

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MEGAN VILLELLA, Individually and on	:	Civil Action No. 1:15-cv-02106-ER-GWG
Behalf of All Others Similarly Situated,	:	(Consolidated)
	:	
Plaintiff,	:	<u>CLASS ACTION</u>
	:	
vs.	:	MEMORANDUM OF LAW IN SUPPORT
	:	OF LEAD COUNSEL’S MOTION FOR AN
CHEMICAL AND MINING COMPANY OF	:	AWARD OF ATTORNEYS’ FEES AND
CHILE INC., et al.,	:	EXPENSES AND AN AWARD TO LEAD
	:	PLAINTIFF PURSUANT TO 15 U.S.C. §78u-
Defendants.	:	4(a)(4)
	:	
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## I. INTRODUCTION

After more than five years of hard-fought litigation, Lead Counsel secured an outstanding \$62,500,000 settlement for the benefit of the Class. The Settlement is an excellent result for the Class given the serious obstacles to recovery, the credible defenses to liability and damages that Defendant SQM has articulated, the fact that the Court might have accepted those arguments on the pending motion for summary judgment and motion to exclude Lead Plaintiff's expert, and the recovery relative to the amount of estimated recoverable damages suffered by the Class.<sup>1</sup> To obtain this Settlement, Lead Plaintiff and Lead Counsel overcame a number of significant challenges that existed from the filing of the initial complaint, as SQM unsuccessfully moved to dismiss the litigation on *forum non conveniens* grounds, arguing that the case should be pursued in Chile. Baig Decl., ¶¶24-25. In recognition of these risks and the result obtained, Lead Counsel now respectfully moves this Court for an award of attorneys' fees of 17.5% of the Settlement Amount, and \$1,146,925.56 in expenses that were reasonably and necessarily incurred in prosecuting and resolving the Litigation, plus interest on both amounts.<sup>2</sup> As set forth below, the relevant factors articulated in the Second Circuit's *Goldberger* decision strongly support the requested awards. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). In addition, Lead Plaintiff seeks

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<sup>1</sup> Capitalized terms used herein are defined and have the meanings contained in the Stipulation of Settlement (ECF No. 234) (the "Stipulation"), the accompanying Declaration of Aelish M. Baig in Support of: (1) Final Approval of Class Action Settlement; (2) Approval of Plan of Allocation; and (3) an Award of Attorneys' Fees and Expenses and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) (the "Baig Declaration"), and in the Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation ("Settlement Memorandum"), submitted concurrently herewith. Internal citations are omitted and emphasis is added throughout unless otherwise noted.

<sup>2</sup> Additional Lead Plaintiff's Counsel Johnson Fistel, LLP seeks \$5,872.99 in expenses. *See* Declaration of Michael I. Fistel, Jr. Filed on Behalf of Johnson Fistel, LLP in Support of Application for Award of Attorneys' Fees and Expenses (the "Fistel Decl."), submitted herewith.



a modest award of \$12,697 pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class.

This fee request has the full support of Lead Plaintiff. In addition, following an extensive Court-ordered notice program in which 71,928 Notices have been mailed to potential Class Members, to date not a single Class Member has objected to the requested fees or the expenses (not to exceed \$1,400,000, as set forth in the Notice).<sup>3</sup>

As detailed below, in the Baig Declaration, and in the Settlement Memorandum, the Settlement achieved here represents a very good result for Lead Plaintiff and the Class, particularly when judged in the context of the significant litigation risks in this Action. The \$62.5 million Settlement that Lead Counsel obtained provides the Class with an immediate and certain recovery in a case that faced significant risks. In achieving this result, Lead Plaintiff's Counsel worked more than 19,900 hours over the course of more than five years on this complex litigation, all on a contingency basis, with no guarantee of ever being paid.

Lead Counsel believes that an attorney fee award of 17.5%, together with payment of its litigation expenses, properly reflects the many significant risks taken by Lead Counsel in prosecuting the action, as well as the result achieved. When examined under either of this Circuit's methods of contingency fee determination (*i.e.*, percentage of the fund or lodestar), it is abundantly clear that an award of fees of 17.5% is reasonable, and well within the range of attorneys' fees awarded in similar complex, contingency cases. In addition, the expenses requested by Lead Plaintiff's Counsel are reasonable in amount, and the modest request by Lead Plaintiff adequately reflects its efforts and contributions to the Litigation.

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<sup>3</sup> As of the date of this fee memorandum, which is before the March 12, 2021 deadline for filing objections, Lead Counsel has not received any objection to the fee and expense request. If any timely objections are received from Class Members, Lead Counsel will address them in its reply brief, which will be filed with the Court no later than March 26, 2021.

## **II. HISTORY AND BACKGROUND OF THE LITIGATION**

A detailed description of Lead Plaintiff's claims and Lead Counsel's vigorous prosecution of this case (including key pleadings, exhaustive discovery, motions, and mediation efforts) are set forth in the accompanying Baig Declaration. For the sake of brevity, the Court is respectfully referred to that declaration.

## **III. ARGUMENT**

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

The Supreme Court has 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 Goldberger*, 209 F.3d at 47; *Fresno Cnty. Emps' Ret. Ass'n. v. Isaacson/Weaver Family Tr.*, 925 F.3d 63, 68 (2d Cir. 2019), *cert denied*, \_\_U.S.\_\_, 140 S. Ct. 385 (2019). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *See Goldberger*, 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at \*2 (S.D.N.Y. Nov. 7, 2007).

Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at \*10-\*11 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); *Veeco*, 2007 WL 4115808, at \*2. Indeed, the Supreme Court has emphasized that

private securities actions, such as this one, provide “‘a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [SEC] action.’” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); accord *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

Courts in this Circuit have consistently adhered to this precedent. See *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2004 WL 2397190, at \*10 (S.D.N.Y. Oct. 26, 2004) (“It is well established that where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to ‘a reasonable fee – set by the court – to be taken from the fund.’”); *Fresno Cnty.*, 925 F.3d at 68. Fairly compensating Lead Counsel for the risks they took in bringing this action is essential 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 Civ. 10071 (RJH), 2005 WL 2757792, at \*9 (S.D.N.Y. Oct. 24, 2005).

**B. The Court Should Award a Reasonable Percentage of the Common Fund**

Lead Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund obtained. Courts routinely find that the percentage-of-the-fund method, under which counsel is awarded a percentage of the fund that it creates, is the preferred means to determine a fee because it “‘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 *Hayes v. Harmony Gold Mining Co., Ltd.*, 509 F. App’x 21, 24 (2d Cir. 2013) (“[A]s the district court recognized, the prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class.”). The percentage approach also recognizes that the quality of counsel’s

services is measured best by the results achieved and is most consistent with the system typically used in the marketplace to compensate attorneys in non-class contingency cases.<sup>4</sup>

The Supreme Court has indicated that attorneys' fees in common-fund cases generally should be based on a percentage of the fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (“[U]nder the ‘common fund doctrine,’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class.”). The Second Circuit has expressly approved the percentage method, recognizing that “the lodestar method proved vexing” and had resulted in “an inevitable waste of judicial resources.” *Goldberger*, 209 F.3d at 48-49 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (stating that the “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”). Indeed, the Second Circuit has acknowledged that the “trend in this Circuit is toward the percentage method.” *Wal-Mart Stores*, 396 F.3d at 121; *see also City of Providence*, 2014 WL 1883494, at \*11-\*12.<sup>5</sup>

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<sup>4</sup> *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) (“The percentage method better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work. . . . The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel.”); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011) (the “advantages of the percentage method . . . are that it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made, and that it is consistent with the system typically used by individual clients to compensate their attorneys”).

<sup>5</sup> All federal Courts of Appeal to consider the matter have approved the percentage method, with two circuits requiring its use in common-fund cases. *See In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012); *Rawlings v. Prudential-Bache Proprs., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Powers v. Eichen*, 229

The determination of attorneys' fees using the percentage-of-the-fund method is also supported by the PSLRA, which states 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" recovered for the class. 15 U.S.C. §78u-4(a)(6). Courts have concluded that, by drafting the PSLRA in such a manner, Congress expressed a preference for the percentage, as opposed to the lodestar, method of determining attorneys' fees in securities class actions. See *Veeco*, 2007 WL 4115808, at \*3; *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 465-66 (S.D.N.Y. 2004).

Given the Supreme Court's indication that the percentage method is proper in this type of case, the Second Circuit's explicit approval of the percentage method in *Goldberger* and *Fresno*, as well as the trend among the district courts in this Circuit and the language of the PSLRA, the Court should award Lead Counsel attorneys' fees based on a percentage of the fund.

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

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. See *Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). An "ideal proxy" for the award should reflect the fees upon which common fund plaintiffs negotiating in an efficient market for legal services would agree." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352

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F.3d 1249, 1256 (9th Cir. 2000); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-56 (10th Cir. 1988); *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). The Eleventh and District of Columbia Circuits require the use of the percentage method in common-fund cases. See *Faught*, 668 F.3d at 1242; *Swedish Hosp.*, 1 F.3d at 1271.

(S.D.N.Y. 2014). If this were a non-class action, the customary fee arrangement would be contingent and in the range of 33% of the recovery. *See Blum*, 465 U.S. at 903 (“In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.”) (Brennan, J., concurring).

Lead Counsel’s efforts have resulted in a \$62.5 million settlement. This recovery of between 22% and 30% of recoverable damages is an outstanding result in a pre-trial settlement in a major PSLRA case. The percentage of the Settlement Fund that Lead Counsel requests it be paid is fair and reasonable in light of the substantial benefit Lead Counsel’s work has conferred on the Class.

Here, the Court does not need an “ideal proxy” for what counsel would receive if they were bargaining for their services in the marketplace, because Lead Plaintiff supports the requested fee percentage. *See Declaration of Ian Bainbridge in Support of: (1) Final Approval of Settlement; (2) Approval of Plan of Allocation; and (3) an Award of Attorneys’ Fees and Expenses and an Award to Lead Plaintiff (“Bainbridge Declaration” or “Bainbridge Decl.”), ¶7, submitted herewith.* Moreover, the requested 17.5% fee is well within the range of percentage fees awarded by this Court and others within the Second Circuit in other comparable securities cases. *See, e.g., In re BRF S.A. Sec. Litig.*, No. 1:18-cv-02213-PKC, slip op. at 1 (S.D.N.Y. Oct. 23, 2020) (awarding 25% of \$40 million recovery, plus expenses) (Ex. A)<sup>6</sup>; *In re Patriot Nat’l Inc. Sec. Litig.*, Case No. 1:17-cv-01866-ER, 2019 WL 5882171, at \*1 (S.D.N.Y. Nov. 6, 2019) (awarding 33-1/3% fee plus expenses); *Christine Asia Co. v. Ma*, 1:15-md-02631 (CM)(SDA), 2019 WL 5257534, at \*18 (S.D.N.Y. Oct. 16, 2019) (awarded 25% of \$250 million settlement); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-cv-2548(VSB), 2019 WL 4734396, at \*6 (S.D.N.Y. Sept. 23, 2019) (awarding one-third of \$75 million recovery); *In re BHP Billiton Ltd. Sec. Litig.*, No. 1:16-cv-01445-NRB, 2019 WL 1577313,

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<sup>6</sup> All unreported authorities are attached hereto as Exhibits A-D.

at \*1 (S.D.N.Y. Apr. 10, 2019) (awarding fees of 30% of \$50 million recovery, plus expenses), *aff'd sub nom. City of Birmingham Ret. Sys. v. Davis*, 806 F. App'x 17 (2d Cir. 2020); *In re Intercept Pharms., Inc. Sec. Litig.*, No. 1:14-cv-01123-NRB, slip op. at 1 (S.D.N.Y. Sept. 8, 2016) (awarding fees of 28.63% of \$55 million recovery, plus expenses) (Ex. B).

**D. The Fee Request Is Reasonable When a Lodestar Cross-Check Is Applied**

When using the percentage-of-the-fund method, courts can also look to “hours as a ‘cross check’ on the reasonableness of the requested percentage,” *Goldberger*, 209 F.3d at 50, “to ensure that an otherwise reasonable percentage fee would not lead to a windfall.” *Colgate-Palmolive*, 36 F. Supp. 3d at 353. When used as a “mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.” *Goldberger*, 209 F.3d at 50.

The lodestar method requires a two-part analysis: “first, to determine the lodestar, the court multiplies the number of hours each attorney spent on the case by each attorney’s reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney’s work.” *City of Providence*, 2014 WL 1883494, at \*13. Performing the lodestar calculation here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Lead Plaintiff’s Counsel and their paraprofessionals spent 19,920.35 hours in the prosecution of this case, producing a total lodestar amount of \$10,517,107.25 when multiplied by counsel’s billing rates. *See* accompanying Declaration of Aelish M. Baig Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys’ Fees and Expenses, ¶4

(“Robbins Geller Decl.”); Fistel Decl., ¶4.<sup>7</sup> The amount of attorneys’ fees requested by Lead Counsel herein, \$10,937,500, represents a slight multiplier of 1.04 to Lead Plaintiff’s Counsel’s lodestar.<sup>8</sup>

In cases of this nature, fees representing multiples above lodestar are regularly awarded to reflect the contingency-fee risk and other relevant factors. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 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 (NGG) (RER), 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.”).

Accordingly, in complex contingent litigation, lodestar multipliers of between 2 and 5 are commonly awarded. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5); *Christine Asia*, 2019 WL 5257534, at \*19 (awarding fee representing a 2.15 multiplier, which court found to be “well within the range commonly awarded in securities class actions of this complexity and magnitude”); *BHP Billiton*, 2019 WL 1577313, at \*1-\*2 (awarding fee representing 2.7 multiplier);

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<sup>7</sup> In determining whether the rates are reasonable, the Court should take into account the attorneys’ professional reputation, experience, and status. Here, the lawyers and paraprofessionals at Lead Counsel are experienced securities practitioners with track records of success, and among the most prominent and well-regarded securities practitioners in the nation. Lead Counsel’s hourly rates are reasonable and have recently been judicially approved. *See Hr’g Tr.* at 160:22-24, *In re Am. Realty Cap. Props., Inc. Litig.*, No. 15-MC-40(AKH) (S.D.N.Y. Jan. 23, 2020) (“I find your lodestar reasonable, the rates appropriate and, in relationship to the work that you did, reasonable”) (Ex. C); *Hr’g Tr.* at 25:12-16, *Kaess v. Deutsche Bank AG*, No. 09-cv-01714 (GHW)(RWL) (S.D.N.Y. June 11, 2020) (“I find these billable rates [for Robbins Geller] based on the timekeeper’s title, specific years of experience, and market rates for similar professionals in their fields . . . to be reasonable in this context.”) (Ex. D).

<sup>8</sup> 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 Jenkins*, 491 U.S. at 283-84.



*Telik*, 576 F. Supp. 2d at 590 (“In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court.”).

Here, while shouldering the risk of non-recovery, Lead Counsel litigated this case on a contingency basis for more than five years. Accordingly, the modest lodestar multiplier here is well within the range awarded by courts in this Circuit, and thus Lead Counsel’s fee is reasonable when the cross-check is performed.

The lodestar/multiplier is to be used merely as a cross-check on reasonableness. To find otherwise undermines the principles supporting the percentage approach and encourages needless lodestar building litigation. *See also In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 196 (E.D. Pa. 2000) (“The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel’s request of thirty percent.”). Lead Counsel invested substantial time and effort prosecuting this Litigation against SQM to a successful completion. The requested fee, therefore, is manifestly reasonable, whether calculated as a percentage of the fund or in relation to Lead Plaintiff’s Counsel’s lodestar.

As detailed in the Baig Declaration, based on its efforts in litigating this case and producing an excellent result, Lead Counsel believes the requested fee, whether calculated as a percentage of the fund or in relation to counsel’s lodestar, is manifestly reasonable. Moreover, as discussed below, each of the factors cited by the Second Circuit in *Goldberger* also strongly supports a finding that the requested fee is reasonable.

**E. The Relevant Factors Confirm that the Requested Fee Is Reasonable**

In *Goldberger*, the Second Circuit explained that whether the court uses the percentage-of-the-fund method or the lodestar approach, it should continue to consider the traditional criteria that reflect a reasonable fee in common fund cases, including:

- the time and labor expended by counsel;
- the risks of the litigation;
- the magnitude and complexity of the litigation;
- the requested fee in relation to the settlement;
- the quality of representation; and
- public policy considerations.

*Goldberger*, 209 F.3d at 50. Consideration of these factors demonstrates that the requested fee is fair and reasonable.

### **1. The Time and Labor Expended by Counsel**

Lead Counsel has expended substantial time and effort pursuing the Litigation on behalf of the Class. Since the Litigation began in March 2015, Lead Plaintiff's Counsel and their paraprofessionals devoted in excess of 19,900 hours to prosecuting the Class' claims. As detailed in the Baig Declaration, submitted herewith, counsel, among other things:

- conducted an extensive factual investigation into the underlying facts;
- researched the law relevant to the claims asserted and SQM's potential defenses thereto, and drafted a detailed amended complaint;
- successfully opposed Defendant's motion to dismiss the Complaint for failure to state a claim and on the basis of *forum non conveniens*;
- retained an expert in Chilean law to assist with the briefing on the motion to dismiss;
- requested, negotiated for, received and analyzed more than 675,000 pages of documents produced by SQM and third parties, including many originally produced in Spanish that had to be translated;
- successfully pursued documents and testimony from SQM's former board member in Canada through letters rogatory filed in Saksatoon, Sakatchewan;
- took 11 fact depositions and one expert deposition and defended Lead Plaintiff's deposition as well as the depositions of two experts designated by Lead Plaintiff;
- obtained class certification over Defendant's vigorous opposition;

- moved for partial summary judgment on Lead Plaintiff's §10(b) claim against SQM and defended against SQM's motion for summary judgment;
- moved to exclude two experts Defendant designated and opposed SQM's motion to exclude Lead Plaintiff's expert on loss causation and damages;
- prepared for and participated in two mediation sessions with Judge Phillips; and
- negotiated and drafted the Stipulation and exhibits thereto, as well as the motion for preliminary approval of the Settlement.

See Baig Decl., ¶¶6-8.

Moreover, Lead Counsel, with the assistance of its damages expert, prepared the proposed Plan of Allocation based primarily on an analysis estimating the amount of artificial inflation in the price of SQM American Depository Shares ("ADS") during the Class Period. Throughout the Litigation, Lead Counsel staffed the matter efficiently and avoided any unnecessary duplication of effort. Additional hours and resources will necessarily be expended assisting Members of the Class with the completion and submission of their Proof of Claim and Release forms, shepherding the claims process, and responding to Class Member inquiries. *See Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 Civ. 4825(JLC), 2013 WL 1364147, at \*6 (S.D.N.Y. Apr. 2, 2013). The significant amount of time and effort devoted to this case by Lead Counsel to obtain a \$62.5 million recovery, work that will not end with the Court's approval of the Settlement, confirms that the 17.5% fee request is reasonable.

## **2. The Risks of the Litigation**

### **a. The Contingent Nature of Lead Counsel's Representation Supports the Requested Fee**

The risk undertaken in the litigation is often considered the most important *Goldberger* factor. *Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at \*5; *Telik*, 576 F. Supp. 2d at 592. The Second Circuit has recognized that the risk associated with a case undertaken on a contingent fee is an important factor in determining an appropriate fee award:

No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

*Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974). “Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.” *Teachers’ Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at \*3 (S.D.N.Y. May 14, 2004); *Am. Bank Note*, 127 F. Supp. 2d at 433 (concluding it is “appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award”); *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 985 F. Supp. 410, 417 (S.D.N.Y. 1997) (“Numerous courts have recognized that the attorney’s contingent fee risk is an important factor in determining the fee award.”). This risk encompasses not just the risk of no payment, but also the risk of underpayment. *See In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 569-70 (7th Cir. 1992) (reversing district court’s fee award where court failed to account for, among other things, risk of underpayment to counsel). When considering the reasonableness of attorneys’ fees in a contingency action, the court should consider the risks of the litigation at the time the suit was brought. *See Goldberger*, 209 F.3d at 55; *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at \*3 (S.D.N.Y. Dec. 28, 2011).

Lead Plaintiff’s Counsel undertook this Litigation on a wholly contingent-fee basis, investing a substantial amount of time and money to prosecute a risky action with no guarantee of compensation or even the recovery of expenses. Unlike Defendant’s counsel, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Plaintiff’s Counsel have not been compensated for any time or expenses since this case began in March 2015, and would have received no compensation or payment of their expenses had this case not been resolved successfully.

From the outset, Lead Counsel understood that it was embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for investing the time and money the case would require. In undertaking that responsibility, Lead Counsel was obligated to assure that sufficient attorney and paraprofessional resources were dedicated to prosecuting the Litigation and that funds were available to compensate staff and to pay for the considerable costs that a case such as this entails. Under these circumstances, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis.

In addition to advancing litigation expenses, Lead Counsel faced the possibility that it would receive no attorneys' fees at all. Indeed, it is possible that, if not for this Settlement, the entire case would have been dismissed in response to Defendant's pending motion for summary judgment.<sup>9</sup>

Losses in contingent-fee litigations, especially those brought under the PSLRA, are exceedingly expensive. Lead Counsel's assumption of the 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."); *In re Marsh ERISA Litig.*,

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<sup>9</sup> Moreover, it is wrong to presume that a law firm handling complex contingent litigation always wins. There are numerous class actions in which lead counsel expended thousands of hours and yet received no remuneration, despite their diligence and expertise. *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 725 (11th Cir. 2012) (affirming judgment as a matter of law following jury verdict partially in plaintiff's favor); *In re Oracle Corp. Sec. Litig.*, No. C 01-00988-SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (court granted summary judgment for defendants after eight years of litigation, after plaintiff's counsel incurred over \$7 million in expenses, and worked over 100,000 hours, representing a lodestar of approximately \$40 million); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556, at \*1 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (jury verdict of \$81 million for plaintiffs against an accounting firm reversed on appeal on loss-causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (Tenth Circuit overturned securities-fraud class-action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on basis of 1994 Supreme Court opinion).

265 F.R.D. 128, 148 (S.D.N.Y. 2010) (“There was significant risk of non-payment in this case, and Plaintiffs’ Counsel should be rewarded for having borne and successfully overcome that risk.”).

**b. Risks of Establishing Liability and Damages**

While Lead Plaintiff remains confident in its claims, its ability to prove liability was far from certain. As detailed in the Baig Declaration and in the Settlement Memorandum, SQM raised numerous challenges in its motion for summary judgment, including challenges to loss causation and damages. Baig Decl., ¶67. More specifically, Defendant argued that Lead Plaintiff could not prove loss causation or damages for the decline in SQM’s ADS price for the two time periods that Lead Plaintiff’s expert testified were corrective. *Id.* In addition, Defendant filed a *Daubert* motion to exclude the testimony of Lead Plaintiff’s loss causation and damages expert. *Id.*, ¶68. Even assuming *arguendo* that Lead Plaintiff was able to overcome Defendant’s summary judgment and *Daubert* motions, these arguments would no doubt be raised again prior to and at trial. Therefore, whether Lead Plaintiff ultimately would prove liability under the Exchange Act was far from assured.

Moreover, there is no way to know how a jury would decide these issues. The damage assessments of the Parties’ respective trial experts would become a “battle of experts.” The outcome of such battles is never predictable, and there existed the very real possibility that a jury could be swayed by experts for Defendant to minimize the Class’ losses or to show that the losses were attributable to factors other than the alleged misstatements and omissions. Thus, even if Lead Plaintiff prevailed as to liability at trial, the judgment obtained might well be only a fraction of the damages claimed.

### 3. The Magnitude and Complexity of the Litigation

The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel. *See Chatelain v. Prudential-Bache Sec. Inc.*, 805 F. Supp. 209, 216 (S.D.N.Y. 1992). It is widely recognized that "shareholder actions are notoriously complex and difficult to prove." *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 (WHP), 2008 WL 5336691, at \*5 (S.D.N.Y. Dec. 15, 2008); *see also Christine Asia*, 2019 WL 5257534, at \*18 ("Securities class actions in particular are 'notably difficult and notoriously uncertain.'"). "[S]ecurities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *Ikon*, 194 F.R.D. at 194; *see also In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 WL 903236, at \*9 (S.D.N.Y. Apr. 6, 2006) ("[T]he legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages. These challenges are exacerbated . . . where a number of controlling decisions have recently shed new light on the standard for loss causation."). This case was no exception. As described herein, this Litigation involved a number of difficult and complex questions concerning liability and damages in a case with a foreign-based plaintiff and defendant that would have required extensive additional efforts by Lead Counsel in preparing for trial.

The trial of liability issues alone would have involved substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, much of which has been translated to English, vigorously contested motions, and the considerable expenditures of judicial resources. Because this case revolved around "difficult, complex, hotly disputed, and expert-intensive issues," this factor favors awarding a 17.5% fee. *City of Providence*, 2014 WL 1883494, at \*16.

#### 4. The Quality of Representation Supports the Requested Fee

The quality of the representation by Lead Counsel is another important factor that supports the reasonableness of the requested fee. Lead Counsel submits that the quality of the representation here is best evidenced by the quality of the result achieved. *See, e.g.*, Settlement Memorandum at §III.C.; *see also Flag Telecom*, 2010 WL 4537550, at \*28; *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at \*3 (S.D.N.Y. July 16, 2007). Lead Counsel demonstrated a great deal of skill to achieve a settlement at this level in this particular case. Lead Counsel are experienced securities class action and complex litigation practitioners. *See Robbins Geller Decl.*, Ex. G. This Settlement is attributable to the diligence, determination, hard work, and reputation of counsel, who developed, litigated, and successfully negotiated the Settlement of this Litigation and a substantial immediate cash recovery in a very difficult case, without the risk of trial. *See Teachers' Ret. Sys.*, 2004 WL 1087261, at \*6.

Finally, courts repeatedly recognize that the quality of the opposition faced by plaintiff's counsel should also be taken into consideration in assessing the quality of counsel's performance. *See, e.g., Marsh ERISA*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."); *Veeco*, 2007 WL 4115808, at \*7 (among the factors supporting a 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"). Here, SQM is represented by lawyers from Milbank LLP, who presented skilled defenses and spared no effort in representing their client. Notwithstanding this formidable opposition, Lead Counsel's ability to present a strong case and to demonstrate its willingness to continue to vigorously prosecute the Litigation through trial and then inevitable appeals enabled Lead Counsel to achieve a very favorable Settlement for the benefit of the Class.



## 5. Public Policy Considerations

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. *See Woburn Ret. Sys. v. Salix Pharms., Ltd.*, No. 14-CV-8925 (KMW), 2017 WL 3579892, at \*7 (S.D.N.Y. Aug. 18, 2017) (fee award was “appropriate, and not excessive, to encourage further securities class actions”); *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.”). Accordingly, public policy favors granting Lead Counsel’s fee and expense application here.

## 6. The Class’ Reaction to the Fee Request to Date Supports the Requested Fee

To date, the Claims Administrator has sent more than 71,900 copies of the Notice to potential Class Members and nominees informing them, *inter alia*, that Lead Counsel intended to apply to the Court for an award of attorneys’ fees in an amount not to exceed 17.5% of the Settlement Amount, plus expenses not to exceed \$1,400,000, plus interest on both amounts.<sup>10</sup> The time to object to the fee request expires on March 12, 2021. To date, however, not a single objection to the fee and expense amounts set forth in the Notice has been received. Such a “low level of objection is a ‘rare phenomenon.’” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). The fact that no objections have been received to date supports the fairness of the fee request.

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<sup>10</sup> *See* accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date (“Murray Decl.”), Ex. A. (Notice).

Additionally, Lead Plaintiff supports the fee request. Bainbridge Decl., ¶7. Lead Plaintiff played an active role in the Litigation and closely supervised the work of Lead Counsel.

#### **IV. COUNSEL’S EXPENSES ARE REASONABLE AND WERE NECESSARY TO THE PROSECUTION OF THIS LITIGATION**

Lead Counsel also respectfully requests an award of \$1,146,925.56 in expenses incurred while prosecuting the Litigation. Submitted herewith is a declaration regarding these expenses, which are properly recovered by counsel. *See* Robbins Geller Decl., ¶¶5-6.<sup>11</sup> *See, e.g., In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 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””); *Flag Telecom*, 2010 WL 4537550, at \*30 (“It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class.”); *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (court may compensate class counsel for reasonable expenses necessary to the representation of the class).

Lead Counsel’s expenses include, for example, the costs of hiring a Chilean law expert to assist in its efforts, Canadian counsel to assist with the letters rogatory, consultants, travel, document management, mediating the Class’ claims, and computerized research. A complete breakdown by category of the expenses incurred is set forth in the accompanying Robbins Geller declaration. These expenses were critical to Lead Counsel’s success in achieving the Settlement. *See Glob. Crossing*, 225 F.R.D. at 468 (“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,

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<sup>11</sup> In addition, Johnson Fistel, LLP seeks an award of expenses of \$5,872.99. *See* Fistel Decl., ¶¶5-6.

they are properly chargeable to the Settlement fund.”). So far, not a single objection to the expense amount set forth in the Notice has been received. Accordingly, Lead Counsel respectfully requests payment for these expenses, plus interest earned on such amount at the same rate as that earned by the Settlement Fund.

**V. LEAD PLAINTIFF IS ENTITLED TO A REASONABLE AWARD UNDER 15 U.S.C. §78u-4(a)(4)**

Lead Plaintiff seeks approval of an award of \$12,697 in recognition of the time and resources it spent representing the Class. The PSLRA allows an “award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class” to “any representative party serving on behalf of a class.” 15 U.S.C. §78u-4(a)(4). Many courts have approved such awards under the PSLRA to compensate class representatives for the time and effort they spent on behalf of the class. *Christine Asia*, 2019 WL 5257534, at \*20 (“Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.”) (awarding \$12,500 to each Lead Plaintiff); *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM, 2020 WL 4196468, at \*23-\*24 (S.D.N.Y. July 21, 2020) (awarding \$25,410 to Lead Plaintiff).

As set forth in the Bainbridge Declaration, Lead Plaintiff took an active role in prosecuting the Litigation, including: (1) communicating with Lead Counsel on issues and developments in the Litigation; (2) reviewing documents filed in the case, including the operative complaint and other briefs and motions; (3) consulting with Lead Counsel on litigation and settlement strategy; (4) providing discovery and a deposition; and (5) reviewing and approving the proposed Settlement. *Id.*, ¶5.

The Notice informed potential Class Members that Lead Plaintiff may seek approval of an award for its time and expenses incurred in representing the Class. Murray Decl., Ex. A (Notice) at 2. To date, no Class Member has objected to such award. Accordingly, Lead Plaintiff's request is reasonable and fully justified under the PSLRA and should be granted.

## **VI. CONCLUSION**

Based on the foregoing, and the entire record herein, Lead Counsel respectfully requests that the Court award attorneys' fees of 17.5% of the Settlement Amount, plus expenses in the amount of \$1,152,798.55, plus interest on both amounts, and \$12,697 to Lead Plaintiff, as permitted by the PSLRA.

DATED: February 26, 2021

Respectfully submitted,

ROBBINS GELLER RUDMAN  
& DOWD LLP  
DANIEL S. DROSMAN  
ELLEN GUSIKOFF STEWART

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\_\_\_\_\_  
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*Lead Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I, Ellen Gusikoff Stewart, hereby certify that on February 26, 2021, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to received such notice.

/s/ Ellen Gusikoff Stewart

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ELLEN GUSIKOFF STEWART

**INDEX OF EXHIBITS TO MEMORANDUM OF LAW IN SUPPORT OF LEAD  
COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES  
AND AN AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)**

<b>Document</b>	<b>Exhibit</b>
<i>In re BRF S.A. Sec. Litig.</i> , No. 1:18- cv-02213-PKC, slip op. (S.D.N.Y. Oct. 23, 2020)	A
<i>In re Intercept Pharms., Inc. Sec. Litig.</i> , No. 1:14-cv-01123-NRB, slip op. (S.D.N.Y. Sept. 8, 2016)	B
Hr'g Tr., <i>In re Am. Realty Cap. Props., Inc. Litig.</i> , No 15-MC-40 (AKH) (S.D.N.Y. Jan 23, 2020)	C
Hr'g Tr., <i>Kaess v. Deutsche Bank AG</i> , No. 09-cv-01714 (GHW)(RWL) (S.D.N.Y. June 11, 2020)	D

# EXHIBIT A



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

_____	X	
In re BRF S.A. SECURITIES LITIGATION	:	Civil Action No. 1:18-cv-02213-PKC
_____	:	
	:	<u>CLASS ACTION</u>
This Document Relates To:	:	
	:	ORDER AWARDING ATTORNEYS' FEES
ALL ACTIONS.	:	AND EXPENSES AND AWARD TO LEAD
_____	X	PLAINTIFF PURSUANT TO 15 U.S.C.
		§78(u)-4(a)(4)

This matter having come before the Court on October 23, 2020, on the motion of Lead Counsel for an award of attorneys' fees and expenses and an award to Lead Plaintiff (the "Fee Motion"), the Court, having considered all papers filed and proceedings conducted herein, having found the Settlement of this Litigation to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Order incorporates by reference the definitions in the Stipulation of Settlement dated May 5, 2020 (the "Stipulation"), and all capitalized terms used, but not defined herein, shall have the same meanings as set forth in the Stipulation.

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Class who have not timely and validly requested exclusion.

3. Notice of Lead Counsel's Fee Motion was given to all Class Members who could be located with reasonable effort. The form and method of notifying the Class of the Fee Motion met the requirements of Rule 23 of the Federal Rules of Civil Procedure and the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 (15 U.S.C. §78u-4(a)(7)), due process, and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to persons and entities entitled thereto.

4. The Court hereby awards attorneys' fees of \$10,000,000, which is equal to 25% of the Settlement Amount, plus expenses in the amount of \$94,821.84, together with the interest earned on both amounts for the same time period and at the same rate as that earned on the Settlement Fund until paid. The Court finds that the amount of fees awarded is fair, reasonable, and appropriate under the "percentage-of-recovery" method.

5. The fees and expenses shall be allocated among Lead Plaintiff's Counsel in a manner which, in Lead Counsel's good faith judgment, reflects such counsel's contribution to the institution, prosecution, and resolution of the Litigation.

6. The awarded attorneys' fees and expenses and interest earned thereon, shall be paid to Lead Counsel immediately upon execution of the Final Judgment and Order of Dismissal with Prejudice and this Order and subject to the terms, conditions, and obligations of the Stipulation, and in particular, ¶6.2 thereof, which terms, conditions, and obligations are incorporated herein.

7. In making this award of fees and expenses to Lead Counsel, the Court has considered and found that:

(a) the Settlement has created a fund of \$40,000,000.00 in cash that is already on deposit, and numerous Class Members who submit, or have submitted, valid Proof of Claim and Release forms will benefit from the Settlement created by Lead Counsel;

(b) over 66,500 copies of the Notice were disseminated to potential Class Members indicating that Lead Counsel would move for attorneys' fees in an amount not to exceed 27.5% of the Settlement Amount and for expenses in an amount not to exceed \$150,000.00, plus interest on both amounts, and no objections to the fees or expenses were filed by Class Members;

(c) Lead Counsel pursued the Litigation and achieved the Settlement with skill, perseverance, and diligent advocacy;

(d) Lead Counsel expended substantial time and effort pursuing the Litigation on behalf of the Class;

(e) Lead Counsel pursued the Litigation entirely on a contingent basis;

(f) the Litigation involves complex factual and legal issues and, in the absence of settlement, would involve lengthy proceedings whose resolution would be uncertain;

(g) had Lead Counsel not achieved the Settlement, there would remain a significant risk that the Class may have recovered less or nothing from Defendants;

(h) public policy concerns favor the award of reasonable attorneys' fees and expenses in securities class action litigation; and

(i) the attorneys' fees and expenses awarded hereby are fair and reasonable and consistent with awards in similar cases within the Second Circuit.

8. Pursuant to 15 U.S.C. §78u-4(a)(4), the Court awards \$2,889.15 to Lead Plaintiff City of Birmingham Retirement and Relief System for the time it spent directly related to its representation of the Class.

9. Any appeal or any challenge affecting this Court's approval regarding the Fee Motion shall in no way disturb or affect the finality of the Judgment entered with respect to the Settlement.

10. In the event that the Settlement is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of the Stipulation, this Order shall be rendered null and void to the extent provided in the Stipulation and shall be vacated in accordance with the Stipulation.

SO ORDERED.

DATED: October 23, 2020

  
\_\_\_\_\_  
P. Kevin Castel  
United States District Judge

**CERTIFICATE OF SERVICE**

I, David A. Rosenfeld, hereby certify that on October 16, 2020, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice.

s/ David A. Rosenfeld  
\_\_\_\_\_  
DAVID A. ROSENFELD

# EXHIBIT B

USDC SDNY

DOCUMENT  
ELECTRONICALLY FILED

DOC #: \_\_\_\_\_

DATE FILED: 9/8/16

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

\_\_\_\_\_ x  
In re INTERCEPT PHARMACEUTICALS, : Civil Action No. 1:14-cv-01123-NRB  
INC. SECURITIES LITIGATION :  
: CLASS ACTION  
: \_\_\_\_\_ :  
This Document Relates To: : ~~PROPOSED~~ ORDER AWARDING  
: ATTORNEYS' FEES AND EXPENSES  
: ALL ACTIONS. :  
: \_\_\_\_\_ x

This matter having come before the Court on September 8, 2016, on Lead Counsel's motion for an award of attorneys' fees and expenses ("Fee Motion"), the Court, having considered all papers filed and proceedings conducted herein, having found the Settlement of this class action (the "Litigation") to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation of Settlement ("Stipulation" or "Settlement") filed with the Court and the memorandum of law in support of the Fee Motion submitted in support thereof. *See* Dkt. Nos. 113, 124.

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Class who have not timely and validly requested exclusion.

3. Notice of Lead Counsel's Fee Motion was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the Fee Motion met the requirements of Rules 23 and 54 of the Federal Rules of Civil Procedure, 15 U.S.C. §78u-4(a)(7), the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995, due process, and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

4. The Court hereby awards Lead Counsel attorneys' fees of 28.63% of the Settlement Amount, plus expenses in the amount of \$421,898.62, together with the interest earned on such amounts for the same time period and at the same rate as that earned by the Settlement Fund. The



Court finds that the amount of fees awarded is appropriate, fair, and reasonable under the “percentage-of-recovery” method.

5. The fees and expenses shall be allocated among Plaintiffs’ other counsel in a manner which, in Lead Counsel’s good-faith judgment, reflects the contributions of such counsel to the prosecution and settlement of the Litigation.

6. The awarded attorneys’ fees and expenses shall be paid immediately to Lead Counsel subject to the terms, conditions, and obligations of the Stipulation.

7. In making the award to Lead Counsel of attorneys’ fees and litigation expenses to be paid from the recovery, the Court has considered and found that:

(a) The Settlement has created a common fund of \$55,000,000 in cash and that numerous Class Members who submit acceptable Proofs of Claim will benefit from the Settlement created by the efforts of Lead Counsel;

(b) The requested attorneys’ fees and payment of litigation expenses have been approved as fair and reasonable by the Plaintiffs;

(c) Notice was disseminated to Class Members stating that Lead Counsel would be moving for attorneys’ fees not to exceed 28.8% of the Settlement Amount and payment of litigation expenses in an amount not to exceed \$450,000, plus interest earned on both amounts;

(d) There were no objections to the requested attorneys’ fees and payment of litigation expenses;

(e) Lead Counsel has expended substantial time and effort pursuing the Litigation on behalf of the Class;

(f) Lead Counsel pursued the Litigation on a contingent basis, having received no compensation during the Litigation, and any fee award has been contingent on the result achieved;

(g) The Litigation involves complex factual and legal issues and, in the absence of the Settlement, would involve lengthy proceedings whose resolution would be uncertain;

(h) Lead Counsel conducted the Litigation and achieved the Settlement with skillful and diligent advocacy;

(i) Public policy concerns favor the award of reasonable attorneys' fees in securities class action litigation;

(j) The amount of attorneys' fees awarded is fair and reasonable and consistent with awards in similar cases within the Second Circuit; and


(k) Plaintiffs' counsel devoted 11,106.20 hours, with a lodestar value of \$5,784,386.00 to achieve the Settlement.

8. Any appeal or any challenge affecting this Court's approval regarding any attorneys' fee and expense application shall in no way disturb or affect the finality of the Judgment entered with respect to the Settlement.

9. In the event that the Settlement is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of the Stipulation, this Order shall be rendered null and void to the extent provided by the Stipulation and shall be vacated in accordance with the Stipulation.

IT IS SO ORDERED.

DATED: September 8, 2016

  
THE HON. NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

# EXHIBIT C

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 In Re:

15-MC-40 (AKH)

4 AMERICAN REALTY CAPITAL  
5 PROPERTIES, INC. LITIGATION,

6 Fairness Hearing

7  
8 New York, N.Y.  
9 January 23, 2019  
10:15 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN

12 District Judge

13 APPEARANCES

14  
15 ROBBINS GELLER RUDMAN & DOWD LLP  
16 Attorneys for TIAA and Class Plaintiffs  
17 BY: DEBRA J. WYMAN, ESQ.  
18 MICHAEL J. DOWD, ESQ.  
19 ROBERT M. ROTHMAN, ESQ.  
20 ELLEN GUSIKOFF-STEWART, ESQ.

21 GLANCY PRONGAY & MURRAY LLP  
22 Attorneys for the Witchko Derivative  
23 BY: MATTHEW M. HOUSTON, ESQ.

24 MILBANK LLP  
25 Attorneys for Defendant ARCP  
BY: SCOTT A. EDELMAN, ESQ.

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1 THE COURT: Who is going to do the application for  
2 Robbins Geller?

3 MR. DOWD: I will, your Honor. Michael Dowd.

4 THE COURT: Good morning, Mr. Dowd.

5 MR. DOWD: Good morning, your Honor.

6 THE COURT: I've read your extensive declaration, that  
7 is, the declaration of Ms. Wyman.

8 I want to take up just your fees, your activities.  
9 The first to file the class action lawsuit were four firms, who  
10 don't seem to be involved: Pomerantz LLP, Wolf Popper LLP, Wolf  
11 Haldenstein LLP, and the Rosen Law Firm. Is it clear that they  
12 are making no claim?

13 MR. DOWD: They are making no claim, your Honor.

14 THE COURT: OK. Did they do anything in the lawsuit?

15 MR. DOWD: No, your Honor. I mean, I'm sure they  
16 filed complaints early on. But the Court, when it appointed us  
17 lead plaintiff, told us to work with other firms and form a  
18 working group, a global working group. And there were a group  
19 of firms, I believe it was nine firms, that agreed to be part  
20 of that working group and to work on the case. And we've  
21 submitted their time with our time. And those are the only  
22 attorneys that would be entitled to fees in this casement.

23 THE COURT: The second thing, I did not appreciate how  
24 many counsel there were. My impression was that there were  
25 three or four at the time that I said what you said.

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1 MR. DOWD: Pardon me, your Honor?

2 THE COURT: I didn't know there were nine other law  
3 firms involved.

4 MR. DOWD: There were, your Honor. The Court --

5 THE COURT: I didn't know that, I said. When I asked  
6 you to coordinate services and organize the plaintiffs' group,  
7 I thought there were just two or three law firms.

8 MR. DOWD: No, they were not. And they each had  
9 clients in the case, except I believe there was one firm that  
10 did not. But they each had clients. They were all class reps.  
11 They were all either on our "may call" or "will call" witness  
12 list. And so they provided valuable service. And they did a  
13 lot of work in the case. We've limited it and tried to give  
14 them discrete projects or dealing with just their plaintiffs,  
15 you know, because that's what we thought the Court wanted with  
16 the working group, and we did do that. Their time is about 10  
17 percent of our time. And I think that's fair considering what  
18 they did in the case.

19 THE COURT: You have a rather detailed description of  
20 the various things you were doing.

21 MR. DOWD: Yes, your Honor. That would be in  
22 Ms. Wyman's, the longer declaration.

23 THE COURT: The declaration in support of application  
24 for award of attorney's fees and expenses is what I'm looking  
25 at. I have the larger one as well.

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1 Ms. Wyman's affidavit identifies the lawyers -- all  
2 your firm?

3 MR. DOWD: Yes. They're all our firm.

4 THE COURT: Why so many lawyers?

5 MR. DOWD: Well, your Honor, there are different  
6 people that helped with different tasks. When I looked at it,  
7 this is what struck me. We had a working group that I really  
8 thought were the people that were going to be responsible for  
9 trying this case. That group was about 15 people, 13 lawyers  
10 and the two forensic accountants that were involved in it from  
11 beginning to end. Those 15 people account for about 72 percent  
12 of our lodestar, \$47 million, just those 15 people. They were  
13 all people that the Court would probably be familiar with or  
14 would have seen their names. Certainly most of us have been  
15 here in court.

16 And then if you add in the four people at our office,  
17 three of our internal staff attorneys and another associate,  
18 that were primarily responsible for the document review, so  
19 that would be another four people, bringing it to 19. I think  
20 those people together would account for about 82 percent of our  
21 entire lodestar.

22 So it may look like a lot of people because there were  
23 timekeepers that did individual things or who were on the case  
24 for a given period of time. But if you look at those people  
25 that really drove the case, you're talking about the 15 main

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1 people that did everything. That's 72 percent of the time.  
2 And if you take in those other four that were responsible for a  
3 lot of the document work, that's, I think, about 82 percent of  
4 the lodestar.

5 THE COURT: 12 people billed more than a thousand  
6 hours.

7 MR. DOWD: Yes, your Honor.

8 THE COURT: How many people were involved in your  
9 firm, Mr. Edelman? Roughly.

10 MR. EDELMAN: Your Honor, I would bet a comparable  
11 number. This was complicated litigation in a big case.

12 THE COURT: I understand.

13 MR. EDELMAN: That doesn't sound at all outlandish to  
14 me. Their the core team.

15 THE COURT: OK. Then I pass that observation.

16 MR. DOWD: That's just Mr. Edelman's firm. There were  
17 also Grant Thornton's lawyers.

18 THE COURT: They had a separate job to do.

19 MR. DOWD: Well, and we had to do the job on the other  
20 side of them as well.

21 THE COURT: That's true.

22 MR. DOWD: They had, at summary judgment --

23 THE COURT: Mr. Dowd, I withdraw that implied  
24 criticism.

25 The hourly rates, for example, what did Jason Forge



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1 do?

2 MR. DOWD: Jason Forge, your Honor? Jason Forge was a  
3 critical part of this team. He worked on the case primarily  
4 towards the end at summary judgment, when he got ready for  
5 trial. He did fantastic work with their damages experts. He  
6 was a former assistant U.S. attorney. He was an AUSA who did  
7 huge cases in LA and San Diego before I talked him into coming  
8 over to our firm. He's a great lawyer, your Honor. He's been  
9 in front of you. I don't think he argued in this case. He was  
10 certainly in the courtroom. He's argued in other cases that  
11 I've been on with him in front of this Court. So you've met  
12 him.

13 THE COURT: Now, the top billing rate of \$1,150 of  
14 Samuel Rudman, \$1,250, he only had 29 hours.

15 MR. DOWD: It's really, it's probably Mr. Coughlin,  
16 myself, and Mr. Robbins.

17 THE COURT: Several billing more than a thousand  
18 dollars. Those seem like New York rates rather than San Diego  
19 rates.

20 MR. DOWD: Well, Mr. Rudman is in New York. But I  
21 think you should look at the rates for lawyers that do this  
22 type of litigation. If you look, the *National Law Journal* said  
23 over a thousand dollars an hour is common now for partners. If  
24 you look at some of the firms on the other side of this case --

25 THE COURT: I wouldn't try.

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1 MR. DOWD: We submitted a declaration showing that  
2 Weil Gotshal -- and they were on the other side of this case,  
3 good lawyers -- we showed that they filed an application in the  
4 Sears bankruptcy earlier last year, and they had nine lawyers,  
5 at \$1500 an hour, and dozens at over a thousand dollars an  
6 hour. So higher than us.

7 THE COURT: The bankruptcy rates are out of sight, and  
8 that's often because the allowances are heavily discounted.

9 Tell me now how the other firms worked.

10 MR. DOWD: How did the other firms work? What did  
11 they do, your Honor?

12 THE COURT: What did they do, yes.

13 MR. DOWD: Well, I can tell you that, for example, if  
14 you just go down the list, if you start with Lowey Dannenberg,  
15 for example. They represented Corsair. And Corsair was a  
16 shareholder and class member for the Cole shares and also the  
17 May 2014 common stock offering. Corsair produced, I believe,  
18 145,000 pages of documents, all of which had to be reviewed for  
19 privilege. They were on our "will call" witness list. They  
20 are on, I believe, also a "may call" witness list. Their  
21 client was deposed. They also assisted with the summary  
22 judgment briefing on the discrete project that Ms. Wyman gave  
23 them.

24 THE COURT: What project was that?

25 MR. DOWD: Do you remember which briefing it was?

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1 MS. WYMAN: Your Honor, we needed some assistance with  
2 the research of some tricky issues, and we asked them to help  
3 us with that, and they prepared --

4 THE COURT: You what?

5 MS. WYMAN: We asked them to help us with some  
6 research and prepared an insert to one of the briefs.

7 MR. DOWD: So you're looking at, your Honor, document  
8 review, analysis of the claims, data collection, motion to  
9 dismiss, negotiation of discovery disputes. Ms. Wyman would  
10 have had to coordinate with them for what their --

11 THE COURT: You're taking it out of their declaration,  
12 what you just said.

13 MR. DOWD: Pardon me?

14 THE COURT: What you just read, is that from their  
15 declaration?

16 MR. DOWD: It's from their declaration, yes, your  
17 Honor, that was submitted.

18 THE COURT: Now, Motley Rice makes no description in  
19 its declaration. What did they do?

20 MR. DOWD: Motley Rice, your Honor, they had two  
21 clients in the case. They had the national sheet metal workers  
22 union. And they were on both the Cole and the May 2014  
23 offering. They were on our "will call" witness list,  
24 Mr. Myers. They had also Union Asset Management, which was a  
25 German entity that was on the July and December 2013 bond

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1 claims. They had two witnesses that they produced,  
2 Mr. Riechwald and Mr. Fischer, who came over from Germany, as I  
3 recall, to have their depositions taken. Similarly, Sheet  
4 Metal Workers had Mr. Myers, so they had three days of  
5 deposition testimony. And all three of those witnesses were on  
6 our "will call" witness list. They are coming.

7 They also assisted us, as I recall, with the motion to  
8 dismiss briefing that related, I think, to the Exxon exchange.  
9 They attended the first mediation. And they would have spent a  
10 lot of time on depo prep and the depositions. And they also  
11 would have interacted, I'm sure, with Ms. Wyman in terms of  
12 document production and disputes with the defendants, so that,  
13 you know, their views would be expressed to the defendants as  
14 well.

15 THE COURT: Johnson Fistel.

16 MR. DOWD: Johnson Fistel, your Honor, represented  
17 their client in the case. There was a class rep. It was Paul  
18 Matten. He was an ARCT IV shareholder. He was on our "may  
19 call" witness list, I believe. They also assisted, they gave  
20 us an associate who came to our office, I believe, in New York,  
21 and assisted with document review of the defendants' documents.  
22 They also produced documents for their client. And I believe  
23 Mr. Matten was also interviewed by the Department of Justice  
24 when they were insistent that they wanted one of our class  
25 reps, or a couple of our class reps, to be interviewed about

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1 their case.

2 THE COURT: Cohen Milstein.

3 MR. DOWD: Cohen Milstein, your Honor, represented the  
4 New York City funds. They were in the July 2013 offering, the  
5 Cole offering, the May 2014 offering. They produced two  
6 witnesses on behalf of the New York City funds, Horan and  
7 Jeter. They were both deposed. They were both on our "will  
8 call" witness list. They had, your Honor, as I recall,  
9 produced 190,000 pages of documents, which had to be reviewed.  
10 And they would have been involved, I'm sure, in checking class  
11 cert issues. And I believe they assisted also with the motion  
12 to dismiss briefing as well, your Honor. So they provided a  
13 valuable service. A lot of their work was related to New York  
14 City funds. Obviously, if we were trying a case in front of  
15 your Honor, in front of a New York jury, it would certainly be  
16 helpful to have New York City funds here.

17 THE COURT: What would they testify on?

18 MR. DOWD: They would have testified about their  
19 purchases in all the different offerings as class reps.

20 THE COURT: Those would have come in by stipulation.

21 MR. DOWD: Your Honor, they don't come in by  
22 stipulation.

23 THE COURT: Well, it's a matter of record what they  
24 bought and when they bought.

25 MR. DOWD: Yes. And no one says, we're going to

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1 stipulate to it, your Honor. I've tried a couple of these  
2 cases.

3 THE COURT: There would have been stipulations.

4 MR. DOWD: Well, I've tried cases, and there weren't  
5 stipulations.

6 THE COURT: You would not need any witnesses on this,  
7 and I don't know that the witnesses would have contributed  
8 anything.

9 I'm reacting because a million dollars for each of  
10 these law firms, given the \$65 million of lodestar that you put  
11 into the case, seems excessive.

12 MR. DOWD: I don't think it was, your Honor. I think  
13 what they did, in terms of their clients and document  
14 production, producing the documents, defending them at  
15 depositions -- we didn't take their depositions. The  
16 defendants deposed them.

17 THE COURT: I understand. But the knowledge of a  
18 class member is derivative and really irrelevant. The  
19 knowledge is derivative of what the lawyer finds and irrelevant  
20 because it doesn't prove any proposition against the  
21 defendants. I understand that these depositions are taken as a  
22 matter of course by defendants, and they have to be, the  
23 clients have to be represented and there's a certain time of  
24 preparation, but over a million dollars for each, without time  
25 records showing anything, I haven't seen any time records for

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1 them.

2 MR. DOWD: Well, your Honor, again, we started out  
3 from a different premise. We seek a percentage of the fee, a  
4 percentage of the fund, as our fee. And that's the trend in  
5 the Second Circuit. I know I've argued with your Honor about  
6 this in the past. But that's how we seek a fee. When my firm  
7 is working on a case --

8 THE COURT: I just don't do that, Mr. Dowd. I told  
9 you in the past, I believe that people who just do it on a  
10 basis of percentage do not want to go through the rigor of  
11 review and time. I'll award lodestar. And I'll be candid with  
12 you right now; you will get an award for your lodestar as well,  
13 not as much as you asked for, but you'll get an award. I'm not  
14 sure about those other firms. I don't know what they  
15 contributed. I don't have a justification of their time. I  
16 don't know what activities took up their time. I don't know  
17 how they distributed their work between partners and  
18 associates. I don't understand the substantial expense factors  
19 that they put into this case. It's hard questions.

20 MR. DOWD: They did break down their time by who the  
21 timekeepers were. And they also broke down their expenses.  
22 Those are attached to their declarations that they each  
23 submitted.

24 But, again, your Honor, when my firm goes into a case,  
25 we negotiated with TIAA. We negotiated for a percentage fee.

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1 And we're not sitting there thinking, let's bring in 50 for  
2 attorneys to sit in a room reviewing documents so we can build  
3 up our lodestar. And that's the problem with the lodestar  
4 analysis. I'm just being honest with your Honor. It  
5 encourages lawyers to hire for people that do nothing to add  
6 value to the case. And we don't do that.

7 THE COURT: You don't do that.

8 MR. DOWD: No, we don't. We work for a percentage.  
9 That's what we asked for. If we put people on an assignment,  
10 it's because we needed it done. You know, at summary judgment  
11 the defendants had like 60 people in the courtroom.

12 THE COURT: You had expenses paid outside bankruptcy  
13 counsel, \$171,000, so that they can file a motion in the  
14 bankruptcy court to get permission so that they could litigate  
15 in this court.

16 MR. DOWD: That's correct, your Honor.

17 THE COURT: That's a lot of money.

18 MR. DOWD: I understand that, your Honor. And when  
19 the Court ordered us to go protect those claims and get the  
20 stay lifted, we had to hire bankruptcy counsel. It's not  
21 like --

22 THE COURT: Did you pay them, or are they waiting to  
23 get paid?

24 MR. DOWD: No, we paid them.

25 THE COURT: You are out of pocket.



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1 MR. DOWD: That's out of pocket for us.

2 And, again, you know, there was a court order saying,  
3 you know, go defend the thing in bankruptcy. I'm not a  
4 bankruptcy lawyer.

5 THE COURT: That's right. It is a large amount.

6 MR. DOWD: I understand.

7 THE COURT: One is a simple motion, to lift stay,  
8 which is ordinarily granted in relationship to a large case  
9 like this.

10 MR. DOWD: And then I think they also had to keep  
11 monitoring it, and I think they probably made other  
12 appearances. I'm not positive -- I know they did. Right?

13 THE COURT: It's too high a fee.

14 MR. DOWD: I understand, your Honor. And we paid out  
15 of pocket. We're not trying to give money away. I mean, if  
16 you cut it, it just cuts my money. I don't think they're going  
17 to give it back.

18 THE COURT: Why weren't they required to make an  
19 application?

20 MR. DOWD: Because we didn't consider them part of a  
21 contingent fee. They wanted to get paid hourly, and that's  
22 what we paid.

23 THE COURT: You paid over a million dollars to  
24 Crowninshield Financial Research, Inc.

25 MR. DOWD: We absolutely did, your Honor.

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1 THE COURT: And you have people on in your firm who do  
2 the same work. No?

3 MR. DOWD: They do similar work. And frankly a lot of  
4 the partners at our firm know a lot about damages. I mean,  
5 that million dollars, your Honor, was, we had to spend it. I  
6 cannot tell you how much work they did.

7 THE COURT: Were they going to be witnesses?

8 MR. DOWD: Pardon me?

9 THE COURT: Were they going to be --

10 MR. DOWD: Yes. It's Dr. Feinstein. He also  
11 testified in front of you on class cert. He was going to  
12 testify again at trial, your Honor.

13 THE COURT: Was his deposition taken?

14 MR. DOWD: His deposition was taken four times, your  
15 Honor.

16 THE COURT: So this million dollars reflects that  
17 activity.

18 MR. DOWD: Absolutely. And the defendant has six  
19 experts, on just loss causation. And you throw in truth on the  
20 market, they had 12. And I guarantee you, because I've worked  
21 with some of them, they paid a lot more than a million dollars  
22 for their 12 guys or six people, whatever you want to call  
23 them.

24 THE COURT: They're not asking me to give them any  
25 allowances to have a law firm relationship with a client who

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1 will or will not pay, I think, in advance. I will not give you  
2 that. You paid William H. Purcell Consulting over \$350,000 --

3 MR. DOWD: We did.

4 THE COURT: -- for testimony concerning due diligence  
5 issues. I remarked that I did not see the due diligence issues  
6 as having experts. It was really a fact and a law issue.

7 MR. DOWD: Yes. And then defendants --

8 THE COURT: I understand that, given defendants'  
9 insistence to have experts of that like, and a certain degree  
10 of uncertainty whether they will or will not be able to use  
11 them, you need to have your own.

12 MR. DOWD: Correct. And they had three.

13 THE COURT: What about Harvey Pitt?

14 MR. DOWD: Harvey Pitt, your Honor --

15 THE COURT: \$200,000 to Harvey Pitt --

16 MR. DOWD: Like 198,000.

17 THE COURT: -- to trace securities.

18 MR. DOWD: Well, and he was also going to testify  
19 about the SEC regulatory framework.

20 THE COURT: I told you I wasn't going to allow that.

21 MR. DOWD: No, I think you said I could award for  
22 that. In fact, I'm pretty sure you awarded that --

23 THE COURT: No. When I commented, you said that he  
24 was going to trace shares, a job that an accountant could do.

25 MR. DOWD: I think you also said he could testify

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1 about the SEC regulatory framework as well.

2 THE COURT: No, I did not.

3 MR. DOWD: I think you did, your Honor.

4 And, you know, your Honor, a lot of Mr. Pitt's bill is  
5 because the defendant showed up with between 15 and 20 lawyers  
6 in Washington, D.C., to take his deposition for two days. At  
7 the end of the first day, I walked out, because I said, this is  
8 a waste of time. And then defendants filed a letter brief  
9 complaining that I had walked out. And we had to go back for a  
10 second day.

11 I didn't want to have Harvey Pitt get deposed twice to  
12 talk about stuff that, you know, frankly I thought was not that  
13 remarkable.

14 THE COURT: You have almost \$50,000 paid to John  
15 Barron and \$384,000 to the firm that Barron went to.

16 MR. DOWD: Correct. Barron.

17 THE COURT: Barron.

18 MR. DOWD: We could have had several experts on  
19 accounting. And we found a REIT auditor and accountant who was  
20 going to testify to both, as to the company and as to Grant  
21 Thornton. I think his expenses are very reasonable.

22 THE COURT: I find your lodestar reasonable, the rates  
23 appropriate and, in relationship to the work that you did,  
24 reasonable. I'll go into lodestar a bit later.

25 The next firm I want to hear from is Lowey Dannenberg.

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1 MR. SKELTON: Good morning, your Honor. Thomas  
2 Skelton of Lowey Dannenberg. Ms. Hart sends her apologies.  
3 She had a client meeting in California with a client who was in  
4 hospice care and may pass at any time and felt that she needed  
5 to keep that appointment.

6 THE COURT: Thank you.

7 MR. SKELTON: Your Honor, my firm represents the  
8 Corsair group of funds. They had a \$19 million loss and were  
9 the second largest shareholder at the lead plaintiff stage. We  
10 were obviously not appointed lead counsel. Throughout the  
11 course of the case, we took our direction from Robbins Geller.  
12 We worked on numerous aspects of the case, including, as set  
13 forth in Ms. Hart's declaration, motions to dismiss, motions  
14 for class certification, motions for summary judgment.

15 THE COURT: What did you do on the motion to dismiss?

16 MR. SKELTON: We did discrete projects and we reviewed  
17 motion papers at the direction of lead counsel, particularly in  
18 any issues that might have related to Corsair. And they would  
19 apply throughout the case. Much of our work was specifically  
20 directed to issues that related to Corsair. For example, one  
21 of the issues that went throughout the case was the issue of  
22 tracing, as Mr. Dowd alluded to. We were able to find  
23 documents through our document platform that showed, in  
24 connection with the May 2014 offering, that Corsair purchased  
25 shares at the offering price on the date of the offering from

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1 one of the underwriters at a price that was outside of the  
2 trading price on that given day.

3 THE COURT: That's an accountant's work for Corsair.  
4 Why was it your work?

5 MR. SKELTON: Corsair retained to us perform these  
6 services and to represent them in the case. And the issue was  
7 whether we could trace the shares to the offering. And our  
8 work, we did the work analyzing the documents and providing the  
9 information to --

10 THE COURT: But normally that work would be done  
11 internally within a company. Corsair is what, a management  
12 company?

13 MR. SKELTON: It's an investment manager, yes.

14 THE COURT: Investment manager.

15 MR. SKELTON: Yes.

16 THE COURT: An investment manager knows what he  
17 bought, what he sold, when he bought it, how much he paid.

18 MR. SKELTON: An investment manager would have had to  
19 find all the documents and analyze them. We analyzed them in  
20 the context of the arguments that the defendants were making  
21 regarding tracing. They argued that we couldn't trace the  
22 shares to the offering because shares are fungible and they're  
23 held electronically and therefore we couldn't recover on the  
24 Section 11 claims. And the client, this is --

25 THE COURT: You bought these shares on the offerings,

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1 did you not?

2 MR. SKELTON: Corsair brought the shares on the  
3 offering, yes.

4 THE COURT: Which offering did you buy on?

5 MR. SKELTON: The May 2014 offering, as well as Cole  
6 merger shares. But the offering at issue was the May 2014  
7 offering.

8 THE COURT: Did you buy from the underwriters?

9 MR. SKELTON: Yes.

10 THE COURT: So what was the big problem?

11 MR. SKELTON: The problem was that the defendants were  
12 arguing in the in limine motions and in summary judgment that  
13 we couldn't trace the shares to the offering because shares are  
14 fungible and, because we couldn't say that these particular  
15 shares did not exist before the offering, we couldn't recover  
16 on the Section 11 claim.

17 THE COURT: That's a legal issue.

18 MR. SKELTON: Yes. And we needed to argue that legal  
19 issue with supporting documents. And the documents we were  
20 able to find showed that Corsair purchased, on the date of the  
21 offering, at the offering price, from one of the underwriters.  
22 And we compared that to publicly available information that  
23 showed that the lowest trading price of the day was above the  
24 price at which Corsair purchased, so therefore they must have  
25 purchased on the offering. This is not a routine analysis that

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1 Corsair would do. They didn't understand the nuances of  
2 Section 11, of the 1933 Act. We did. They retained us to do  
3 this, and that was part of what we did. And we were able to  
4 establish, through documentary evidence, that the shares were  
5 purchased on the offering. And ultimately, your Honor ruled in  
6 favor of the plaintiffs on that issue.

7 Other matters that we dealt with --

8 THE COURT: What was your contribution to the result?

9 MR. SKELTON: Corsair was a certified class  
10 representative. They purchased the shares on the open market.  
11 They purchased shares in the Cole offering. They purchased  
12 shares in the May secondary offering. All of our work, your  
13 Honor, was done either at the direction of lead counsel or in  
14 consultation with lead counsel, and consult --

15 THE COURT: Did you take any depositions of the  
16 defendants?

17 MR. SKELTON: We did not, your Honor. We were not  
18 asked to do that.

19 THE COURT: So all you did was represent your client.

20 MR. SKELTON: Well, we represented our client, who had  
21 issues relating to the various -- the offering and the merger  
22 and common shares. We were asked to perform tasks on the  
23 summary judgment motion, on class certification.

24 THE COURT: In relationship to your client.

25 MR. SKELTON: Well, generally, in relation -- in



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1 relation to our client and other tasks that Ms. Wyman called me  
2 and asked me if we could do certain research projects related  
3 to omissions and related to the admissibility of the financial  
4 restatement, which was an earlier issue that came up during the  
5 case. Our client produced 145,000 pages of documents. We  
6 reviewed the documents for responsiveness and privilege. We  
7 dealt with issues relating to the ESI and follow-up questions  
8 from the defendants regarding the documents that were produced.  
9 Mr. Mishaan of Corsair was deposed. Mr. Rothman from Robbins  
10 Geller attended the prep sessions, worked with us to get ready  
11 for the deposition. He attended the deposition. And the  
12 deposition went very well, and Corsair was certified as a class  
13 representative by your Honor.

14 THE COURT: What did the interview with the Department  
15 of Justice and the Securities and Exchange Commission have to  
16 do with this lawsuit?

17 MR. SKELTON: Well, it involved parallel proceedings  
18 that the SEC and the U.S. Attorney's Office were contemplating  
19 bringing. They wanted to interview Corsair as a witness, and  
20 we prepared our client -- and he was the same person who was  
21 ultimately deposed.

22 THE COURT: So why should the class pay for that?

23 MR. SKELTON: Well, that was time that was spent  
24 learning facts that the government had, and they presented  
25 hypotheticals to us that helped us to understand some of the

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1 issues that they were considering. And we recognized that the  
2 government has different burdens of proof and different  
3 elements, but the underlying facts and the approach that the  
4 government was taking helped to us understand better the  
5 underlying facts in this case.

6 THE COURT: Why shouldn't that be a fee chargeable to  
7 your client, rather than to the class?

8 MR. SKELTON: Well, the information that we learned  
9 and that the client provided to the government was very similar  
10 to the information that was being argued in the case. The  
11 adjusted funds from operations was one of the issues that was  
12 discussed at that meeting. And we believed that that helped  
13 sharpen our focus. And Mr. Mishaan, who was the witness at the  
14 SEC and DOJ meeting, was also the deponent that Corsair  
15 proffered for his deposition.

16 THE COURT: These interviews with the Department of  
17 Justice and with the SEC were not on the record, were they?

18 MR. SKELTON: No, your Honor.

19 THE COURT: They couldn't be used in the lawsuit.

20 MR. SKELTON: No, they could not be used to be  
21 submitted as evidence. But it was helpful to us in  
22 understanding the government's approach and learning facts  
23 about the case that helped us proceed.

24 Just to put a finer point on it, your Honor, the  
25 interview was a short interview. It lasted a couple hours. We

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1 had a prep session the day before. It was not a lengthy period  
2 of time. But we do believe that the information that we  
3 learned during that process was helpful.

4 THE COURT: How much of your fees went into that?

5 MR. SKELTON: I could find it in our time sheets and  
6 submit this, your Honor, but it was probably six to eight hours  
7 of my time and a couple of hours of Ms. Hart's time.

8 MR. DOWD: Your Honor, could I just mention one thing?  
9 This happens in our cases sometimes, and it did here, where DOJ  
10 reaches out and says, we want a victim witness, and since you  
11 already have a lawsuit, we want your victim witness. And the  
12 first thing I say to them and I'm sure is what we said in this  
13 case -- I think Mr. Forge dealt with it -- is, get out of here,  
14 go find your own witnesses. And then they say, well, you know,  
15 if we want, we can subpoena your witnesses.

16 And so I think at times, you get stuck in this  
17 position with the U.S. Attorney's Office. And I say, you got  
18 to go in there and protect them because I don't know what  
19 they're going to write down, that your witness may or may not  
20 have said, and turn over in Jencks Act discovery before their  
21 trial.

22 And so you have to protect your witness. And it's not  
23 our fault, your Honor. We always tell them just go away, find  
24 your own witnesses, OK, you do your job, we'll do ours. It's  
25 not like they are going to help us.

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1           And I say that with all due respect. I used to be an  
2 assistant U.S. attorney, so --

3           THE COURT: One last question. If I were to give a  
4 lesser bonus to your and to the other firms than I give to  
5 Robbins Geller, would that it be unjust?

6           MR. SKELTON: Well, as I understand it, your Honor,  
7 Robbins Geller as lead counsel has the discretion, unless your  
8 Honor orders otherwise, to distribute the fees in accordance  
9 with its discretion as to the contributions that were made by  
10 the firms. We believe that our contribution was valid and  
11 meritorious, but of course Robbins Geller, they did the lion's  
12 share of the work, they took the depositions, they did a  
13 phenomenal job and they got a phenomenal result.

14           THE COURT: My thought was that I would make awards to  
15 each of your firms so that Robbins Geller would not have the  
16 burden of redistribution.

17           MR. SKELTON: That is certainly within your  
18 discretion, your Honor, to do that and to award what you think  
19 our firms' contribution was. We do believe we contributed to  
20 the success of the case. I believe that Robbins Geller agrees  
21 with that. Obviously Robbins Geller did the lion's share of  
22 the work. They took the depositions. And they created a  
23 tremendous result. So I'm not going to sit here and tell you  
24 that your Honor has to award me the same multiplier that  
25 Robbins Geller gets. They were lead counsel. But we do

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1 believe that our contribution was meritorious and that our time  
2 was valid and that our application should be granted.

3 THE COURT: Thank you.

4 MR. SKELTON: Thank you, your Honor.

5 THE COURT: Tell me your name again?

6 MR. SKELTON: Thomas Skelton from Lowey Dannenberg.

7 THE COURT: I'll hear Motley Rice next.

8 MR. DOWD: Your Honor, I'm not sure that all the  
9 co-counsel came. I mean, we were here to present for them,  
10 just like everything else in this case. We tried to keep a  
11 tight rein on everybody just so that there wouldn't be waste of  
12 time. And I'm pretty sure Cohen Milstein was here on Tuesday  
13 and they may have sent a different person today because they  
14 couldn't be here again today. But most of the people, we told  
15 them, we submitted your time and we'll argue for you. And  
16 that's typically the way we did things in this case. We didn't  
17 want ten firms showing up. I mean, the Court's order said, "As  
18 reported in yesterday's status conference, lead plaintiff's  
19 counsel, Robbins Geller, will work with and lead a working  
20 group of all interested plaintiff's counsel." And that's what  
21 we did.

22 THE COURT: I understand, Mr. Dowd. But I have to  
23 examine the reasonableness of all the constituent parts of your  
24 fee, of your fee request, notwithstanding that you're  
25 requesting for everybody.

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1 I'm looking at Mr. Levin's declaration, Mr. Levin  
2 being a member of Motley Rice. That firm does not have offices  
3 in New York, does it?

4 MR. DOWD: I don't know whether they have an office in  
5 New York.

6 They do. Mr. Rothman says they do.

7 THE COURT: But the lawyers that worked on the case,  
8 were they from the New York office or another office?

9 MR. ROTHMAN: There was one lawyer who was either from  
10 Westchester or Kentucky, maybe from Connecticut, and the rest,  
11 Mr. Levin is in the South Carolina office.

12 THE COURT: It doesn't seem to be right to charge for  
13 transportation. I will disallow that charge.

14 I don't know what they did. What did they do in the  
15 case?

16 MR. DOWD: Well, I talked to you about that already,  
17 your Honor. They had the sheet metal workers. They produced  
18 Mr. Myers for his deposition. They also had Union Asset  
19 Management.

20 THE COURT: Tell me what they did to contribute to the  
21 victory.

22 MR. DOWD: Well, that does contribute to the victory,  
23 your Honor. You're producing deponents and witnesses who  
24 bought different offerings that contribute to the victory. I  
25 mean, they flew these guys over, as I understand it, from

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1 Germany to have their depositions taken, which is probably part  
2 of the travel expenses in this case. They assisted with the  
3 motion to dismiss briefing on the Exxon exchange. They  
4 attended the first mediation. They did all that depo prep and  
5 depo work. They produced respectively about, between them, the  
6 two plaintiffs, over 26,000 pages of documents, your Honor.

7 THE COURT: Johnson Fistel.

8 MR. DOWD: Johnson Fistel we talked about as well.  
9 That was Paul Matten. He was one of the ARCT IV witnesses.  
10 They also assisted with the document review. They lent us an  
11 associate to assist with document review.

12 They also produced about 1100 pages of documents on  
13 behalf of Mr. Matten. I believe their client was also  
14 interviewed by the DOJ.

15 THE COURT: The Weiss law firm, are they here? Is  
16 Weiss here?

17 MR. DOWD: I don't believe so, your Honor. Again, we  
18 kept tight reins on everybody to try to keep the numbers down.

19 THE COURT: This is an interest in their fee, not a  
20 matter of -- they're not getting paid for coming here today.  
21 They just have an interest in getting paid.

22 What about the Weiss law firm? What did they do?

23 MR. DOWD: Their client was Simon Abadi. He was, I  
24 believe, in the Cole offering. And they produced documents for  
25 their client. Their client was deposed in the case. He was on

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1 one of the "may call" witness lists. And so they did do work  
2 that related to their client in the case.

3 THE COURT: Stull Stull & Brody.

4 MR. DOWD: Stull Stull & Brody represented  
5 Dr. Esposito and another gentleman named Noah Bender. Esposito  
6 was one of the witnesses that really gave a standing on ARCT  
7 IV. He was together with Mr. Matten. But Dr. Esposito was  
8 deposed, and he was on our "will call" witness list because he  
9 gave a standing on the ARCT IV issue. And so they would have  
10 represented Dr. Esposito at his deposition and assisted with  
11 anything related to Dr. Esposito's briefing.

12 THE COURT: Gardy & Notis.

13 MR. DOWD: Gardy & Notis, your Honor, they had a  
14 client who was not named as a class rep in this case named  
15 Shenker. I think that he sought lead plaintiff appointment.  
16 However, because they were on the Cole exchange, they went down  
17 to Maryland because there had been a securities case against  
18 Cole, and they tried to make sure, their primary role was to  
19 make sure that our claims, our claims asserted in this case,  
20 didn't get cut out in the release in the Maryland Cole case.  
21 Not only did they argue below in this case, in the district  
22 court, but then I believe they also argued it on appeal as  
23 well, your Honor. And so that was their main role in the case,  
24 was objections and appeals in the Cole case to protect our  
25 clients to make sure their claims didn't get released in



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1 Maryland, in sort of an end-around. And so that was the work  
2 we gave them to do, and they did it, and they did it well.

3 THE COURT: The Polaszek Law Firm.

4 MR. DOWD: The Polaszek Law Firm represented the City  
5 of Tampa funds. They were on the May 2014 offering. They  
6 produced their client, who was one of the class reps, was  
7 Ernest Carrera, on behalf of Tampa, obviously, and he was on  
8 our "may call" witness list at the end of the day. They  
9 produced documents. Their client was deposed.

10 Frequently, when I looked at their lodestar, I was  
11 thinking I would have thought it would have been higher. But  
12 that was just my view.

13 THE COURT: Cohen Milstein.

14 MR. DOWD: Cohen Milstein we discussed. They  
15 represented the New York City funds. They were on a host of  
16 offerings, I think three different offerings. They produced  
17 two witnesses, Mr. Horan and Mr. Jeter. They were both  
18 deposed. They were both on our "will call" witness list. They  
19 did significant work in the case. They produced 190,000 pages  
20 of documents that had to be reviewed for privilege and  
21 responsiveness. And they also assisted with the motion to  
22 dismiss briefing in the case, as I recall. And so I think that  
23 their work was very good, and they did a good job, and helped  
24 us with the case.

25 MR. LOMETTI: Your Honor, I'm sorry. It's Chris

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1 Lometti from Cohen Milstein. Julie Reiser was here on Tuesday,  
2 is in court in California, had a mediation, actually, in  
3 California today. She couldn't be here. I'm here if you have  
4 any additional questions.

5 But I think there may have been four offerings that  
6 the New York City funds were involved with.

7 THE COURT: Did you take part in any depositions  
8 against defendants?

9 MR. LOMETTI: No, your Honor.

10 THE COURT: Or any motions?

11 MR. LOMETTI: I think the firm worked on the motion to  
12 dismiss, on class cert issues, and I believe -- Michael,  
13 correct me if I'm wrong -- but there was some work that the  
14 firm did in relation to the investment managers in general.  
15 New York City funds had five investment managers, and there was  
16 a time where the defendants were possibly wanting to depose  
17 some or all of them and we had to fight that, and which we did  
18 successfully. And we may have been involved with other  
19 investment manager-type issues as well in the case, your Honor.

20 MR. DOWD: That's correct, your Honor.

21 THE COURT: Thank you.

22 And Levi & Korsinsky.

23 MR. DOWD: They had clients Mitchell and Bonnie Ellis.  
24 They were on the ARCT IV offering. They were on our "may call"  
25 witness list. They produced documents. The defendants did not

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1 take their depositions. I noted that their expenses were zero,  
2 which was consistent with that. But that would have been their  
3 primary role: protecting their client, producing documents,  
4 reviewing them, and responding to issues on motion to dismiss  
5 that dealt with their clients.

6 THE COURT: If I were to give you whatever I give you,  
7 as a fee for everyone, what would be the methodology of  
8 distribution?

9 MR. DOWD: What would be our process? I think we  
10 would have to --

11 THE COURT: Your theory of distribution.

12 MR. DOWD: We would have to look at what everyone did  
13 and then figure out how to divide it. A large part of it would  
14 be based on what the Court ordered and how much we got, and we  
15 would have to think that through and then talk to the firms and  
16 make a decision. That's what would happen. It's not like  
17 there's some mathematical equation that we use.

18 THE COURT: I feel I want to reward your law firm more  
19 than the others proportionally.

20 MR. DOWD: Your Honor, I will say this. In this case,  
21 we kept those co-counsel to 10 percent of our lodestar,  
22 basically. And they did work on the case. And they did good  
23 work, with everything they had to do. And they cooperated with  
24 us. And they worked with their witnesses. And it added value  
25 to the case. I don't think it's fair --

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1 THE COURT: I'm sure they did. But the driving force  
2 in this case --

3 MR. DOWD: Absolutely.

4 THE COURT: -- and the reason that the result is  
5 uncommon, was the work of your firm.

6 MR. DOWD: I understand, your Honor. But I can't  
7 stand here and denigrate these other firms that I feel made a  
8 legitimate contribution to this case. And I won't do it.

9 THE COURT: OK. I'll take a short break and then  
10 I'll --

11 MR. DOWD: Your Honor, I would like to address some  
12 other issues too for the Court's consideration.

13 THE COURT: Go ahead.

14 MR. DOWD: Is that all right?

15 THE COURT: Yes, go ahead.

16 MR. DOWD: Because I know the Court goes with the  
17 lodestar approach. I understand. But, you know, in this case,  
18 TIAA, the lead plaintiff, did a great job. And the Court  
19 actually said they did an excellent job in this case. They  
20 held our feet to the fire. We had an ex ante negotiated fee  
21 agreement with them, before we were appointed lead plaintiff,  
22 calling for 12.4 percent of the fee.

23 THE COURT: How much?

24 MR. DOWD: 12.4 percent. You have to do some math on  
25 it. But that's what it comes out to. That's where the 127

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1 million comes from, your Honor.

2 TIAA is one of the largest retirement systems in the  
3 world, your Honor. They have almost a trillion dollars in  
4 assets.

5 THE COURT: I'm familiar with that.

6 MR. DOWD: All I'm saying is, they're used to dealing  
7 with lawyers, and they drove a good bargain on behalf of  
8 themselves and the class at 12.4 percent. If you look at the  
9 Second Circuit law, it says an ex ante negotiated fee  
10 agreement, the Second Circuit has said, should be given serious  
11 consideration by the court. Other judges in this court have  
12 said it's entitled to a presumption of reasonableness or  
13 correctness, starting with Judge Lynch, back in the *Global*  
14 *Crossing* case, probably almost 15 years ago.

15 THE COURT: From the point of view of a client wanting  
16 to litigate, there's a choice of paying as you go on a time  
17 basis, but the model for defendants is, the client takes each  
18 bill that comes and looks at it and says, well, I don't need  
19 this service or that service or you billed me too much on that,  
20 and you make adjustments. And at the end of the day, when you  
21 have a recovery, if the client has been paying you on a time  
22 basis and you want a bonus, the client will often say, well, I  
23 hired you because you're good, and I hired you because I'm  
24 willing to pay the high rates that you charge. So why should I  
25 also pay a bonus?

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1           You're getting a percentage from TIAA in lieu of pay  
2 as you go. Therefore you've had to wait. And therefore, from  
3 the perspective of TIAA, which is one of the beneficiaries of  
4 many in this lawsuit, it's not really arm's-length bargaining.

5           MR. DOWD: It is, though, your Honor.

6           THE COURT: It's an indication.

7           MR. DOWD: I understand.

8           THE COURT: I accept it as an indication.

9           MR. DOWD: I'll telling you just what some other  
10 courts have said.

11          THE COURT: I understand.

12          MR. DOWD: That 12.4 --

13          THE COURT: I understand some give lodestar and some  
14 give percentages.

15          MR. DOWD: Right.

16          THE COURT: I give lodestar. I don't give  
17 percentages.

18          MR. DOWD: But the negotiated fee agreement is given a  
19 presumption of reasonableness in courts. And that 12.4  
20 percent, your Honor, it's lower, lower than what a lot of  
21 people get. It is a contingent fee. We're not getting paid by  
22 the hour. It's contingent-fee litigation. And people do it on  
23 a percentage basis. That's how it works. And in this  
24 courthouse last year somebody got 25 percent on 250 million.  
25 The Second Circuit in November affirmed 13 percent on 2.3

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1 billion, your Honor, in a case.

2 THE COURT: The Court of Appeals does not want to  
3 substitute itself for my judgment in the case. It's tough  
4 work. There are very few legal principles involved.

5 MR. DOWD: Your Honor, can I just ask you to consider  
6 two other issues?

7 The defendants, in connection with the audit committee  
8 investigation and, you know, our suit, as well as other issues,  
9 totaled \$264 million that they spent. Now, that's not just our  
10 case.

11 THE COURT: Say that again.

12 MR. DOWD: 264 million.

13 THE COURT: Who?

14 MR. DOWD: The defendants. That's what ARCP paid for  
15 everything that resulted from the audit committee  
16 investigation, a lot of which we had to duplicate and a lot of  
17 which was probably directly on our case. They spent \$69 1/2  
18 million just in the first three quarters of 2019. In the first  
19 three quarters of 2019 I know the lion's share of that money  
20 had to be defending our case. 69 1/2 million, that's more than  
21 my lodestar, just for three quarters last year.

22 I would ask the Court to consider that. These numbers  
23 are not crazy.

24 When you look at what happened in this case, your  
25 Honor, I mean, the quality of the representation, I can tell

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1 you, your Honor --

2 THE COURT: I'm not going to cut your lodestar, if  
3 that's what you're worrying about.

4 MR. DOWD: No, no, I'm not worried about that. I'm  
5 worried about trying to get more than my lodestar.

6 THE COURT: You'll get more.

7 MR. DOWD: I would like to get as much as I could.

8 THE COURT: I could give you all 12.2 percent, but I'm  
9 not going to give you that much.

10 MR. DOWD: All right, your Honor. Just consider this.  
11 Bloomberg News, 2017, had an analyst that said this case would  
12 settled for between 33 and 117 million dollars. We got 1.052  
13 billion. Last summer, JPMorgan said, based on what they paid  
14 the opt-out litigants in this case, which were huge funds, huge  
15 funds -- Vanguard, PIMCO, BlackRock -- they said that we get  
16 450. And we got 1.025 billion, your Honor.

17 I just, I can't sit down before I tell you that. I  
18 mean, we did a remarkable job. And we should benefit from  
19 that -- for not taking the 450 and coming in and getting the  
20 same lodestar award, for saying, no, we're going to roll the  
21 dice on summary judgment and make this case worth more for the  
22 class, your Honor. And that's what we did. And we should be  
23 rewarded for taking that risk.

24 That's all I ask the Court to consider. I know the  
25 Court wants to rule, and I don't want to belabor it, but I ask



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1 you to consider that.

2 THE COURT: What did you perceive to be the risk, the  
3 probability, of my granting summary judgment to the defendant?

4 MR. DOWD: I don't know. To be honest, your Honor, I  
5 thought that we could very possibly get thrown out on Grant  
6 Thornton, who ended up paying 50 million --

7 THE COURT: What did you think that?

8 MR. DOWD: I don't know. Because I think that  
9 auditors get out of these cases an awful lot. I think they did  
10 a study and only like 2 percent --

11 THE COURT: They were not responsible for the AFFO --

12 MR. DOWD: Exactly.

13 THE COURT: But they were responsible to know how  
14 their numbers were being used.

15 MR. DOWD: No, I understand that.

16 THE COURT: And their numbers were being used in a way  
17 that you considered and you were likely to prove to be false  
18 and misleading.

19 MR. DOWD: But it was a risk. And you look at some of  
20 these other people that filed opt-out cases, they weren't  
21 taking that risk.

22 THE COURT: I don't mean to denigrate what you did.  
23 Because I think what you did was very good. A 50 percent  
24 discount of proveable damage is a much lower figure than that,  
25 because the number of over \$2 billion ascribable to the overall

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1 damage is subject to many, many pitfalls, failures of claims  
2 and the like. So your achieving over a billion dollars is  
3 highly significant.

4 MR. DOWD: Thank you.

5 THE COURT: And I don't want to take away from it. I  
6 think you did outstanding work. I think you have to be  
7 rewarded for your persistence and your stubbornness and for  
8 your leadership in the case. You stood up to the most powerful  
9 law firms in the City of New York and were their equal.

10 MR. DOWD: Thank you, your Honor.

11 THE COURT: However, your lodestar rates for partners  
12 are pretty high.

13 MR. DOWD: They're also lower than the rates of the  
14 firms on the other side.

15 THE COURT: Yes. But they had to get it on a  
16 pay-as-you-go basis, and you're getting it from me.

17 MR. DOWD: Well, that's even better, your Honor.

18 THE COURT: You have a significantly lower expense.

19 MR. DOWD: They're \$1500 an hour, your Honor.

20 THE COURT: I know.

21 MR. DOWD: They got it in 2014 and 2015, some of these  
22 firms. That money is worth 50 percent more now, because they  
23 got it then and they had higher rates than us. You know, I  
24 mean, it's not -- our rates are not high, you know what. I  
25 mean --

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1 THE COURT: We have an imperfect world.

2 MR. DOWD: I understand that. But, you know, my world  
3 isn't much different from theirs when it comes to, you know,  
4 meeting salary obligations and funding expenses and everything  
5 else. I don't get paid on the 30th day of every month like  
6 they do.

7 THE COURT: Is the transportation from San Diego --  
8 you're in San Diego, right?

9 MR. DOWD: Yes, your Honor.

10 THE COURT: And Ms. Wyman is in San Diego.

11 MR. DOWD: Yes.

12 THE COURT: Are your transportation costs chargeable  
13 as an expense?

14 MR. DOWD: Yes, it is an expense.

15 THE COURT: You're taking advantage of a lower cost  
16 structure in San Diego, significantly lower structure.  
17 Charging the transportation cost and asking to be paid New York  
18 rates, that's significant.

19 MR. DOWD: Your Honor, our transportation costs were  
20 significantly higher because we cut out a lot of the airline  
21 fees. So out of pocket I'm losing about 130 grand on that,  
22 your Honor.

23 THE COURT: I'll take a short recess.

24 (Recess)

25 THE COURT: I've considered the arguments, read the

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1 fee justifications and the expense itemizations. I find the  
2 lodestars of each of the firms reasonable and appropriate and  
3 the expenses reasonable as well.

4 My award for all of the counsel who will be sharing  
5 this fee is \$100 million, plus allowance of expenses of  
6 \$5,164,539.91.

7 It comes out to a multiplier of 1.376, but regardless  
8 of the accuracy of my arithmetic, the number is \$100 million of  
9 fee and \$5,164,539.91.

10 I believe that, in this case, as I said before, the  
11 services delivered by the Robbins Geller firm were outstanding,  
12 that Ms. Wyman, Mr. Dowd, and your colleagues, Mr. Rothman, did  
13 outstanding work. I think in the fees of some of the other  
14 firms it was hard for me to see the same amount of  
15 productivity, in terms of obtaining the result, and in some  
16 cases whether or not all the fees that were presented were fees  
17 that should be allowed. But it's very hard to pierce through  
18 this, as Mr. Dowd has suggested that everything went into the  
19 final result, and so I determined that each of the firms would  
20 be considered as having had a full lodestar, and that the  
21 add-on, the bonus, would be done in the aggregate for all  
22 firms.

23 How the fees are ultimately allocated is something, I  
24 guess, the firms are going to have to work out for themselves.  
25 As I understand it, I have no continuing jurisdiction, should

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1 there be any dispute.

2 There's no interest to be awarded on this amount. It  
3 will be paid, how did you say, about third, Mr. Dowd, one third  
4 on when?

5 MR. DOWD: Yes, your Honor. There's a third now, a  
6 third in 90 days, and a third on the initial distribution, the  
7 big distribution.

8 THE COURT: OK. And it will be payable by the funds  
9 that have already been paid by the defendants.

10 MR. DOWD: Yes, your Honor. The money, we got the  
11 money in October, your Honor.

12 THE COURT: All the money.

13 MR. DOWD: Yes. And that actually, if we had awaited  
14 the final approval like a lot of firms do -- they don't fight  
15 for that. We've made the class about \$4 million on that alone,  
16 just by standing, holding out for that.

17 THE COURT: That's not unusual. Payment on the  
18 agreement.

19 MR. DOWD: A lot of people won't fight for it anymore,  
20 your Honor.

21 THE COURT: OK. That's my award. And I congratulate  
22 all of you. Thank you very much.

23 MR. DOWD: Thank you, your Honor.

24 MS. WYMAN: Thank you, your Honor.

25 MS. GUSIKOFF STEWART: Thank you, your Honor.

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1 MR. HOUSTON: Your Honor --

2 THE COURT: Two minutes.

3 MR. DOWD: Your Honor, we have an order that we  
4 adjusted, I think we filed it yesterday, to reflect a third, a  
5 third, a third. And I think our expenses went down about  
6 \$9,000.

7 THE COURT: Hand it up. Then I'll talk to  
8 Mr. Houston.

9 MR. DOWD: Oh, it has a percentage in it. So if you  
10 want us to just submit one later?

11 THE COURT: Yes.

12 MR. DOWD: Or I can write it in now, whichever you  
13 prefer.

14 THE COURT: You can write it in now.

15 Meanwhile, I'll hear from Mr. Houston.

16 MR. HOUSTON: Your Honor, very briefly. We had a  
17 couple issues with process on the submissions in the derivative  
18 matter. We have asked for, with counsel for VEREIT, that we be  
19 given the opportunity to file a reply statement once they have  
20 gone through our time records and identified their issues. We  
21 think this will create the greatest and clearest record.

22 THE COURT: I think this is what you do. Without  
23 giving me anything, give Mr. Edelman what you propose.

24 Mr. Edelman will then give you his objections. You will  
25 negotiate to whatever extent you feel appropriate. And then

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1 there will be a filing on a joint basis, just the way you do  
2 with a 2(e) letter, so I don't get separate filings. So just  
3 give me the outside date by which you can accomplish all that.  
4 Discuss it with Mr. Edelman. And then we'll issue an order.

5 MR. HOUSTON: Your Honor, that was the second issue.  
6 We have discussed some dates. We had asked for a month to put  
7 together the records in accordance with your Honor's directive  
8 on Tuesday.

9 THE COURT: How much time do you want?

10 MR. HOUSTON: OK. So we'll take that month.  
11 Mr. Edelman, how long do you want? Do you want your two weeks  
12 that you suggested, or longer than that, to review what we are  
13 submitting?

14 MR. EDELMAN: Your Honor, so as I understand it, you  
15 want us to do a joint letter.

16 THE COURT: At the end.

17 MR. EDELMAN: At the end?

18 THE COURT: Outlining the positions.

19 MR. EDELMAN: And do you want us to be limited to the  
20 page limits? Because as I understand it, Mr. Houston is  
21 planning on now submitting a different set of time records.

22 THE COURT: What do you propose?

23 MR. EDELMAN: I would propose that Mr. Houston submit  
24 whatever he wants to submit. To the extent that there was  
25 stuff in the time records that shouldn't have been in there,

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1 take them out, put them in a letter responding to our position.  
2 We put in a letter responding to that. And then your Honor is  
3 in a position to decide. And we do it as quickly as we can.  
4 We've already had extensive briefing and argument on this.

5 MR. HOUSTON: The only problem with that is that we  
6 never did get the chance to respond to the initial issues. And  
7 Mr. Edelman has already said that, on review of the next  
8 submission of records, there may be additional issues.

9 THE COURT: Mr. Houston, February 21, you file with  
10 the Court your submission, backed up by whatever supporting  
11 data you think is appropriate.

12 Mr. Edelman, on March 13, you respond.

13 MR. EDELMAN: Thank you, your Honor.

14 THE COURT: And Mr. Houston, another week, March 20,  
15 to reply. And I'll endeavor to decide on the papers or, if I  
16 need to see you, I'll do that as well.

17 OK? Are those dates satisfactory?

18 MR. EDELMAN: Thank you, your Honor.

19 MR. HOUSTON: Yes. Thank you, your Honor.

20 THE COURT: All right.

21 Anything further?

22 MR. EDELMAN: Yes. Your Honor, on behalf of VEREIT  
23 and, I think, all the counsel, we want to thank you for all  
24 your work and your attention and your good humor throughout  
25 what was a very contentious fight. Thank you.



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1 MR. DOWD: Thank you, your Honor. And I would also  
2 thank your staff as well. They were fabulous too.

3 THE COURT: Yes. The staff is fantastic and they make  
4 people look good, to the extent I look good. Metaphorically  
5 speaking.

6 It's been a pleasure to have you. It's not common to  
7 have a case this well argued, this well presented. There were  
8 lots of discovery issues throughout. Your ability to cooperate  
9 in this procedure that I have facilitated my work enormously,  
10 and where I couldn't resolve it, we had hearings on a short  
11 basis. My goal in this, which I don't suppose was  
12 accomplished, was to reduce transaction costs as much as  
13 possible and move the case along as much as I could. You'll  
14 judge me whether I succeeded or not, but that was my goal. And  
15 I think it was facilitated by the way you cooperated with each  
16 other, while at the same time representing your respective  
17 clients most zealously. So I thank you.

18 MR. DOWD: Thank you.

19 MR. EDELMAN: Thank you, your Honor.

20 MS. WYMAN: Thank you, your Honor.

21 THE COURT: When is finality, Mr. Dowd?

22 MR. DOWD: Well, there's no objection, so it should be  
23 30 days from judgment, which I believe the Court entered  
24 yesterday.

25 THE COURT: What about my not giving a fee award yet?

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1 I've done everything in the class action.

2 MR. DOWD: Oh, no, they are separate cases. They  
3 weren't even consolidated ever. They were coordinated for  
4 discovery but not consolidated, so my case is down right now,  
5 and it will be final in 30 days because there are no  
6 objections.

7 MR. EDELMAN: Also, it's our understanding that the  
8 derivative judgment makes that case final and the fee issue is  
9 separate.

10 THE COURT: Will be supplementary to the judgment.

11 MR. HOUSTON: Yes. That's right, your Honor.

12 THE COURT: OK. Thank you.

13 MR. DOWD: Thank you.

14 MR. EDELMAN: Thank you again, your Honor.

15 (Adjourned)

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# EXHIBIT D

K6BKDEUC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 NORBERT G. KAESS, et al,

4 Plaintiffs,

5 v.

09 CV 1714 (GHW) (RWL)  
Telephone Conference

6 DEUTSCHE BANK AG, et al.,

7 Defendants.

8 -----x  
New York, N.Y.  
9 June 11, 2020  
4:30 p.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13 APPEARANCES

14 GLANCY PRONGAY & MURRAY LLP  
15 Attorneys for Plaintiffs

16 BY: BRIAN P. MURRAY  
-and-

17 ROBBINS GELLER RUDMAN & DOWD LLP

18 BY: THEODORE J. PINTAR  
ERIC NIEHAUS  
KEVIN LAVELLE

19 CAHILL GORDON & REINDEL LLP  
20 Attorneys for Deutsche Bank Defendants

21 BY: DAVID JANUSZEWSKI  
SAMUEL MANN

22 SKADDEN ARPS SLATE MEAGHER & FLOM LLP  
Attorneys for Underwriter Defendants

23 BY: WILLIAM J. O'BRIEN  
ANDREW BEATTY

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1 (The Court and all parties appearing telephonically)

2 THE COURT: This is Judge Woods.

3 Is there a court reporter on the line?

4 (Pause)

5 THE COURT: Let me just say a few words at the outset  
6 of today's conference.

7 First, you should conceive of this conference as if it  
8 was happening in the courtroom. As you know, the dial-in  
9 information for this call is publicly available; members of the  
10 public and the press are welcome to dial in.

11 Second, let me ask you to all keep your phones on mute  
12 at all times when you're not speaking on the phone. I can hear  
13 some background noise right now, shuffling some paper. We  
14 should not hear any background noise during the course of the  
15 conference. Please keep your phones on mute at all times when  
16 you are not speaking during the conference. That will help us  
17 to keep a clear record of what we say today.

18 Third, I'd like to ask each of the people who will  
19 speak during this conference to please identify themselves each  
20 time that they speak during this conference. So, if you speak  
21 during this conference, you should say your name each time that  
22 you speak. You should do that regardless of whether or not  
23 you've spoken previously during the conference. That will help  
24 us to keep a clear record of today's conference.

25 Last, as you've heard, there is a court reporter on

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1 the line. You should not be surprised if he chimes in at any  
2 point. If he does, and if he asks you to do something to help  
3 him to hear or understand what you're saying, please do what he  
4 asks. That will help us to, again, keep a clear record of the  
5 conference today.

6 Because there is a court reporter on the line  
7 transcribing the conference, I'm ordering that there be no  
8 recordings or rebroadcasts of any portion of the conference.

9 So, with those introductory remarks in hand, let me  
10 turn to the parties.

11 I'd like to ask for counsel for each side to identify  
12 counsel who are on the line for each of the parties and any  
13 representatives for each of the parties. What I'm going to ask  
14 is that, if you can, that one person from each side identify  
15 herself and the members of her team; that way, we won't have to  
16 hear many people chiming in at a time.

17 So let me begin with counsel for plaintiffs.

18 Who's on the line for plaintiffs?

19 MR. PINTAR: Good afternoon, your Honor. It's Ted  
20 Pintar, and I'm here with Eric Niehaus and Kevin Lavelle, from  
21 Robbins Geller Rudman & Dowd, for plaintiffs.

22 THE COURT: Good. Thank you very much.

23 Who is on the line for defendants?

24 MR. MURRAY: Excuse me. I hate to interrupt, but this  
25 is also for plaintiffs, Brian Murray, from Glancy Prongay &

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1 Murray. Sorry to interrupt you.

2 Now the defendants.

3 THE COURT: Fine.

4 Counsel for defendants?

5 MR. JANUSZEWSKI: Good afternoon, your Honor. This is  
6 David Januszewski, and I have my colleague, Samuel Mann. We  
7 are both from Cahill Gordon & Reindel, representing Deutsche  
8 Bank and the Deutsche Bank defendants. And on the line, we  
9 also have, from Deutsche Bank, Stella Tipi, in-house counsel at  
10 Deutsche Bank.

11 THE COURT: Good. Thank you very much.

12 So, counsel --

13 MR. O'BRIEN: I'm sorry. Good afternoon, your Honor.  
14 I just wanted to introduce myself and my colleagues. William  
15 J. O'Brien and Andrew Beatty, from the firm of Skadden Arps  
16 Slate Meagher & Flom, on behalf of the underwriter defendants.

17 THE COURT: Good. Thank you very much.

18 So, counsel, first, let me thank you all for being on  
19 the call. I scheduled this conference as a settlement hearing  
20 or approval hearing with respect to the proposed resolution of  
21 this case. I have reviewed all of the materials that have been  
22 submitted on the docket to date in connection with this matter.  
23 I'd like to hear, however, from each of the parties, to hear,  
24 in particular, if there's anything that any of you would like  
25 to add to any of your written submissions in connection with

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1 the proposed resolution of the case.

2 Let me begin with counsel for plaintiffs.

3 Counsel?

4 MR. PINTAR: Again, good afternoon, your Honor. Ted  
5 Pintar, for plaintiffs.

6 I had a number of things I wanted to mention just at  
7 the outset. Obviously, we're here on the final approval of an  
8 \$18.5 million settlement. We are very proud of that result.  
9 As we have indicated, and I won't repeat all of what's in the  
10 papers, but it represents a very significant percentage of  
11 reasonably recoverable damages.

12 On February 27, 2020, this Court entered its  
13 preliminary approval order. Pursuant to that order, notice was  
14 disseminated. The claims administrator mailed over 112,000  
15 notice packages, published the summary notice in the Wall  
16 Street Journal and Business Wire, and set up a settlement  
17 website where the notice and other settlement-related documents  
18 were posted.

19 And, as a result, there was one objection. It's not  
20 clear to me whether that has been withdrawn. I won't attempt  
21 to characterize Mr. Agay's email. We submitted it to the  
22 Court. He indicates, however, that he would not be  
23 participating today. There were only four opt-outs. And I do  
24 have some information on claims to date. Over 11,000 claims  
25 have been submitted, and they are still processing claims --



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1 the mailed claims, so that number is likely to rise even from  
2 there.

3 So, we believe that not only is it a good settlement,  
4 that the class has reacted very positively to it, and, as you  
5 know, today we're asking the Court to enter three orders: The  
6 final judgment, the order approving plan of allocation, and the  
7 order awarding attorneys' fees and expenses and award to class  
8 plaintiffs. Other than that, your Honor, I certainly don't  
9 have anything to add to our papers. I'm happy to address any  
10 questions the Court may have, though.

11 THE COURT: Good. Thank you very much, counsel.

12 Let me hear from each of the groups of defendants.

13 First, counsel for the Deutsche defendants.

14 MR. JANUSZEWSKI: Yes, your Honor. Again, this is  
15 David Januszewski, from Cahill Gordon.

16 We have nothing to add to what was submitted, which  
17 was designed to address the objection that my friend just  
18 addressed. We have nothing to add to that.

19 THE COURT: Good. Thank you very much.

20 Counsel for the remaining defendants, anything that  
21 you'd like to add to your written submissions?

22 MR. O'BRIEN: Yes. William O'Brien, from the firm of  
23 Skadden Arps Slate Meagher & Flom, on behalf of the underwriter  
24 defendants.

25 And like Mr. Januszewski, we have nothing further to

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1 add.

2 THE COURT: Good. Thank you very much.

3 Is there anyone else on the line who wishes to be  
4 heard?

5 So, hearing none, counsel, I'm going to approve the  
6 proposed resolution of this action, or series of actions. What  
7 I'd like to do is to ask you to place your phones, again, on  
8 mute, if you would, please. I'd like to review the reasoning  
9 for my decision. I'm going to do so now orally. At the end,  
10 I'll take up the two orders and judgment that the parties have  
11 proposed. Let me begin with, first, an overview.

12 So, I. Overview:

13 Plaintiffs brought this securities class action in  
14 February 2009 on behalf of all persons who purchased the  
15 7.35 percent Noncumulative Trust Preferred Securities of  
16 Deutsche Bank Capital Funding Trust X and/or the 7.60 percent  
17 Trust Preferred Securities of Deutsche Bank Contingent Capital  
18 Trust III securities from Deutsche Bank AG pursuant to public  
19 offerings from November 6, 2007, to February 14, 2008.  
20 Plaintiffs allege that defendants violated Sections 11,  
21 12(a)(2), and 15 of the Securities Act (the "Securities Act")  
22 and (15, U.S.C., Section 77k, 771(a)(2), and 77o) by omitting  
23 material facts from the offering documents. See declaration of  
24 Eric I. Niehaus ("Niehaus dec."), Docket No. 308, paragraph 3.

25 Since then, plaintiffs have extensively litigated this

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1 case. The parties have engaged in significant motion practice,  
2 and have completed fact discovery. Niehaus declaration  
3 paragraphs 3-4. Now, plaintiffs seek final approval of the  
4 class action settlement and approval of their plan for  
5 allocating the net proceeds of the settlement. Plaintiffs'  
6 counsel also seek an award of attorneys' fees and litigation  
7 costs, and the lead plaintiffs seek an award for expenses  
8 incurred while representing the class.

9 Judge Batts presided over this case for almost the  
10 entire time that it has been pending in this court. The case  
11 was reassigned to me on February 20, 2020, after Judge Batts'  
12 untimely death.

#### 13 II. Class Certification:

14 On October 2, 2018, pursuant to Rule 23 of the Federal  
15 Rules of Civil Procedure, Judge Batts granted plaintiffs'  
16 motion to certify a class defined as: All persons or entities  
17 who purchased or otherwise acquired the 7.35 percent  
18 Noncumulative Trust Preferred Securities of Deutsche Bank  
19 Capital Funding Trust X ("7.35 percent Preferred Securities"),  
20 and/or the 7.60 percent Trust Preferred Securities of Deutsche  
21 Bank Contingent Capital Trust III ("7.60 percent Preferred  
22 Securities"), pursuant or traceable to the public offerings  
23 that commenced on or about November 6, 2007, and February 14,  
24 2008. Excluded from the class are defendants, the officers and  
25 directors of Deutsche Bank, and the underwriter defendants at

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1 all relevant times, members of their immediate families and  
2 their legal representatives, heirs, successors, or assigns and  
3 any entity in which defendants have or had a controlling  
4 interest. Docket No. 224 at 10.

5 III. Approval of the Settlement Agreement:

6 Rule 23(e) requires court approval for a class action  
7 settlement to ensure that it is procedurally and substantively  
8 fair, reasonable, and adequate. Federal Rule of Civil  
9 Procedure 23(e). To determine procedural fairness, courts  
10 examine the negotiating process leading to the settlement.  
11 Wal-Mart Stores, Inc. v. Visa USA, Inc., 396 F.3d 96, 116  
12 (2d Cir. 2005). To determine substantive fairness, courts  
13 analyze whether the settlement's terms are fair, adequate, and  
14 reasonable according to the factors set forth in City of  
15 Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

16 The court examines procedural and substantive fairness  
17 in light of the "strong judicial policy favoring settlements"  
18 of class action suits. Wal-Mart Stores, 396 F.3d at 116. A  
19 "presumption of fairness, adequacy, and reasonableness may  
20 attach to a class action settlement reached in arm's-length  
21 negotiations between experienced capable counsel after  
22 meaningful discovery." Id. "Absent fraud or collusion,  
23 [courts] should be hesitant to substitute [their] judgment for  
24 that of the parties who negotiated the settlement." In re EVCI  
25 Career Colls. Holding Corp. Sec. Litig., 2007 WL 2230177, at \*4

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1 (S.D.N.Y. July 27, 2007).

2 A. Procedural Fairness:

3 The settlement is procedurally fair, reasonable,  
4 adequate and not a product of collusion. The settlement was  
5 reached after the parties had conducted a thorough  
6 investigation and evaluated the claims and defenses; the  
7 agreement in principle was reached after sessions with the  
8 Honorable Judge Layn R. Phillips, a former United States  
9 District Judge and an experienced mediator of securities class  
10 actions and other complex litigation. Niehaus declaration  
11 paragraph 6, 129. In advance of the mediation, the parties  
12 exchanged detailed mediation statements addressing both  
13 liability and damages. *Id.* The parties reached a final  
14 resolution on September 12, 2019, with the assistance of Judge  
15 Phillips, after formal mediation. *Id.*

16 B. Substantive Fairness:

17 The settlement is also substantively fair. The  
18 factors set forth in Grinnell provide the analytical framework  
19 for evaluating the substantive fairness of a class action  
20 settlement. The Grinnell factors are: (1) the complexity,  
21 expense, and likely duration of the litigation; (2) the  
22 reaction of the class; (3) the stage of the proceedings and the  
23 amount of discovery completed; (4) the risks of establishing  
24 liability; (5) the risks of establishing damages; (6) the risks  
25 of maintaining the class action through the trial; (7) the

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1 ability of the defendants to withstand a greater judgment; (8)  
2 the range of reasonableness of the settlement fund in light of  
3 the best possible recovery; and (9) the range of reasonableness  
4 of the settlement fund to a recovery in light of all of the  
5 attendant risks of litigation. Grinnell 295 F.2d at 463.  
6 Litigation here through trial will be complex, expensive, and  
7 long. It has been complex, expensive, and long. Thus, the  
8 first Grinnell factor weighs in favor of final approval. See  
9 In re Payment Card Interchange Fee & Merch. Disc. Antitrust  
10 Litig., 330 F.R.D. 11, 36 (E.D.N.Y 2019) ("Settlement is  
11 favored if settlement results in substantial and tangible  
12 present recovery, without the attendant risk and delay of  
13 trial.").

14 With respect to the second factor, the class members'  
15 reaction to the settlement has been overwhelmingly positive.  
16 Of the 112,397 notice packets mailed to potential members of  
17 the settlement class, four exclusion requests were received.  
18 Supplemental declaration of Ross D. Murray (Supplemental Murray  
19 Dec.") Docket No. 324, Paragraphs 4, 6. Only one class member,  
20 Mr. Richard Agay, objected. See Richard Agay letter ("Agay  
21 letter") Docket No. 320-21.

22 That objection did not challenge the settlement, the  
23 resolution of this case, the reasons for the settlement, the  
24 manner in which class plaintiffs and lead counsel prosecuted  
25 the litigation, the work lead counsel performed, or lead

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1 counsel's fee and expense application. Instead, the objection  
2 asserted only that Mr. Agay received his copy of the notice  
3 late, and that he was confused by certain aspects of the  
4 submission, and that the claims administrator did not  
5 sufficiently respond to Mr. Agay's telephonic inquiry. On  
6 June 5, 2020, Mr. Agay emailed lead counsel in an email that I  
7 construe as him withdrawing his objections, perhaps because he  
8 recognized that he was apparently persuaded by the response of  
9 the parties showing that he was not entitled to recovery in the  
10 suit. See Docket No. 329. While Mr. Agay received his notice  
11 later than expected, he received it with enough time to submit  
12 objections, and the delay was caused by a failure at his  
13 broker. His objection does not suggest that the overall  
14 distribution or notice program was ineffective in design or  
15 execution.

16           The absence of objections, with the exception of one  
17 retail investor, who literally withdrew his objection, coupled  
18 with the minimal number of requests for exclusion, strongly  
19 supports the finding that the settlement plan of allocation and  
20 fee and expense requests are fair, reasonable, and adequate.  
21 See *In re Citigroup, Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382  
22 (S.D.N.Y. 2013); *In re Bisys Sec. Litig.*, 2007 WL 2049726, at  
23 \*1 (S.D.N.Y. July 16, 2007); *In re Veeco instruments Inc. Sec.*  
24 *Litig.*, 2007 U.S. Dist. LEXIS 85629, at \*40.

25           In sum, the overall favorable response demonstrates

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1 that the class approves of the settlement and supports final  
2 approval.

3           The plaintiffs completed fact discovery, so counsel  
4 "had an adequate appreciation of the merits of the case before  
5 negotiating." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 475  
6 (S.D.N.Y. 2013) (quoting *In re Warfarin Sodium Antitrust Litig.*,  
7 391 F.3d 516, 537 (3rd Cir. 2004); see also Niehaus declaration  
8 paragraph 5. Lead plaintiffs spent significant time and  
9 resources analyzing and litigating the legal and factual issues  
10 of this case, including an extensive factual and legal  
11 investigation into the settlement class's claims and engaging  
12 in the detailed formal mediation process. Niehaus declaration  
13 paragraph 5.

14           Turning to the fourth and fifth factors, the risk of  
15 establishing liability and damages further weighs in favorable  
16 of final approval. "Litigation inherently involves risks." *In*  
17 *re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126  
18 (S.D.N.Y. 1997). Indeed, the primary purpose of settlement is  
19 to avoid the uncertainty of a trial on the merits. See *Velez*  
20 *v. Majik Cleaning Serv., Inc.*, 2007 WL 7232783, at \*6 (S.D.N.Y.  
21 June 25, 2007). Here, plaintiffs face significant risks as to  
22 both liability and damages; defendants challenged the premise  
23 that the allegedly omitted information was material and the  
24 notion that plaintiffs could prove that the drop in price was  
25 related to the allegedly omitted information. See Niehaus



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1 declaration paragraphs 106, 115 to 17. The proposed settlement  
2 eliminates these uncertainties. These factors, therefore,  
3 weigh in favor of final approval.

4 The risk of obtaining class certification is  
5 nonexistent here. Therefore, the sixth Grinnell factor weighs  
6 in favor of final approval. Settlement generally eliminates  
7 the risk, expense, and delay inherent in the litigation process  
8 as a whole.

9 Turning to the seventh factor, there is nothing to  
10 suggest that Deutsche Bank or the underwriter defendants would  
11 be unable to withstand a greater judgment than the settlement  
12 amount. "But a defendant is not required to empty its coffers  
13 before a settlement can be found adequate." Shapiro v.  
14 JP Morgan & Co., 2014 WL 1224666, at \*11 (S.D.N.Y. Mar. 24,  
15 2014) (quotation omitted).

16 Deutsche Bank's financial circumstances -- or I should  
17 say the defendants' financial circumstances do not ameliorate  
18 the force of the other Grinnell factors, which lead to the  
19 conclusion that the settlement is fair, reasonable, and  
20 adequate.

21 Finally, the amount of the settlement, in light of the  
22 best possible recovery and the attendant risks of litigation,  
23 weighs in favor of final approval. The determination of  
24 whether a settlement amount is reasonable "is not susceptible  
25 of a mathematical equation yielding a particularized sum." In

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1 re Austrian & German Bank Holocaust Litig., 80 F.Supp. 2d 164,  
2 178 (S.D.N.Y. 2000). Instead, "There is a range of  
3 reasonableness with respect to a settlement - a range which  
4 recognizes the uncertainties of law and fact in any particular  
5 case and the concomitant risks and costs necessarily inherent  
6 in taking any litigation to completion." Newman v. Stein, 464  
7 F.2d 689, 693 (2d Cir. 1972).

8 Here, lead plaintiffs assert that the settlement would  
9 constitute 47 percent of the estimated recoverable damages.  
10 Niehaus declaration paragraph 19. This is a reasonable result  
11 when compared to the median ratio of settlement to investor  
12 losses of 2.1 percent for securities class action settlements  
13 in 2019. Id. Therefore, the amount of this immediate recovery  
14 is reasonable, and this factor weighs in favor of final  
15 approval.

16 Weighing the Grinnell factors, I find that the  
17 settlement is substantively fair and weigh in favor of final  
18 approval.

19 IV. Plan of Allocation:

20 "To warrant approval, the plan of allocation must also  
21 meet the standards by which the settlement was  
22 scrutinized - namely, it must be fair and adequate...an  
23 allocation formula need only have a reasonable, rational basis,  
24 particularly if recommended by experienced and competent class  
25 counsel." In Re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d

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1 319, 344 (S.D.N.Y. 2005)(citation and quotation omitted). "A  
2 plan of allocation need not be perfect," in re EVCI Career  
3 Colleges Holding Corp. Sec. Litig., 2007 WL 2230177, at \*11  
4 (S.D.N.Y. July 27, 2007)(collecting cases), or "tailored to the  
5 rights of each plaintiff with mathematical precision,"  
6 PaineWebber, 171 F.R.D. at 133; see also RMed  
7 International, Inc. v. Sloan's Supermarkets, Inc., 2000 WL  
8 420548, at \*2 (S.D.N.Y. April 18, 2000) (recognizing that  
9 "aggregate damages in securities fraud cases are generally  
10 incapable of mathematical precision"). Thus, "In determining  
11 whether a plan of allocation is fair, courts look primarily to  
12 the opinion of counsel." In re EVCI Career Colleges Holding  
13 Corp. Sec. Litig., 2007 WL 2230177, at \*11.

14 Lead counsel, who are experienced and competent in  
15 complex class actions, prepared the plan of allocation in  
16 connection with plaintiffs' damages expert. Niehaus  
17 declaration paragraphs 100, 134. The settlement fund, minus  
18 attorneys' fees and expenses, will be allocated on a pro rata  
19 basis according to the relative size of class members'  
20 "Recognized claims." Id. at paragraphs 9, 10. The expert has  
21 calculated an estimated individual class members' claim based  
22 on (i) allegations when the alleged concealed facts and trends  
23 became known (i.e., realization events); (ii) an event study  
24 that estimates price changes in the securities as a result of  
25 realization events; and (iii) the statutory formula used to

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1 calculate recoverable damages during the settlement class  
2 period. Declaration of Steven P. Feinstein ("Feinstein dec"),  
3 Docket No. 177-1, paragraphs 29-42.

4 Because the plan of allocation has a clear rational  
5 basis, equitably treats the class members, and was devised by  
6 experienced and estimable class counsel, the Court finds it  
7 fair and adequate. See *In re Telik, Inc. Sec. Litig.*, 576  
8 F.Supp. 2d, 570, 581 (S.D.N.Y. 2008).

9 V. Dissemination of Notice:

10 On February 27, 2020, the Court entered an order  
11 granting preliminary approval of the settlement as "fair,  
12 reasonable and adequate" to class members. In accordance with  
13 that order, lead counsel retained Gilardi & Co. LLC ("Gilardi")  
14 as claims administrator to supervise and administer the notice  
15 procedure in connection with the settlement and to process all  
16 claims. Declaration of Ross D. Murray ("Murray dec"), Docket  
17 No. 310, paragraph 2.

18 Gilardi sent a copy of the notice to potential members  
19 of the settlement class. First, Gilardi mailed, by first class  
20 mail, the notice packet to 283 nominees - banks, brokerage  
21 companies, and other institutions - that Gilardi had in its  
22 proprietary database. *Id.* at paragraph 5.

23 Next, Gilardi mailed the notice packet to 4,643  
24 additional institutions or entities on the U.S. Securities and  
25 Exchange Commission's ("SEC") list of active brokers and

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1 dealers. Id. paragraph 5.

2 Gilardi also delivered electronic copies of the notice  
3 packet to 381 registered electronic filers, primarily  
4 institutions and third-party filers, and to the depository  
5 trust company ("DTC") on the DTC legal notice system ("LENS"),  
6 which enables bank and broker nominees to contact Gilardi for  
7 copies of the notice for their beneficial holders. Id.  
8 paragraph 7. Gilardi received multiple responses and  
9 additional names of potential settlement class members from  
10 individuals or other nominees, with requests for over 64,000  
11 notice packets to be forwarded directly to nominees' customers.  
12 Id. paragraph 9. Gilardi also published the summary notice in  
13 the Wall Street Journal and transmitted it over Business Wire.  
14 Id. paragraph 11. Gilardi also posted the date and time of the  
15 hearing on the settlement website. Id. paragraph 12.

16 Gilardi ultimately mailed a total of 112,397 notice  
17 packets, including mailing notice packets to persons a second  
18 time when the first set were returned as undeliverable.  
19 Supplemental Murray declaration paragraph 4.

20 These notices apprised settlement class members, among  
21 other things, of: (i) the amount of the settlement; (ii) the  
22 reasons why the parties are proposing the settlement; (iii) the  
23 maximum amount of attorneys' fees and expenses that will be  
24 sought; (iv) the identity and contact information for  
25 representatives of lead counsel available to answer questions

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1 concerning the settlement; (v) the right of settlement class  
2 members to object to the settlement; (vi) the right to request  
3 exclusion from the settlement class; (vii) the binding effect  
4 of a judgment on settlement class members; (viii) the dates and  
5 deadlines for certain settlement-related events; and (ix) the  
6 way to obtain additional information about the action and the  
7 settlement by contacting lead counsel and the settlement  
8 administrator. See Federal Rule of Civil Procedure  
9 23(c)(2)(B).

10 I find that these efforts fairly and adequately  
11 advised class members of the terms of the settlement, as well  
12 as the right of Rule 23 class members to opt out of, or to  
13 object to the settlement, and to appear at the final fairness  
14 hearing today. I find that the notice and its distribution  
15 comported with all constitutional requirements, including those  
16 of due process.

17 VI. Attorneys' Fees, Costs and Expenses:

18 Lead counsel requests attorneys' fees in the amount of  
19 what the Court calculates to be \$6,166,666.67 plus interest  
20 earned at the same rate as the settlement fund. This amounts  
21 to one-third of the settlement fund, or 33.3 percent of the  
22 settlement fund. Lead counsel also seeks reimbursement of:  
23 (i) \$1,203,502.39 in litigation expenses in total, with Robbins  
24 Geller Rudman & Dowd LLP ("Robbins Geller") seeking  
25 \$1,170,981.31, Glancy Prongay & Murray seeking \$28,740.22, and

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1 Murray Frank LLP seeking \$3,780.86; and (ii) to approve the  
2 award to the lead plaintiffs, or class plaintiffs, of "20,000  
3 in the aggregate pursuant to 15, U.S.C., Section 77Z-1(a)(4) in  
4 connection with their representation of the class." Niehaus  
5 declaration paragraph 17.

6 Now, the trend in the Second Circuit is to use the  
7 percentage of the fund method to compensate attorneys in common  
8 fund cases, although the Court has discretion to award  
9 attorneys' fees based on the lodestar method or the percentage  
10 of recovery method. See *Fresno County Employees' Ret.*  
11 *Association v. Isaacson/Weaver Family Trust*, 925 F.3d 63, 68  
12 (2d Cir. 2019).

13 The notice provided to class members advised that  
14 class counsel would apply for attorneys' fees for up to  
15 33.3 percent of the settlement fund, in addition to litigation  
16 costs not to exceed 1.3 million. See Gilardi declaration  
17 Exhibit A Notice at 2. No class member objected to the  
18 request.

19 A. Goldberger Factors:

20 Reasonableness is the touchstone when determining  
21 whether to award attorneys' fees. In *Goldberger v. Integrated*  
22 *Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), the Second Circuit  
23 set forth the following six factors to determine the  
24 reasonableness of a fee application: (1) the time and labor  
25 expended by counsel; (2) the magnitude and complexities of the

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1 litigation; (3) the risk of the litigation; (4) the quality of  
2 representation; (5) the requested fee in relation to the  
3 settlement; and (6) public policy considerations. Id at 50.

4 1. Class Counsel's Time and Labor:

5 Plaintiffs' counsel have expended more than 26,000  
6 hours of attorney time in total over the course of this action,  
7 the vast majority of which was time expended by of counsel at  
8 Robbins Geller. Declaration of Eric Niehaus in support of lead  
9 counsel's motion for an award of attorneys' fees ("Niehaus fee  
10 declaration"), Docket No. 311 paragraph 5. Niehaus declaration  
11 paragraph 135.

12 2. Magnitude and Complexity of the Litigation:

13 The size and difficulty of the issues in a case are  
14 significant factors to be considered in making a fee award. In  
15 re Prudential Sec, Inc. Ltd. Partnership Litig., 912 F. Supp.  
16 97, 100 (S.D.N.Y. 1996). "In evaluating the settlement of a  
17 securities class action, federal courts, including this Court,  
18 have long recognized that such litigation is notably difficult  
19 and notoriously uncertain." In re Flag Telecom Holdings Ltd.  
20 Sec. Litig., 2010 WL 4537550, at \*15 (S.D.N.Y. Nov. 8, 2010)  
21 (quotation omitted). This case is one of substantial  
22 magnitude. In addition to all of the complications that are  
23 attendant to any large securities class action, this matter  
24 involved events that happened over ten years ago, extensive  
25 discovery, and litigation. The amount sought by plaintiffs'



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1 counsel is commensurate with the magnitude and complexity of  
2 this litigation.

3 3. The Risk of Litigation:

4 As discussed, lead counsel faced significant risk in  
5 prosecuting this action and proving the merits of the claims.  
6 All of the fact-finding has concluded. Given the complexity of  
7 the case, the risk at summary judgment and trial is  
8 significant. Defendants adamantly denied any wrongdoing, and,  
9 in the event that litigation had continued, would have  
10 continued to aggressively litigate their defenses through  
11 summary judgment, Daubert motions, trial, and any appeals.

12 4. Quality of Representation:

13 Lead counsel has considerable expertise in securities  
14 litigation. See Robbins Geller resume, Niehaus fee  
15 declaration, Exhibit G; see also declaration of Brian P. Murray  
16 filed on behalf of Glancy Prongay & Murray LLP in support of  
17 application for award of attorneys' fees and expenses ("Murphy  
18 fee declaration"). Robbins Geller attorneys are currently  
19 "lead or [are] named counsel in hundreds of securities class  
20 action or large institutional-investor cases" and are  
21 "responsible for the largest securities class action in  
22 history." Niehaus fee declaration, Exhibit G. RiskMetrics  
23 Group has recognized Glancy Prongay & Murray as one of the top  
24 plaintiffs' law firms in the United States in its securities  
25 class action services report for every year since the inception

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1 of the report in 2003. See Murphy fee declaration, Exhibit I.

2 The high quality of defense counsel opposing  
3 plaintiffs' efforts further proves the caliber of  
4 representation that was necessary to achieve the settlement.  
5 Cahill Gordon & Reindel and Skadden Arps Slate Meagher & Flom  
6 are two prominent defense firms, and "the ability of  
7 plaintiffs' counsel to obtain a favorable settlement for the  
8 class in the face of such formidable opposition confirms the  
9 quality of their representation of the class." In re Marsh  
10 ERISA Litig., 265 F.R.D. 128, 148 (S.D.N.Y. 2010).

11 Accordingly, the Court finds that this Goldberger  
12 factor weighs in favor of the requested fee award.

13 5. The Requested Fee in Relation to the Settlement:

14 Generally, courts consider the size of a settlement to  
15 ensure that the percentage awarded does not constitute a  
16 windfall. In this case, the requested fee is 33.3 of the  
17 settlement, within the range of reasonableness, in light of  
18 other class action settlements in this circuit. See Mohny v.  
19 Shelly's Prime Steak, Stone Crab & Oyster Bar, 2009 WL 5851465,  
20 at \*5 (S.D.N.Y. Mar. 31, 2009) ("Class counsel's request for  
21 33 percent of the settlement fund is typical in class action  
22 settlements in the Second Circuit.").

23 6. Public Policy Considerations:

24 When determining whether a fee award is reasonable,  
25 courts consider the social and economic value of the class

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1 action "and the need to encourage experienced and able counsel  
2 to undertake such litigation." In re Sumitomo Copper Litig.,  
3 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999). "Courts have, as a  
4 generic matter, frequently observed that the public policy of  
5 vigorously enforcing the federal securities laws must be  
6 considered in calculating an award." In re BioScrip, Inc. Sec.  
7 Litig., 273 F.Supp. 3d 474, 502 (S.D.N.Y. 2017) (quotation  
8 omitted) affirmed sub nom. Fresno County Employees Retirement  
9 Association v. Isaacson/Weaver Family Trust, 925 F.3d 63  
10 (2d Cir. 2019).

11 Vigorous, private enforcement of the federal  
12 securities laws can only occur if private investors can obtain  
13 some parity in representation with that available to large  
14 corporate defendants. Accordingly, public policy favors  
15 granting lead plaintiffs' fee request.

16 After considering all of the Goldberger factors, the  
17 requested fee award appears to be reasonable.

18 B. Lodestar "Cross Check":

19 In Goldberger, the Second Circuit "encouraged the  
20 practice of requiring documentation of hours as a 'cross check'  
21 on the reasonableness of the requested percentage."

22 Goldberger, 209 F.3d at 50. "Of course, where used as a mere  
23 cross-check, the hours documented by counsel need not be  
24 exhaustively scrutinized by the district court." Id.

25 As of April 17, 2020, plaintiffs' counsel have

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1 expended over 26,000 hours in total in this case, resulting in  
2 a total lodestar of \$16,069,646. Niehaus fee declaration  
3 paragraph 4, Exhibit A; Murphy fee declaration, Exhibit A.  
4 Robbins Geller expended 17,356.85 hours with a lodestar of  
5 \$12,021,477, Glancy Prongay & Murray LLP expended 8,097.8 hours  
6 with a lodestar of \$3,639,826.50, the Frank Murray LLP expended  
7 562.2 hours with a lodestar of \$355,902.50. Id. Plaintiffs'  
8 counsel submitted declarations and time reports in support of  
9 their motion for attorneys' fees. Id. Counsel submitted a  
10 summary time records detailing the billable rate and hours  
11 worked by each attorney and professional support staff in this  
12 case. I find that these billable rates based on the  
13 timekeeper's title, specific years of experience, and market  
14 rates for similar professionals in their fields nationwide and  
15 in New York, where Robbins Geller LLP is based, to be  
16 reasonable in this context.

17           Based on plaintiffs' counsel's requested  
18 fee - one-third of the settlement, or by the Court's  
19 calculation, \$6,166,666.67 - the lodestar yields a negative  
20 "cross-check" multiplier of about 0.38; therefore, the fee is  
21 well below the typically awarded multipliers in this circuit.  
22 "Courts regularly award lodestar multipliers from 2 to 6 times  
23 lodestar in this circuit." *Fleisher v. Phoenix Life Insurance*  
24 *Company*, 2015 WL 10847814, at \*18 (S.D.N.Y. Sept. 9,  
25 2020) (quotation omitted) (collecting cases). Thus, the lodestar

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1 "cross-check" confirmation that plaintiffs' counsel requested  
2 fee is reasonable.

3 The Court therefore finds that, based on the  
4 Goldberger factors and the lodestar "cross-check," that  
5 plaintiffs' counsel's requested fees are reasonable.

6 C. Litigation Expenses:

7 Plaintiffs' counsel requests \$1,203,502.39 total in  
8 litigation expenses, including filing fees, process service,  
9 mailing expenses, document management and hosting services,  
10 investigative and expert witnesses, legal research, travel and  
11 mediation. See Niehaus fee declaration paragraph 5, Exhibit B.  
12 Robbins Geller seeks \$1,170,981.31, Glancy Prongay & Murray  
13 seeks \$28,740.22, and Murray Frank LLP seeks \$3,780.86. The  
14 largest component of plaintiffs' counsel's expenses was the  
15 cost of experts and consultants, amounting to \$750,458, or  
16 approximately 62 percent of total expenses. Niehaus fee  
17 declaration paragraph 6. The next largest components of  
18 plaintiffs' counsel's expenses were for transportation, hotels,  
19 and meals (\$227,852.66), court transcripts and deposition  
20 materials (\$68,030.54), and mediation (\$27,210). See Niehaus  
21 fee declaration, Exhibit B. The notice disclosed that lead  
22 counsel would seek up to \$1,300,000 in litigation expenses. No  
23 objection to these expenses was received.

24 "It is well-established that counsel who create a  
25 common fund are entitled to the reimbursement of expenses that

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1 they advance to a class." In re Giant Interactive Group, Inc.,  
2 279 F.R.D. 151, 165 (S.D.N.Y. 2011); see also In re Indep.  
3 Energy Holdings, 302 F.Supp. 2d 180, 183 Note 3 (S.D.N.Y.  
4 2003). "Attorneys may be compensated for reasonable  
5 out-of-pocket expenses incurred and customarily charged to  
6 their clients as long as they were 'incidental and necessary to  
7 the representation of those clients.'" (quotation omitted).  
8 The expenses for which lead counsel seeks payment are the type  
9 of expenses that courts typically approve. See In re Global  
10 Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y.  
11 2004). Therefore, the Court finds that the requested  
12 litigation expenses are reasonable and necessary to the  
13 representation of the class and are appropriately reimbursed to  
14 class counsel.

15 D. Lead Plaintiffs' Expenses:

16 Lead plaintiffs seek an award of \$20,000 for both of  
17 them in recognition of the time and expense that they incurred  
18 on behalf of the class. Motion in support, Docket No. 307, at  
19 31; see also Niehaus declaration paragraph 17. 15, U.S.C.,  
20 Section 77Z-1(a)(4) allows "the award of reasonable costs and  
21 expenses (including lost wages) directly relating to the  
22 representation of the class to any representative party serving  
23 on behalf of a class."

24 As set forth in their declaration, lead plaintiffs  
25 dedicated a significant amount of time to the successful

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1 prosecution of this action, including by reviewing pleadings  
2 and motions, discussing strengths and risks of the case, and  
3 consulting with lead counsel regarding settlement. Kaess and  
4 Farrugio declaration paragraphs 2 through 12. These are the  
5 kinds of activities which regularly are found to support awards  
6 to class representatives.

7 As set forth in their declaration, lead plaintiffs  
8 assert that the value of their time and resources invested in  
9 this case is substantially in excess of the \$20,000 award that  
10 they seek here. Id. And the application here is consistent  
11 with the notice, which disclosed that "Class plaintiffs may  
12 seek an award pursuant to 15, U.S.C., Section 77z-1(a)(4) in  
13 connection with their representation of the class in an amount  
14 not to exceed \$20,000 in the aggregate." Murphy fee  
15 declaration, Exhibit A notice.

16 Thus, I find that the requested award of \$20,000 to  
17 lead plaintiffs is reasonable.

18 VII. Conclusion:

19 In conclusion, I approve the class action settlement  
20 for \$18,500,000 and approve the plan for allocating the net  
21 proceeds of the settlement. I also award plaintiffs' counsel  
22 attorneys' fees in the amount of what the Court calculates to  
23 be \$6,166,666.67, plus interest earned at the same rate as the  
24 settlement fund. This amounts to one-third of the settlement  
25 fund, or 33.3 percent of the settlement fund. I am also

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1 awarding \$1,203,502.39 in litigation expenses to be divided as  
2 outlined by lead counsel. Finally, I award lead plaintiffs  
3 \$20,000 in the aggregate for time and expenses incurred while  
4 representing the class.

5 So, counsel, thank you very much for your patience as  
6 I got through the reasoning for my decision to approve the  
7 settlement here.

8 I received the proposed orders and judgment, and I  
9 expect to act on those promptly after today's conference.

10 Is there anything else that we should take up now,  
11 before we adjourn?

12 First, counsel for plaintiffs?

13 MR. PINTAR: Not for plaintiffs, your Honor. Again,  
14 Ted Pintar. Thank you very much.

15 THE COURT: Thank you.

16 Counsel for the Deutsche Bank defendants?

17 MR. JANUSZEWSKI: Your Honor, David Januszewski.

18 Nothing else from us.

19 THE COURT: Good. Thank you.

20 Counsel for the underwriter defendants?

21 MR. O'BRIEN: Yes. William O'Brien, from Skadden Arps  
22 Slate Meagher & Flom LLP.

23 Nothing further from us as well.

24 THE COURT: Good. Thank you, all.

25 COUNSEL: Thank you. \* \* \*