in light of the substantial time and labor expended by Lead Counsel; the substantial recovery obtained for the Class; the quality of Lead Counsel's representation; the significant risks presented in the prosecution and settlement of this securities class action under the PSLRA on a contingent basis; the magnitude and complexity of the Litigation; and the professional standing of both Lead Counsel and Defendants' Counsel.

Counsel also seek payment of $813,208.13 in expenses incurred in prosecuting the action. As discussed herein, the expenses requested are reasonable in amount and were necessarily incurred for the successful litigation of the case. Finally, Lead Plaintiff seeks $10,000.00 pursuant to 15

U.S.C. §78u-4(a)(4) for its efforts representing the Class in the Litigation. The modest award is reasonable and should be awarded.

The requested amounts were disclosed in the Court-approved Notice that was provided to the Class. To date, no Class Member has objected to any of these requests.[3]

II. ARGUMENT

A. Lead Counsel Is Entitled to an Award of Attorneys' Fees from the Common Fund

The U.S. Supreme Court and the First Circuit have long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007). Awards of reasonable attorneys' fees from a "common fund" provide compensation that "encourages capable plaintiffs' attorneys to aggressively litigate complex, risky cases like this one" and spread the costs of the litigation "proportionately among those benefitted by the suit." *Tyco*, 535 F. Supp. 2d at 265.

The Supreme Court also has emphasized that private securities actions, such as the instant action, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the U.S. Securities and Exchange Commission ("SEC"). *See 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) (noting private securities actions "provide a most effective weapon in the

[3] The objection deadline is July 5, 2022. If any timely objections are received, Lead Counsel will address them in a reply memorandum due no later than July 19, 2022.

enforcement of the securities laws and are a necessary supplement to [SEC] action").[4] Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential: "[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*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). Accordingly, Lead Counsel is entitled to an award of attorneys' fees from the Settlement Fund.

B. The Court Should Award Attorneys' Fees Using the Percentage-of-the Fund Method

The Supreme Court has endorsed the percentage method, stating that "under the common fund doctrine. . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The First Circuit also has endorsed this method in common fund cases, noting that it is the prevailing method and that it "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace." *Thirteen Appeals*, 56 F.3d at 308. Indeed, the percentage method "appropriately aligns the interests of the class with the interests of the class counsel[,] . . . is 'less burdensome to administer than the lodestar method,' . . . 'enhances efficiency' and does not create a 'disincentive for the early settlement of cases.'" *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (noting method "directly aligns the interests of the class and its counsel").[5] For these reasons, courts assessing fee awards in

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[4] Internal citations are omitted, and emphasis is added throughout, unless otherwise indicated.

[5] The PSLRA provides that "[t]otal 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." 15 U.S.C. §78u-4(a)(6). Thus, "the PSLRA has made percentage-of-recovery the standard for determining whether attorneys' fees are reasonable." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005).

securities fraud class actions generally apply the percentage method, with or without consideration of lodestar as a "cross-check." *See, e.g.*, *Hill v. State St. Corp.*, 2015 WL 127728, at *17 (D. Mass. Jan. 8, 2015) (noting that lodestar cross-check is sometimes used but would not be "particularly helpful or appropriate" to assess fees in that securities fraud action).

The requested fee of 33-1/3% is both reasonable under the circumstances and well within the typical range of percentage fees awarded in the First Circuit and elsewhere. *Crandall v. PTC Inc.*, 2017 U.S. Dist. LEXIS 217581, at *16 (D. Mass. July 14, 2017) (awarding 33-1/3%); *Roberts v. TJX Cos., Inc.*, 2016 U.S. Dist. LEXIS 136987, at *45 (D. Mass. Sept. 30, 2016) (awarding 33-1/3%). *See also Plymouth County Ret. Sys. v. Patterson Cos., Inc.*, No. 0:18-cv-00871-MJD-HB, Order Awarding Attorneys' Fees and Expenses and Awards to Plaintiffs Pursuant to 15. U.S.C. §78u-4(a)(4) (D. Minn. June 10, 2022) (ECF 267) (awarding 33-1/3% fee on $63 million settlement, plus expenses); *Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharm., Inc.*, 2020 WL 3053468 (M.D. Tenn. May 29, 2020) (awarded one-third of $120 million recovery, plus expenses); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396 (S.D.N.Y. Sept. 23, 2019) (awarding one-third fee on $75 million settlement).

C. Factors Considered by Courts in the First Circuit Confirm that the Requested Fee Is Fair and Reasonable

While "[t]he First Circuit has not endorsed a specified set of factors to be used in determining whether a fee request is reasonable," *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005), courts in this Circuit consider several factors when considering an award of attorneys' fees, including:

> "(1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any."

Hill, 2015 WL 127728, at *17 (quoting *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 458 (D.P.R. 2011)); *Medoff v. CVS Caremark Corp.*, 2016 U.S. Dist. LEXIS 19135, at *26-*27 (D.R.I. Feb. 17, 2016) (same). Courts also have considered whether lead plaintiffs support the requested fee and the reaction of the class. *See Hill*, 2015 WL 127728, at *19-*20; *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 401 (D. Mass. 2008) (considering "the reaction of the class members to the settlement and proposed attorneys' fees" as one of the relevant factors). As set forth below, all of these factors weigh strongly in favor of finding that the requested fee award of 33-1/3% of the common fund is reasonable.

1. The Amount of the Recovery and the Number of Class Members Who Will Benefit From the Settlement Support the Requested Fee

Courts consistently have recognized that the result achieved is one of the most important factors to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained."); *see also Puerto Rican Cabotage*, 815 F. Supp. 2d at 458 ("[T]he net dollars and cents results achieved by counsel for their clients is often the most influential factor in assessing the reasonableness of any attorneys' fee award."). The Settlement Fund of $15,000,000.00 has been obtained through the diligent efforts of Lead Counsel without the necessity and risk of prolonged litigation, trial, and appeals.

Indeed, one of the distinct advantages of the percentage-of-the-fund method is that it directly incorporates the value of the recovery obtained into the calculation of the fee. *See Duhaime*, 989 F. Supp. at 377 (noting advantage of percentage method is that "it focuses on result, rather than process, which better approximates the workings of the marketplace" and "the greater the value secured for the class, the greater the fee earned by class counsel"). Furthermore, as explained in the Final Approval Brief and Astley Decl., the favorable nature of this Settlement is supported by recent empirical evidence regarding securities class action settlements. Between 2012 and 2021, the

median recovery in securities cases with estimated damages of between $200 million and $399 million was 2.3%.[6] Measured against that yardstick, the Settlement, if approved, will compensate the Class for approximately 5% of its estimated recoverable damages – a substantial recovery in light of the Defendants' countervailing legal arguments. Astley Decl., ¶¶5-6. *See also CVS*, 2016 U.S. Dist. LEXIS 19135, at *18 (finding that settlement amounting to 5.33% of estimated recoverable damages was "well above the median percentage of settlement recoveries in comparable securities class action cases"). Here, the Settlement is all cash, not dependent upon the number of claims made, there is no reversion to Defendants, and hundreds – if not thousands – of members of the Class will now receive compensation that was otherwise uncertain when the case began.

2. The Skill and Experience of Counsel Support the Requested Fee

The prosecution and management of a complex national securities class action requires unique legal skills and abilities. As demonstrated by its firm résumé, Robbins Geller, are experienced and skilled practitioners in the securities class action field, and have long and successful track records in such cases. Their willingness and ability to undertake complex and difficult cases such as this and their commitment to the Litigation added valuable leverage to the settlement negotiations. *See Hill*, 2015 WL 127728, at *17 (noting plaintiffs' counsel's "experience and expertise contributed to the achievement of the Settlement"); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 350 (D. Mass. 2015) (finding skill of lawyers "nationally known for and greatly experienced in representing plaintiffs" in class action lawsuits weighed in favor of fee award).

The quality of the work performed by Lead Counsel in attaining the Settlement should also be evaluated in light of the quality of the opposition. *See In re Xcel Energy, Inc., Sec., Derivative &*

[6] *See* Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review*, at 23, fig. 21 (NERA Jan. 25, 2022) ("NERA Study") (attached as Ex. A to Astley Decl.).

"ERISA" Litig., 364 F. Supp. 2d 980, 995 (D. Minn. 2005) ("Defendants' attorneys . . . consistently put plaintiffs' counsel through the paces. All counsel consistently demonstrated considerable skill and cooperation to bring this matter to an amicable conclusion."). Here, Defendants have been represented by highly experienced lawyers throughout the Litigation from Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., and Prince Lobel Tye LLP, well-respected law firms known for their vigorous defense in cases such as this.

Notwithstanding this formidable opposition, Lead Counsel developed a case that was sufficiently strong to persuade Defendants to settle the action on terms highly favorable to the Class. *See Schwartz v. TXU Corp.*, 2005 WL 3148350, at *30 (N.D. Tex. Nov. 8, 2005) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation."). Accordingly, this factor further supports the requested attorneys' fees.

3. The Complexity and Duration of the Litigation Support the Requested Fee

Courts have long recognized that securities class actions are notoriously complex and difficult to prove, and this case was no exception. *See, e.g.*, *Redwen v. Sino Clean Energy, Inc.*, 2013 U.S. Dist. LEXIS 100275, at *19 (C.D. Cal. July 9, 2013) ("Courts experienced with securities fraud litigation routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (recognizing securities class litigation is "notably difficult and notoriously uncertain"); *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *16 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 Fed. Appx. 73 (2d Cir. 2015) ("[T]he complex and multifaceted subject matter involved in a securities class action such as this supports the fee request.").

Many complex issues were raised in the Litigation. Among other things, Lead Counsel needed to develop an understanding of AUGMENT and its prospects. A comprehensive factual investigation was undertaken by Lead Counsel who drafted detailed complaints. Once the PSLRA-mandated discovery stay was lifted following resolution of the motion to dismiss, Lead Counsel propounded targeted discovery to Defendants and third parties. Based on the fruits of this discovery, which included millions of pages of documents and deposition testimony, Lead Plaintiff sought to and did amend its complaint to add the Longwood Defendants. In connection with the mediation, Lead Counsel drafted mediation statements that set out Lead Plaintiff's strongest evidence based on the documents produced and testimony obtained. Defendants likewise made compelling arguments in connection with their motions to dismiss and the mediations, including that they made no materially false statements, or material omissions, and did not omit any information they had a duty to disclose; Lead Plaintiff could not establish scienter; and their statements were "forward-looking" and accompanied by meaningful cautionary language. Defendants would argue that if the Class suffered any damages, they were significantly lower than Lead Plaintiff's estimates. These and other matters required substantial attention by Lead Counsel, who needed to analyze the factual record and relevant law carefully.

Accordingly, the magnitude and complexity of this Litigation support the conclusion that the requested fee is fair and reasonable.

4. The Risk of Non-Payment Was Extremely High in This Case

In a case undertaken on a contingent fee basis, the risk of the litigation is a key factor in determining an appropriate fee award. *See Roberts v. TJX Cos., Inc.*, 2016 WL 8677312, at *13 (D. Mass. Sept. 30, 2016) ("[M]ost importantly, Class Counsel took the case on a contingency fee basis, assuming significant risk in litigating the case."); *Hill*, 2015 WL 127728, at *18 ("consider[ing] . . . contingency risk in awarding attorneys' fees" when counsel "litigated the Action on a fully

contingent basis and were exposed to the risk that they might obtain no compensation for their efforts on behalf of the class"). Where, as here, Lead Counsel "undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel." *CVS*, 2016 U.S. Dist. LEXIS 19135, at *28.

As noted in the Astley Decl., *see* ¶¶42-54, from the outset of this case in 2017 it was apparent that Lead Counsel faced very significant challenges to establishing liability and damages. Thus, there was a significant risk that the case could be litigated for many years but result in no recovery for the Class and no payment for counsel. Specifically, Lead Counsel faced substantial risks and uncertainties in, among other things, proving that Defendants' alleged misstatements were materially false and misleading as required by the federal securities laws. There is also a risk that Defendants could establish that the stock decline was caused by something other than the alleged false and misleading statements and omissions. Although Lead Counsel obtained class certification, it faces a risk that the Class Period may be shortened. Lead Plaintiff also faced the very real risk that because OvaScience is no longer an operating business, there would be no funds available to satisfy a judgment in excess of insurance policy limits. Therefore, in the absence of a settlement, the Class faced a substantial litigation risk with no guarantee of a greater recovery. Despite these very real risks, Lead Counsel worked vigorously to achieve a significant result for the Class. Under these circumstances, the requested fee is fully appropriate.

5. The Amount of Time Devoted to the Litigation by Lead Counsel Supports the Requested Fee

The extensive time and effort expended by Lead Counsel in prosecuting the Litigation and achieving the Settlement over the last five years also establish that the requested fee is justified and reasonable. *See Hill*, 2015 WL 127728, at *19. The Astley Decl. details the substantial efforts of Plaintiff's Counsel in prosecuting Lead Plaintiff's claims. While a lodestar cross-check is not

required, *see Hill*, 2015 WL 127728, at *17, courts considering lodestar frequently note that lodestar multiples of 1.0 to 4.0 are generally considered appropriate. *See, e.g.*, *Relafen*, 231 F.R.D. at 82 (approving settlement with 2.02 lodestar multiple). When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Tyco*, 535 F. Supp. 2d at 270 (quoting *Thirteen Appeals*, 56 F.3d at 307). In this case, the lodestar method, whether used directly or as a cross check on the percentage method, strongly demonstrates the reasonableness of the requested fee.

Here, Plaintiff's Counsel spent over 18,500 hours of attorney and other professional support staff prosecuting the Litigation. *See* Fee Declarations. Based on counsel's rates, their collective lodestar is $12,838,290.25.[7] A $5,000,000 fee therefore represents a negative multiplier of 0.39x to counsel's lodestar. The fact that counsel are seeking fees far below the amount of their lodestar supports the reasonableness of the requested fee. *See In re Health Ins. Innovations Sec. Litig.*, 2021 U.S. Dist. LEXIS 61051, at *36-*37 (M.D. Fla. Mar. 23, 2021) (a "negative lodestar multiplier of 0.33 further supports the reasonableness of the fee requested"); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 U.S. Dist. LEXIS 119702, at *26 (S.D.N.Y. Nov. 8, 2010) ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for their reasonableness of the fee request."). The substantial time and effort

[7] The Supreme Court and courts in this Circuit have approved the use of current hourly rates in calculating the base lodestar figure as a means of compensating for the delay in receiving payment and the loss of interest. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *Cohen v. Brown Univ.*, 2001 WL 1609383, at *1 (D.N.H. Dec. 5, 2001); *Souss v. Banco Santander S.A. & Santander Bancorp.*, 2011 WL 13350165, at *12 (D.P.R. June 9, 2011).

devoted to this case, was critical in obtaining the favorable result achieved by the Settlement, and confirms that the fee request here is reasonable.[8]

6. Awards in Similar Cases Support the Requested Fee

As discussed above, Lead Counsel's requested fee of 33-1/3% of the Settlement Fund is well within the range of fee awards in class action cases in this Circuit and elsewhere. *See* §II.B. Thus, this factor strongly supports the reasonableness of the requested fee.

7. Public Policy Considerations Support the Requested Fee

Public policy supports rewarding counsel for prosecuting securities class actions, especially where, as here, "counsel's dogged efforts – undertaken on a wholly contingent basis – result in satisfactory resolution for the class." *CVS*, 2016 U.S. Dist. LEXIS 19135, at *29 (quoting *Tyco*, 535 F. Supp. 2d at 270). As the Supreme Court has emphasized, private securities actions such as this provide "a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action." *Bateman*, 472 U.S. at 310.

8. The Endorsement of Lead Plaintiff and the Reaction of the Class Support the Requested Fee

Lead Plaintiff was appointed pursuant to the relevant provisions of the PSLRA. As set forth in Lead Plaintiff's declaration, Lead Plaintiff carefully oversaw the prosecution and resolution of this Litigation, and had a sound basis for assessing the reasonableness of the fee request. Lead Plaintiff fully supports and approves that request. *See* Declaration of Edward Freedman ("Freedman Decl."), ¶11, submitted herewith.

[8] Moreover, the legal work on this action will not end with the Court's approval of the proposed Settlement. Additional hours and resources already have been, and necessarily will continue to be, expended assisting members of the Class with their Proof of Claim and Release Forms, overseeing the claims process, and responding to Class Member inquiries.

Furthermore, the reasonableness of the requested fee is supported by the reaction of the Class. *See, e.g.*, *Hill*, 2015 WL 127728, at *19 ("The endorsement of the Lead Plaintiffs and the favorable reaction of the class both support approval of the requested fees."). As of June 21, 2022, the Claims Administrator has disseminated in excess of 32,400 Notice Packages. *See* accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), on behalf of the Court-appointed Claims Administrator for the Settlement, Gilardi & Co. LLC ("Gilardi"), ¶¶4-11. To date, no Class Members have objected to any portion of the Settlement or Lead Counsel's requested fee.[9] Only two Class Members have opted out of the Class, *see* Murray Decl., ¶18, which lends further support to the requested fee. *See, e.g.*, *Bezdek*, 79 F. Supp. 3d at 351 (finding "overwhelmingly positive" reaction of class to settlement and "quite low number of opt-outs" weighed in favor of requested fee).

In sum, Lead Counsel respectfully submits that the 33-1/3% fee is reasonable here, and should be awarded.

D. The Expenses Incurred Are Reasonable and Were Necessary to Achieve the Benefit Obtained

Lead Counsel's fee application includes a request for payment of litigation expenses that were reasonable and necessary to the prosecution of the Litigation. Attorneys who create a common fund for the benefit of a class are entitled to payment of reasonable litigation expenses from the fund. *See, e.g.*, *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("[L]aw firms are not eleemosynary institutions, and lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a

[9] Lead Counsel will address any fee-related objections that are received in its reply papers, to be filed with the Court on July 19, 2022.

general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax."). In the Notice, the Class was advised that Lead Counsel would ask the Court for an award of litigation expenses not to exceed $875,000.00.

Plaintiff's Counsel's expense request of $813,208.13 is reasonable and should be approved. The Fee Declarations submitted herewith, provide itemized schedules of the expenses incurred by each firm. The expenses listed on those schedules are ones that are necessarily incurred in litigation and routinely charged to clients billed by the hour by each firm.

Lead Counsel respectfully submits that these expenses were reasonably and necessarily incurred in prosecuting this action and should be awarded from the Settlement Fund. *See, e.g.*, *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which the paying, arms' length market reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund."); *see also Anwar v. Fairfield Greenwich Ltd.*, 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) ("Here, Plaintiffs' Counsel seek reimbursement for expenses such as mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type the paying, arms' length market reimburses attorneys. . . . As such, these expenses shall be reimbursed."); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 454 (E.D. Cal. 2013) (noting "travel, mediation fees, photocopying, . . . delivery and mail charges" are "routinely reimbursed"). No Class Member has objected to these requested expenses.

E. The Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) of the PSLRA Is Reasonable

The Class also was advised that Lead Plaintiff would ask the Court for an award not to exceed $15,000.00 in connection with its participation in the Litigation. 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); *see also In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 2012 WL 6184269, at *2 (D. Mass. Dec. 10, 2012) (reimbursing lead plaintiffs a total of $54,626 when they had "worked closely with counsel throughout the case, communicated with counsel on a regular basis, reviewed and provided input with respect to counsel's submissions, provided information, produced documents, and participated in settlement discussions"); *Zametkin*, slip op. at 6 (awarding $14,910 to lead plaintiff); *Ahearn v. Credit Suisse First Boston LLC*, No. 03-CV-10956 (JLT), slip op. at 5-6 (D. Mass. June 7, 2006) (awarding total of $35,000 in PSLRA expenses to two lead plaintiffs). The reason behind permitting payment for services of a lead plaintiff was made clear in the congressional record: "These provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Reg. No. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, at 731 (1995).

As set forth in its declaration, Lead Plaintiff has actively and effectively fulfilled its obligations as a representative of the Class, complying with the demands placed upon it, and providing valuable assistance to Lead Counsel. Indeed, Lead Plaintiff was actively involved in this case from start to finish. For example, Lead Plaintiff located and produced documents relevant to Freedman Family Investments LLC filing for appointment as Lead Plaintiff; located and produced documents relevant to Freedman Family's motion for class certification; reviewed Defendants' discovery requests and assisted in providing responses; reviewed filings provided by counsel; reviewed key orders and hearing transcripts; discussed case strategy with counsel; discussed

settlement status; and was consulted during the mediation process. Freedman Decl., ¶¶5-7. These actions are precisely the type that support reimbursement to representative parties under the PSLRA.

Thus, in recognition of Lead Plaintiff's time and effort expended for the benefit of the Class, Lead Counsel respectfully requests a compensatory award to Lead Plaintiff in the amount of $10,000.00, which represents its time spent in the prosecution of the Litigation over the past five years. This amount is reasonable and fully justified under the PSLRA based on Lead Plaintiff's extensive involvement in the Litigation and the amount of time devoted for the benefit of the Class. Therefore, Lead Counsel and Lead Plaintiff respectfully submit that this award should be granted.

III. CONCLUSION

For the reasons set forth above, Lead Counsel respectfully requests that the Court enter an Order awarding them fees in the amount of 33-1/3% of the Settlement Fund, plus accrued interest;

and $813,208.13 in litigation expenses, plus accrued interest. Lead Counsel further request that Lead Plaintiff be awarded $10,000.00 in connection with its representation of the Class.

DATED: June 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system will, be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, if any, on June 21, 2022.

s/ Stephen R. Astley
STEPHEN R. ASTLEY